

Review of the civil and criminal justice system in Queensland

Hon Martin Moynihan AO QC
December 2008

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To: **The Honourable Kerry Shine MP**
Attorney-General and Minister for Justice and
Minister Assisting the Premier in Western Queensland

Dear A Honourable

I refer to your appointment of 14 July 2008 requiring me to examine and report on the workings of Queensland Courts in the civil and criminal jurisdictions with a view to making more effective use of public resources.

I enclose my report and recommendations.

A handwritten signature in black ink, appearing to read 'Martin Moynihan', with a long, sweeping horizontal stroke extending to the right.

The Honourable Martin Moynihan AO QC

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Recommendations

Chapter 1: no recommendations

Chapter 2: no recommendations

Chapter 3: no recommendations

Chapter 4: With regard to the Overview of the Queensland Criminal Justice System I recommend that:

With regard to legislation

1. There be a comprehensive overhaul of all criminal justice procedure legislation and rules to consolidate, modernise and streamline criminal justice procedure in Queensland;
2. Legislation to implement the recommendations of this Review that are accepted by Executive Government be implemented in two stages:
 - Stage One is a Criminal Justice Procedure (Interim) Act. This gives effect to the recommendations in respect of:
 - Monetary Limits for the Civil Jurisdiction (Chapter 7);
 - Disclosure (Chapter 5);
 - Summary Disposition of Indictable Offences (Chapter 8); and
 - Sentencing Discounts for an Early Plea (Chapter 10). It may be that this is best done by amendment to the existing provisions of the *Penalties and Sentences Act 1992*;

Express provision should be made in the Act for criminal justice agencies to collaborate in developing protocols and compatible business processes across agencies.

- Stage Two is a Criminal Justice Procedure Act, which would incorporate stage one recommendations, to:
 - reform the committal proceedings process as recommended in Chapter 9;
 - provide for any legislative requirement for the implementation not dealt with by the Stage 1 Act;
 - 'roll in' the updated procedural provisions from the *Criminal Code 1899*, the *Justices Act 1886* and other legislation;
 - deal with any matters which had arisen with respect to the interim Act; and
 - provide for the establishment of the Criminal Justice Procedures Co-ordination Council if this has not been achieved in Stage 1 (see Appendix 6).

The passing of this legislation will highlight the need for an Act to provide for the substantive criminal jurisdiction of the Magistrates Court to replace the

Justices Act 1886.

- The Criminal Justice Procedure (Interim) Act, preferably, or otherwise the Criminal Justice Procedure Act, should also provide for:
 - The electronic acquisition, storage, transfer, lodgement or filing and access to data;
 - Electronic (audio, video, email, text etc) lodgement, conferencing and hearings (particularly directions hearings);
 - A Criminal Justice Procedure Co-ordination Council;
 - Consultation between agencies when proposals by one agency may impact on other agencies;
 - Facilitating the development of protocols among criminal justice agencies, based on the successful Brisbane Committals Protocol (Appendix 5). These protocols should provide for, amongst other things, the 'fast tracking' of cases and the formatting and production of QP9's, with a view to early identification of cases possibly subject to a plea. A protocol should be binding on the parties or could be reflected by Queensland Courts in a Practice Direction, where that is appropriate; and
 - The establishment of uniform criminal procedure rules;

With regard to Queensland Courts

3. Queensland Courts consider adopting a policy, stating and reflecting this policy in a Practice Direction or Practice Directions, that:
 - Court events are to be used to progress a case to resolution and that an adjournment to a future date without more is not acceptable;
 - Court events are based on information previously acquired (electronically) and not used to acquire information to be acted on a later date;
 - Court events will be conducted on the basis that there is a real prospect of progressing a matter/solution or a specific court order is required.

It is preferable that any Practice Direction are uniform across the courts, subject to any necessary adjustments;
4. Queensland Courts also consider adopting a policy, stating and reflecting this policy in a Practice Direction or Practice Directions, that once a hearing date or a court event is allocated, the court will act on the basis that the matter will proceed on the allocated day, and for the estimated time, and allocate court time accordingly. The legal representatives for a party in a matter allocated a hearing date are under an obligation to inform the court forthwith on becoming aware that:
 - The trial or hearing would not proceed because of a change of plea or any other reason; or
 - A case may not be ready to proceed on the allocated day or would not be completed in the allocated time.

I acknowledge that the adoption of this approach will put a premium on courts providing certain hearing dates and note that the effective implementation of those proposals will support this occurring;
5. The use of the term 'mention' be discontinued. I endorse the 'Death of the Mention' project in England and the use of electronic communication between courts, ODPP, Legal Aid Queensland and the legal profession to arrange hearing dates, adjournments and to minimise time spent attending or waiting for court appearances or in hearings;

6. Consideration be given to incorporating a provision in the Criminal Justice Procedure Act to empower the clerk of the court or judicial registrar (cf s 23D and 23DA of the *Justices Act 1886*) to make any order that the magistrate has power to make, where the parties consent, in relation to setting hearing dates and other administrative matters. The Magistrates Court should consider developing appropriate practice directions to encourage parties to minimise court appearances by using those provisions in conjunction with electronic communication;
7. A broad definition of “hearing” to include hearings conducted by electronic means be incorporated in the Criminal Justice Procedure Act;

With regard to Queensland Police Service

8. The Queensland Police Service consider extending the use of technology for electronically recording the evidence of all witnesses. In particular, eyewitness statements should be recorded at the earliest opportunity. Provision of access to recorded evidence, subject to certification, would satisfy disclosure requirements. Transition arrangements may be necessary for those not able to access the material in electronic form;
9. Police charging practices be monitored and evaluated against the charges dealt with by a court to determine whether there is over charging. The number of charges brought should not play any role as criteria for career advancement by police. The QPS consider reviewing its training of police recruits and serving police officers to ensure they understand the importance of accurate and consistent charging;

With regard to Legal Aid Queensland and the Aboriginal & Torres Strait Islander Legal Service

10. Legal Aid Queensland consider, as part of its current review of funding arrangements:
 - Funding more summary trials; and
 - Funding counsel at an early stage.I endorse LAQ’s intention to develop a single committal funding policy (see also Chapter 9: *Committals*);
11. The Aboriginal & Torres Strait Islander Legal Service seek funding from the Commonwealth to provide legal representation for summary matters that may increase as a consequence of the recommendations made in this Review.

Chapter 5: With regard to disclosure I recommend that:

12. The statutory provisions for disclosure should be redrawn to be simpler, more coherent and consistent. In particular but not exhaustively:
 - There must be disclosure of the evidence relied on by the prosecution; and
 - There must also be disclosure of all information or material known to, or in the possession of, the prosecution bearing on the case which is capable of rebutting the prosecution case or advancing the defence case (or similar

provision meeting the concerns expressed in the chapter);

13. The following exclusions should remain:

- s 590AO Limit on disclosure of sensitive evidence;
- s 590AN Limit on disclosure of things accused person already has;
- s 590AP Limit on disclosure of witness contact details;
- s 590AQ Limit on disclosure contrary to the public interest; and
- s 590AX Unauthorised copying of sensitive evidence.

(There were no issues raised in the course of the inquiry about provisions to the effect of those identified);

14. The Queensland Police Service should review its training of cadets and serving QPS officers to ensure they understand and comply with disclosure obligations. Failure to comply with disclosure obligations should have a disciplinary consequence. Police training should also emphasise the value of comprehensive and accurate QP9's;

15. Before a 'brief to prosecute' (the means of satisfying the statutory disclosure obligations) is transmitted (including electronically) to the Director of Public Prosecutions or filed (including electronically in the Magistrates Court) the arresting officer (as defined in s 590AD of the Criminal Code) must be satisfied there is sufficient evidence to support the charges and the statutory disclosure provisions have been complied with.

The arresting officer must swear a certificate that he or she is satisfied that those two requirements have been complied with and lodge the certificate with the brief of evidence in the Magistrates Court;

16. If a party (the applicant) contends that the other party has not complied with that party's disclosure obligations that party must communicate (electronically, or by fax or letter) with the other party specifying the following matters:

- what the applicant says the other party should have done but has not;
- the order sought and why it should be made;
- a brief statement of the relevant facts necessary to resolve the issue;
- nominate a reasonable time for a response;
- state whether the party wants an oral hearing or a decision based on the material before the magistrate.

(note that an accused has specific disclosure obligations);

A recipient of such a communication must respond within the specified time stating:

- the communication was a response to the applicant's communication; and
- what, if anything, the respondent proposed to do in response to the request;

These provisions should not prevent the applicant or the respondent from writing to each other in addition or otherwise communicating on a relevant matter;

If the applicant:

- does not receive a satisfactory reply; or
 - does not receive a response in the time nominated;
- the applicant may file an application in the Magistrates Court seeking further disclosure (a disclosure application);

The following documents must be filed with the disclosure summons stating the order sought and served (electronically, fax, letter) on the respondent:

- the applicant's letter;
- the respondent's reply (if any); and
- any other relevant correspondence exchanged after the applicant received the respondent's reply or the nominated time for replying had passed relevant to the issue.

No affidavit is necessary and no other material will be before the court on an application without the leave of the court.

The magistrate may then dispose of the matter without oral submissions unless a party has indicated it wishes to make oral submissions and the magistrate decides that oral submissions are necessary to dispose of the case;

17. If at any time after the filing of the brief of evidence a magistrate is satisfied that timely disclosure was not made in compliance with the prosecutions obligations at the time of certification the magistrate may order the certifying officer file an affidavit explaining and justifying the failure and provide a copy of the defence (justification might be founded on a statutory provision and/or the circumstances);
18. If a magistrate does not consider the affidavit satisfactorily explains and justifies the failure to make proper disclosure in the time provided for or in a reasonable time the magistrate may order or recommend (any or a combination):
 - that specified material adverse to the interest of the accused not be tendered in evidence or relied on by the prosecution;
 - that the Queensland Police Service pays an amount to the defendant or the defendant's legal representatives reflecting the costs to the defence incurred as a consequence of the failure. The magistrate should inform him or herself of the amount and fix it and set a time for it to be paid;
 - disciplinary proceedings or proceedings for breach of s 204 of the *Criminal Code*; and/or
 - a stay of the proceedings unless it is demonstrated that there are compelling reasons that in the interests of justice this should not be done. In making that decision the magistrate will take into account whether conduct of the defence may be adversely affected by the delay and the public interest. The stay may be lifted:
 - by consent; and
 - on the application of the ODPP that it is in the interests of justice, including the public interest, that the stay be lifted; on such terms and conditions as the magistrate imposes (if any).

(Disciplinary proceedings would be at the discretion of the Commissioner of Police or the delegate of the Commissioner);
19. A case conference (see Chapter 9: *Reform of the Committal Proceedings Process*) should only be held if there are no outstanding issues about compliant disclosure, unless a magistrate orders it or the parties agree;
20. That there be a co-ordinated and staged move by the major criminal justice agencies, QPS, ODPP, Legal Aid Queensland, Bar Association of Queensland, Queensland Law Society and Queensland Courts to electronic acquisition, transfer, storage and access of disclosable material (an electronic brief);

21. There should be provision for staged certified disclosure by a protocol, practice direction, guideline or legislation providing for disclosure (staged disclosure) of:
- The QP9 form prepared by the police summarising the case against the accused;
 - Any complaint or bench charge sheets;
 - The substance of alleged admissions made by the accused or recordings of those admissions;
 - A list of witnesses with a copy of any statement by the witness in the possession of the prosecution;
 - If there is no statement the name of the witness to be provided and the category of evidence (eye witness etc);
 - An accurate summary of forensic evidence;
 - The accused's criminal and traffic history; and
 - Any other known material the prosecution is required to disclose; within realistic time lines. Full disclosure must be made if the matter is not resolved within the specified time;
22. Certification of compliance would be required for each stage of disclosure.

Chapter 6: With regard to Information Management Issues I recommend that:

23. Steps be taken to collect accurate, reliable, coherent, compatible information using consistent terminology across all agencies;
24. The work of IJIS and Future Courts continues to be supported and made known and accessible to operational staff of the criminal justice agencies, LAQ and legal practitioners;
25. The following steps should be taken as soon as possible to make more effective use of existing criminal justice information across the board:
- Encourage the use and implementation of the Future Courts Glossary of Terms across all criminal justice agencies;
 - Fund the Queensland Police Service to 'cleanse' its Single Person Identifier data;
 - Agencies to use police Single Person and Incident Identifier data across the sector;
 - Review Complaint and Summons information and process so as to align this to criminal matters alone;
 - Streamline the transmission process by the use of electronic data transmission within and across agencies;
 - Establish information custodianship arrangements according to best practice standards;
 - Future Courts and/or IJIS to liaise with developers of the Queensland Sentencing Information System (QSI) data base to implement a single standard for reporting legislation and offence code information across the criminal justice system; and
 - Implement the CJA – Proof of Concept Evaluation recommendations that support data quality improvements;

26. Uniform guidelines be developed, based on best practice, across the criminal justice system for the management of electronic data across agencies, in individual cases and generally from investigation to disposition;
27. Pending the implementation of Future Courts and IJIS solutions, consideration be given to the establishment of a central 'register' to document not only the work that is underway within these two programs but also to summarise the various satellite systems that exist across the relevant agencies. This should be accessible via an internet facility;
28. The Criminal Justice Procedures Co-ordination Council should have the role of overseeing and co-ordinating the implementation of recommendations made in this chapter. Further, the involvement of the Criminal Justice Sector Blueprint team be sought to reflect the sector's interests and leverage existing governance work undertaken for providing a sustainable governance model for the sector.

Chapter 7: With regard to monetary limits for civil jurisdictions I recommend that:

29. The monetary limit of the Small Claims Tribunal be increased to \$25,000;
30. The civil monetary limit of the Magistrates Court be increased to \$150,000;
31. The civil monetary limit of the District Court be increased to \$750,000;
32. The relevant costs scales should be reviewed and brought into line with the increased complexity and responsibility reflected in the increased monetary limits;
33. The civil jurisdictional monetary limits for the District and Magistrates Courts should be reviewed regularly, at least every 5 years, and adjusted to reflect the then current value of money and other relevant considerations.

Chapter 8: With regard to Summary Disposition of Indictable Offences I recommend that:

34. The following offences be heard and determined summarily:
 - Offences with a maximum penalty of less than 3 years imprisonment;
 - Matters currently prescribed in s 552A;
 - Matters where the value of property involved is less than \$30,000;
 - Common and serious assault (not being of a sexual nature);
 - Assault occasioning bodily harm;
 - Dangerous driving simpliciter; and
 - Wilful damage;
35. All serious offences continue to be dealt with on indictment. These are:
 - Sexual offences committed against children under the age of 14;
 - Where the value of property involved is \$30,000 or more;
 - Where the prosecution will seek a custodial sentence in excess of two years imprisonment;
 - Offences relating to:
 - Homicide;
 - Dangerous driving causing death/GBH;

- Armed robbery;
 - GBH;
 - Rape;
 - Incest;
 - Arson;
 - Torture;
 - Corruption;
 - Drugs where the ODPP is alleging a commercial element;
36. All other offences may be heard and determined summarily, at the election of the ODPP;
37. Section 552D of the Criminal Code be retained and amended to include a discretion for the magistrate to commit a matter to the District or Supreme Court if satisfied by the defendant that there are exceptional circumstances that justify doing so;¹
38. The time limitation for summary matters provided by section 52 of the *Justices Act 1886* be increased to 2 years from the date that the matter of complaint arose;
39. The District Court be given jurisdiction to deal with all offences where the maximum penalty for the offence is 20 years or less. This would require amendment of ss 61(1) and (2) of the *District Court of Queensland Act 1967* (DCQA);
40. Legal Aid Queensland and the Aboriginal & Torres Strait Islander Legal Service should be funded to review their current funding policies for summary proceedings with a view to aligning funding to the recommended changes. Both agencies should then be appropriately funded to deal with summary matters.

Chapter 9: With regard to committals I recommend that:

41. The magistracy be given overall responsibility for supervising committal proceedings.

A magistrate's intervention should not depend on the application of a party, it can be made on the magistrate's own initiative provided the parties are given the opportunity to make submissions in respect of the proposed intervention.

Without diminishing any general powers, a magistrate should be given power to give directions, set timetables and deal with any non-compliance with statutory provision, practice direction or order.

With particular reference to disclosure the magistrate should have power to:

- determine whether or not specific material information is disclosable;
- inspect any information to determine whether it should be disclosed and the terms on which it should be disclosed;
- give directions as to how the disclosure requirements are to be met;
- set timetables; and

¹ For an example see section 5 of the Criminal Code (WA) which provides for the defence to make an application to have a matter tried on indictment.

- deal with issues of non-compliance with the disclosure requirements or any direction;
42. The ODPP be given an increased role in:
- providing advice and support to QPS in relation to the investigation of serious crimes (a protocol should be developed);
 - the summary disposition of indictable matters; and
 - prosecution of committal proceedings; the long term objective being, that the ODPP take over responsibility for the prosecution of all committals in Queensland.

This recommendation is subject to the following consideration:

It is imperative that the implementation not over-stretch or erode the capacity of the Office of the Director of Public Prosecutions to effectively carry out its work, or dilute the quality of the work of the ODPP. It is, for example, vital that the effectiveness of the chamber system presently in place (which should be replicated in areas of expansion) not be compromised. The strength of the chamber system is that it allows a mixture of experienced and less experienced prosecutors to take responsibility for a mix of cases;

43. Prosecution evidence be given in statement form;
44. There be provision for the transition from a paper based system to full electronic data base and electronic proceedings;
45. A witness may only be called to give evidence at a committal hearing:
- by the prosecution;
 - with prosecution consent (the DPP should consider issuing guidelines as to the circumstances in which consent will be given);
 - by leave of a magistrate on the application by an accused; or
 - by a magistrate on his or her own motion.
- Before granting leave or in acting on his or her own motion, a magistrate must be satisfied that there are substantial reasons why in the interests of justice the witness should attend the committal hearing to give oral evidence or be available for cross-examination on their written statement (see s 91 *Criminal Procedure Act* NSW. Note the principles that apply to such applications have been clearly articulated in NSW (see Appendix13));
46. Where the QPS is prosecuting the committal, the DPP should consider issuing written guidelines for QPS prosecutors in relation to the circumstances in which consent should be given to a witness being called and any other considerations;
47. Where leave has been given to cross-examine a witness, questioning should be limited to reasons for which leave/consent was granted (cf s 92 *Criminal Procedure Act* (NSW));
48. Prior to an application to the Magistrate to cross-examine witnesses, the prosecution and defence should communicate to see if agreement can be reached. I propose that the party seeking to have a witness called should write to the other party (usually defence to prosecution) identifying:
- the witness or witnesses;

- the issues relevant to the application, for example, identification or expert opinion; and
- the reasons justifying the witness being called.

The correspondence should specify a reasonable time to reply.

The respondent should reply saying whether the request is agreed to, and if not, stating:

- why not; or
- any terms or conditions to be imposed which would make it acceptable for the witness to be called.

If the respondent does not reply in a reasonable time or if there is a dispute as to any terms and conditions, an application can be made to the court;

49. A pilot case conference project be established in conjunction with the Brisbane Committals Project (the protocol for which is set out in Appendix 5) to test and evaluate a case conference scheme. A statutory framework can then be developed in the light of this experience.

Under the pilot, case conferences should be mandatory for indictable matters currently prosecuted by the ODPP in Brisbane under the protocol. It should take place after disclosure issues have been properly resolved and the certificate of disclosure filed and served preferably prior to the committal.

ODPP and LAQ should have responsibility for driving this project;

50. A rigorous and properly funded evaluation process should be designed and implemented with the case conference pilot. This should be directed at comparing the outcome of matters that have gone through case conferencing with those that have not to determine whether case conferencing:
- Increases the plea rate;
 - Produces earlier pleas or nollis;
 - Produces more accurate charging;
 - Reduces court time and over listing; and
 - Any other relevant considerations.

I note that in NSW an evaluation of the trial is being conducted by the State Bureau of Statistics. Consideration should be given to the involvement of an independent agency with the appropriate skills;

51. Subject to the outcome of the case conference pilot, a mandatory case conference between the prosecution and the legal representatives for the accused be introduced in Queensland to facilitate the earlier resolution of indictable matters. Legislation establishing this regime should provide that::
- There is an ongoing obligation on the lawyers for parties to engage in discussion with a view to resolving issues and achieving resolution (see, for example, Victorian Magistrate Court rule 19 (see Appendix 12);
 - Where the ODPP is responsible for prosecuting the committal proceedings, case conferencing is compulsory;
 - The case conference should take place after the certificate of disclosure has been filed and before any committal hearing;
 - Legal representatives with sufficient authority to negotiate and resolve matters should attend and act reasonably and genuinely;

- At the conferences lawyers for the parties must consider and discuss:
 - the appropriateness of charges;
 - the likely penalty and benefits of an early plea;
 - any issues bearing on the progress of the case or the conduct of the trial; and
 - any offers bearing on a plea of guilty;
 - The outcome of the conference should be recorded and sealed and kept in the court file and should only be opened in specified circumstances (see NSW Act);
 - A conference may take place:
 - face to face;
 - video or phone conference;
 - email;
 - text messaging; or
 - in writing.
 - It is desirable but not essential that the accused be present;
52. Where there is no application to call or examine a witness, there should be an administrative committal in the registry. This may occur before, for example a committal for sentence, or after a compulsory case conference. Where there is an application to call a witness but it is not upheld, the magistrate may commit at the time of hearing the application;
53. The *Bail Act 1980* be amended to allow the bail status of an accused before committal to continue after the committal until the accused appears in the court to which he or she has been committed. This is subject always to the right of the ODPP to apply to have bail revoked, or to have conditions added or modified, and the right of the accused to make an application to vary bail conditions.
- This provision will allow administrative committals in the registry to take place without the necessity of making a new bail application. Other considerations may apply where the accused is held in custody at the time of committal;
54. The management for ex officio indictments should be transferred to the registry and the process aligned with the registry process for administrative committals.
55. The NSW test applied by the magistrate in deciding to commit an accused be adopted, that is, the magistrate must consider all the evidence and determine whether or not ‘there is a reasonable prospect, that a reasonable jury, properly instructed, would convict the accused person of an indictable offence’: s64 *Criminal Procedure Act (NSW) 1986*.
- This does not diminish the power of the DPP or the Attorney-General to bring an ex officio indictment if it is in the public interest that there is a prosecution.
- A committing magistrate should be enabled to make recommendations to the DPP with respect to issues such as the appropriateness of charges and other issues that may arise with respect to the indictment. This does not in any way limit the DPP’s discretion;
56. It be noted that funding issues for LAQ and other agencies will arise as a result of the recommendations of this Review.

I endorse LAQ's stated intention to develop a single committals funding policy (see Appendix 14).

I endorse the recommendation of the National Conference of Directors of Legal Aid and Directors of Public Prosecution that 'grants of legal aid be structured to encourage early resolution of matters prior to committal';

Chapter 10: With regard to Sentencing Discounts for an Early Plea of Guilty I recommend that:

57. The *Penalties and Sentences Act 1992* be amended to provide for when it may be reasonable to consider that a plea of guilty has been entered at the earliest available opportunity. This may include, amongst other things: the charges pleaded to have been decided; the defendant is aware of those charges; there has been full disclosure; and, the defendant has had reasonable time to take, and consider, legal advice and to give instructions;
58. The *Penalties and Sentences Act 1992* be amended to include a section similar to the Western Australian section 8(2) of the *Sentencing Act 1995* (WA) which stipulates that 'a plea of guilty is a mitigating factor and the earlier in the proceedings that it is made, or indication is given that it will be made, the greater the mitigation';
59. The *Penalties and Sentences Act 1992* be amended to include a section which specifically provides for a discretion for sentencing judges and magistrates to state the sentence that would have been imposed but for the plea of guilty, with a view to encouraging this to be done more frequently;
60. If a discount for an early plea of guilty is given in a form other than, or in addition to, a reduction of the term of imprisonment, (such as an early parole release date) the *Penalties and Sentences Act 1992* be amended to encourage sentencing judges and magistrates to identify the benefit other than or in addition to the reduction in the term of imprisonment that has been received by the defendant.

Chapter 11: No recommendations

Introduction

On 14 July 2008 I was commissioned by the Attorney-General and Minister for Justice and Minister Assisting The Premier in Western Queensland, the Hon Kerry Shine (the Attorney-General), to examine and report on the working of Queensland courts in the civil and criminal jurisdictions with a view to making more effective use of public resources. The Terms of Reference² referred to the following factors:

The increasing volume and complexity of demands on the State's civil court system and increases in the time and resources consumed by the litigation process, it is timely to examine whether the current jurisdictional limits of Queensland's courts are appropriate.

In the desirability of early identification and encouragement of pleas of guilty in the District and Supreme Courts and the potential for a greater number of less serious indictable offences to be finalised in the Magistrates Court, it is timely to review the criminal jurisdiction, including the jurisdictional limits of Queensland's courts, and to consider new models for progressing criminal matters.

The Terms of Reference then referred to five areas upon which I was to report:

1. Monetary limits for the civil jurisdiction;
2. Summary disposition of indictable offences;
3. Reform of the committal proceedings process;
4. Sentencing discounts for early pleas; and
5. Case conferencing.

The first topic relates to the civil law and was dealt with in a report handed to the Attorney-General on 21 October 2008. That report is included here³ for the sake of completeness.

The other four topics are interrelated. Each is an integral part of the criminal justice process. It is impossible to consider any of them in isolation from the others, or from other parts of the criminal justice system. I have considered the issues raised by the

² A copy is attached as Appendix 1.

³ Chapter 7: *Monetary Limits for Civil Jurisdictions*.

Review process, in the context of their place in an overall criminal justice system with a view to developing a just, integrated, responsive system.

I have approached my task on the basis that an effective criminal justice system⁴ makes a crucial contribution to peace, order and good government in the State of Queensland.

The State of Queensland is governed according to the Rule of Law. This rule has evolved as a safeguard against the arbitrary exercise of power by the State. In simple terms, the Rule of Law is founded on a separation of powers between the legislative (parliament), executive and judicial arms of government.

The criminal justice system is an essential component of the Rule of Law.

An effective criminal justice system should provide equal justice to all according to law by disposing of cases:

- impartially;
- fairly;
- expeditiously;
- with the minimum unavoidable delay; and
- with the minimum but necessary use of public resources.

These issues are canvassed in Chapter 2: *Touchstones*.

Members of the public ought to confidently expect a fair process and a just outcome irrespective of whether a matter results in an adjudicated outcome and in whichever forum the matter is resolved. Opportunities for early resolution are to be encouraged without losing sight of this principle.

In undertaking this Review I have endeavoured to understand the criminal justice system as a whole and to bear in mind the interconnections between the various components (called agencies in this report) of the justice system. The cost of benefits to one agency, fall on another, and delay by one agency has an exponential effect on delay across the system. Change in one part of a system impacts upon

⁴ There are many components of an effective criminal justice system e.g. Queensland Police Service, Office of the Director of Public Prosecutions, Courts, Legal Aid Queensland and the legal profession are some of them; see Chapter 4: *An Overview of the Queensland Criminal Justice System*.

other parts of the system. The system is interactive; what is done (or not done) in one agency impacts on other agencies. Sometimes these impacts can be foreseen and other times they cannot. The unforeseeability of all consequences should not deter the reform process. It will be an ongoing one.

The two 'round tables' convened by the Review and various consultations showed the openness of the agencies to identifying problems and collaborating to solve them in an environment which supports that approach, rather than staying in the silo and blaming others. The recommendations are designed to facilitate cooperation to improve the criminal justice system without compromising the separate roles of the agencies.

These themes are developed in the chapters which follow, particularly Chapter 4: *An Overview of the Queensland Criminal Justice System*.

A major challenge in undertaking my task is to consider a number of perspectives:

- accused
- victim
- witnesses
- Queensland Police Service (QPS)
- Office of the Director of Public Prosecutions (ODPP)
- defence lawyers
- courts
- Queensland Corrective Services (Corrective Services)
- various other agencies, and
- the overall perspective of the community

and to try to develop an integrated criminal justice system that deals effectively with criminal cases without compromising the underlying values of the system.

Some limitations

My task is to examine and report to the Attorney-General on the working of Queensland courts in the civil and criminal jurisdictions, reflecting five specific aspects with a view to making more effective use of public resources. The major focus of my work is the criminal justice system.

To do this, I have identified and developed proposals, as far as the material available and the time constraints allow, to streamline the criminal justice system processes to make them more effective in delivering fair and just results.

It is for the executive government acting through the Attorney-General to determine what recommendations might be accepted and when and how they might be prioritised, funded and implemented.

In any event it is beyond my capacity to carry out those functions because of the combined effect of a number of practical considerations.

Most significant of these considerations is the lack of reliable, comprehensive data. It is for example impossible to track a person through the justice system from arrest and charge, through to the courts and Corrective Services. Although a number of different agencies have systems to collect data for their own specific purposes, this has not yielded relevant data to enable the Review to accurately map the criminal justice system as a whole, or to track the various processes in that system that nearly always involve multiple agencies (see Chapter 6: *The Information Management Issues*).

The community, which funds the criminal justice system, has every right to expect those funds to be used effectively. In practical terms, there are limited resources and many legitimate competing demands for those resources to support health, education, disability and other needs. It is unrealistic and impractical to expect that society should fund, for example, a jury trial no matter how trivial the offence or how inconsequential the outcome for the accused. Expenditure of funds for one purpose means, axiomatically, that those funds are not available for another purpose. Maintaining the status quo inevitably gives priority to certain social objectives over others, whether this is explicit or not, but the environment in which the criminal justice system operates may have changed.

For reasons canvassed throughout this report, I am not in a position to identify in any comprehensive manner the resources (money and skills) involved in implementing a recommendation for agencies which must continue their day to day work while managing and implementing the change.

Those things said it is obvious that there needs to be a staged, prioritised and structured approach to implementation of any recommendations with evaluation of effectiveness and adjustments made where they are indicated. I have made some broad recommendations with respect to these matters.

Further considerations

I have endeavoured to be realistic in my recommendations bearing in mind the workload in an environment when government finances are already stretched. Moreover the recommendations will have to be implemented in agencies such as the QPS, ODPP and courts which must continue to function in their day to day business.

I am indebted to many people who have contributed commitment, wisdom, ideas, experience, time and effort to this report. This is apparent from the responses to the advertising of the Review, those proffering submissions and attending round tables and consultations. (See Chapter 3: *How we went about it* and Appendix 3)

I have endeavoured to adhere to the target date for presentation of the report, despite the short time for reporting on wide ranging complex considerations. The nature and extent of those considerations emerges in Chapter: 2 *Touchstones*, Chapter 4: *An Overview of the Queensland Criminal Justice System* and Chapter 6: *The Information Management Issues*.

Change is inevitable as the criminal justice system responds to the pressures of a dynamic society. In the short term the implementation of the Review's recommendations will itself generate ongoing change and response.

There are occasions throughout this Report on which the same point or the same or similar text is repeated. That reflects an appreciation that not everyone, understandably, will read the Report from beginning to end. It also reflects the fact that themes and issues are interrelated and cannot always be neatly segregated.

Further, the same considerations may bear on a number of aspects canvassed by the Report. It may be useful, even for a reader of the whole Report, to repeat what was said elsewhere to put a particular aspect into context.

The procedural changes recommended by this Report aim to facilitate early resolution of criminal matters and to achieve more effective use of public resources in doing equal justice to all according to law, impartially, fairly and expeditiously.

Chapter 2: *Touchstones* of the Report deals with the values which underpin our criminal justice system.

Legislative and other reform

The Report recommends the enactment of a Criminal Justice Procedure Act to provide a framework for effective criminal justice processes and procedures. The need for this, and for updating and consolidating existing procedural rules of court, is clear and recognised as long overdue by many of those with whom I consulted.

Legislative reform should occur in two stages.

1. Stage one would be a Criminal Justice Procedure (Interim) Act that would give effect to the recommendations in respect of the civil monetary limits, disclosure, summary disposition of indictable offences, sentencing discounts for early pleas of guilty, reforming the committal process and earlier resolution of matters through case conferencing; and
2. Stage two would involve the introduction of the Criminal Justice Procedure Act to provide for any legislative requirement for implementation not dealt with by the stage one Act (see Chapter 4: *Overview*).

The Act should also provide for a Criminal Justice Procedures Co-ordination Council.

Updated uniform criminal procedure rules and forms for Supreme, District and Magistrates Courts should also be developed as part of the second phase of reform. A similar process has been undertaken in respect of civil matters (cf UCPR 1999). I note in this context that the Rules Committee is currently developing a Civil Procedure Bill to achieve consistency in processes and structure across the civil jurisdictions of the Supreme, District and Magistrates Courts.

The recommendations concerning the summary disposition of indictable offences in Chapter 8 dealing with the second Term of Reference for the Review are designed to align particular categories of offences to the level of Supreme, District or Magistrates Courts, proportionate to the seriousness of the offences and the potential

consequences of a conviction for the accused. This will make more effective use of public resources.

The recommendations of Chapter 9: *Reform of the Committal Proceedings Process* (incorporating Term of Reference 5: *Case Conferencing*) are designed to achieve a more rigorous committal process to test whether a case justifies committal to the Supreme or District Courts for trial or sentence; and provide for the testing of the prosecution case when that is justified.

Finally, the Report makes recommendations in Chapter 10 in respect of the use of sentencing discounts to encourage pleas of guilty, so making better use of public resources. This was the fourth Term of Reference for the Review.

Touchstones

A **touchstone** is a black siliceous stone used to test the purity of gold and silver by the colour of the streak produced on it by rubbing it with either metal.

Rubbing a metal on a touchstone grinds off a small amount of metal onto the stone to form a coloured stripe. This is compared to a stripe ground from an alloy of known high-quality composition next to the sample (this is called “priming” the stone) and the purity of the sample is evaluated.

By extension, the metaphorical use of touchstone means any intellectual measure by which the validity of a concept can be tested.⁵

As I have said, the purpose of the criminal justice system is to provide equal justice for all according to law, by disposing of cases impartially, fairly and expeditiously (minimum unavoidable delay) with the minimum but necessary use of public resources. The purpose of this chapter is to expand on and deal with some implications of these considerations.

An effective criminal justice system should be such that the risks of the innocent being convicted and the guilty acquitted are as low ‘as human fallibility allows’.⁶

Under the system by which Queensland is governed, Parliament has an overriding responsibility for making laws (Acts of Parliament) for the peace, welfare and good government of the State.⁷

The executive government (essentially the Parliamentary majority) is responsible to Parliament for carrying out the functions of government through the public or executive service (i.e. public servants). The public service is organised into departments or agencies headed by a public servant (a Director-General) who is answerable to a Minister who is a member of and responsible to the Parliament.

Queensland courts, the Supreme, District and Magistrates Courts, deal with cases commenced in the criminal and civil jurisdictions of the respective courts. The issues

⁵ <http://en.wikipedia.org/wiki/Touchstone>. A touchstone is ‘a test of criterion for the qualities of a thing’ Delbridge, A. and J.R.L. Bernard ed, *The Macquarie Concise Dictionary*, 2nd ed, The Macquarie Library, 1988.

⁶ Report on Criminal Justice in England and Wales – the Runciman Report 1993.

⁷ *Constitution Act 1967*.

raised by the Terms of Reference in the current Review impact on the day to day working of Queensland courts. Queensland courts depend on the executive government (through the Department of Justice and Attorney-General) for funding and administrative resources. This Report focuses on the Supreme, District and Magistrates Courts.

Judges and magistrates, supported by court staff, progress cases to a conclusion and try those cases which cannot otherwise be resolved to determine whether an accused is guilty or not guilty.

The corporate support and operational areas of Queensland courts have undergone a major restructuring since July 2007.

A Courts Corporate Services Unit was established in September 2007 and is responsible for managing finance and general administration, judicial and client support.

The new structure is designed to improve case management and workflows, better support and develop staff, improve financial performance, manage risk and streamline processes.

There is a move to addressing issues and improving processes across three levels of courts.

A Queensland Courts Focus Group consisting of the heads of jurisdiction, senior court staff and departmental officers has been established.

The processes are designed to progress the alignment of processes and policies, give performance evaluation and budgetary considerations across courts and jurisdictions. A whole of Queensland Courts Business Plan has been developed.

It has been said of the constitutional arrangement which I have described with the separation of powers between legislative, executive and judicial powers as 'the legislature controls the money, the executive controls the force and the judiciary controls neither'.⁸

⁸ Hamilton, A, *The Federalist Papers v No. 78* New York Random House 504.

In such an environment the general acceptance of judicial decisions by citizens and the executive government is essential to peace, order and good government and rests on public confidence in the courts and legal processes.

This topic has been canvassed on a number of occasions by the Hon Murray Gleeson AC during his term as Chief Justice of the High Court of Australia. In a speech to the Supreme Court of Japan ‘Current Issues for the Australian Judiciary’⁹ on 17 January 2000 he observed:

A culture of acceptance of the decisions of unelected judges, even when those decisions defeat the will of popularly elected legislators, rests ultimately upon confidence in the independence, impartiality, integrity and professionalism of the judiciary.

He also dealt with this point in a speech to the Judicial Conference of Australia ‘Public Confidence in the Judiciary’ on 27 April 2002.¹⁰

In a speech to the National Judicial College of Australia “Public Confidence in the Courts” on 9 February 2007¹¹ he remarked that:

All institutions of government exist to serve the community, and the judicial branch of government, which has no independent force to back up its authority, depends upon public acceptance of its role.

The system I have described is often referred to as the Rule of Law. A criminal justice system reflects the values of the society that it serves. These values contribute to the Rule of Law. The values reflected in the Rule of Law for present purposes can be expressed as follows:

- No citizen is above the law;
- The purpose of the system is for courts to provide equal justice for all according to law impartially, fairly, without unjustifiable delay and with the minimum but necessary use of public resources;
- Conviction of a criminal offence should be the result of a ‘fair trial’ in which an accused has the opportunity to know and to meet the case made against them with proper legal representation;¹²

⁹ http://www.hcourt.gov.au/speeches/cj/cj_Japanj.htm

¹⁰ A revised for publication version appears in (2002) 14 JOB 49 “Public Confidence in the Judiciary”.

¹¹ http://www.hcourt.gov.au/speeches/cj/cj_9feb07.pdf

¹² Absence of a fair trial may be a ground for setting a conviction aside: see *Dietrich v R* (1992) 109 ALR 385 per Mason CJ and McHugh J at 388 citing *Jago v District Court of New South Wales* (1989) 87 ALR 577; 168 CLR 23, per Mason CJ at 29; Deane J at 56; Toohey J at 72; Gaudron J at 75.

- The process of disclosure mandated by the Parliament requires the prosecution to provide details of evidence and other information so an accused is fully informed of the case to be met. This process is the lynchpin of the criminal justice system (see Chapter 5: *Disclosure*);
- The concepts of equal justice for all and fairness connotes the necessity for a criminal justice system to take into account and address the consequences of disadvantage, disability or the like for individuals and groups in our society when they come before the courts; and
- A criminal charge is an accusation by the executive government of the State (acting through the Queensland Police Service (QPS), the Office of the Director of Public Prosecutions (ODPP) and other areas of the executive) against an individual who is alleged to have broken the law.

There is a vast disparity of power and resources between the executive and a citizen accused of a crime. This is reflected in the following considerations:

- Subject to express exceptions, the prosecution must satisfy a judge and jury, or a magistrate, that an accused is guilty beyond reasonable doubt before there can be a conviction (this is often referred to as the presumption of innocence);
- There are restrictions on the admissibility of evidence obtained unlawfully or on confessions which are not voluntary; see s 10 of the *Criminal Law Amendment Act 1894* which provides to the effect that confessional evidence is not admissible if it is not voluntary;
- The *Evidence Act 1977*, s 10 preserves the general rule (although there are statutory exceptions) of common law privilege against self incrimination (the privilege of silence);
- By s 130 of the Act a court may exclude evidence when satisfied it would be unfair to an accused to admit it. Evidence obtained unlawfully may be excluded under this rule;
- A defendant is not subject to disclosure obligations save in specific circumstances, for example, a defendant must notify the prosecution of alibi, representation and expert evidence;¹³ and
- Initiation of a criminal process against a citizen is a serious exercise of state power and should only be utilised where there is adequate evidence of sufficient weight to justify a conviction: ‘the committal test’.

¹³ See *Criminal Code* ss 590A and 590C.

Those considerations reflect recognition by our system of government of the disparity of power and resources between the executive government and the citizen.

The implications of the prosecution's disclosure obligations and failure to comply with them are dealt with in Chapter 5: *Disclosure* and of the committals test in Chapter 9: *Reform of the Committal Proceedings Process*.

It is common to hear reference to a right to trial by jury. There is no entrenched right to trial by jury under Australian law; it is a matter for parliament. Australian parliaments are under no constraint and can lawfully determine whether there can be a trial by judge or magistrate alone imposing such conditions as parliament sees fit.

Section 80 of the *Commonwealth Constitution* provides that the trial on indictment of any offence against any law of the Commonwealth shall be by jury. It was held in *R v Archdall and Roskrug; ex parte Carrigan and Brown* (1928)(41) CLR 128 that s 80 allows the parliament to decide which offences are and are not to be tried on indictment with the consequence that s 80 did not guarantee trial by jury. Notwithstanding passionate criticism of this construction by a number of commentators and that individual justices of the High Court from time to time have expressed a different view, the High Court has consistently held that s 80 allowed parliament to decide which offences are and which are not to be tried on indictment and hence by a judge and jury.¹⁴

The *Criminal Code and Jury and Other Amendment Act 2008* (Qld) s 615 provides that a court may make a 'no jury order' in circumstances where there would otherwise be a jury trial if it considered it was in the interests of justice to do it and, if the application was made by the prosecutor, the accused consented to the order; s 615(2).

There is nevertheless a widely and justifiably held view that trial by jury should not be lightly dispensed with, given the serious consequences for an accused which may follow conviction of a criminal offence, the implications for and the attitudes of the community as a whole in respect of some particular offences and categories of offences.

¹⁴ See *Cheung v The Queen* (2001) CLR 1 (2001) 76 ALJR 133.

There is much to be said in support of the jury system which involves citizens drawn from the community to determine whether or not the prosecution has proved guilt beyond reasonable doubt before delivering a verdict of guilty. Jury duty is one of the few civic obligations directly discharged by citizens rather than by elected representatives or by executive government acting through employed public servants. A jury brings to bear the combined knowledge and experience of twelve citizens and reflects community wisdom and values. There is no doubt the jury franchise should be wide and that jurors should be properly paid and supported.

Although trial by jury should not be lightly dispensed with, considerations arise as to whether the seriousness of a particular offence with which an accused is charged and the potential consequences of a conviction are disproportionate to the commitment of public resources and the delay involved by having a trial by jury.

These considerations are reflected in the parliament's categorisation of offences in terms of crimes, misdemeanours, simple and regulatory offences.

Offences categorised as crimes and misdemeanours are indictable offences. Indictable offences are dealt with by a Supreme or District Court judge and tried by judge and jury¹⁵ as a crime or as a misdemeanour (with consequent trial by jury), or as a simple offence (with the consequence of trial by a magistrate alone) when legislation constitutes criminal offences.

There is also increasing recourse to processes such as a penalty notice which provide for payment of a penalty without any court involvement unless the person receiving the notice elects for a contested hearing.

Parliament has also provided for the summary disposition of indictable offences by a magistrate without the consent of the accused. These considerations are canvassed in Chapter: 8 *Summary Disposition of Indictable Offences* of this report.

The system

The criminal justice system in Queensland has its origins, as do the criminal justice systems of many other countries, in the common law system which evolved in

¹⁵ See *Criminal Code* (Qld) ss 1 and 3.

England over a long period. That system is frequently referred to as an adversarial system.

Under the law a criminal trial involves as protagonists the crown on one hand and the accused on the other. Each is free to decide the ground on which (the issue of guilt) is contested, the evidence and questions to be asked.¹⁶

The contestants determine issues and the direction of the trial. The focus of the adversarial system is the jury as the ultimate arbitrator of fact acting in accordance with the law as determined by the trial judge. The jury has no investigative role. The rules of evidence (for example, hearsay) are designed to filter out inherently unreliable evidence.

The accusatorial system is often contrasted with the inquisitorial system which is said by its protagonists to focus better on finding the truth rather than proving a particular case. By way of contrast, in the inquisitorial system the judges are actively involved in the investigation, the collection and presentation of the evidence and its evaluation, and so in determining the verdict.

This is not the place to pursue the pros and cons in detail or to rate the features of each system against the other. Like all labels, adversarial and inquisitorial greatly over weigh some characteristics of the respective systems and distort the differences between them. In truth there is an argument that each system is evolving by taking up aspects of the other.

The point is that the adversarial cast of mind 'A man will not know of what metal a bell is made if it has not been well beaten so the law shall be well known by good disputation'¹⁷ shapes the attitude of the protagonists: prosecution against the defence, defence attitude towards police and police towards the defence. This culture can blind the protagonists to finding common ground to dispose of a case expeditiously with the minimum necessary commitment of resources without compromising the conduct of the defence.

¹⁶ Review of the Criminal Justice System, Western Australia p 53 citing *Ratten v The Queen* (1974) 131 CLR 510 at 517.

¹⁷ Hankford J, Lord Chief Justice of England and Wales 1413-1424.

As I have said a key element in an effective criminal justice system is that cases are finalised expeditiously, without unjustified delay and with the minimum but necessary commitment of resources. It is in everyone's interest – victims, witnesses, accused, QPS, ODPP, courts, lawyers and the community - to have cases resolved as early as possible.

The majority of criminal cases are resolved by pleas of guilty or otherwise rather than by trial and verdict of guilty or not guilty. This is evidenced by the data for criminal cases committed for trial for Queensland provided by ODPP.

Table 2(a): Criminal cases committed for trial

ODPP Figures ¹⁸	2006/07	2007/08
Number of matters committed for trial	5280	5224
Number of matters ending in a plea prior to trial	4387	4261
Percentage	83%	81.5%
Average over the two year period	82%	

An effective justice system supports those cases not proceeding to trial being identified early and their exit from the system facilitated. These issues are dealt with in some detail in Chapter 4: *An Overview of the Queensland Criminal Justice System* and Chapter 9: *Reform of the Committal Proceedings Process*.

Delay

Complaints about delay in the criminal justice system are common even if there is justification for the delay. This is understandable. Delay has obvious negative effects for victims, witnesses, investigators and the effective use of public resources.

Victims frequently report that the state of uncertainty until there is a final resolution creates enormous stress for them and their families and their lives are disrupted by court events.

¹⁸ Figures received from ODPP.

The life of an accused and of an accused's family is seriously disrupted during the resolution of a criminal case, whether or not there is a guilty or not guilty verdict. Clearly the disruption is far more damaging in the case of an accused found not to be guilty.

Delay may result in evidence being lost or its reliability eroded, especially where witnesses are required to remember events which occurred years before a trial.

Delay involves considerable opportunity costs for public resources. Police, for example, cannot close a case and redeploy resources for other investigations. When the time comes for the hearing, witnesses, including police, may have been moved on and have to be found. Resources have to be deployed to find them rather than be involved in a current investigation.

Failure to deal effectively with unjustified delay by the court system diminishes the status of the courts in the eye of the public. The causes of justified delay should be identified, explained and addressed so as not to erode public confidence.

Some categories of delay are of course unavoidable, for example, it may take time to identify and apprehend the accused who may for example have fled the country or there may be legitimate difficulties in identifying witnesses and being able to interview them. Technology and scientific capacity may lag behind the investigator's demands. Continuing improvements in DNA and criminal profiling, for example, mean that old crimes can be detected and prosecuted many years after they were committed.

There are variations of complexity of cases. Some cases, although serious, may be straightforward from an evidentiary point of view. Others apparently simple may require lengthy investigation; testing results may take a long time to become available.

Delay may be the consequence of agency and systems failures which can be dealt with by better cooperation and effective processes among agencies.

In this context, the Queensland Magistracy, ODPP, Legal Aid Queensland and the QPS are to be congratulated for the development and implementation of the Brisbane Committals Protocol. It is a template for agencies working together to create a more effective system. I have also been greatly heartened by the spirit of

cooperation by the wide range of criminal justice agencies and interested parties in the two round table occasions generally and in submissions and consultations for this review.

I have dealt with these issues in other parts of the report, for example, Chapter 4: *An Overview of the Queensland Criminal Justice System*.

I strongly endorse the approach whereby criminal justice agencies develop and apply protocols as a basis for implementing effective processes. These advantages include:

- bringing together the criminal justice agencies affected by the matters the protocol deals with;
- fostering collaboration across agencies and emphasising the common interest to work out mutually acceptable processes; and
- the agencies (and the people) in the best position identifying the advantages and the disadvantages to their particular agency etc.

Returning to the issue of delay, there is reason for concern about time spent in remand custody – people who cannot get bail before a committal hearing. According to the Queensland Corrective Services (Corrective Services) submission the median time for remand in 2007 was just less than four months. The average remand period for the 10 per cent serving the longest remand period was just less than 14 months.

There are obvious negative consequences for prisoners on remand being held in custody who, it must be remembered, have not been found guilty of an offence. Delay and uncertainty create significant disruption to family life and employment for the accused on remand who may be exposed to additional risks – health, safety and social – while in prison. This is of particular concern for juveniles.

The prisoner in remand custody may be found not guilty at their eventual trial, or if found guilty may be sentenced to a non-custodial sentence or a custodial sentence less than the remand period already served. Other accused, not in remand custody, will continue in the community.

The cost per day for a remand prisoner is \$178.11 compared with the cost of managing an accused in the community of \$11.71.¹⁹

The innocent among this group will suffer from uncertainty and the guilty can avoid dealing with the consequences of their offending if the system is not effective.

Where health or drug issues are involved, the defendant cannot access any of the Corrective Services rehabilitation or treatment programs until they are convicted. The relationship between drug use and property and other categories of crime is obvious and has been well documented. The longer a drug user continues without treatment the more likely the person will continue to offend and the more their drug use and offending is likely to escalate. The community pays a price for this.

In procedural terms the single most important contribution courts can make to the criminal justice system is to minimise what I have referred to as justified delay and to eliminate unjustified delay.

Courts should provide early and certain court events for matters which are ready and will proceed to hearing or trial on the allocated day. They should make explicit the assumption that it is the obligation of the legal profession to be ready to proceed on the day or to give early notification if that is not the case so that the time can be reallocated.

An effective court system allows lawyers to focus on progressing cases to final disposition rather than focussing on court events as a process, for example, multiple court events which have no outcome but adjournment to another date for mention, often referred to as 'churning'. In those circumstances the lawyers for the parties would be better off spending time taking instructions from clients, negotiating with the prosecution, preparing for hearing or trial or appearing in trials or sentences.

Court events should be based on information previously acquired (electronically) and not used to acquire information to be acted on at some future date.

Court occasions should be focused on delivering an outcome of moving the case actively towards finalisation, rather than mentions which have no other reason than

¹⁹ 2008/09 Queensland State Budget, Service Delivery Statements, Department of Corrective Services.

setting another court date which has no outcome. Legal Aid Queensland found that as 'a mention represents approximately 30% of the overall preparation fee matters may be mentioned unnecessarily prior to resolution'.²⁰

²⁰ Legal Aid Queensland, *Criminal law legal aid fees: A discussion paper*, December 2007, <https://elo.legalaid.qld.gov.au/elodgement/whatsnew/pdf/criminalfeesfinalreport.pdf> at p 18.

How we went about it

On 15 July 2008 the Hon Kerry Shine, Attorney-General and Minister for Justice and Minister Assisting The Premier in Western Queensland (the Attorney-General) invited various agencies to attend a forum on a review of the civil and criminal justice system in Queensland. On 28 July 2008 the Attorney-General launched the forum and I outlined how I proposed to progress things.

At the forum I identified the fact that the progress of the Review depended upon the cooperation and collaboration of those organisations which make up the system. I also outlined the steps I intended to take throughout the Review.

On 9 August 2008 an advertisement was placed in the following newspapers:

- The Courier Mail;
- The Gold Coast Bulletin;
- The Cairns Post;
- The Longreach Leader;
- Mackay Daily Mercury;
- Rockhampton Morning Bulletin;
- Sunshine Coast Daily;
- The Toowoomba Chronicle; and
- The Townsville Bulletin.

The advertisement outlined the Attorney-General's review of the civil and criminal justice system in Queensland and asked for contributions from interested parties on the review and invited comment by 5 September 2008.

The review received formal submissions from the following individuals/agencies:

- Chief Judge Marshall Irwin – Queensland Magistrates Court;
- The Public Advocate, Ms Michelle Howard;
- Buckland Criminal Lawyers;
- Commonwealth Director of Public Prosecutions (Qld);
- RACQ Insurance (Term of Reference 1);
- Suncorp-Metway Insurance (Term of Reference 1);

- Bar Association of Queensland;
- Queensland Law Society;
- Boe Lawyers;
- Legal Aid Queensland;
- Office of the Director of Public Prosecutions (Qld);
- Queensland Corrective Services;
- Mr Trevor Pollock – Retired Magistrate;
- Mr Rick East;
- Ms Robyn Hill – Director of Courts – Supreme and District Courts;
- Mr Paul Marschke – Court Administrator – Magistrates Courts; and
- Mr Neil McGroarty – Barrister-at-Law.

A Discussion Paper (Appendix 2) was produced in relation to the Reform of the Committal Proceedings Process and other issues and was published for comment on the Department of Justice and Attorney-General website.

The launch forum was held on 28 July 2008. Two ‘round table’ discussions were held on 20 August 2008 and 15 October 2008.

We had a number of informal ‘forums’ drawing on a diverse range of participants.

The Review team and I consulted widely, formally and informally. On some occasions we instigated the contact, on other occasions the approach was made to me or my staff.

Drafts of recommendations and other material were circulated to agencies particularly affected and responses invited.

There was regular liaison by staff with the contacts designated by various agencies; other contacts were identified as the proceedings unfolded.

There were a number of informal ‘brainstorming sessions’ about issues and proposals by commission staff and other contributors in respect of various aspects of the inquiry and Report.

Appendix 3 is a list of organisations and individuals who contributed by attending the round tables and other meetings, and in doing so facilitated the work of the Review. Others who do not wish to be named contributed to this Report.

As is apparent I am indebted to the generosity and efforts of many people in compiling this report. It is almost inevitable that I overlook some contributors. For that I apologise. A large number of individuals and organisations made invaluable contributions to the Review by attending round tables, meeting with review staff and assisting the Reviewer. I have attempted to name all those who have provided this assistance.

I am indebted to Ms Julie Grantham, Director-General, Department of Justice and Attorney-General for her support in providing accommodation and support by departmental staff.

I would like to make particular mention of the unwavering support I have received from Ms Catherine O'Malley, Acting Director of the Strategic Policy Unit Department of Justice and Attorney-General, Ms Jo Sherman, Consultant to the Future Courts Program, and Ms Edith Mendelle from Integrated Justice Information Strategy.

I was ably assisted by Ms Marg Herriot (Principal Researcher), Ms Kate Bannerman (Senior Project Officer), Ms Camille Smith-Watkins (Research Officer), Ms Julie Guy and Ms Beth Schmidt who was my Executive Assistant for most of the Review.

An Overview of the Queensland Criminal Justice System (The Overview)

... interests other than those of the litigants are involved in litigation, especially criminal litigation. The community has an immediate interest in the administration of criminal justice to guarantee peace and order in society. The victims of crime, who are not ordinarily parties to prosecutions on indictment and whose interests have generally gone unacknowledged until recent times, must be able to see that justice is done if they are not to be driven to self-help to rectify their grievances.²¹

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4.0 Introduction

The purpose of this chapter is to give a sufficient overview of the criminal justice system to provide a context for the issues canvassed by the Terms of Reference. It is far from comprehensive but provides a basic map of a complex and changing system.

²¹ *Drozd* (1993) 67 A Crim R 112 Per Brennan J at 115.

4.1 Sources of criminal law

Although Queensland inherited its legal framework from Britain, the source of all criminal law in this State is statutory not common law. The *Criminal Code Act 1899* drew heavily on the common law but sought to bring all criminal law into a single statutory source. The Criminal Code as amended from time to time continues to be the primary source of criminal law, however numerous other pieces of legislation dealing with different aspects of the criminal law have been introduced since this time.

4.2 Classification of criminal offences - crimes, misdemeanours & simple offences

Under the Criminal Code, offences are classified according to their seriousness into simple and indictable offences, and this then determines the method of trial (section 3 *Criminal Code Act 1899*). 'Indictable' offences are serious offences which are tried on indictment by a judge and jury or judge alone in the Supreme or District Court. The indictment is an historical concept but now simply refers to a document presented by the Office of the Director of Public Prosecutions (ODPP) which sets out the charge against the accused. Indictable offences are further classified as either 'crimes' or 'misdemeanours'. Crimes are the more serious indictable offences and historically were the only offences for which an arrest without warrant was possible. Now the distinction is less important. The most important distinction is between indictable and non-indictable (simple) offences. Simple offences are less serious offences that are heard summarily, that is, by a magistrate without a jury. There are also a number of indictable offences that can be dealt with summarily at the election of the accused in some cases and the prosecution in others (see Chapter 8: *Summary Disposition of Indictable Offences*). Section 3 of the Criminal Code also provides for regulatory offences but this category does not require any consideration here.

4.3 History

The Queensland criminal justice system has its foundation in legislation drafted in the 1800's. Both the *Criminal Code Act 1899* and the *Justices Act 1886*, two of the most important pieces of legislation governing both substantive and procedural law, date back to this time and are drafted in the archaic and prolix language of the time.

The system of law reflected in this legislation evolved in England over hundreds of years before being brought to Australia at the time of British settlement. It was progressively applied as European society in Australia developed.

In simple terms, the Magistrates Court system and processes in the *Justices Act 1886* originally involved groups, known as a 'bench', drawn from members of the community who satisfied a property qualification, essentially the 'landed gentry'. Historically, these 'justices of the peace' were primarily concerned with law enforcement. They were not independent but were honorary positions and subject to the whims of the government of the day.

As the system evolved, a qualified lawyer (the Clerk) was appointed on a full time basis to advise the bench about procedural and other matters.

After 1850 in Queensland, salaried magistrates (stipendiary magistrates) were appointed. These were initially police and water police magistrates. The system of police courts and stipendiary magistrates operated alongside the justices of the peace system.

Eventually, police magistrates were replaced with stipendiary magistrates drawn from the public service, usually from those who had been promoted from the position of clerk of the court.

Criminal justice legislation drafted in the 1800's necessarily reflected a far less complex society and had the need for far fewer substantive offences than is now the case. Colonial society had very different needs, expectations, values and social requirements. Colonial and post colonial society was pretty simple and fairly homogenous. There were no computers, telephones or motor cars, let alone the

internet. Public drunkenness, fist fights, disputed mining claims and stealing stock were the typical business of magistrates. Society was stable, changes were incremental over time.

Colonial police also had a simpler task, with few investigative tools at their disposal. Evidence often involved eye witnesses and little else. It would have been rare for more than one offender to be charged for an offence or for there to have been more than one charge laid against an offender.

In contrast, modern society is increasingly complex, technologically advanced and diverse. Fifteen years ago, social commentator Hugh Mackay described 'a period of unprecedented social, cultural, political, economic and technological change...'.²² The nature and rate of change has continued exponentially since then bringing with it continual and increasing complexity.

As society has become more complex, so too has criminal behaviour. New offences have been, and continue to be, created to deal with drug crimes, international money laundering, fraud, terrorism, internet crime and child pornography. Police have also responded by developing more sophisticated policing techniques, assisted by major technological changes and advances in science, for example DNA testing and electronic surveillance.

The 'revolution' in transport, communication and the form and use of information (for example, the worldwide web) means that criminal activity is not constrained by national boundaries.

Legal research is conducted online. Court proceedings are recorded electronically and can be assessed directly during the course of proceedings. For example, the Queensland Sentencing Information Service (QSIS) is an online database service operated as a joint initiative of the Department of Justice and Attorney-General (Queensland) and the Judicial Commission of New South Wales. The service provides a 'day-to-day guide on precedents, comparable cases, and the application of the principles of sentencing laws'.²³ QSIS provides amongst other things text of the High Court of Australia cases, Queensland Court of Appeal criminal judgments, sentencing remarks from the Supreme and District Courts, sentencing statistics,

²² Mackay, *Reinventing Australia*, 1993 at p 6.

²³ Queensland Sentencing Information Services, *User Guide*, at p 5.

legislation and Practice Directions. The aim of QGIS is to provide consistency and predictability in sentencing. The service is presently available to all judges of the Supreme and District Courts, magistrates, legal staff from the State and Commonwealth Director of Public Prosecutions, Legal Aid Queensland, Queensland Police Prosecutors, solicitors and barristers from the private profession and policy arms of the Queensland government.

It is hardly surprising that the substantive and procedural provisions of the *Justices Act 1886* are no longer appropriate to the world in which they now apply. There are limits to the extent to which processes developed in the late 19th century environment can be effectively applied to, or adapted for today's dynamic and complex world.

Successive governments have attempted to keep pace with changing social conditions through piecemeal and ad hoc reactive legislative amendments and reforms. Inevitably reform happens in fits and starts as social change and other factors outrun the legal and social infrastructure. In a sense reform is always running behind the pace.

In the last 130 years, there have been over 100 amendments to the *Justices Act 1886*, as well as more than 100 amendments to the *Criminal Code Act 1899*. In recent times, law reform bodies, including the Queensland Law Reform Commission, the Criminal Justice Commission (now the Crime and Misconduct Commission), the Taskforce on Women and the Criminal Code and others have made recommendations in relation to criminal justice issues. Governments of both persuasions have also pursued strong public order agendas. Reforms in the last two decades include substantial reforms to the *Bail Act 1980*, the introduction of the *Penalties and Sentences Act 1992* and the *Police Powers and Responsibilities Act 2000*. A comprehensive review of the substantive law was conducted in the mid 1990's in an attempt, later aborted, to overhaul the *Criminal Code Act 1899*.

In the last two decades significant changes to the magistracy have also taken place. Until 1991 stipendiary magistrates were promoted through the public service, part of the executive arm of government. There was no clear separation of executive and judicial power. There was a hierarchy of classifications and promotions through the public service and no requirement for legal or other qualifications until 1971 when it was introduced for new appointments. There were magistrates without legal qualifications well into the 1990's.

After 1991 magistrates were no longer public servants but independent judicial officers. In 2000, stipendiary magistrates became simply 'magistrates'.

Magistrates now generally have wide experience of the day to day application and working of the criminal law, having been recruited from lawyers in private practice, the ODPP, Legal Aid Queensland and other legal agencies.

The Magistrates Court itself is also very different from that envisaged by the *Justices Act 1886*. There are 87 magistrates, 28 of these are women, appointed to 31 different locations and circuiting to 83 others throughout the State. The Supreme, District and Magistrates Courts are integrated into the hierarchy known as Queensland Courts.

While there has been significant and constant reform to both the substantive and procedural law over the last century, there has not been a single, comprehensive review to evaluate the effectiveness of criminal justice processes in Queensland. In addition there has been little consideration and much less accommodation of the impact of technology on the creation, storage, manipulation and evaluation of information and the importance of this to the justice system as a whole.

Until recently the reform process has been episodic, fragmented and ad hoc. This Review presents a fresh opportunity to bring the criminal justice system into the 21st century, to begin the important and ongoing task of aligning criminal justice processes with social needs, expectations and values as well as developments and opportunities.

4.4 Criminal justice system agencies

The Queensland criminal justice system is made up of a complex arrangement of separate components I will refer to as agencies.

While these various agencies operate independently and have specific functions, they are all part of the one interconnected system. Events that occur or do not occur in one part of the system affect the workings of other agencies and of the whole system. Some of these effects are direct and obvious, for example delays in forensic

reports from the Forensic Scientific Services' mortuary, known widely as the John Tonge Centre, cause delays in the committal of the case to which the results relate, and may also result in additional court events during that period. The effects of other events or changes in one component of the system are not always direct or foreseeable. The benefits and costs of change are not distributed evenly across agencies.

The major agencies, involved across all aspects of the criminal justice system, include:

The Queensland Police Service

The Queensland Police Service (QPS)²⁴ has an important responsibility for maintaining peace and order and public protection, irrespective of whether a criminal offence has been committed.

Police officers identify, apprehend, investigate and charge alleged offenders. The police are responsible for collecting the evidence that will be relied upon in the prosecution and so have a critical function in the proper exercise of the disclosure obligation which is developed in Chapter 5: *Disclosure*.

In Queensland, police also have responsibility for prosecuting many minor (summary) offences that are dealt with in the Magistrates Court. According to a recent analysis by the Integrated Justice Information Strategy (IJIS) project, 85% of criminal jurisdiction matters are initiated by the QPS.²⁵

The Office of the Director of Public Prosecutions

The Office of the Director of Public Prosecutions (ODPP) prosecutes people charged with serious criminal offences on behalf of the community. The Director of Public Prosecutions is an independent statutory officer who oversees the prosecution of all criminal cases in the Supreme and District Courts and some prosecutions in the Magistrates Court. Under the *Director of Public Prosecutions Act 1984* the Director

²⁴ <http://www.police.qld.gov.au/>

²⁵ This percentage came from a data query from QWIC (Queensland Wide Interlinked Database) the Criminal database used by the Supreme, District and Magistrates Courts. Criminal prosecutions are also initiated by a range of non criminal justice agencies including: RSPCA, Department of Primary Industries and Fisheries and the Department of Transport.

of Public Prosecutions (DPP) is required to 'prepare, institute and conduct criminal proceedings' on behalf of the State of Queensland.²⁶

The independence of the Director ensures that criminal prosecutions are undertaken independently from the government of the day and free from any other improper influence.

The Director issues guidelines under s 11(1)(a) of the *Director of Public Prosecutions Act* which apply to all staff and police in their prosecutorial role to ensure consistency, clarity and transparency in the exercise of the prosecutorial function.

The ODPP has offices in Brisbane and in eight regional centres. In 2006/07 it received \$34.002 million in total budget allocations and had 324 staff.²⁷ In 2006/07 the ODPP received 7,970 matters²⁸ for prosecution, post-committal in the Supreme and District Courts. There were also 2,275 matters referred to it under the 'committals program' under which the ODPP conducts the prosecution of committals in Brisbane Central, Ipswich and some in Southport.

Commonwealth Director of Public Prosecutions

The Commonwealth Director of Public Prosecutions²⁹ is responsible for prosecuting offences against Commonwealth law including the importation of drugs, corporations offences, fraud on the Commonwealth, terrorism, regulatory offences, people smuggling and people trafficking. Commonwealth prosecutions are conducted by the Commonwealth Director in State courts. Commonwealth offences committed in Queensland are dealt with in Queensland courts according to the procedures and processes applicable to all State offences.

Lawyers

In our adversarial system, lawyers play an indispensable role acting for the prosecution and the accused. The effective functioning of the system is dependent

²⁶ *Director of Public Prosecutions Act 1984*, s 10(1)(a).

²⁷ See pages 26 and 27 of the Office of the Director of Public Prosecutions annual report 2006-07: http://www.justice.qld.gov.au/files/CourtsAndTribunals/odpp_annualreport0607.pdf.

²⁸ A 'matter' is a file which contains a single offender and a single offence. From 08/09 the ODPP will define a 'matter' as a file which may contain multiple offenders and multiple offences.

²⁹ Website: <http://www.cdpp.gov.au/>

on competent lawyers to advise their client and present the best possible 'case' for their client in court. The conduct and outcome of the case will often be determined by the competence of the lawyers who ensure full disclosure has taken place, negotiate charges and pleas of guilty and advocate for their client.

Criminal cases are prosecuted on behalf of the State by legal practitioners (barristers or solicitors) employed by the ODPP or who are in private practice and engaged to prosecute on its behalf.

People charged with criminal offences are defended by lawyers they retain privately or provided or funded by Legal Aid Queensland.

*The Bar Association of Queensland*³⁰ represents the interests of members of the barristers. The *Queensland Law Society*³¹ is the professional body that represents the interests of legal practitioners in Queensland.

Both professional bodies have responsibility for setting professional standards for members of the profession and for ensuring that those standards are met.

The Legal Services Commission³² also plays an important role in enforcing professional standards. It is an independent statutory body established in 2004, with responsibility for dealing with complaints against lawyers. It has power to take disciplinary and regulatory action if a complaint is upheld.

Legal Aid Queensland

Legal Aid Queensland³³ is obliged to 'manage its resources so as to make legal assistance available at a reasonable cost to the community and on an equitable basis across the state'.³⁴ It does this by using a mix of lawyers employed by Legal Aid Queensland or lawyers who are employed by 'preferred providers' legal firms.

Legal Aid Queensland has funding agreements with both State and Federal Governments to provide legal services to some financially disadvantaged people who

³⁰ Website: <http://www.qldbar.asn.au/>

³¹ Website: <http://www.qjs.com.au/content/lwp/wcm/connect/QLS/Home/>

³² Website: <http://www.lsc.qld.gov.au/>

³³ Website: <http://www.legalaid.qld.gov.au/>

³⁴ *Legal Aid Queensland Act 1997*, s 43(b).

are accused of criminal offences. An accused, particularly in the Supreme and District Courts, may be represented by Legal Aid Queensland in-house lawyers or by preferred supplier law firms throughout the State. Funding for legal representation may be dependent upon a 'means' test which assesses the financial circumstances of the accused or a 'means and merit' test which considers both their financial circumstances and whether the case meets certain criteria in relation to the category of offence and strength of case. Legal Aid Queensland also funds 'duty solicitor' services to provide initial advice and representation in appropriate cases at the first court appearance. In 2007/08, 23,659 applications for legal aid funding were received with 21,823 approved.³⁵

Queensland Courts

Queensland Courts³⁶ exercise both criminal and civil jurisdiction. Except for Term of Reference 1 this Review is focussed on the criminal jurisdiction. Queensland Courts also deal with criminal prosecutions for breaches of State and Commonwealth Laws. The courts are hierarchical with the most serious cases in the jurisdiction of the Supreme Court, then the District and Magistrates Courts.

Supreme Court

The Supreme Court³⁷ deals with the most serious criminal offences such as murder, manslaughter and major drug offences.

Criminal trials in the Supreme or District Court are heard by judge and jury, with the judge deciding questions of law and the jury deciding whether the accused is guilty or not guilty. The judge determines the sentence to be imposed. Recent changes by the State government now permit trial by judge alone in certain circumstances with the consent of the accused. The Supreme Court operates out of courthouses in four locations and circuits to 32 locations.

³⁵ Legal Aid Queensland submission p 4.

³⁶ Website: www.courts.qld.gov.au.

³⁷ Website: <http://www.courts.qld.gov.au/1504.htm>

Table 4(a): Supreme Court Criminal Non-Appeal 07-08

Defendants	Finalisations	Clearance Rate	Attendance Index
1493	1538	103%	3.2

Table 4(b): Annual Caseload – criminal jurisdiction Brisbane Supreme Court 05-06³⁸

Number of Cases ³⁹	2003-04	2004-05	2005-06
At start of year	181	265	305
Commenced during year	727	800	999
Disposed of during year	639	750	863
Undisposed of at end of year	265	305	444

District Court

Following committal, serious offences proceed by way of indictment in the Supreme or District Court. The DPP can also bypass the committal and bring an indictment by way of ex officio proceedings.

The District Court⁴⁰ deals with the majority of indictable criminal matters. Over the years there has been an increase in the jurisdiction of the District Court. It now hears a number of categories of offences that were previously tried in the Supreme Court. Offences such as rape, armed robbery and fraud are heard in the District Court.

Table 4(c): District Court Criminal Non-Appeal 07-08

Defendants	Finalisations	Clearance Rate ⁴¹	Attendance Index ⁴²
6606	6836	103.5%	4.1

³⁸ This information taken from the Supreme Court Annual Report 2005/06.

³⁹ "case" means person on an indictment.

⁴⁰ Website: <http://www.courts.qld.gov.au/121.htm>

⁴¹ Clearance rate – R.O.G.S performance measure, may also include matters outside the counting period, for e.g.: bench warrant pick ups, breaches of probation, suspended sentence etc. That is why the clearance rate is above 100% as it takes into account older matters which have been reactivated.

⁴² Attendance Index – Average number of times a matter appears before the court until it is finalised.

Table 4(d): Annual Caseload – criminal jurisdiction Brisbane District Court 05-06⁴³

Number of Cases	2003-04	2004-05	2005-06
At start of year	836	855	874
Presented during year	2777	2592	2988
Disposed of during year	2768	2586	2971
Undisposed	855	874	887

The Childrens Court of Queensland, a specialist court established under the *Childrens Court of Queensland Act 1992* has the jurisdiction of the District Court to deal with children charged with indictable offences. It deals with children under the *Juvenile Justice Act 1992*.

The District Court operates out of courthouses in seven locations throughout Queensland with circuits to 32 locations.

The Magistrates Court of Queensland

All criminal matters begin in the Magistrates Court.⁴⁴ Each year the Magistrates Court deals with approximately 170,000 criminal cases. It operates out of courthouses in 83 locations. Magistrates have jurisdiction to hear and determine summary offences (less serious offences) and some indictable offences. When the magistrate is satisfied the case justifies a trial by jury the case is committed for trial (judge and jury) in the Supreme or District Court. Those convicted or pleading guilty are sentenced by a judge sitting alone in either the Supreme or District Court (see also Chapter 8: *Summary Disposition of Indictable Offences*).

There are also a number of specialist jurisdictions in the Magistrates Courts including the Murri Courts which sentence adult and juvenile Aboriginal and Torres Strait Islander offenders likely to go to prison or detention with input from community members, the Childrens Court and the Drug Court. In recent years the court has also established and supported a number of innovative diversion programs including the justice mediation program, homeless persons diversion program, alcohol diversion programs and early drug treatment programs. The Coroners Court is also part of the Magistrates Court. It investigates reportable deaths in Queensland.

⁴³ This information taken from the District Court Annual Report 2005/06.

⁴⁴ Website: <http://www.courts.qld.gov.au/126.htm>

For most citizens, the Magistrates Court is the face of the criminal justice system. Most people who have contact with the courts will only do so in the Magistrates Court. The vast majority of criminal cases (approximately 96% of people charged with criminal offences) are finalised in the Magistrates Court either by pleas of guilty or by summary trial. The Magistrates Court is less formal than the Supreme and District Courts and there is a much greater throughput of cases. It doesn't have the drama of the criminal trial before a jury. Nonetheless the functioning of this forum and the quality of justice delivered has a profound and pervasive effect on the public's confidence and faith in the justice system.

The Attorney-General and the Department of Justice and Attorney-General

As Queensland's first law officer, the Attorney-General has the responsibility to represent the public interest on behalf of the State; the right to initiate legal proceedings and in certain prescribed instances, to intervene in legal proceedings on behalf of the State; as well as other legal prerogatives and rights.

The Department of Justice and Attorney-General⁴⁵ has overall administrative responsibility for the justice system in Queensland. It provides the resources and infrastructure to enable the criminal justice system to operate effectively. It administers the court services, public prosecutions and, through Crown Law and provides legal advice to the government.

The Dispute Resolution Branch⁴⁶ of the Department of Justice and Attorney-General accepts referrals for a wide range of criminal matters for justice mediation.⁴⁷ The police, ODPP or magistrate may refer a matter to mediation, or the accused or the alleged victim can request the matter be referred. The referral may occur at any time during the process. Where the matter is successfully mediated, generally it would result in no further action by police or ODPP, or the outcome may be taken into account in sentencing. To be suitable for mediation the accused must have taken responsibility for their actions or at least have admitted that their actions have caused harm. In addition the alleged victim must agree to the referral.

⁴⁵ Website: <http://www.justice.qld.gov.au/>

⁴⁶ Website: <http://www.justice.qld.gov.au/18.htm>

⁴⁷ The Department of Communities has responsibility for mediation involving juvenile offenders.

Justice mediation allows the parties to create more flexible and individualised outcomes including:

- an apology;
- a commitment not to reoffend;
- completion of an activity to help prevent reoffending (for example, an anger management course or counselling);
- restitution; and
- compensation for injury or donation to charity.

The program operates from Brisbane and has only recently expanded to Southport, Cairns and Townsville.

In 2007/08 the program received 486 referrals and conducted 193 mediations for offences such as assault, stealing, wilful damage and occasionally more serious matters such as grievous bodily harm, fraud and stealing.

An effective justice mediation program, though not suitable for all cases, can make a considerable contribution to an effective criminal justice system by resolving cases at an early stage with minimum preparation for a trial or sentence.

The State Penalties and Enforcement Registry (SPER) is also administered by JAG to collect and enforce unpaid infringement notices and court ordered fines. The SPER system was developed to ensure that compensation or restitution payments are maximised for victims of crimes, whilst affording potential fine defaulters new flexible payment arrangement to minimise their chances of ending up in prison.

Queensland Corrective Services

Queensland Corrective Services⁴⁸ (Corrective Services) has responsibility for dealing with an offender after they have received a sentence of imprisonment or a community based order such as probation. It is also responsible for accused who are in remand custody because they cannot obtain bail. The core purpose of Corrective Services is

⁴⁸ Website: <http://www.correctiveservices.qld.gov.au/>

'community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders'.⁴⁹

Department of Communities

The Department of Communities has responsibility for a range of issues associated with the criminal justice sector including administration of domestic violence and juvenile justice legislation, the provision of community-based and detention services to juvenile offenders, sentences by the courts and the organisation and delivery of youth justice conferencing, a diversionary option initiated either by the police or by the courts.

Other Organisations

There are a number of other organisations that may become involved in the criminal justice system in specific circumstances. These include, but are not restricted to:

Community legal centres

A range of specialist and generalist community legal centres,⁵⁰ funded by Commonwealth and State governments may provide legal advice, support and representation to people accused of criminal offences.

The *Aboriginal and Torres Strait Islanders Legal Service*⁵¹ (ATSILS) is a specialist legal service plays a vital role in representing Aboriginal and Torres Strait Islander people facing criminal charges in Queensland courts. It provides duty lawyer services, advice and representation in all Queensland courts. Criminal law matters make up the bulk of ATSILS' workload. ATSILS is funded by the Commonwealth Government.

Department of Child Safety

The Department of Child Safety⁵² is dedicated to the protection of children and young people who are at risk from harm, or who have been harmed. It may play a role,

⁴⁹ Queensland Government, Corrective Services website, at <http://www.correctiveservices.qld.gov.au/About_Us/The_Department/index.shtml> (2/9/2008).

⁵⁰ Website: <http://www.qails.org.au/>

⁵¹ Website: <http://www.atsils.com.au/>

⁵² Website: <http://www.childsafety.qld.gov.au/>

similar to a parenting role, where one of its clients is charged with a criminal offence or is a victim of a criminal offence.

Disability Services Queensland

Disability Services Queensland⁵³ provide a range of services and support for people with intellectual disabilities and their families. It may play a role when one of its clients is affected by criminal charges, either as an accused, a witness or a victim.

Public Advocate

The Public Advocate⁵⁴ protects and promotes the rights and interests of adults with impaired decision-making capacity through systemic advocacy. There is a high representation of people with impaired decision-making capacity to be accommodated by the criminal justice system.

Public Interest Monitor

The Public Interest Monitor is appointed to oversee the exercise of police surveillance powers. Under s 159 of the *Police Powers and Responsibilities Act 2000* it has responsibility:

- to monitor compliance by police officers (surveillance powers);
- to appear at any hearing for a surveillance warrant to test the validity of the application;
- to gather statistical information about the use and effectiveness of surveillance and covert search warrants; and
- whenever the Public Interest Monitor considers it appropriate, to give to the Commissioner a report on non compliance by police officers.

The function of the Public Interest Monitor, in broad terms, is to assist in the process of balancing two competing expectations. The first is the community expectation that modern investigative agencies will have appropriate powers and technology available to them in combating contemporary crime. The second expectation is that the erosion of fundamental rights of the individual that the granting of such powers necessarily involves, will be minimised to the greatest extent possible. This is achieved by ensuring that the process of applying for, approving, and using those

⁵³ Website: <http://www.disability.qld.gov.au/>

⁵⁴ Website: <http://www.justice.qld.gov.au/473.htm>

powers is carried out strictly in accordance with the restrictions laid down by Parliament.⁵⁵

Queensland Health

Queensland Health's Forensic Sciences Services⁵⁶ are responsible for forensic analysis and support in criminal matters through forensic biology, chemistry, pathology and toxicology. The Forensic Scientific Services' mortuary, known widely as the John Tonge Centre, is responsible for autopsies ordered by the Coroner. Some forensic testing is complex and lengthy and can add considerable delay to the finalisation of a criminal matter. Responsibility for mental health and a number of programs in the treatment, management, early intervention of alcohol and other drug problems, also rests with Queensland Health.

The Crime and Misconduct Commission

The Crime and Misconduct Commission⁵⁷ (CMC) is responsible for investigating major crime, misconduct by public servants and State organisations, and it runs the witness protection program in Queensland. The CMC investigates public sector matters and cannot investigate private organisations unless there is a link with the public sector.

The Mental Health Court

The Mental Health Court⁵⁸ consists of a Supreme Court judge assisted by two psychiatrists. The court has jurisdiction to determine questions in relation to an alleged offender's state of mind. For example, it may be asked to decide whether the accused was of unsound mind at the time of the offence, whether they are unfit for trial and if so whether this is permanent, and, if the accused faces a murder charge, whether at the time of the offence they were suffering from diminished responsibility.

A case cannot progress to disposition in the Supreme or District Court until the preliminary mental health questions have been dealt with. The work of the court however greatly facilitates the work of the Supreme or District Courts by its determination of the issues before it prior to any trial or plea of guilty.

⁵⁵ Eighth Annual Report of the Public Interest Monitor for the period 1 July 2004 to 30 June 2005.

⁵⁶ Website: <http://www.health.qld.gov.au/>

⁵⁷ Website: <http://www.cmc.qld.gov.au/asp/index.asp>

⁵⁸ Website: <http://www.courts.qld.gov.au/1346.htm#MHC>

This Review has been told that the Mental Health Court has a heavy workload and the issues it deals with can be complex and difficult. Accordingly, a referral to the Mental Health Court can add significant delay to the resolution of a case.

Victim support groups

There are a number of specialist victim support groups in Queensland. These include the *Queensland Homicide Victims' Support Group*⁵⁹ (QHVSOG) which provide support, information and personal advocacy to people affected by homicide; *Protect All Children Today Inc.*⁶⁰ (PACT Inc.) which advocates on behalf of children and their families dealing with the consequences of abuse, assaults and neglect and *Bravehearts*⁶¹ which provides support and advocacy for victims of child sexual offences. Brisbane Rape and Incest Survivors Support Centre⁶² runs groups for women survivors of sexual violence.

4.5 Criminal justice processes and procedures

This Review is not directly concerned with specific criminal offences found primarily in the Criminal Code, but rather with how those offences are 'processed', what happens after an offence is committed and an arrest is made, how and when matters are resolved, how criminal law processes work in practice and the impact they have on those who come in contact with the criminal justice system including those accused of criminal offences, victims of crimes and witnesses.

The rules governing criminal law procedure are found in various statutes, court rules, practice directions as well as internal agency policy and procedure documents.

Cultural factors and traditions also impact on procedure and what happens in practice.

Although the criminal trial is seen as the 'end point' for the criminal justice system, in fact, in the order of 90% of all criminal cases in all jurisdictions are resolved without a trial.

⁵⁹ Website: <http://www.qhvsg.org.au/>

⁶⁰ Website: <http://www.pact.org.au/>

⁶¹ Website: <http://www.bravehearts.org.au/>

⁶² Website: <http://www.bravehearts.org.au/>

Criminal procedure should be directed at moving accused people through the system to finalisation by: the prosecution discontinuing the case; a plea of guilty; trial and verdict of either guilty or not guilty at the earliest opportunity for those remaining cases.

The system is skewed towards the criminal 'trial' as the probable or only outcome and procedures are geared towards this. According to the ODPP, more than 80% of matters it receives for prosecution in the Supreme or District Courts are resolved without a trial but very often in the week before trial or even on the morning of the trial. That is, the exception, (trial) drives the system and its procedures rather than a focus on an earlier determination. An effective system will identify those cases that can be resolved without trial and facilitate their resolution at the earliest opportunity. One of the aims of this Report is to shift that balance. Put shortly, there is a trade off between early preparation to effect a resolution by discontinuance and plea of guilty and saving cost of trial to verdict by a jury.

Criminal proceedings were initiated against 203,068 individuals in 2007/2008 involving 344,933 charges, 6583 individuals were committed to the Supreme or District Court for trial or sentence.

The various exit points are set out in the table below:

Table 4(e): Exit Points

EXIT POINTS	WHO	WHEN	PRECONDITIONS/ REASONS	ESTIMATED PERCENTAGE
Justice mediation	Complainant / police / offender	Before committal – can be after	Agreement of victim / accused	Less than .01%
Plea of guilty	Accused	Any time between 1 st appearance - trial	Full disclosure / legal advice	70 – 85 % (varies according to jurisdiction)
No evidence to offer	Police and the ODPP	Committal or prior to committal	Police and ODPP review of evidence	Approx 10% of charges before committal (indictable offences only)
Magistrate does not commit	Magistrate	Committal	Insufficient evidence (no prima facie case) to commit	Less than 10% of charges (indictable offences only)

Nolle prosequi / no true bill	DPP	After committal	Many – e.g. include new evidence; acceptance of accused’s defence; lost evidence; complainant does not wish to proceed; witnesses can’t be located	10-17% of matters ⁶³ committed for trial
Pre – trial rulings (can lead to plea / DPP not pursuing case)	Judge	After committal before trial	Application by either party	No figures
Removal of case from jury’s consideration	Judge	Trial		This is now rare because of changes to the criminal trial process.
Trial and verdict	Magistrate (summary) Judge & Jury	Trial - summary - indictment		Less than 20% of matters initiated in District Court. There are no figures for Magistrates Court. Court staff estimate less than 4% of summary matters end in trial.

4.6 Phases of the criminal justice system

Phase 1: a crime is committed, investigated and charges laid

Attached as Appendix 4, is an outline of the criminal justice system prepared by Legal Aid Queensland. It shows the primary decision-making points and charts the sequence of events that the typical criminal justice case will move through.

A criminal ‘case’ begins with the commission of an offence. A person does or fails to do something that contravenes ‘the law’ – that is, a particular statutory provision. Not all crime is reported and police will usually only know about an alleged offence if a victim or member of the public brings it to their attention. Some offences do not have

⁶³ A matter may be multiple offenders and multiple charges.

an identifiable 'victim' but are considered offences against society generally, for example certain drug trafficking and some fraud offences. In such cases police usually have to go looking for evidence rather than acting on a specific complaint, though frequently will act on a 'tip off' from a member of the public.

Once a complaint is made or an offence has been discovered, police determine whether the behaviour constitutes an offence, whether the person thought to be responsible can be identified, whether there is sufficient evidence to arrest the suspect and what offence/s to charge them with. There are often multiple charges and multiple offenders arising out of a single criminal incident and a number of single incidents may be included on an indictment if there is a sufficient nexus.

Arrest and investigation

The arrest and detention of a citizen is a serious exercise of a power of the State. Accordingly, alternatives to arrest and charge have evolved. In less serious matters, the police may determine to issue a notice to appear under the *Police Powers and Responsibilities Act 2000* requiring a person to appear at a specific court session, or a complaint and summons under the *Justices Act 1886*. In other specified offences, the police may issue an infringement notice, in which case the person pay a specified fine without appearing in court.⁶⁴

The police investigation may be initiated before or after arrest or charge depending on the nature of the offence. Police are often required to respond to an immediate report of an offence before any investigation takes place, for example, where an assault is reported the police will respond first, investigate later.

In other cases, for example, a suspected fraud, the investigation takes place first and the suspected offender is arrested and charged only once sufficient evidence has been gathered.

As part of the investigation process, and usually before charges are laid, the suspect may agree to an interview with police. The suspect is entitled by law to have a legal representative present although many suspects forego this right. Legislation requires the initial interview to be audio/video recorded where practicable.

⁶⁴ The *Summary Offences and other Acts Amendments Bill 2008* was introduced on 11 November 2008 and extends the range of offences for which infringement notices may be issued.

How the police discharge their obligations for the investigation, collection and storage of information and evidence is vital to the functioning of the entire justice system – the quality of investigation, police understanding of rules of evidence (relevance, hearsay etc), proper storage and record keeping are all essential to a fair and just system.

The importance of this obligation is recognised in the statutory disclosure obligations under the *Criminal Code Act 1899*. It is of such significance to the issues at the heart of this Review that it is the subject of a separate chapter (see Chapter 5: *Disclosure*).

It is my view that the use of technology at the outset in police investigations and collection of evidence should have benefits for police and for the criminal justice system as a whole. For example, eyewitness statements could be videotaped in the early course of the investigation.

It is well recognised that human memories change over time, particularly the more often the story is told. Early recording of witness statements has a number of benefits. It will:

- aid the preservation of evidence;
- reduce the number of times a witness has to tell their story;
- reduce the need for examination and cross-examination of witnesses at a committal hearing; and
- assist police in building the brief of evidence concurrent with an investigation.

Bail and remand

Once a person has been arrested and taken into custody, the next decision-making point is whether or not to grant bail.

Police have power to grant ‘watchhouse bail’ in which case the person will be released from custody with notice to appear at a particular Magistrates Court session and time. In other cases, for example, in some more serious offences or where an accused has a history of breaching bail conditions, the police will bring the accused before a magistrate in order for the court to determine the question of bail. Bail for some serious offences (for example, murder) must be determined by the Supreme Court.

Initial bail can be 'enlarged' (extended) by a magistrate under s 17 of the *Bail Act*. However, the magistrate has no power to extend bail after the accused has been committed for trial or sentence. A question that has arisen for this Review is whether initial bail – whether it is 'watchhouse' or court bail – should endure for the life of the matter until it is finally resolved. The IJIS program has identified a similar issue and proposed a project entitled *Bail Act Changes* the object of which is to amend legislation so that custody status (in custody/on-bail/at large) remains in force until charges are finalised or bail is granted, amended or revoked. No funding has yet been received to progress this project. (This issue is considered further in Chapter 9: *Reform of the Committal Proceedings Process*).⁶⁵

Where an arrested person is not granted bail, their first court appearance will generally be at the 'arrest court' (Magistrates Court) the following morning.

Historically, it was uncommon for a person remanded in custody to get bail. However in recent decades there has been a consistent trend towards granting bail in all except the most serious of offences or when there are public safety concerns that the accused will flee in which case the person will be held on remand until trial. Although most people charged with a criminal offence will receive bail, the number on remand continues to rise steadily as the numbers of people charged with criminal offences increases. This is of particular concern given the length of time between arrest and final resolution in most cases.

A review of matters listed for trial in the District Court in April, May and June 2008 revealed that of seven matters in which the accused was held in remand, two individuals were discharged after a *nolle prosequi* was entered on the morning (18 and 24 months after their respective arrests).

In another case, the accused was acquitted at trial after being held in remand for two months, 17 months after arrest.

⁶⁵ This IJIS project has not been referenced in this chapter because funding has not yet been released to initiate the project.

Phase 2: the Magistrates Court processes (court events, adjudication, and committal)

Police initiate the court process by lodging charges in court via a bench charge sheet. This is now done electronically where possible. Proceeding may also be commenced by complaint and summons. Once the court process begins the case will follow a sequence of steps until resolution by either: a plea of guilty, the prosecution discontinued or a trial.

The accused may have the benefit of advice and representation at this early stage from the duty solicitor (a lawyer funded by Legal Aid Queensland to give initial advice and representation). In many circumstances, this will lead to an early plea of guilty.

As has been said a number of times in this Report, most criminal cases ultimately result in a plea of guilty or are otherwise resolved without trial, but a number of critical decision-making points and external factors along the continuum influence when this is most likely to occur. Some of these factors are:

- whether and when the accused gets legal representation;
- when full disclosure is made;
- the availability of legal aid;
- any benefits, perceived or real, of entering an early plea; and
- perception about likely outcome in different courts or before different judicial officers.

Where the likely penalty is a term of imprisonment, the accused will generally obtain an adjournment for further legal advice and representation at the first court appearance. The Review has sought data in relation to number of pleas entered on the first appearance, but the information is apparently not available. Where the accused has not indicated a plea, or the prosecution/defence need time to prepare their case, they will seek an adjournment.

If the person pleads not guilty to a summary offence (or to an indictable offence that the accused elects to have dealt with summarily) there will be a trial by a magistrate. If the offence is an 'indictable offence' a committal hearing will be held to determine if the matter should be committed to the Supreme or District Court for trial or sentence.

The result of the committal will be either that there is no case to answer and charges are dismissed by the magistrate, or the matter is committed to the Supreme or District Court for trial or sentence. The total number of individuals committed from the Magistrates to the Supreme or District Courts in Queensland in the year 2007/2008 is 6583.

The Magistrates Court resolves more than 90% of all criminal matters initiated, primarily through pleas of guilty but also through summary trials. In 2007/2008, 187,445 individuals had their matters finalised before the Magistrates Court. The bulk of matters initiated are either minor (for example, shoplifting) or common and uncomplicated (for example, drink-driving) and therefore dealt with relatively quickly. Most of these matters will be finalised within the first or second court appearance.

A person convicted of a criminal offence in the Magistrates Court may lodge an appeal within 28 days of conviction to the District Court (s 222 *Justices Act*).

Most prosecutions in the Magistrates Court are conducted by police prosecutors. Under a protocol between QPS, LAQ, the Magistrates Court and the ODPP committals in Brisbane, Ipswich and some in Southport are prosecuted by the ODPP (Appendix 5). The ODPP may also be asked to take over a case if there are particular legal or factual complexities.

Indictable matters usually involve a number of court appearances (commonly called mentions) prior to the committal or the summary trial of an indictable offence. These court events may be before a different magistrate each time. Either the prosecution or the defence may request an adjournment because, for example, the brief of evidence has not been received, disclosure is not complete, or they are waiting for scientific results. Although precise data is not kept, court staff estimate that for indictable offences there is an average of four to six court events before the committal hearing.

A survey of ODPP concluded files for matters committed for trial (68 matters) found an average of 5.6 mentions in those matters before committal. In a small random sample of Magistrates Court cases surveyed by Future Courts, the number of mentions varied from four to nineteen mentions prior to the committal.

This usually means that many months will elapse before a committal hearing is held. There was an average of 7.4 months between arrest and committal in the 68 matters referred to above.

In a small percentage of matters the police offer no evidence (NETO) on some or all of the charges. It may have become clear that they have arrested the wrong person or charged the right person with the wrong offence or that they have insufficient evidence to support the charge. Some offenders may be recharged at a later stage if further evidence is gathered and the process will begin again. Accurate records are not kept as to the number of charges 'NETO'd'. In small samples of Magistrates Court files conducted by Future Courts, 11.8% of charges were 'NETO'd'.

Phase 3: Indictment, Supreme and District Court events

Indictment

Once a matter is committed to the Supreme Court or District Court it is referred to the ODPP to prosecute. The ODPP has 6 months from the committal date to present the indictment in the appropriate court. During this period, the ODPP considers the evidence, requests any additional evidence or material from the police, determines the appropriateness of the charges and considers whether there is a "reasonable prospect of conviction".

In Brisbane matters the ODPP has carriage from the beginning. For matters committed to trial in the District Court and concluded in April, May and June 2008 the average length of time between committal and presentation of indictment was 4.3 months. The average length of time between presentation of indictment and conclusion was 11.6 months.

Prior to presenting an indictment, the ODPP may decide to discontinue the prosecution by handing up a no true bill to the court.

After the indictment is presented, the ODPP may discontinue some or all of the counts on the indictment either by handing up a 'nolle prosequi' or endorsing the face of an indictment that the prosecution does not intend to pursue the matter to the court.

These situations arise, for example, where there is insufficient evidence to sustain the charge or where a critical witness dies or cannot be located. In some cases, it may be a result of charge negotiation; in that case a fresh indictment is presented for the accused to plead guilty.

Approximately 10–17% of cases are finalised by being discontinued by the ODPP. In 2007/2008 there were 1741 no true bills and nolle prosequi entered by the ODPP. In many cases a fresh indictment will be presented. The ODPP currently presents approximately 400 indictments per month; this is considerably higher, in absolute terms, than any other State.

It is often only after committal and once the indictment is presented that the negotiation between defence and the prosecution begins in earnest. Police prosecutors and junior ODPP prosecutors do not have authority to negotiate charges etc. I am advised however that the ODPP prosecutors are usually able to get authority from a senior officer fairly quickly by phone if the defence makes a submission in relation to a plea etc. The QPS prosecutors on the other hand are subject to considerable constraints in negotiating charges and it can be a lengthy process to get approval. Defence lawyers will generally wait until the matter is transferred to the ODPP to make a submission.

Often it is only once defence counsel has been engaged, usually after committal, and a more senior prosecutor is appointed, that there is any genuine discussion about the appropriateness of charges, the strength of evidence and exploration of pleas of guilty.

Anecdotally, the Review is told that 'in-house' Legal Aid Queensland lawyers are often more willing to engage in discussion of these issues prior to committal than private solicitors engaged by LAQ; however the outcome of such discussions still depends on having an ODPP prosecutor with sufficient authority to negotiate on the other side.

It is well known that there is nothing like the spectre of a looming trial to focus the minds of all the parties on the issues. For this reason significant negotiations take place in the week before trial and even on the morning of trial. The ODPP records for Brisbane matters show that there were pleas of guilty on the morning of the trial in 16 of 68 matters listed for trial and finalised in April, May and June 2008. These

issues and relevant recommendations are made in Chapter 9: *Reform of the Committal Proceedings Process*.

Court events – ‘mentions’

There is justified concern that court ‘mentions’ too often are used as ‘bring ups’ or simply to clarify points for courts legal representatives/police/prosecution. In effect nothing is done to progress the file and the court event is simply a reminder for legal representation, police and prosecutors to look at the file on the morning of the court event. The term ‘mention’, in my view, tends to confirm the expectation that very little will happen at the court event – the case will literally be ‘mentioned’. Legal firms send junior staff with no knowledge of the file, and no authority to make decisions on the case to court to attend the mention.

Court events should be based on information already acquired (electronically) not used just to acquire information. Moreover the outcome of a court event should progress the case to resolution; to adjourn the matter to another ‘mention’ date should not be an acceptable outcome. Court events should have an outcome advancing a case to resolution rather than another date.

In a survey conducted by this Review of all concluded ODPP files of matters scheduled for trial for the months of April, May and June 2008 the number of District Court mentions varied from 3 to 46; the average number of mentions was 14.6.

Legal Aid Queensland reports that the cost of mentions is approximately 30% of overall preparation.⁶⁶

Court events are extremely resource intensive, there is a direct cost in judges and lawyers time and court resources and cost to an accused and witnesses. There is also an indirect costs of having lawyers waiting around who could otherwise be negotiating an outcome or preparing for a trial. The judge could be dealing with disposing of a case or advancing it to resolution rather than simply adjourning it to another date.

⁶⁶ Legal Aid Queensland criminal law legal aid fees: A discussion paper December 2007 at p 18.

For these reasons a project 'Death of the Mention' has been put in place in the criminal jurisdiction in England. It uses electronic communications and dispenses with appearances.⁶⁷

Trial

Although criminal justice processes lead criminal cases inexorably towards trial, the figures show, the resolution of a case by a jury verdict is exceptional. The criminal justice processes should reflect this, rather than the matter will be tried to verdict.

It is inefficient and raises unrealistic expectations for the system to be geared towards the exceptional trial rather than the more typical plea of guilty.

It is too often the trial date that focuses the minds of defence and prosecution on the real issues. In the meantime there is an enormous amount of "churning" in the system until the trial date is set.

4.7 Discretionary decisions

The criminal justice system is made up of sequential steps commencing with the investigation of an offence, and subsequent arrest and charge with various decision-making points along the way until the matter is resolved. The decisions that are made at these points by various agencies fundamentally affect the course and outcome of the case, long before the trial happens or the matter is otherwise resolved. For example decisions such as: whether to charge, who is charged, what charges are laid, who gets legal aid funding, and whether a prosecution is pursued.

The exercise of discretion by individuals within the justice system: police, the prosecutor, the court officers etc is both necessary and inevitable to mitigate the otherwise arbitrary application of the law and its processes and procedure. On the other hand excessive discretion that is not subject to clear accountability mechanisms will lead to arbitrariness and unfairness.

Our legal system depends on these discretionary powers being exercised ethically, responsibly and publicly. Clear written policies and procedures are critical to ensuring that discretion is exercised fairly and consistently. For example, I earlier

⁶⁷ Lord Judge – The Criminal Justice System in England and Wales; speech to the University of Hertfordshire 4 November 2008.

referred to the DPP guidelines which apply to all prosecutors in the exercise of their responsibilities (see Appendix 5).

Decisions by various agencies or individuals affect the entire system and can distort the priorities of the system or have other unintended or unforeseeable consequences.

There are many examples of how discretionary decisions drive the system. I have given consideration only to two key issues: police charging practices and legal aid remuneration. These two issues were raised with me by many people with whom I consulted. There are, of course, numerous other critical discretionary decisions which have an impact on other parts of the system.

Police charging practices

The first decision-making point in the criminal justice continuum is whether or not to arrest and charge and the determination of the charge to be brought against an alleged offender. The decision to arrest is primarily a decision that falls within the discretion of the police. State and Federal police practices, priorities and the charges initiated determine the nature and extent of the court's workload, and ultimately that of the entire justice system. Policing practices and priorities have a significant role in determining the profile of court users and ultimately the prisoner population profile. They also determine, to a great extent, the type and number of applications for legal aid funding.

According to national research⁶⁸ Queensland focuses its policing efforts on bringing minor drug offences to justice. As a result, there are more individuals charged here with minor drug offences than any other State (and presumably more applications for legal aid for these types of offences). Consequently considerably more court resources are utilised in dealing with minor drug offences than is the case in other States.

This is not a result of Queensland having more drug offenders but is the direct result of Queensland policing policy and practice. This may of course be a consequence of

⁶⁸ Australian Crime Commission Illicit Drug Data Reports 2003-04 to 2005-06.

legitimate government priority but if so, it points to the necessity and difficulty of aligning resourcing of agencies (police, LAQ and courts) with the policy priority.

Table 4(f): Recorded Drug Offences⁶⁹

	2003/04	2004/05	2005/006
QLD	44,692	45,175	48,360
NSW	23,305	24,477	22,386
VIC	14,845	13,734	13,348

Table 4(g): Recorded Drug Offences per 100,000⁷⁰

	2003/04	2004/05	2005/006
QLD	1,146	1,131	1,182
NSW	347	362	328
VIC	298	272	260

Further, the Australian Institute of Health and Welfare Statistics on drug use in Australia report that at 30 June 2005, 28% of Queensland prisoners sentenced for drug offences, had possession or use of drugs as their most serious offence. In New South Wales this proportion was 5% and in Victoria 3%.

Whilst comparisons across jurisdiction are difficult, the overall disparity between Queensland and the other jurisdictions is evident. There is potential of 'net widening' effects from this policy priority, that is, a greater number of young people are potentially criminalised by this charging practice.

This example highlights the interconnectedness of the various agencies in the criminal justice system, but also the complexity of these relationships. It is not always possible to foresee the costs and consequences of various decisions and policy priorities. What it points to is the need for continual and sophisticated evaluation and analysis. IJIS is developing an integrated, criminal justice sector Blueprint which analyses the current service delivery model with a view to identifying

⁶⁹ QPS Annual Statistical Reviews, NSW Recorded Crime Statistics, Victoria Police Crime Statistics.

⁷⁰ Australian Crime Commission Illicit Drug Data Reports 2003-04 to 2005-06.

pressure points on the end-to-end criminal justice process. The intention is to deliver a sector-wide framework that supports coherent policy development and targeted, cost-effective justice services. The IJIS Criminal Justice Analytics projects will provide Government with a statistical capability that will enable the evaluation of policy decisions and program investment. I commend IJIS for the work it is doing in this regard.

The issue of whether police 'overcharge' was also raised a number of times with this Review. There is certainly a widespread perception that this is the case among those who made submissions and attended round tables and the issue emerged during consultation.

It also emerged at a round table that career advancement opportunities may depend on the number of charges laid by an officer, irrespective of outcome. Whether the number of 'charges' is actually used as a performance indicator that is relevant to promotion or simply as evidence of activity is unclear.

A survey of concluded ODPP files for April, May and June (for Brisbane) shows the initial charges were changed after committal in approximately 30% of matters committed for trial (this does not include any changes to charges that have occurred prior to committal). Whether this is a consequence of over charging, inappropriate charges or other factors cannot be determined.

It is nevertheless evident that any QPS practice that encourages excessive charging not only causes unfairness to an accused but also creates inefficiencies and costs to the criminal justice system as a whole in refining and negotiating appropriate charges and getting early pleas of guilty. A perception that police 'overcharge' may also contribute to a belief that charges will later be reduced and lead the accused and their representatives to 'hold out' until the ODPP takeover the conduct of the matter.

It is obvious that accurate and appropriate charges at an early date will support more effective use of resources throughout the criminal justice system.

I recommend that police charging practices should be monitored and evaluated against the charges dealt with by a court to see if there is over charging (charges not justified by the evidence). The number of charges brought should not play any role

as a criterion for career advancement by police. The QPS should also consider reviewing its training of police recruits and serving police officers in relation to appropriate charging.

The Review was also told of concerns about the QPS practice of charging assaults on police officers as aggravated assaults to enable the officer to apply for criminal compensation. This is both costly in terms of allocation of public resources (aggravated assaults are dealt with in the District Court, rather than the Magistrates Court) but is unfair to the accused.

Legal aid remuneration

Another example of how the exercise of discretionary decisions drives the system is the effect of legal aid remuneration. For example, there is widespread, entrenched view among participants in consultations and round tables that Legal Aid Queensland's funding arrangements for a hand-up committal and plea of guilty in the Supreme or District Court discourages an early plea of guilty. This would appear to be borne out by a discussion paper on legal aid fees prepared by LAQ:

Limits placed on the fees which can be claimed for certain cases/components mean that there is no incentive to achieve the earliest resolution of a case. In fact there is a financial incentive to delay preparation in the early stages of the case and proceed to other case stages in order to complete adequate preparation and be paid a more reasonable fee for the preparation required to complete the case.⁷¹

On 23 September 2008 I wrote to Legal Aid Queensland concerning what I described as a 'longstanding widely held view' that Legal Aid Queensland's funding arrangements in respect of committals (particularly hand-up committals and pleas of guilty) inhibits the early resolution by plea of guilty or negotiation with the prosecution for an early plea.

I also raised the issue of the summary disposition of indictable offences, which has considerable potential to bring about an early less expensive resolution and other benefits by plea of guilty or summary trial.

Legal Aid Queensland responded by letter of 8 October 2008. Legal Aid Queensland accepted that there is a perception that its funding arrangements have a negative

⁷¹ Legal Aid Queensland, *Criminal law legal aid fees: A discussion paper*, December 2007 at p 17.

impact on the early disposition of matters, but was of the view that the perception was not justified.

It is indisputable that people accused of indictable offences that could otherwise be dealt with summarily are more likely to get funding if the matter proceeds on indictment. This review is told that few matters receive funding for a summary trial which is subject to both a means and a merit test. In addition it can be difficult to satisfy the merit test early in the proceedings before full disclosure has taken place and before the DPP has become involved.

In comparison, LAQ currently run four different funding programs for the Committal stage. In all of these, applicants are subject to a means test but none requires satisfaction of a merits test. However the fee payable depends on which of four committal funding schemes the matter falls within. LAQ has recently reviewed its funding arrangements and changes to funding of committals have been in place since July 2008.

On 10 November 2008 I received an email from Superintendent Dale Pointon of the Queensland Police Service Legal Service Branch that since the round tables he had been 'inundated' with emails from police prosecutors complaining about Duty Lawyers asking for committal mentions and full briefs of evidence for indictable offences that may be dealt with summarily, only to have the defendant appear unrepresented at the mention to plead guilty summarily.

A high rate of late change of election is borne out by ODPP data on the committals it prosecuted in 2007/2008. This shows that in 25% of matters where the accused initially elected to have the matter dealt with on indictment, there is a change of plea and the matter is dealt with summarily at a later court hearing.

It has been suggested to me that one explanation for this might be that proper disclosure might prompt the recognition of the inevitability of conviction. Other 'less charitable' explanations relate to LAQ funding arrangements. There is an obvious financial incentive for a duty lawyer in private practice to encourage an accused to elect to proceed on indictment. The problem for LAQ is that most private lawyers may only be prepared to take on duty lawyer work because of the prospect of securing legal aid funding of indictable matters that they pick up as a duty lawyer.

As I have said elsewhere, late changes of election and late hand-up committals create considerable difficulties for police, courts and witnesses, many of whom have been obliged to attend in anticipation of a 'contested' committal.

I am not in a position to reach a final conclusion in respect of these matters, but obviously they indicate basis for concern – it is essential that LAQ funding should be aligned to an outcome so as to make effective use of public resources. Confidence in the system is enhanced if this is seen to be the case.

I am aware that LAQ is currently reviewing its funding arrangements and I encourage it to consider funding a greater number of summary matters and to fund Counsel at an earlier stage in indictable offences. I endorse its stated intention to develop a single committals funding policy. (See Appendix 14, Legal Aid Funding Arrangements).

I also endorse the recommendation of the joint directors of Legal Aid Queensland and Director of Public Prosecutions that 'grants of legal aid be structured to encourage resolution of matters prior to committal'.⁷²

Impact on the courts

Policy decisions and practices, such as these, have a significant impact on the court system. The tables below highlight the volume of finalised defendants proceeding through the Queensland system and provide comparisons with other jurisdictions. The figures have been normalised per 100,000 population.

⁷² National Legal Aid and Conference of Director of Public Prosecutions at p 2.

Table 4(h): Magistrates Court Statistics 2006-07⁷³

	QLD	NSW	VIC	WA
Defendants	141,571 (3386 Per 100K)	156,206 (2260 per 100k)	95,772 (1059 per 100k)	79,122 (3757 per 100k)
Withdrawn by Prosecution	8150 (5.3%) (195 per 100k)	11,818 (7.6%) (172 per 100k)	10,884 (11.2%) (209 per 100k)	2447 (3.1%) (116 per 100k)
Transferred to Higher Court	4140 (2.3%) (99 per 100k)	3356 (2.1%) (49 per 100k)	2080 (2.1%) (40 per 100k)	2440 (3.1%) (116 per 100k)
Acquitted	1084 (0.3%) (26 per 100k)	7018 (4.5%) (102 per 100k)	6629 (6.9%) (127 per 100k)	750 (0.8%) (36 per 100k)
Proven Guilty	128,195 (90.6%) (3066 per 100k)	133,686 (85.6%) (1941 per 100k)	77,179 (79.8%) (1483 per 100k)	73,234 (92.6%) (3477 per 100k)
- Custodial Orders	7432 (5.3%) (178 per 100k)	13,538 (10.1%) (197 per 100k)	10,630 (13.8%) (904 per 100k)	3991 (94.6%) (189 per 100k)
- Non-custodial Orders	120,763 (94.2%) (2888 per 100k)	120,148 (85.9%) (1744 per 100k)	66,259 (85.9%) (1273 per 100k)	69,243 (94.6%) (3288 per 100k)

Table 4(i): Higher Court Statistics 2006-07

	QLD	NSW	VIC	WA
Defendants	5841 (140 Per 100K)	3141 (46 per 100k)	2346 (45 per 100k)	1814 (123per 100k)
Withdrawn by Prosecution	1010 (17.3%) (24 per 100k)	204 (6.5%) (3 per 100k)	89 (3.9%) (2 per 100k)	286 (15.8%) (19 per 100k)

⁷³ Australia Bureau of Statistics Catalogue 4513.0.

Acquitted	216 (3.7%) (5 per 100k)	194 (6.2%) (3 per 100k)	175 (7.5%) (3 per 100k)	232 (12.8%) (16 per 100k)
Proven Guilty	4608 (78.9%) (110 per 100k)	2704 (86.1%) (39 per 100k)	2073 (88.4%) (40 per 100k)	1324 (70.3%) (86 per 100k)
- Custodial Orders	3497 (75.9%) (84 per 100k)	2466 (91.2%) (197 per 100k)	1672 (80.7%) (32 per 100k)	1015 (76.7%) (66 per 100k)
- Non-custodial Orders	1110 (24.1%) (27 per 100k)	237 (8.8%) (3 per 100k)	348 (16.8%) (7 per 100k)	299 (22.6%) (7 per 100k)

4.8 Framework for reform

The discussion in this chapter highlights the archaic and fragmented legal structure that underpins the criminal justice system. It points to the urgent need for criminal justice procedures to be consolidated in a single Act – the Criminal Justice Procedure Act. I have made recommendations accordingly. The Act should be drafted in more appropriate and modern language that is relevant to the 21st century.

The need for better coordination and cooperation between agencies within the criminal justice system is also apparent from the discussion in this chapter. The various agencies in the criminal justice system are interrelated and policies and practices in one agency impact on others in the system. Inconsistent terminology and processes are rife. Consultation and cooperation is random and often dependent on a fortuitous and temporary connection between individuals.

A more sophisticated approach to the development of criminal justice policy and practice based on coordination and information sharing is necessary.

The two round tables held as part of this Review show a more collaborative approach can be productive. These drew together representatives from key justice agencies to identify issues, share information, find common ground and generate options. I was impressed at the willingness of all those who attended to come out of their bunkers

and consider issues from other perspectives. It was a productive process which contributed significantly to the Review process.

New approaches to resource allocation are also necessary. In particular, resources should be directed at the overall objectives of the system rather than those of the individual agency. Agencies should be encouraged to develop practices that benefit the entire system, even if these have an immediate cost to their own agency.

These issues highlight the need for high level criminal justice policy coordination. Accordingly, I have made detailed recommendations for the establishment of a Criminal Justice Practice Oversight Council. The details for this proposal are set out in Appendix 6.

I also support the development of protocols (agreements between agencies) to deal with process and procedures, for example the Brisbane Committals Protocol. I appreciate that the negotiation of a protocol can be time consuming and at times frustrating.

The process is however useful. Agencies can find common ground and agree on ways to resolve issues. This is more productive than sitting around and complaining about one another. It gives agencies an appreciation of the impact of doing (or not doing) something across the system. A collaborative approach gives agencies the 'ownership' of practices and procedures. It facilitates effective solutions and adjustment in the light of experience.

At different agreement process, but equally important, are agreements negotiated between government and particular communities on justice policy issues. I note, for example, the landmark Queensland Aboriginal and Torres Strait Islander Justice Agreement developed by the Queensland Government and the Aboriginal and Torres Strait Islander Advisory Board and the Indigenous Partnership Agreement signed by the Queensland Government and Aboriginal and Torres Strait Islander communities. Both are important agreements that deal with a range of justice issues that impact on Aboriginal and Torres Strait Islander people.⁷⁴

⁷⁴ Website: <http://www.atsip.qld.gov.au/resources/publications/>

4.9 Conclusion

This chapter highlights the dynamic and interactive nature of the criminal justice system and its various components. It also highlights some of the critical challenges faced by government in reforming the system. These include:

- the urgent need for more cohesive and relevant criminal justice procedure legislation;
- the need to reorient criminal justice procedures away from the trial as the likely outcome to facilitate early and fair outcomes. A better system is needed to support the 'run of the mill' cases with mechanisms for dealing with exceptions as exceptions. Only a small percent of cases go to trial but it is estimated that 30% of cases take up 70% of resources;
- the need for consistent, accurate and appropriate police charging practices;
- the need for greater collaboration and coordination between agencies in determining priorities and in allocating resources. This is demonstrated by the development of agreements across agencies. I commend the development of the Brisbane Committals Protocol and IJIS in this regard;
- the need for mechanisms and practices to encourage the early involvement of competent and experienced legal advisors on both sides to conduct negotiations, refine charges, give appropriate advice and to make high quality submissions to the court;
- the need for government funding of agencies and agency allocation of funding to be aligned with clearly articulated justice system outcomes and in particular, the early resolution of criminal matters; and
- the need for soon and certain hearing dates with a minimal number of unnecessary court events.

This Review begins the process of reform and realignment. It will be an ongoing task.

4.10 Recommendations

Chapter 4: With regard to the Overview of the Queensland Criminal Justice System I recommend that:

With regard to legislation

1. There be a comprehensive overhaul of all criminal justice procedure legislation and rules to consolidate, modernise and streamline criminal justice procedure in Queensland;
2. Legislation to implement the recommendations of this Review that are accepted by Executive Government be implemented in two stages:
 - Stage One is a Criminal Justice Procedure (Interim) Act. This gives effect to the recommendations in respect of:
 - Monetary Limits for the Civil Jurisdiction (Chapter 7);
 - Disclosure (Chapter 5);
 - Summary Disposition of Indictable Offences (Chapter 8); and
 - Sentencing Discounts for an Early Plea (Chapter 10). It may be that this is best done by amendment to the existing provisions of the *Penalties and Sentences Act 1992*;

Express provision should be made in the Act for criminal justice agencies to collaborate in developing protocols and compatible business processes across agencies.

- Stage Two is a Criminal Justice Procedure Act, which would incorporate stage one recommendations, to:
 - reform the committal proceedings process as recommended in Chapter 9;

- provide for any legislative requirement for the implementation not dealt with by the Stage 1 Act;
- 'roll in' the updated procedural provisions from the *Criminal Code 1899*, the *Justices Act 1886* and other legislation;
- deal with any matters which had arisen with respect to the interim Act; and
- provide for the establishment of the Criminal Justice Procedures Co-ordination Council if this has not been achieved in Stage 1 (see Appendix 6).

The passing of this legislation will highlight the need for an Act to provide for the substantive criminal jurisdiction of the Magistrates Court to replace the *Justices Act 1886*.

- The Criminal Justice Procedure (Interim) Act, preferably, or otherwise the Criminal Justice Procedure Act, should also provide for:
 - The electronic acquisition, storage, transfer, lodgement or filing and access to data;
 - Electronic (audio, video, email, text etc) lodgement, conferencing and hearings (particularly directions hearings);
 - A Criminal Justice Procedure Co-ordination Council;
 - Consultation between agencies when proposals by one agency may impact on other agencies;
 - Facilitating the development of protocols among criminal justice agencies, based on the successful Brisbane Committals Protocol (Appendix 5). These protocols should provide for, amongst other things, the 'fast tracking' of cases and the formatting and production of QP9's, with a view to early identification of cases possibly subject to a plea. A protocol should be binding on the parties or could be reflected by Queensland Courts in a Practice Direction, where that is appropriate; and
 - The establishment of uniform criminal procedure rules;

With regard to Queensland Courts

3. Queensland Courts consider adopting a policy, stating and reflecting this policy in a Practice Direction or Practice Directions, that:

- Court events are to be used to progress a case to resolution and that an adjournment to a future date without more is not acceptable;
- Court events are based on information previously acquired (electronically) and not used to acquire information to be acted on a later date;
- Court events will be conducted on the basis that there is a real prospect of progressing a matter/solution or a specific court order is required.

It is preferable that any Practice Direction are uniform across the courts, subject to any necessary adjustments;

4. Queensland Courts also consider adopting a policy, stating and reflecting this policy in a Practice Direction or Practice Directions, that once a hearing date or a court event is allocated, the court will act on the basis that the matter will proceed on the allocated day, and for the estimated time, and allocate court time accordingly. The legal representatives for a party in a matter allocated a hearing date are under an obligation to inform the court forthwith on becoming aware that:
 - The trial or hearing would not proceed because of a change of plea or any other reason; or
 - A case may not be ready to proceed on the allocated day or would not be completed in the allocated time.

I acknowledge that the adoption of this approach will put a premium on courts providing certain hearing dates and note that the effective implementation of those proposals will support this occurring;

5. The use of the term 'mention' be discontinued. I endorse the 'Death of the Mention' project in England and the use of electronic communication between courts, ODPP, Legal Aid Queensland and the legal profession to arrange hearing dates, adjournments and to minimise time spent attending or waiting for court appearances or in hearings;
6. Consideration be given to incorporating a provision in the Criminal Justice Procedure Act to empower the clerk of the court or judicial registrar (cf s 23D and 23DA of the *Justices Act 1886*) to make any order that the magistrate has power to make, where the parties consent, in relation to setting hearing dates and other administrative matters. The Magistrates Court should consider developing appropriate practice directions to encourage parties to minimise court appearances by using those provisions in conjunction with electronic communication;

7. A broad definition of “hearing” to include hearings conducted by electronic means be incorporated in the Criminal Justice Procedure Act;

With regard to Queensland Police Service

8. The Queensland Police Service consider extending the use of technology for electronically recording the evidence of all witnesses. In particular, eyewitness statements should be recorded at the earliest opportunity. Provision of access to recorded evidence, subject to certification, would satisfy disclosure requirements. Transition arrangements may be necessary for those not able to access the material in electronic form;
9. Police charging practices be monitored and evaluated against the charges dealt with by a court to determine whether there is over charging. The number of charges brought should not play any role as criteria for career advancement by police. The QPS consider reviewing its training of police recruits and serving police officers to ensure they understand the importance of accurate and consistent charging;

With regard to Legal Aid Queensland and the Aboriginal & Torres Strait Islander Legal Service

10. Legal Aid Queensland consider, as part of its current review of funding arrangements:
 - Funding more summary trials; and
 - Funding counsel at an early stage.I endorse LAQ’s intention to develop a single committal funding policy (see also Chapter 9: *Committals*);
11. The Aboriginal & Torres Strait Islander Legal Service seek funding from the Commonwealth to provide legal representation for summary matters that may increase as a consequence of the recommendations made in this Review.

Disclosure

‘...better to risk saving a guilty person than to condemn an innocent one’⁷⁵

‘...better that ten guilty persons escape than that one innocent suffer’⁷⁶

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5.0 Introduction

Proper and timely disclosure is the lynchpin of our criminal justice process. It provides the accused with knowledge of the case the prosecution proposes to make against them and so is the foundation of a fair trial. If a trial is not fair the conviction may be set aside and the accused discharged.⁷⁷

Proper and timely disclosure provides the basis for a magistrate’s determination of whether to commit a matter for trial or sentence in the Supreme or District Courts. This, the committals process, is dealt with in Chapter 9: *Reform of the Committal Proceedings Process*.

Proper and timely disclosure also has a number of outcomes which make criminal procedure more effective to the benefit of the prosecution, the defence and the community.

Proper disclosure:

- provides an accused and the accused’s lawyers with knowledge about:

⁷⁵ Francois-Marie Arouet (1694 1778) – pen name Voltaire.

⁷⁶ Blackstone, William, *Commentaries on the Laws of England*, Clarendon Press, Oxford, 1765-1769.

⁷⁷ *Dietrich v R* (1992) 109 ALR 385 per Mason CJ and McHugh J at 388 citing *Jago v District Court of New South Wales* (1989) 87 ALR 577; 168 CLR 23, per Mason CJ at 29; Deane J at 56; Toohey J at 72; Gaudron J at 75.

- the events alleged to constitute the offence or offences;
- the issues which arise relating to those events that have to be dealt with to progress the matter to resolution;
- the identification and access to the evidentiary material bearing on those issues; and
- the case the prosecution will present so providing a basis for the lawyer to obtain instructions and give advice to an accused.
- puts the Office of the Director of Public Prosecutions (ODPP) in a position to gauge the strengths and weaknesses of the prosecution case so as to consider whether:
 - there should be further investigation and collection of evidence;
 - the charges should be modified; and
 - the matter should be pursued.
- provides a platform for decisions by prosecution and defence so as to progress the case to resolution, for example by:
 - negotiation;
 - a timely plea of guilty;
 - identifying issues of law to be determined at committal court proceedings or by way of a pre-trial ruling in the Supreme or District Courts; and
 - the conduct of the trial.
- provides a platform for court control of the progress of the case to resolution with the minimum but necessary use of public resources, for example:
 - time limits can be imposed, compliance monitored, founding focussed court intervention to progress the matter to a conclusion; and
 - directions can be given, monitored and enforced.

Timely disclosure minimises delay and supports the effective use of public resources. It fosters early pleas of guilty, founds negotiation and reduces wasting of resources.

Proper and timely disclosure also serves to balance the inequality of power and resources between the executive government (the prosecution) and an accused (citizen charged with an offence). Private prosecutions, either by individuals or by non-State prosecuting agencies such as the RSPCA, are rare and are not considered here. Nor are prosecutions by State agencies for regulatory and quasi criminal offences (for example, prosecutions by Department of Primary Industry and Fisheries officers for fishery offences).

The common law has long required the prosecution to disclose all relevant evidence;⁷⁸ as well as that relied on by the prosecution to sustain a prosecution.

5.1 Statutory provisions for disclosure

Parliament has made disclosure a statutory duty in Chapter 62 Division 3 of the *Criminal Code Act 1899* (the Criminal Code).

Section 590AB of the Criminal Code provides (emphasis is mine):

- (1) This chapter division acknowledges that it is a fundamental obligation of the prosecution to ensure criminal proceedings are conducted fairly with the single aim of determining and establishing truth.
- (2) Without limiting the scope of the obligation, in relation to disclosure in a relevant proceeding, the obligation includes an ongoing obligation for the prosecution to give an accused person full and early disclosure of —
 - (a) all evidence the prosecution proposes to rely on in the proceeding; and
 - (b) all things in the possession of the prosecution, other than things the disclosure of which would be unlawful or contrary to public interest, that would tend to help the case for the accused person.

The ongoing nature of the obligation is also emphasised by s 590AC of the Criminal Code which says:

590AC Chapter division does not have particular consequences

- (1) Nothing in this chapter division—
 - (a) requires the disclosure of a thing it is unlawful to disclose under this or another law; or
 - (b) affects an accused person's right to a thing under another law.
- (2) Failure to comply with this chapter division in a proceeding does not affect the validity of the proceeding.

Sections 590AD, AE, AF, and AG of the Criminal Code provide for the interpretation of various terms and other matters; it is unnecessary to reproduce them here.

Sections 590AH to AJ then provide in the following terms:

590AH Disclosure that must always be made

- (1) This section applies –
 - (a) without limiting the prosecution's obligations mentioned in section 590AB(1); and

⁷⁸ *Grey v The Queen* 2001 HCA 65, *Mallard v R* 2005 HCA 68.

- (b) subject to section 590AC(1)(a) and chapter subdivision D.
- (2) For a relevant proceeding, the prosecution must give the accused person each of the following things –
- (a) a copy of the bench charge sheet, complaint or indictment containing the charge against the person;
 - (b) the following things in relation to the accused person –
 - (i) a copy of the accused person’s criminal history in the possession of the prosecution;
 - (ii) a copy of any statement of the accused person in the possession of the prosecution;
 - (c) the following things in relation to witnesses –
 - (i) for each proposed witness for the prosecution –
 - (A) a copy of any statement of the witness in the possession of the prosecution; or
 - Example –*
 - A statement made by a proposed witness for the prosecution in an audio recording of an interview
 - (B) if there is no statement of the witness in the possession of the prosecution – a written notice naming the witness;
 - (ii) for each proposed witness for the prosecution who is, or may be, an affected child – a written notice naming the witness and describing why the proposed witness is, or may be, an affected child;
 - (iii) if the prosecution intends to adduce evidence of a representation under the *Evidence Act 1977*, section 93B, a written notice stating that intention and the matters mentioned in section 590C(2)(b) to (d);
 - (d) the following things in relation to tests or forensic procedures –
 - (i) a copy of any report of any test or forensic procedure relevant to the proceeding in the possession of the prosecution;
 - Example of a forensic procedure –*
 - DNA, fingerprint or another scientific identification procedure
 - (ii) a written notice describing any test or forensic procedure, including a test or forensic procedure that is not yet completed, on which the prosecution intends to rely at the proceeding;
 - (e) a written notice describing any original evidence on which the prosecution intends to rely at the proceeding;
 - (f) a copy of any other thing on which the prosecution intends to rely at the proceeding;
 - (g) a written notice or copy of any thing else in the possession of the prosecution prescribed under a regulation.

590AI When mandatory disclosure must be made

- (1) This section applies if –
 - (a) the prosecution must give an accused person a written notice or copy of a thing under section 590AH(2); or
 - (b) the prosecution must give an accused person a written notice of a thing under section 590AO(2) and, apart from section 590AO, the prosecution would have to give the accused person a copy of the thing under section 590AH(2).
- (2) The prosecution must give the accused person the written notice or copy –
 - (a) for a committal proceeding a prescribed summary trial – at least 14 days before evidence starts to be heard at the relevant proceeding; or
 - (b) for a trial on indictment – no more than 28 days after presentation of the indictment, or if the trial starts less than 28 days after presentation of the indictment, before evidence starts to be heard at the trial.
- (3) Subsection (2) is not intended to discourage the prosecution from voluntarily giving the accused person the written notice or copy at a time before the latest time the subsection may be complied with.

- (4) The court may, at any time, shorten the period mentioned in subsection (2)(a) or extend the period mentioned in subsection (2)(b).

590AJ Disclosure that must be made on request

- (1) This section applies –
- (a) without limiting the prosecution’s obligation mentioned in section 590AB(1); and
 - (b) subject to section 590AC(1)(a) and chapter subdivision D.
- (2) For a relevant proceeding, the prosecution must, on request, give the accused person –
- (a) particulars if a proposed witness for the prosecution is, or may be, an affected child; and
 - (b) a copy of the criminal history of a proposed witness for the prosecution in the possession of the prosecution; and
 - (c) a copy or notice of any thing in the possession of the prosecution that may reasonably be considered to be adverse to the reliability or credibility of a proposed witness for the prosecution; and
 - (d) notice of any thing in the possession of the prosecution that may tend to raise an issue about the competence of a proposed witness for the prosecution to give evidence in the proceeding; and
 - (e) a copy of any statement of any person relevant to the proceeding and in the possession of the prosecution but on which the prosecution does not intend to rely at the proceeding; and
 - (f) a copy or notice of any thing in the possession of the prosecution that is relevant to the proceeding but on which the prosecution does not intend to rely at the proceeding.
- (3) If the prosecution gives notice of a thing under subsection (2) that is not original evidence, the prosecution must advise the accused person that the thing may be viewed on request by the accused person at a stated place.

In brief, the parliament, having laid down the foundation for a fair trial, goes on to make the detailed provision for effective disclosure. An accused is under limited obligation to disclose in respect of alibi, expert evidence and evidence of representation under s 590A of the Criminal Code.

These provisions are intended to be a statutory codification of disclosure requirements. Apart from the issues of construction canvassed in this chapter and of non-disclosure there were no issues bearing on those statutory provisions raised in the course of this Review.

These legislative provisions recognise the accusatorial nature of criminal law procedure with the onus on the prosecution to prove its case beyond reasonable doubt before a jury can convict an accused.

The criminal justice system is not strictly a dispute resolution process; it is instead a contest between the State, represented by the police and the ODPP, and the individual citizen. This contest takes the form of an allegation of particular behaviour by a specific person in circumstances that amount to a criminal offence. The onus of

proof is on the prosecution to prove beyond reasonable doubt the facts alleged, including identity, and to show that the evidence establishes all of the elements of the offence alleged (that is, that the facts if proved amount to criminal behaviour).

A criminal case is not an equal contest. The prosecution has the power and resources of the State behind it pitted against an individual who does not. Disclosure obligations are not reciprocal. There are numerous safeguards directed at ensuring that the contest is resolved by a fair trial. The serious consequences of a wrongful conviction are well recognised by the justice system (see also Chapter 2: *Touchstones*).

Parliament recognises the risk of wrongful conviction and the disparity of power and resources by imposing obligations on the prosecution to provide the accused with material within its knowledge and power which might not otherwise come to the knowledge of the accused, even if disclosure is adverse to the prosecution case; see s 590AB(2)(b) of the Criminal Code (set out earlier) in particular.

5.2 Disclosure Provisions are poorly expressed

The disclosure provisions of Chapter 62 Division 3 of the Criminal Code are, in my view, awkwardly and confusingly expressed, inhibiting an otherwise effective process. Some examples suffice to make the point.

The use of the word 'thing' throughout the disclosure provisions is confusing and complicating. A 'thing' can range from an abstract concept to a physical object. In general terms 'a thing' is defined as 'a material object without life or consciousness; an inanimate object', 'some entity, object, or creature which is not or cannot be specifically designated or precisely described', 'a fact or circumstance' (Macquarie dictionary).

Section 590AB(2)(b) of the Code speaks of 'all things' in possession of the prosecution by way of contrast with 'all evidence' in subsection (2)(a).

Section 590AD of the Code provides that an 'exculpatory thing' means 'reliable evidence of a nature to cause a jury to entertain a reasonable doubt as to the guilt of an accused'.

Section 590AE(1) refers to 'a thing in the possession of the prosecution' compared with 'any thing' in s 590AJ(2)(d).

Note also the provisions of s 590AL(2) and (3) which speak of 'an exculpatory thing'. An 'exculpatory thing' is defined in terms of 'reliable evidence of a nature to cause a jury to entertain a reasonable doubt as to the guilt of the accused person'.

Section 590AJ (2) speaks of (my emphasis):

- (b) a copy of the criminal history of a proposed witness for the prosecution in the possession of the prosecution; and
- (c) a copy or notice of any thing in the possession of the prosecution that may reasonably be considered to be adverse to the reliability or credibility of a proposed witness for the prosecution; and
- (d) notice of any thing in the possession of the prosecution that may tend to raise an issue about the competence of a proposed witness for the prosecution to give evidence in the proceeding; and
- (e) a copy of any statement of any person relevant to the proceeding and in the possession of the prosecution but on which the prosecution does not intend to rely at the proceeding; and

Disclosure in this context relates to providing an accused with information that satisfies certain criteria; in particular the case to be made out by the prosecution. The information may be acquired, recorded, held, transferred and accessed in various forms: paper based - for example certificates of analysis and statements of witnesses; digital, for example records of interview, photographs, listening device and telephone intercepts; or physical objects, for example murder weapon, the drugs being sold, money.

The information may fit into various categories such as, for example, admissible evidence, eye witness, expert or admission by an accused. The use of the word 'thing' in this environment is unhelpful and confusing.

5.3 Test Disparities

The difficulties are compounded by the disparate and potentially subjective nature of the tests imposed by the legislation:

- Section 590(2)(b) speaks in terms of 'would (c.f. could) tend to help the case of the accused';
- Section 590AD provides that an 'exculpatory thing' ... 'means reliable evidence of a nature to cause a jury to reasonably doubt as to the guilt' of the accused;

- Other tests are to be found in s 590AJ(2):
 - (c) “that may reasonably be considered to be adverse to the reliability or credibility” of a proposed witness
 - (d) “may tend to raise an issue”;
- Section 590AJ(2) deals with disclosure that must be made on request. Subsection (2) (c) is in terms ‘may reasonably be considered to be adverse to the reliability or credibility’ of a proposed prosecution witness, while subsection (2) (d) says ‘may tend to raise an issue about the competence of a proposed witness’;
- Section 590AE(3)(b)(ii) provides in effect that where the prosecution is aware of ‘something’ that may be disclosable, it is not disclosable if the prosecution is unable ‘to locate it without unreasonable effort’ c.f. ‘has made reasonable efforts but cannot locate it’.

There is no coherence apparent in the use of these various expressions. Moreover, definitions of this kind afford the prosecution an opportunity to make a subjective judgment, for example, that materials relevant to issues in the case against the defendant are not disclosed. This may be because from the perspective of the prosecution the evidence is not reliable and therefore does not give rise to a reasonable doubt. An example of this, told to the Review at the first round table, is of an investigating officer who did not disclose some key information because he thought no one would believe it.

All these provisions, although differently expressed, introduce a subjective element in the prosecution’s decision making. These decisions are made in the context of the prosecution case and may provide a basis for discounting the defence case. The various tests such as ‘what would tend to help the case of the accused’ or would be ‘reasonably considered as adverse’ or would be ‘reliable evidence ... to cause a jury to reasonably doubt’ the guilt of an accused scattered through the legislation do not provide clear guidance as to all that must be disclosed.

5.4 Queensland Police Service

The Queensland Police Service (QPS) is primarily responsible for the investigation of crime, the identification and apprehension of perpetrators and for collecting evidence to sustain a conviction. The ODPP has no investigative power or resources, independent of the QPS, to carry out an investigation. The primary disclosure

obligation therefore falls on the QPS; though it is often the ODPP who must liaise with the QPS to ensure compliance. This is recognised in the definition of ‘arresting officer’⁷⁹ and the use of that term in 590AE(2) of the Criminal Code. It is imperative that investigating officers and prosecutors, QPS and ODPP, have a clear understanding of disclosure obligations and that there be internal monitoring of compliance.

The view has been expressed to me from a number of sources that there is a pervasive police culture that ‘it’s not our job to help the defence’ and ‘the defence is under no reciprocal obligation so why should we have to disclose’. That there is such a culture cannot be lightly dismissed given the frequency with which the perception was raised and the importance of disclosure in founding a fair trial.

Police conduct based on these attitudes flies in the face of the legislative provisions and as such may well constitute a breach of s 204 of the Criminal Code where the conduct amounts to failure to comply with a statutory obligation.

Disobedience to statute law

- (1) Any person who without lawful excuse, the proof of which lies on the person, does any act which the person is, by the provisions of any public statute in force in Queensland, forbidden to do, or omits to do any act which the person is, by the provisions of any such statute, required to do, is guilty of a misdemeanour, unless some mode of proceeding against the person for such disobedience is expressly provided by statute, and is intended to be exclusive of all other punishment.
- (2) The offender is liable to imprisonment for 1 year.

Whether these perceptions are well founded or not the issue must be addressed given the critical importance of disclosure and the need for confidence in the system. It is necessary that the QPS review its training of police cadets and serving police officers to reinforce understanding of compliance with disclosure obligations.

Put shortly, the time has come to ‘give teeth’ to the disclosure provisions of the law as I was urged to do by the Bar Association of Queensland, the Queensland Law Society, Legal Aid Queensland and many practitioners who are familiar with the working of the criminal justice system.

⁷⁹ Section 590AD Criminal Code.

On 10 September 2008 I wrote to the QPS and a number of other criminal justice system agencies inviting comment on an early draft of proposals designed to improve the disclosure requirements. The letter asked for a response by 24 September 2008; to date I have not received a QPS response on those proposals.

The move from a paper based to electronic systems to capture, record, store, access and transmit a brief of evidence complying with the disclosure obligations should lessen the police burden. Much of the material making up the brief, records of interviews, photographs, listening device recording, telephone conversations and computer data is already in electronic form. The video recording of the evidence of certain categories of witnesses (such as eye witnesses) contemporaneously with the investigation would enhance the reliability and value of that evidence and assist in identifying whether a witness should be cross-examined in a Magistrates Court committal hearing.

At present, and to a degree understandably, police postpone the compilation of a full brief to prosecute until it is clear whether the matter may be resolved by a plea of guilty. The QPS has written to this Review on behalf of police prosecutors concerned at the large number of matters in which an accused elects to proceed on indictment thus necessitating considerable police effort in preparing the brief of evidence only to have the accused plead guilty summarily at a later court event. Although QPS still have disclosure obligations in relation to summary offences, they are not required to prepare a full brief of evidence. While LAQ have argued that in some cases it is the disclosure of the brief of evidence that leads to the plea, and I accept this is sometimes the case, it is desirable that there be greater certainty for QPS about when a brief of evidence is required. The recommendations in Chapter 8: *Summary Disposition of Indictable Offences*, if accepted, will provide certainty about whether a matter is proceeding summarily or on indictment and therefore, whether a full brief of evidence is necessary.

Compilation of a brief of evidence involves the collection and collation of a range of material, paper or electronic records of conversations, analysts' certificates, photographs, transcriptions etc; numerous copies have to be made.

The adoption of an electronic data base concept allows the brief to be built and augmented as the case unfolds from the beginning of the investigation. The same data base would support the case from the early investigation right through to

disposition. This is currently not the case as each prosecuting body must currently compile their own brief. It appears that there is no interagency co-ordination in this respect.

As I understand it each agency has developed a process independently. The electronic brief systems developed by the Commonwealth Director of Public Prosecutions and by the Crime and Misconduct Commission are in place. Future Courts and the QPS are also developing such a system. It is desirable that such endeavours should be co-ordinated if the maximum benefit is to be obtained. I understand that the CMC does make its electronic brief software available to other agencies.

Another issue relates to the provision of disclosure information in digital form to lawyers who do not have the capacity to receive and access it electronically on a 'print as required' basis. I am informed that there are no savings for police if they have to provide digitally recorded interviews etc on paper base. There needs to be a transition period with a printout on demand capability. Many criminal practitioners deal with digital material; more inevitably will move in that direction. Systems development must also take into account that an accused in the custody of Queensland Corrective Services does not have access to data in electronic form.⁸⁰

5.5 Failure to comply with disclosure requirements

As I have mentioned earlier, failure to comply with the requirements of the law for disclosure can give rise to grave injustice. A graphic example of this is *Mallard v The Queen* [2005] HCA 68. In that case a man was convicted of murder and served years of imprisonment before the High Court of Australia set the conviction aside on the basis that investigating Western Australian police had concealed or not made available to the defence information in their possession which might have (and did, as is evidenced by the successful appeal to the High Court) advanced the accused's case. There are a plethora of other cases in the law reports, too many to canvass here, which make the same point.

In their submissions the Queensland Law Society and Legal Aid Queensland provide examples of miscarriages of justice being averted by disclosable information coming

⁸⁰ Letter from Queensland Corrective Services dated 6 November 2008.

to hand fortuitously or because of active investigation and requests by defence lawyers rather than as a result of compliance with the disclosure process.

It is of course recognised that events outside the control of the Queensland Police Service may compromise that Service's ability to make disclosure in a comprehensive and timely way. For example, delays in scientific testing results or a witness may not be able to be located etc. The need to investigate fresh crimes puts pressure on the time available to comply with disclosure in cases where an offender has been identified and charged. That however emphasises the benefit of the expeditious disposition of cases rather justifying delay, other than in exceptional circumstances.

Such considerations do not however excuse compliance with ongoing disclosure obligations, nor do they provide a satisfactory explanation for much of the failure to make proper and timely disclosure which occurs, as anyone who has been involved in the criminal justice processes on an ongoing basis knows.

There has been a substantial body of information in submissions, consultations and proceedings at the round tables convened by the Review to found concern that disclosure obligations are not being met. In particular it has been said that s 590AB(2)(b) which requires disclosure of 'all things in the possession of the prosecution ... that would tend to help the case for the accused', is deliberately not being carried out or is being 'overlooked' in a concerning number of cases. It is open to conclude that there is a pattern here rather than the presence of exceptional omissions.

The Queensland Law Society, the Bar Association of Queensland and Legal Aid Queensland were unanimous in expressing concerns about the persistent and pervasive problem of non-compliance by the Queensland Police Service with the statutory disclosure obligations. The ODPP also expressed concerns about the need for timely compliance of disclosure by police.

There have been, for example, accounts of experienced high ranking detectives directing a lower rank and inexperienced police prosecutor as to what disclosure to make rather than the prosecutor making an independent assessment.

Misunderstandings of the obligations occur. For example, the Review was told of one case in which a failed identification process was not disclosed because the arresting police officer did not consider it relevant; it obviously was.

I reiterate that it is of major concern there are accounts of police officers expressing views along the lines that, notwithstanding disclosure obligations imposed by Parliament, it is not their job to help the defence or that the defence should be under reciprocal obligations as a condition of the police making disclosure. As I have said in this chapter and in Chapter 2: *Touchstones* the legislative provisions reflect the values of our criminal justice system.

In making the following recommendations I have given consideration to the adoption of the *Criminal Procedure Act 1996* (UK) and the Code of Practice under that Act as I have been urged by the Queensland Law Society's comprehensive and helpful supplementary submission of 24 October 2008.

I am of the view that the approach recommended by this Report is more attuned to the current issues in this State's overall criminal justice processes and will be less demanding of resources, particularly when the other wide ranging changes recommended by this report are borne in mind. The effectiveness of the recommendations, assuming them to be adopted, should be monitored and any necessary modifications to the law which are indicated be implemented in the future.

Finally I return to what is conveniently referred to as the disclosure test.

There are examples of a more coherent, consistent and objective approach than that reflected in the current Queensland legislation. In *Mclikenny v R* 1991 Cr App Rep 287 at 312 Lloyd CJ spoke in terms of 'making available all material which may prove helpful to the defence'.

The *Criminal Procedure Act 2004* (WA) Section 42 speaks in terms of 'all evidentiary material that is relevant to the charge': s 42(1). The *Crime and Misconduct Act 2001* (Qld) stipulates that when reporting to the ODPP for the purpose of potential proceedings the Crime and Misconduct Commission is obliged to provide all information known to it that 'supports a defence that may be available to any person liable to be charged as a result of the report': s 49(3)(b).

The *Criminal Disclosure Act 2008* (No. 38 Public Act, New Zealand - not in force at the time of writing) provides for disclosure in terms of relevance and defines relevant as –

... **relevant**, in relation to information or an exhibit, means information or an exhibit, as the case may be, that tends to support or rebut, or has a material bearing on, the case against the defendant.

In my view the disclosure provisions contained in Chapter 62 Division 3 of the Criminal Code commencing at 590AB should be re-drafted to more precisely and coherently address the disclosure issue, having regard to the matters raised in this chapter of the Review.

5.6 Staged disclosure

Consideration should be given to provide for staged disclosure, the approach endorsed by most of those attending the round table and in submissions. The first stage would require disclosure of:

- The QP9 form prepared by the police summarising the case against the accused. (The quality of QP9 forms will be decisive if limited disclosure is to be successful) ;
- Any complaint or bench charge sheets;
- The substance of alleged admissions made by the accused or recordings of those admissions;
- A list of witnesses with a copy of any statement by the witness in the possession of the prosecution;
- If there is no statement the name of the witness to be provided and the category of evidence (eye witness etc) should be provided;
- An accurate summary of forensic evidence;
- The accused's criminal and traffic history; and
- Any other known material the prosecution is required to disclose.

The second stage would require full disclosure if there was no plea of guilty on the material disclosed in the first stage.

Realistic time lines should be set by agreement (protocol) or Magistrates Court Practice Direction. The time lines set by the Brisbane Committals Protocol⁸¹ are 21 days from arrest, service of complaint and summons or notice to appear.

5.7 Recommendations

Chapter 5: With regard to disclosure I recommend that:

12. The statutory provisions for disclosure should be redrawn to be simpler, more coherent and consistent. In particular but not exhaustively:
 - There must be disclosure of the evidence relied on by the prosecution; and
 - There must also be disclosure of all information or material known to, or in the possession of, the prosecution bearing on the case which is capable of rebutting the prosecution case or advancing the defence case (or similar provision meeting the concerns expressed in the chapter);

13. The following exclusions should remain:
 - s 590AO Limit on disclosure of sensitive evidence;
 - s 590AN Limit on disclosure of things accused person already has;
 - s 590AP Limit on disclosure of witness contact details;
 - s 590AQ Limit on disclosure contrary to the public interest; and
 - s 590AX Unauthorised copying of sensitive evidence.

(There were no issues raised in the course of the inquiry about provisions to the effect of those identified);

14. The Queensland Police Service should review its training of cadets and serving QPS officers to ensure they understand and comply with disclosure obligations. Failure to comply with disclosure obligations should have a disciplinary

⁸¹ Appendix 5.

consequence. Police training should also emphasise the value of comprehensive and accurate QP9's;

15. Before a 'brief to prosecute' (the means of satisfying the statutory disclosure obligations) is transmitted (including electronically) to the Director of Public Prosecutions or filed (including electronically in the Magistrates Court) the arresting officer (as defined in s 590AD of the Criminal Code) must be satisfied there is sufficient evidence to support the charges and the statutory disclosure provisions have been complied with.

The arresting officer must swear a certificate that he or she is satisfied that those two requirements have been complied with and lodge the certificate with the brief of evidence in the Magistrates Court;

16. If a party (the applicant) contends that the other party has not complied with that party's disclosure obligations that party must communicate (electronically, or by fax or letter) with the other party specifying the following matters:

- what the applicant says the other party should have done but has not;
- the order sought and why it should be made;
- a brief statement of the relevant facts necessary to resolve the issue;
- nominate a reasonable time for a response;
- state whether the party wants an oral hearing or a decision based on the material before the magistrate.

(note that an accused has specific disclosure obligations);

A recipient of such a communication must respond within the specified time stating:

- the communication was a response to the applicant's communication; and
- what, if anything, the respondent proposed to do in response to the request;

These provisions should not prevent the applicant or the respondent from writing to each other in addition or otherwise communicating on a relevant matter;

If the applicant:

- does not receive a satisfactory reply; or
- does not receive a response in the time nominated;

the applicant may file an application in the Magistrates Court seeking further disclosure (a disclosure application);

The following documents must be filed with the disclosure summons stating the order sought and served (electronically, fax, letter) on the respondent:

- the applicant's letter;
- the respondent's reply (if any); and
- any other relevant correspondence exchanged after the applicant received the respondent's reply or the nominated time for replying had passed relevant to the issue.

No affidavit is necessary and no other material will be before the court on an application without the leave of the court.

The magistrate may then dispose of the matter without oral submissions unless a party has indicated it wishes to make oral submissions and the magistrate decides that oral submissions are necessary to dispose of the case;

17. If at any time after the filing of the brief of evidence a magistrate is satisfied that timely disclosure was not made in compliance with the prosecutions obligations at the time of certification the magistrate may order the certifying officer file an affidavit explaining and justifying the failure and provide a copy of the defence (justification might be founded on a statutory provision and/or the circumstances);
18. If a magistrate does not consider the affidavit satisfactorily explains and justifies the failure to make proper disclosure in the time provided for or in a reasonable time the magistrate may order or recommend (any or a combination):
 - that specified material adverse to the interest of the accused not be tendered in evidence or relied on by the prosecution;
 - that the Queensland Police Service pays an amount to the defendant or the defendant's legal representatives reflecting the costs to the defence incurred as a consequence of the failure. The magistrate should inform him or herself of the amount and fix it and set a time for it to be paid;
 - disciplinary proceedings or proceedings for breach of s 204 of the *Criminal Code*; and/or

- a stay of the proceedings unless it is demonstrated that there are compelling reasons that in the interests of justice this should not be done. In making that decision the magistrate will take into account whether conduct of the defence may be adversely affected by the delay and the public interest. The stay may be lifted:
 - by consent; and
 - on the application of the ODPP that it is in the interests of justice, including the public interest, that the stay be lifted; on such terms and conditions as the magistrate imposes (if any).

(Disciplinary proceedings would be at the discretion of the Commissioner of Police or the delegate of the Commissioner);

19. A case conference (see Chapter 9: *Reform of the Committal Proceedings Process*) should only be held if there are no outstanding issues about compliant disclosure, unless a magistrate orders it or the parties agree;
20. That there be a co-ordinated and staged move by the major criminal justice agencies, QPS, ODPP, Legal Aid Queensland, Bar Association of Queensland, Queensland Law Society and Queensland Courts to electronic acquisition, transfer, storage and access of disclosable material (an electronic brief);
21. There should be provision for staged certified disclosure by a protocol, practice direction, guideline or legislation providing for disclosure (staged disclosure) of:
 - The QP9 form prepared by the police summarising the case against the accused;
 - Any complaint or bench charge sheets;
 - The substance of alleged admissions made by the accused or recordings of those admissions;
 - A list of witnesses with a copy of any statement by the witness in the possession of the prosecution;
 - If there is no statement the name of the witness to be provided and the category of evidence (eye witness etc);
 - An accurate summary of forensic evidence;
 - The accused's criminal and traffic history; and

- Any other known material the prosecution is required to disclose; within realistic time lines. Full disclosure must be made if the matter is not resolved within the specified time;

22. Certification of compliance would be required for each stage of disclosure.

The Information Management Issues

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6.0 Information Management Challenges

Reliable, up to date, accurate and accessible data is the life blood of an effective criminal justice system. It allows decision makers at all levels to make evidence based decisions; it challenges entrenched beliefs and perceptions, and it provides a foundation to secure funding. Such a system is dependent on effective information technology support.

It is important to bear in mind that the criminal justice system is made up of a number of interactive agencies (see Chapter 4: *An Overview of the Queensland Criminal Justice System*). What one agency does or does not do impacts on other agencies, a benefit to one agency may come at a cost to others.

An effective information system will allow agencies to:

- Track each individual against whom a charge or charges are pending, alone or with others, until disposition;
- Identify variations and trends and formulate effective, flexible and immediate responses;
- Accurately assess the effectiveness of strategies in order to make evidence based evaluation with consequent adjustments;
- Identify related cases or those with common characteristics to enable specific strategies to be developed to address unique needs;
- Identify and deal with impacts of changes on other agencies and on the system as a whole;
- Ensure focussed, effective allocation of resources; and
- Make cost benefit and process analysis, and budget bids.

It became obvious early in the life of the Review that there is a pervasive lack of comprehensive, reliable, comparable, integrated and accessible data within agencies and across the criminal justice system as a whole. This substantially inhibits data analysis to predict the consequences, costs and effectiveness of changes as well as producing a basis for evidence based decisions in the day to day operation of the system.

As the Review extended its enquiries and investigations across the justice sector it emerged that the available data is fragmented, unreliable and incoherent. It is collected by multiple agencies using incompatible business rules and inconsistent terminology. There are a mass of repetitious manual data entry processes within and across agencies. There is a high risk of error in the compilation of data.

The business processes and databases used in the various agencies (Queensland Police Service, Department of Justice and Attorney-General, Department of Communities Services, Queensland Corrective Services, Office of the Director of Public Prosecutions) operate as independent silos designed for limited, specific and often incompatible purposes. The terminology and data held within each agency is inconsistent and effective and efficient sharing of information is therefore virtually impossible. It is rare for an agency to have a broad frame of reference or a focus that reflects the working of a system of which it is one component. It is also to be noted that the other key players, notably Legal Aid Queensland, are outside this system. It would be useful, if not essential, if other agencies were considered when designing a system.

As I have said, data passed on by one component of the system to another may, without it being noticed, corrupt data being used by other agencies. Although some agencies are beginning to address these issues, there has been no broad co-ordinated approach that accommodates all agencies. There is currently little consideration paid to whether an agency can build on the work of another agency. Further, there is limited evaluation of the effectiveness of processes within an agency, much less across the entire criminal justice system because of these deficiencies and of the silo culture. However, the Criminal Justice Sector Blueprint⁸² work, currently sponsored by the Department of Justice through Integrated Justice Information Strategy (IJIS), will provide a mechanism to co-ordinate a strategic

⁸² For more information see: <http://ijis.govnet.qld.gov.au/projects/blueprint.asp>

approach to the delivery of cost effective criminal justice services. This work has recently been endorsed by the IJIS CEO's committee. I commend the ongoing development of the Criminal Justice Sector Blueprint.

Most agencies, or units within agencies, develop customised systems with narrow application and the information held within such systems is rarely effectively shared beyond the immediate user base. As the Review progressed the researchers would regularly hear by *word of mouth* that although the agency approached did not have the data sought it was thought that 'x' in another agency might be able to help. That occasionally proved to be the case but often 'x' had left and with the data collection abandoned, the process used being not documented, the format was an obstacle to effective access or the review team did not have the time to access, evaluate and use the data.

Current automated reporting systems do not effectively or routinely capture and report on measures as fundamental as:

- The status of all charges against all offenders connected by a single criminal incident;
- The location of a particular offender at any given time;
- The number/percentage of full hand-up committals;
- The number of contested committals; and
- The fact that a disconcerting number of matters set down for committal but changed to a full hand-up committal at the last moment. This is a particularly sore point for those witnesses summoned but who are not needed. Preparation time by prosecutions and court time is wasted.

It is beyond the scope and capacity of this Review to comprehensively and effectively address these information management issues across the criminal justice system in the time available.

Moreover, the resources, in particular the people with the appropriate skills and knowledge necessary to address these issues in the operational context, are already heavily committed in supporting the Integrated Justice Information Strategy (IJIS), Future Courts and running the ongoing day to day business of the criminal justice system.

The Integrated Justice Information Strategy and the Future Courts projects are important initiatives in addressing the information issues in the criminal justice system.

The Integrated Justice Information Strategy is a whole-of-government program designed to create a better co-ordinated criminal justice system. The program is facilitating the delivery of information across the criminal justice system, regardless of where the information is captured and held.

The Integrated Justice Information Strategy vision is to transform the delivery of criminal justice services by establishing 'an integrated criminal justice sector that delivers informed justice solutions through cooperation, information sharing and supporting systems to enhance the safety of staff, participants and the community'.

The program is broken into a number of initiatives that will each deliver incremental business changes to improve information sharing across criminal justice agencies.

The Future Courts program was established to create a modern, innovative and effective courts system for Queensland.

To achieve this, Future Courts is developing relevant and easy to use online services for litigants, legal representatives and the broader community, and improve registry operations through the more effective use of information, new technology, and process innovation.

The program involves Supreme, District and Magistrates Courts of Queensland and encompasses both the civil and criminal domains, and the tribunals administered by these courts.

It will be some time (perhaps years) before the full benefits of the work of these projects will be available to comprehensively support day to day operations in criminal justice agencies. In the meantime they must continue to deal with the day to day functions of the system.

I should note that the Review has been assisted by the Future Courts and IJIS teams. Future Courts have systematically endeavoured to source information to inform our analysis. To do this, in the absence of reliable statistics from operational

systems, they utilised creative yet, at times, resource intensive approaches including manual reviews of samples from court or ODPP files. The Review team has, nevertheless, utilised the information that has been produced while acknowledging its limitations. The IJIS team has given access to its works for use in the Review.

6.1 IJIS Criminal Justice Analytics – Proof of Concept

One IJIS project that has a data focus is the Criminal Justice Analytics (CJA) – Proof of Concept that has been successfully completed. This project examined data from four criminal justice agencies to determine whether cross sector statistical reporting is possible. This concept was proved. The project also identified that there are significant data quality issues which require addressing. In the Evaluation Report⁸³ a number of recommendations were made which focussed on:

- Improving the data quality at each agency for individuals and systems;
- Engaging front-line officers in understanding the importance of their information to their agency and to the system as a whole;
- Ensuring that information is standardised where possible;
- Investigating a governance framework to ensure the correct use and interpretation of information; and
- Developing a statistical and reporting capability for the sector that incorporates standards, common terminology, data dictionaries, and a supporting database on which issues, policy developments, and legislative changes that affect the statistics are stored.

I commend the ongoing support of the CJA project and its work to improve data quality and create a sector-wide statistical and reporting capability.

6.2 Terminology

Problems emerge in relation to the different units of counting that are used within each criminal justice agency. This, coupled with the problem that there is no single, reliable way to identify ‘people’ (for example, an accused person) across the justice sector, renders analysis across the board virtually impossible.

⁸³ The CJA Evaluation Report is a confidential internal document.

By way of example, the terms 'file', 'matter', 'charge', 'case' and 'defendant' are some of the most important information 'units' in the criminal justice environment. Such labels however are used inconsistently both within and across multiple agencies. Different counting rules also apply, for example, in some areas multiple persons are managed through the same 'file' while in other situations each individual is treated as a separate 'case'. Anomalies such as these render analysis and statistical reporting highly problematic but also make it exceedingly difficult to track individuals and cases through the system.

Relying predominantly on technical solutions to solve these information management problems is akin to resolving communication difficulties between an English speaker and a Chinese speaker by providing each of them with the most up to date expensive mobile phone. It does not matter how sophisticated the phone system is, if there is not a common language the technology will not solve the problem.⁸⁴

Currently, the inconsistent terms used by different agencies render comparisons and sector wide analysis virtually impossible. There is therefore a need to establish consistent information so that the same terminology or a common 'language' can be used across the sector.

As I have said, long term solutions to such data integrity and information sharing problems are being addressed by both the Future Courts Program within the Department of Justice and Attorney-General and the cross-agency IJIS program.

While Future Courts program continues to make good progress, the analysis and design of future information system requirements is still underway and the implementation of these solutions is some years away.

The Integrated Justice Information Strategy (IJIS) is focussed on long term cross-agency improvements of the criminal justice system, including business process improvement, information sharing and ICT-enabled business change. Once agencies fully utilise these capabilities and maintain the investment, many financial and socio-economic benefits will be realised.

⁸⁴ This is illustrated by the "C-NOMIS" project in Britain, a program to merge 200 plus data bases used by 80,000 staff across a number of criminal justice agencies with a budget of 234 million pounds. After it had cost 572 million pounds, the project was scaled back to cover the prison system alone. A similar cut back occurred in British Columbia, Canada some years before: Lucas, Edward, *The electronic bureaucrat*, The Economist.com, at http://www.economist.com/specialreports/displaystory.cfm?story_id=10638002

6.3 Opportunities

Those things said, there are some immediate, short term and achievable steps which would have system wide benefits in return for a relatively low investment of resources. These projects can be undertaken without distorting operational work on long term objectives; indeed, they are compatible with those objectives. The relevant privacy considerations need to be taken into account in implementing the following proposals.

Use and implementation of the Future Courts Glossary of Terms across all criminal justice agencies

A particularly relevant initiative within the Future Courts program is the development of a central 'Glossary of Terms' that will form the basis for a new information model and performance measurement framework. This glossary will be used within each business and will also be embedded into the future state wide court case management systems. A common 'language' will improve information gathering and statistical analysis across the board. There is significant potential for this Glossary of Terms to be used more broadly across the sector and it is therefore recommended that it be distributed to all relevant agencies with this objective in mind.

Queensland Police Service Single Person Identifier data

Every person charged or investigated by the Queensland Police Service in relation to an alleged crime is allocated a 'Single Person Identifier' code in the Service systems. Currently, many people are referenced multiple times with multiple Single Person Identifiers which renders the capture of information relating to incidents highly problematic. The scope of this problem is evidenced by the fact that the number of separate and distinct Single Person Identifiers held in the police systems currently greatly exceeds the population of Queensland. The tracking of individuals, specific court cases and incidents through the criminal justice system is therefore highly problematic.

Even within the Queensland Police Service, reliable identification of individuals is rarely possible but this problem is exponentially increased when the interaction of

different criminal justice agencies is considered. Each uses its own data classification methodologies to capture and access information relating to individuals.

The Single Person Identifier could potentially provide the 'glue' to allow data from separate agencies involved in the criminal justice system to exchange across their disparate systems. A precursor to this, however, is the 'cleansing' of the data.

Appropriate funding should be allocated to police to pursue this endeavour as a priority.

By way of some practical examples, the quality of the Single Person Identifier would be improved by:

- automatic submission of Birth Deaths and Marriages data changes to Police systems;
- transmission of drivers⁸⁵ licence photographs from Queensland Transport along with the identifying details that are already transferred;
- focussing on data concerning key persons of interest first. For example: current prisoners, prisoners on parole, prisoners supervised by Corrective Services in the community, defendants indicted to the Supreme or District Courts, and defendants in committal proceedings. This prioritisation and focus should deliver more benefits sooner.

If implemented these proposals will have a flow on effect across the criminal justice system.

Agencies are working with IJIS to implement a process through which information about individuals can be linked (Offender Linking Map).⁸⁶ This map utilises each agencies' individual identification numbers and links each where appropriate. This will facilitate a process whereby individuals can be tracked across the criminal justice system.

⁸⁵ Note that the *Transport (New Queensland Driver Licensing) Amendment Bill 2008* and the *Adult Proof of Age Card Bill 2008* would not allow the transfer of the digital photo and biometric data that will be stored by police, except for transport related offence investigation and limited other situations. The explanatory notes indicate that the restrictions are for privacy reasons.

⁸⁶ For more information see: <http://ijis.govnet.qld.gov.au/projects/criminal-justice-analytics-offender%20linking.asp>

Consistency of core data elements

It should be possible for any agency involved in the management of files across the criminal justice sector to determine the location of a particular person in relation to a particular (alleged) crime and the status of all charges against them that arose out of a particular criminal incident.

An effective approach is to identify key data elements that are sourced in one component of the criminal justice system, for example, police and flow through other agencies such as the ODPP, Magistrates Court and Queensland Corrective Services.

Consistency of these core data elements will potentially provide the 'glue' to link cases, accused people and criminal incidents through two of the key agencies, Courts and police.

Complaint and Summons information and process

There are many inconsistencies associated with the use of a Complaint and Summons to institute proceedings which create information management problems across the agencies.

Currently prosecution actions are initiated with Magistrates Courts by filing either a bench charge sheet (police only) or a Complaint and Summons (police and authorised public officer or individual; for example most breach of peace and good behaviour order complaints are by private individuals). Complaint and Summons are used to commence some civil type matters such as the *Dividing Fences Act* (order to fence and order to repair existing dividing fence) and *Peace and Good Behaviour Act* (orders).

The procedure for lodging a Complaint and Summons should be reviewed in order to:

- Determine whether some actions could be better initiated by an originating application instead of a complaint and summons (for example, civil matters and

Peace and Good Behaviour Act orders) and confine the use of the Complaint and Summons to criminal matters;

- Review the suitability of the complaint and summons forms, for example:
 - the content of the form could be modified to enable the collection of the same information about the defendant and the charge as the bench charge sheet;
 - the prosecuting agency incident number could be provided on the Complaint and Summons form; and
 - the general wording, format and preamble in the form could be brought up to date;
- Simplify Part 4 of the *Justices Act 1886* relating to procedures in relation to making of complaints and issue of summons or warrants of arrest along similar lines to provisions of chapter 14 of the *Police Powers and Responsibilities Act 2000*; and
- Ensure that a Police Single Person Identifier is allocated to each defendant and is incorporated on every complaint and summons.

Electronic charge tracking

A transmission sheet is lodged with the Magistrates Court at the initial committal proceedings in the Magistrates Court. The transmission sheet states on what charges the defendant was committed. It also reflects any amendment to individual charges by the ODPP as well as any additional charges brought by the ODPP.

At present, all charges made by the ODPP are hand written on the transmission sheet. There is no electronic link of charges from the commencement of proceedings to the end of proceedings. This link would be beneficial because it would enable a charge to be traced through the system from charging by police to finalisation in the Supreme or District Court. This information needs to be provided electronically by the Magistrates Court to the ODPP, then provided electronically by the ODPP to the Supreme or District Courts so that it is linked to the results of each charge finalised in these courts.

Best practice standards for information custodianship

Criminal justice agencies should consider adopting a compatible if not consistent approach for information management. This would involve:

- Identifying the critical data that needs to be shared across agencies;
- Nominating a suitable agency that is the logical 'custodian' or source of the original data; and
- Ensuring that other agencies capture that information in the same format as the custodian agency.

Not only will this improvement in data consistency bring about more effective use of resources in case management across the board, it will also provide more transparency for interested parties such as victims of crime. From a victim's perspective, the main concern is what is happening to their case and, subject of course to privacy constraints, it will be easier to provide such individuals with the information they require. Statistical reports will also become more reliable and trend analysis (for example, recidivism rates) will be greatly facilitated. This would be done by legislation.

A single standard for reporting legislation and offence codes across the criminal justice system

Currently each agency maintains legislation in many formats in multiple systems to support operational staff who need to, for example, 'select' from available offences or other legislative components. The maintenance of this data is problematic, error prone and manually intensive. As part of the Reference Data Management (RDM) project within the IJIS program, the business requirements for creating a single standard for offence reference data have been completed and signed off by criminal justice agencies. It is recommended therefore that IJIS seek funding to implement the Offence Reference Data project and for IJIS to leverage previous investment in the RDM project and the legislative data that underpins the Queensland Sentencing Information System (QSIS). An offence reference data solution should provide an automated information 'feed' to all agencies to reduce costs and improve quality, consistency and timeliness.

Principles for the management of evidence in electronic form

Most criminal (and civil) cases increasingly involve a substantial amount of evidence in digital form that is not easily converted to paper format. Criminal investigations necessarily involve digital data including emails, photos, phone interception, other surveillance data and clandestine voice recordings. Most civil cases now potentially involve large volumes of electronic information, particularly email.

The volume of information relevant to a particular case may be large and organising and accessing it complex. These considerations apply particularly in drug trafficking, 'terrorism' and fraud cases.

Court transcripts are also now captured in digital form. Jurors are increasingly drawn from people who acquire access and evaluation information digitally and interactively rather than by sitting passively as evidence unfolds. The way in which evidence is presented should take account of this.

The profession, law enforcement agencies and the courts are struggling to embrace this new environment effectively. If, however, new approaches, systems and processes are not embraced to reflect the requirements and opportunities presented by digital evidence, the integrity and efficiency of the criminal justice system will be significantly compromised.

I note in this context that the Commonwealth Director of Public Prosecutions, the Queensland Police Service and the Criminal and Misconduct Commission have implemented electronic briefs and the Future Courts program has also facilitated the introduction of electronic civil trials in the Supreme and District Courts. This work indicates the potential for shorter trials and the more effective use of court resources. As mentioned in Chapter 5: *Disclosure* the compilation of an electronic brief should streamline the vital disclosure process.

In this context there should be more use of electronic data collection for example to record the accounts of eye witnesses at the scene soon after the event. Police sometimes do this in the form of a 'field' tape which is often distorted and unclear.

Queensland Courts and other criminal justice agencies should adopt emerging international 'principles'⁸⁷ through rules and practices to facilitate the management of evidence in electronic form in criminal cases supported by legislation.

Some of these emerging principles include:

- Increasingly, Electronically Stored Information (ESI) is potentially disclosable in criminal (and civil) cases. There is therefore a duty to identify, preserve and disclose it;
- Wherever possible ESI should be retained, exchanged and delivered in its original searchable electronic state rather than converted to paper format; and
- When managing ESI parties should make sure that the effort and cost associated with accessing and producing the evidence is proportionate to issues in dispute. Early judicial intervention will benefit the parties in early identification of issues.

Online interactive facility

I have mentioned the Queensland IJIS and Future Courts projects. While the policy reflected in those projects and the priority given to consistent, quality data in recent times are commended it should be acknowledged that many of those engaged to work within these programs have actually been seconded from operational areas and this has, unfortunately, meant that the operations have been, at times, unavoidably compromised.

In this environment, not surprisingly, a disconnection arises. People involved in agencies need data for their day to day work. They focus on the data to hand and familiar data, do it 'the way we always have' or make ad hoc 'case by case' decisions without considering the effect of the overall system.

One of the ramifications of this situation appears to be the increasing prevalence of 'satellite' systems that have been developed independently by staff to address perceived gaps in their central systems. Staff who are not particularly well skilled in relation to information management principles have a tendency to develop their own solutions to their needs without reference to the broader information management needs. Such systems are usually embodied in software applications such as

⁸⁷ Sedona Conference, *The Sedona Canada Principles Addressing Electronic Discovery* (January 2008) at http://www.thesedonaconference.org/dltForm?did=canada_pincpls_FINAL_108.pdf

spreadsheets. These independent systems often hold important information however they are difficult to control and distribute widely.

It is recommended that, pending the implementation of Future Courts and IJIS solutions, consideration be given to the establishment of a central 'register' to document not only the work that is underway within these two programs but also to summarise the various satellite systems that exist across the relevant agencies. This could be made accessible via an intranet facility and collaboration between agencies in relation to this information could perhaps be fostered using 'blog' style technology.

6.4 Conclusion

Finally, integrated effective use of electronic data collection, storage, transmission and access is essential to support the practices and processes recommended in the Report.

It is, I think, obvious that there needs to be a coordinated and integrated approach to dealing with the issues raised in this chapter across the criminal justice sector.

The changes canvassed are already occurring; they will continue to evolve. To be effective they have to be properly funded, discerningly prioritised and managed across the criminal justice system. It has to be accepted that:

- there are no ad hoc quick fixes. The changes will take time, their implementation will of itself impact and change the system; it is a dynamic process;
- the changes require profound cultural changes across agencies and so will be resisted by some;
- the potential benefits are high across the system but may vary from agency to agency;
- the costs are high and immediate, the benefits will take some time to manifest but the system will be more effective; and
- the cost of doing nothing is high – the system will become increasingly moribund without reliable up to date accessible data.

The accumulative effect of the co-ordinated implementation of these recommendations will facilitate the effective use of public resources and give momentum to further improvements to the criminal justice system.

For these reasons, I recommend that a Criminal Justice Procedures Co-ordination Council be formed with the role of overseeing and co-ordinating the implementation of recommendations made in this chapter.⁸⁸

6.5 Recommendations

Chapter 6: With regard to Information Management Issues I recommend that:

23. Steps be taken to collect accurate, reliable, coherent, compatible information using consistent terminology across all agencies;
24. The work of IJIS and Future Courts continues to be supported and made known and accessible to operational staff of the criminal justice agencies, LAQ and legal practitioners;
25. The following steps should be taken as soon as possible to make more effective use of existing criminal justice information across the board:
 - Encourage the use and implementation of the Future Courts Glossary of Terms across all criminal justice agencies;
 - Fund the Queensland Police Service to 'cleanse' its Single Person Identifier data;
 - Agencies to use police Single Person and Incident Identifier data across the sector;
 - Review Complaint and Summons information and process so as to align this to criminal matters alone;

⁸⁸ See Chapter 4: An *Overview of the Queensland Criminal Justice System*.

- Streamline the transmission process by the use of electronic data transmission within and across agencies;
- Establish information custodianship arrangements according to best practice standards;
- Future Courts and/or IJIS to liaise with developers of the Queensland Sentencing Information System (QSIS) data base to implement a single standard for reporting legislation and offence code information across the criminal justice system; and
- Implement the CJA – Proof of Concept Evaluation recommendations that support data quality improvements;

26. Uniform guidelines be developed, based on best practice, across the criminal justice system for the management of electronic data across agencies, in individual cases and generally from investigation to disposition;

27. Pending the implementation of Future Courts and IJIS solutions, consideration be given to the establishment of a central 'register' to document not only the work that is underway within these two programs but also to summarise the various satellite systems that exist across the relevant agencies. This should be accessible via an internet facility;

28. The Criminal Justice Procedures Co-ordination Council should have the role of overseeing and co-ordinating the implementation of recommendations made in this chapter. Further, the involvement of the Criminal Justice Sector Blueprint team be sought to reflect the sector's interests and leverage existing governance work undertaken for providing a sustainable governance model for the sector.

Monetary Limits for Civil Jurisdictions

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7.0 Introduction

The first Term of Reference for this Review related to whether the current monetary limits for civil matters in the Magistrates and District Court were appropriate. The monetary limits of this Term of Reference relate to civil matters. Criminal monetary limits will be dealt with under Terms of Reference 2, 3, 4 and 5.

7.1 Current monetary limits

The current monetary limits of the courts which are the subject of this review are as follows:

Table 7(a): Current Civil Monetary Limits

Small Claims Tribunal	Magistrates Court	District Court	Supreme Court
\$7,500 ⁸⁹	\$50,000 ⁹⁰	\$250,000 ⁹¹	Unlimited ⁹²

The civil monetary jurisdictional limit of the Magistrates and District Courts has not been changed since 1997.⁹³ In the case of the Small Claims Tribunal, the monetary limit was last amended in 1998.⁹⁴ The effects of inflation since these last changes,

⁸⁹ See definition of the terms “small claim” and “prescribed amount” in s 4 of the *Small Claims Tribunal Act 1973* Qld.

⁹⁰ See s 4 of the *Magistrates Courts Act 1921* Qld.

⁹¹ See s 68(2) of the *District Court of Queensland Act 1967* Qld.

⁹² See s 58 of the *Constitution of Queensland 2001*.

⁹³ By the *Courts Reform Amendment Act 1997* Qld, s 43 and s 73.

⁹⁴ By the *Civil Justice Reform Act 1998* Qld s 26.

and the decrease in the value of money, have meant that the significance and worth of today's monetary limits is not as it was in 1997 or 1998.

I note that in 1993 the Magistrates Court limit was set at \$40,000 and the District Court at \$200,000. In this context the 1997 and 1998 increases were, even by the standards of the day, modest.

7.2 Submissions received

Submissions were received by this Review regarding this Term of Reference from the following organisations:

- Queensland Bar Association;
- Queensland Law Society;
- Legal Aid Queensland;
- RACQ Insurance; and
- Suncorp Metway Insurance Ltd.

To inform my decision making I also consulted with the judges of the Supreme and District Courts, Magistrates, a number of practitioners and in respect of the implementation of proposals for Queensland Civil and Administrative Tribunal.

I thank each of those organisations, and the individuals whom I consulted, for their submissions and views, as these have been extremely useful in understanding and considering a range of views.

There is unanimous consensus that the existing monetary limits of the Magistrates Court and the District Court should be increased. The only variation in the submissions relates to the amount of the increase. Those who did suggest amounts for the monetary limits are summarised in the following table:

Table 7(b): Submissions' Suggested Civil Monetary Limits

Submission	Small Claims Tribunal	Magistrates Court	District Court
Queensland Bar Association	-	\$100,000	\$750,000
Queensland Law Society	-	\$75,000	\$300,000

Suncorp Metway Insurance Ltd	-	\$50,000	\$500,000 (implemented incrementally)
Legal Aid Queensland	\$20,000-30,000	Parity with other Australian States and Territories ⁹⁵	

No formal submissions supported an unlimited jurisdiction for the District Court, and some specifically opposed it. The judges of the District Court advocated an unlimited civil jurisdiction for that court, referring to the Victorian and South Australian provisions in particular. I will return to the issue in due course. I have decided to adhere consistently to the hierarchical approach rather than differentiate between causes of action as New South Wales has done.

I note that there are statutory provisions available for parties to a matter to agree between themselves to deal with matters that exceed the maximum jurisdiction limits of the Magistrates and District Courts through s 4A of the *Magistrates Court Act 1921* (Qld) and the *District Court Act 1967* (Qld). On the material available to me it appears that it is rare for these provisions to be employed.

Additionally, ss 82 and 83 of the *District Court Act 1967* (Qld) provide for the transfer of actions from the District Court to the Supreme Court by application from either the plaintiff or the defendant. It is unknown how frequently this is done.

7.3 The position in other Australian jurisdictions

I acknowledge my indebtedness to the Queensland Bar Association's submission under this Term of Reference for the data and analysis which follows.

The civil monetary limits that apply in other jurisdictions are provided in the following table:

⁹⁵ See Table 7(c) for the civil monetary limits that apply in other States and Territories.

Table 7(c): Civil Monetary Limits of other Australian Jurisdictions

	Equivalent to Queensland Magistrates Court	Equivalent to Queensland District Court
NSW	Magistrates Court \$60,000 ⁹⁶	District Court <ul style="list-style-type: none"> • general jurisdiction – \$750,000⁹⁷ • actions or partnership accounts and actions under an intestacy or will – \$20,000 • any motor accident or work injury damages claim – unlimited
VIC	Magistrates Court \$100,000	County Court – unlimited ⁹⁸
SA	Magistrates Court <ul style="list-style-type: none"> • general jurisdiction – \$40,000 • claims for injury in motor vehicle accidents and claims about land – \$80,000 	District Court – unlimited ⁹⁹
WA	Magistrates Court – \$50,000	District Court – \$500,000 (\$750,000 as at 1 January 2009) ¹⁰⁰
TAS	Magistrates Court – \$50,000 ¹⁰¹	No equivalent
NT	Local Court – \$100,000 ¹⁰²	No equivalent
ACT	Magistrates Court – \$50,000 ¹⁰³	No equivalent

South Australia

The District Court of South Australia has had concurrent jurisdiction with the Supreme Court since 1991.¹⁰⁴ South Australia retained the existing s 40 of the *Supreme Court Act 1935* (SA). That had the effect that if a proceeding was brought in the Supreme Court which could have been brought in the District Court, and if a plaintiff recovered less than an amount fixed by the Rules for the purposes of that

⁹⁶ Section 30 *Local Court Act 2007* (NSW).

⁹⁷ Section 4 *District Court Act 2007* (NSW).

⁹⁸ Section 3 *Courts Legislation (Jurisdiction) Act 2006* (VIC).

⁹⁹ Section 8(1) *District Court Act 1991* (SA).

¹⁰⁰ Section 50(1) read with section 6(1) *District Court of Western Australia Act 1969* (WA).

¹⁰¹ Section 7(1) read with section 3 of the *Magistrates Court (Civil Division) Act 1992* (TAS).

¹⁰² Section 14(1) read with section 3 *Local Court Act 1989* (NT).

¹⁰³ Section 257(1) *Magistrates Court Act 1930* (ACT).

¹⁰⁴ *District Court Act 1991* (SA).

section¹⁰⁵, no order for costs would be made in favour of the plaintiff unless the court was of the opinion that it was otherwise just in the circumstances of the case. This provision, and the associated rule, is a disincentive to commencing an action in the Supreme Court which may result in a judgment below the specified limits.

Victoria

As a result of a review in 2005, the monetary limit of the Victorian County Court was abolished and the County Court was granted concurrent jurisdiction with the Supreme Court of Victoria.¹⁰⁶ The scheme of the legislation also included a cost disincentive. Rule 63.24 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) provided for a different form of cost penalty for a plaintiff who obtained a judgment in the Supreme Court which was for less than half of the amount for which the County Court had jurisdiction.

The prima facie order provided for under the Rule was that a plaintiff would only receive costs on the County Court scale, less an amount equal to the additional costs incurred by the defendant by reason of the proceeding having been brought in the Supreme Court instead of the County Court.

The complexity and complications of the Rule was the subject of specific criticism by the Victorian Bar in its submissions to the Victorian Attorney-General's review in 2005. Whilst the Victorian Bar Association supported the move to a concurrent civil jurisdiction between the Supreme Court and County Court, this support was conditioned on the removal of this potential cost penalty. Despite the recommendation of the Victorian Bar Association, Rule 63.24 remains in the *Supreme Court (General Civil Procedure) Rules* (Victoria) in force after the commencement of concurrent jurisdiction.

The costs provisions to which I have referred are a constraint on access to the unlimited jurisdiction of the County or District Courts in Victoria and South Australia.

The bulk transfer of cases between levels of courts which occurred in Victoria following those changes suggests there may have been a delay issue on the Supreme Court. There is no such issue in Queensland.

7.4 The position in Queensland

Queensland courts are organised as a hierarchy. In the criminal jurisdiction there is a delineation between the levels of courts, operating by reference to categories of perceived seriousness of offences (between the Supreme and District Courts) and by

¹⁰⁵ Currently the South Australian Supreme Court Civil Rules 2006 Rule 263(2) provides the following limits: \$150,000 for an action founded on a motor vehicle accident, \$25,000 for a defamation action and \$75,000 for all actions for damages or other monetary sums.

¹⁰⁶ *Courts Legislation (Jurisdiction) Act 2006* (Vic).

reference to mode of trial (by indictment in the Supreme or District Courts, by summary trial in the Magistrates Court).

Monetary limits are a consistent, if sometimes crude, way of founding jurisdiction and allocating categories of cases across the hierarchy in terms of complexity and weight of issues. That is reflected in the legislation provisions as to jurisdiction to which I have referred earlier.

In his report 'Access to Justice' (1996), Lord Woolf, Master of the Rolls of England¹⁰⁷ reviewed the civil justice system in England and Wales. He proposed reform of the civil justice system by reference to a principle of "proportionality", which meant that the resources devoted by the court system should be proportionate to the importance and complexity of the particular case or category of cases. Lord Woolf was speaking primarily of proposals for a system of active case management by the courts to deal with endemic delay, but the concept is, in my view, relevant to delineation of jurisdiction between the courts by reference to monetary limits.

In a hierarchical system parties decide the level of court in which to initiate a case and may be guided by the importance and complexity of the case. One indication of the importance and complexity of a case is the amount of money in issue. There may be adverse costs consequences if parties decide to take a matter to an inappropriate level of court.

7.5 Changes to the Queensland Civil Monetary Limits

In my view the hierarchy of Queensland courts should be maintained with a monetary limit as the primary delineation point between each of the courts below the level of Supreme Court. The question is how much?

Any dollar figure setting the limit for the jurisdiction of a court in the Queensland hierarchy of courts is, to a degree, arbitrary. There is no single definitive criterion; different minds may quite reasonably arrive at different figures.

Taking into account only the effects of inflation and changes to the value of money eroding the significance of the present limits, there is a compelling case for increasing the present monetary limits. I have not however limited myself to simply adjusting for the effect of erosion upon the monetary limits set ten years ago. I have, for example, taken into account factors such as the relatively high geographical accessibility to the Magistrates Courts in Queensland compared to the District and Supreme Courts, and also the changes in the professional qualification and the increasingly broader range of professional experience of appointees to the Magistrates Court over the last ten years. I have also taken into account that the *Uniform Civil Procedure Rules* apply across the hierarchy of courts.

¹⁰⁷ Lord Chief Justice of England and Wales and head of the English Court of Appeal.

I have not attempted to quantify the impact of any changes in the monetary limits bearing on resourcing of each jurisdiction as a consequence of implementing the recommended changes.

The data and the processes involved in using it to evaluate the effect of the changes mentioned are not readily available. The existing systems for example do not break up cases in terms of causes of action allowing differentiation analysis between various categories of cases in a particular court.

In any event it may not be possible to come up with a statistically valid model based on the available data. In Chapter 6: *The Information Management Issues* I deal with difficulties in accessing valid data to evaluate the effectiveness or otherwise of processes. As I remark in that chapter, people with the necessary skills and knowledge to deal with these issues are heavily committed to IJIS, ROGS, Future Courts and to data bearing on the effective day to day running of the court system. To take people out of those systems would slow up necessary changes. In any event the necessary work could not be done in time for a Report by December 2008, given the other Terms of Reference.

With changes to the monetary limits a number of cases presently commenced in the Supreme Court would be commenced in the District Court; and a number presently commenced in the District Court would be commenced in the Magistrates Court. This would free up Supreme Court resources to deal with cases more efficiently but would increase the number of cases going to the District Court. This may have cost benefits both to the justice system and to the parties involved because it costs less to run a matter in the District and Magistrates Courts than in the Supreme Court.

Small Claims Tribunal

Legal Aid Queensland was the only entity to make a submission on increasing the monetary limit of the Small Claims Tribunal. The relevant part of its submission is as follows:

Increases to the civil jurisdictional limits for courts of Queensland are long overdue. Of particular concern to LAQ is the low limit (\$7,500) in the Small Claims Tribunal and the Minor Debt jurisdiction of the Magistrates Court.

In our view, access to justice requires people to have access to fast, fair and accessible forums to determine their legal rights. This means access to a process which provides an adjudicated decision with simplified procedures (adapted to the needs of self representing litigants) and no risk of costs. This important role in our justice system is currently played by the Small Claims Tribunal and the Minor Debts Court. In the future, the Queensland Civil and Administrative Tribunal will play this role.

There is much force in this submission.

Disputes in the Small Claims Tribunal are presided over by a referee who is a magistrate.¹⁰⁸ The Small Claims Tribunals are physically conducted in the courthouse of the Magistrates Courts throughout the State. Courthouses of the Magistrates Court are highly accessible to the vast proportion of the population of Queensland. Magistrates Courts give access to assisted alternative dispute resolution processes provided by the Department. The parties to proceedings in the Small Claims Tribunal conduct the proceedings themselves, and lawyers and professional advocates are not permitted to appear.¹⁰⁹ Costs may not be awarded against any party, except for filing fees.¹¹⁰

As I have said the process of setting a monetary limit is somewhat arbitrary and minds may differ.

My recommendation is more modest than that submitted for by Legal Aid Queensland. \$30,000 is a substantial amount of money, and there is an argument to support the proposition that parties to a dispute over that amount of money should be entitled to engage the advocacy of lawyers to present their case.

I note that in March 2008 the Queensland Government announced its intention to create a new tribunal which would have jurisdiction to hear and determine civil and administrative matters, provisionally described as QCAT. I note that one of the recommendations of the QCAT review was that the jurisdiction of QCAT should extend to Small Claims Tribunal matters and minor debt claims.¹¹¹ The legislation to give effect to the proposal is not yet in place. It is for the executive government and Parliament to decide the jurisdictional arrangements and the consequences.

Magistrates Court

The current civil monetary limits and the limits advocated by submissions made to the Review appear in tables 7(a) and (b). I have considered these and I have also borne in mind the various complex statutory regimes (for example the *Personal*

¹⁰⁸ Section 5 *Small Claims Tribunals Act*.

¹⁰⁹ See s 32 *Small Claims Tribunals Act*.

¹¹⁰ See s 35 *Small Claims Tribunals Act*.

¹¹¹ Recommendation 23: The Magistrates Courts have a jurisdiction to hear and determine matters defined in s.2 of the *Magistrates Courts Act* as a "minor debt claim" which are claims for debts not exceeding \$7,500.00. If a plaintiff elects to pursue such a minor debt claim in the Magistrates Court, then simplified procedures for such minor debt claims apply, under chapter 13, part 9, division 2 of the *Uniform Civil Procedure Rules 1999*. The QCAT panel also recommended that appeals from original decisions of QCAT should be as of right on questions of law, except where the matter involves a claim having a monetary value of \$7,500 or less, in which case leave of the president of QCAT would be required. – see recommendation 28. The figure of \$7,500 is also the monetary limit of the Small Claims Tribunal and the minor debt claims jurisdiction of the Magistrates Court. There is no necessary correlation between appeal rights for QCAT on the one hand, and on the other hand, increasing the monetary limit for jurisdiction of whatever tribunal will hear small debt claims and small claims. It may have been that the QCAT panel selected the benchmark figure of \$7,500 for appeal rights because the amount is the same as the jurisdiction for small claims and small debts. It is a matter for policy for the Government as to whether it wishes, for the sake of consistency, that a monetary limit for the appeal rights from QCAT be the same as QCAT's jurisdiction for small claims and minor debts.

Injuries Proceedings Act 2002 (Qld)) designed to bring about an early resolution of categories of personal injury cases and to narrow the issues of compensation.

District Court

As I have said, I do not recommend that Queensland move to concurrent jurisdiction between the Supreme Court and the District Court but than an increase in the monetary limit is justified and overdue.

The jurisdiction of the District Court concerning land

I have given specific consideration to whether the jurisdiction of the District Court concerning land should be changed, the issue having been raised in the course of my consultations.

The present jurisdiction of the District Court concerning litigation about land is set out in s 68 of the *District Court of Queensland Act 1967*. This provides that, in general, the District Court has jurisdiction to hear and determine all personal actions where the amount sought to be recovered does not exceed the current monetary limit of \$250,000. Section 68(1)(a) confers on the District Court the jurisdiction to hear and determine an equitable claim or demand for recovery of money for damages, whether liquidated or unliquidated.

Section 68(1)(b) then goes on to list a range of actions and matters about which the provision specifically states that the District Court has jurisdiction.¹¹² Several of these concern land:-

- Section 68(1)(b)(iii) concerning an action for specific performance of an agreement for the sale or other disposition of land;
- Section 68(1)(b)(xi) to recover possession of any land;
- Section 68(1)(b)(xii) to restrain, by injunction or otherwise, a trespass or nuisance to land.

There is a limitation on the jurisdiction on the District Court in each of these cases, in that the value of the land in question must not exceed the monetary limit of \$250,000 to be increased to \$750,000 if my recommendation is implemented.

Section 68(3) provides that for the purpose of the jurisdiction of the District Court, and the monetary limit, the value of land is the most recent valuation at the time of instituting the proceedings, of the unimproved value of the land under the *Valuation of Land Act 1944* (Qld), currently issued by the Department of Natural Resources and Water. If there is no such valuation in respect of the land then the current market

¹¹² See subsections (i) – (xiv).

value (excluding improvements) is the value of the land for the purposes of the District Court jurisdiction.

Section 76 of the *Valuation of Land Act* provides that a certified copy of particulars of a valuation shall 'for all purposes and in all proceedings be evidence of the matters and things stated therein'. A certified copy of an extract of an entry on a valuation roll costs \$25.60.¹¹³

In my view, these provisions and arrangements are satisfactory to establish the jurisdiction of the District Court in a land matter with a minimum of cost, in the overwhelming majority of cases. So far as I am aware it will be rare for a valuation of unimproved land not to be available at the commencement of proceedings and there seems to be no need to provide for those circumstances.

Cost Scales

The Queensland Law Society (QLS) submitted that the civil monetary limit of the Magistrates Court should not be increased beyond \$75,000 for the following reasons:

- (a) to do so would dilute the amounts recoverable for party/party or standard costs against an unsuccessful opponent;
- (b) a substantial amount of personal injury work which currently occurs in the District Court would, if the Magistrates Court were increased to \$100,000.00, occur in the Magistrates Court. Much of this work is of a highly technical nature involving detailed familiarity with a plethora of legislation with respect to which judges of the District Court have developed special expertise.¹¹⁴

There are rising scales of costs, categorised in terms of the money value involved, which may be ordered in favour of a successful party prescribed by the *Uniform Civil Procedure Rules 1999* (Qld).¹¹⁵ The amounts which may be allowed in costs increase as the level of court rises through the hierarchy of courts. I do not consider that the difference between the items for costs which may be awarded should be the main driver of my recommendations on this term of reference, as against the goals of effective use of public resources and accessibility of the Queensland public to a suitable venue for the resolution of disputes. On the other hand lawyers should be compensated for the increased monetary value reflected in the bands. As I have said monetary value is the criterion the system uses to measure the weight or complexity of claims and to determine jurisdiction.

¹¹³ See item 2 of Schedule 2 (Fees) of the *Valuation of Land Regulation*.

¹¹⁴ Queensland Law Society submission to the Review, dated 21 August 2008.

¹¹⁵ See the *Uniform Civil Procedure Rules 1999* (Qld), schedules 1-3.

7.6 Conclusion

My recommendations follow. I would add to these that the monetary limits in the civil jurisdiction of the Magistrates Courts (including Small Claims Tribunals if that be relevant) should be reviewed regularly, say every 5 years, and adjusted to reflect the then current value of money and other relevant considerations.

7.7 Recommendations

Chapter 7: With regard to monetary limits for civil jurisdictions I recommend that:

29. The monetary limit of the Small Claims Tribunal be increased to \$25,000;
30. The civil monetary limit of the Magistrates Court be increased to \$150,000;
31. The civil monetary limit of the District Court be increased to \$750,000;
32. The relevant costs scales should be reviewed and brought into line with the increased complexity and responsibility reflected in the increased monetary limits;
33. The civil jurisdictional monetary limits for the District and Magistrates Courts should be reviewed regularly, at least every 5 years, and adjusted to reflect the then current value of money and other relevant considerations.

Summary Disposition of Indictable Offences

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8.0 Introduction

The summary disposition of indictable offences is the second Term of Reference for the Review. Queensland has more matters dealt with on indictment in the District Court than any other Australian jurisdiction and this is a direct consequence of the classification of offences. The Chief Justice of the High Court of Australia, the Hon Murray Gleeson AC, in the *State of the Judicature* address of March 2007, observed that:

the disposition of civil and criminal matters, where appropriate by summary procedures or by procedures suitably adapted to less complex cases, is a vital part of the system's response to the twin problems of cost and delay and to the need to provide private citizens with reasonable access to justice because for most people, this is the level at which any encounter with the courts is likely to occur.¹¹⁶

Summary matters are matters dealt with in the Magistrates Court. This is in contrast to matters which are brought before the District or Supreme Courts for trial before judge and jury, or by judge alone. Offences can be either criminal or regulatory¹¹⁷ and the Criminal Code divides criminal offences into the categories of crimes, misdemeanours and simple offences.¹¹⁸ Crimes and misdemeanours are indictable, while regulatory or simple offences can be dealt with summarily by a Magistrate. In

¹¹⁶ As cited by Judge Marshall Irwin, Chief Magistrate, in his address 'A Vision for the Future of the Queensland Magistrates Court', QUT, Wednesday 2 April 2008 at p 1.

¹¹⁷ *Criminal Code Act 1899* (Qld) (Criminal Code) s 3(1).

¹¹⁸ *Criminal Code Act 1899* (Qld) (Criminal Code) s 3(2).

general, indictable offences must be tried in the District or Supreme Courts; an indictment being a 'written charge bringing a person to trial in a court other than one of summary jurisdiction'.¹¹⁹ However an exception exists as some indictable offences may be dealt with summarily.

Chapter 58A of the *Criminal Code* nominates the indictable offences that may be dealt with summarily. In practice a defendant, if charged with an indictable offence capable of summary disposition, can have a trial by jury in the District or Supreme Courts or can elect to have the matter dealt with by the Magistrates Court. There is a safeguard in place through the retention of the Magistrate's discretion, pursuant to s 552D of the *Criminal Code*, not to deal with a matter if satisfied that the nature or seriousness of the offence is such that the defendant may not be adequately punished upon summary conviction. Anecdotal evidence suggests that very few defendants exercise the option to have their matter heard by a Magistrate.

There are two distinct areas of concern for the Review:

1. Which offences should be capable of being dealt with summarily, and
2. Who should decide whether a matter should be heard in the District or Supreme Court?

In Chapter 2, *Touchstones*, of this Report I noted that, while it is common to hear reference to a right to trial by jury, no entrenched right to a trial by jury for criminal offences exists and it is a matter for state parliaments to decide. Parliaments are under no constraint and can lawfully determine whether there can be a trial by judge or magistrate alone. There is nevertheless a widely and justifiably held view that trial by jury should not be lightly dispensed with, given the serious consequences which may follow conviction of a criminal offence and the consequences for the community as a whole, in some offences or categories of offences. The constantly recurring issue is that of proportionality: are the processes and resources that are employed in response to particular offences, or categories of offences, proportionate to the seriousness of the offence from the aspect of the community and from that of the consequences for the accused if convicted? Does a matter warrant an allocation of the public resources of the District or Supreme Court, at a cost of \$3988 and \$5903 per finalisation, or does it warrant the allocation of the resources of the Magistrates

¹¹⁹ Shanahan, M J and others, *Carter's Criminal Law of Queensland* 16th ed, LexisNexis Butterworths, Australia 2006 at p 60; the primary definition is provided by the *Criminal Code* at Schedule 1, s 1 'indictment'.

Court at a cost of \$314 per finalisation?¹²⁰ These issues are identified by Gleeson CJ in his *State of the Judicature* address. The disproportionate allocation of resources for some offences is displayed in the table below:

Table 8(a): Resources allocated and outcome for a sample of accused

Offence charged	Number of mentions in Magistrate Court	Number of mentions in District Court	Time in months between arrest and conclusion	Final result	Sentence
1 x Wilful Damage; 1 x Common Assault	7	8	17	Plea on morning – nolle some charges	6 months
1 x common assault; 1 x AOBH; 1 x wilful damage	7	15	23	Found not guilty	Acquitted
1 x wilful damage	7	9	18	Plea on morning of trial	Recognisance – 6 months
6 x wilful damage; 1 x stealing; 1 x fraud	7	5	25	Plea on morning of trial – nolle some charges	12 months probation

8.1 The history of reform to the summary disposition of indictable offences

This Review's concern with the summary disposition of indictable offences follows a succession of reports and comprehensive reviews on the same topic. In 1997 changes were made to the Criminal Code through the *Criminal Law Amendment Act 1997* which had the unintentional result of minor assault matters being heard in the District and Supreme Courts unless the defendant elected to have the matter heard summarily. In August 2001 the Criminal Justice Commission report *Funding Justice: Legal Aid and Public Prosecutions in Queensland* reported concern about this, the

¹²⁰ Productivity Commission Report on Government Services 2008, *Table 7A.23 Real net recurrent expenditure per finalisation, criminal, 2006-07*, at <www.pc.gov.au/gsp/reports/rogs/2008/justice> accessed 18 September 2008.

limited types of matters that could be dealt with by magistrates and the election process for indictable offences.¹²¹ In September 2001 the *Report on Reform of the Summary Jurisdiction in Queensland*¹²² undertook a thorough examination of the topic and made a series of recommendations. This was followed in 2004 by a Department of Justice and Attorney-General discussion paper entitled *Review of the Summary Disposition of Indictable Offences in Queensland*.¹²³

A combination of cost benefit issues, lack of agreement by stakeholders, political reluctance to remove the right of election from the defendant and the sheer size and complexity of the task at hand have thus far prevented earlier recommendations from being implemented. It is this extensive body of work that has laid the foundations for the current Review.

8.2 Which matters may presently be dealt with summarily?

There are no clear and distinct criteria for categorisation of offences which may be dealt with summarily. A number of consultations and submissions to the Review have commented on the lack of coherence and the irrationality of the current classifications. I agree. As a result there is a haphazard selection of matters being heard in the District or Supreme Courts that could be dealt with in the Magistrates Court.

Defendant Election

Chapter 58A of the *Criminal Code*, at section 552B, nominates the indictable offences that may be heard summarily unless the defendant elects to have trial by jury. The section nominates the types of offences and also the monetary limits of property involved; as shown below:

552B Charges of indictable offences that may be dealt with summarily
(1) This section applies to a charge before a Magistrates Court of any of the following indictable offences—

¹²¹ Criminal Justice Commission, *Funding Justice: Legal Aid and Public Prosecutions in Queensland*, 2001 at p 77.

¹²² Brassington, J and Kerr S, Department of Justice and Attorney-General, Queensland Government, *Report on Reform of the Summary Jurisdiction in Queensland*, 2001.

¹²³ Department of Justice and Attorney-General, Queensland Government, *Discussion Paper: Review of the Summary Disposition of Indictable Offences in Queensland*, May 2004.

- (a) an offence of stealing, fraud, receiving or other dishonesty, or of making anything moveable with intent to steal it, and the value of the property, benefit or detriment is not more than \$5000;
 - (b) an offence against section 406 [Bringing stolen goods into Queensland];
 - (c) an offence relating to damage to or destruction of property up to the value of \$5000;
 - (d) an offence relating to an animal, skin or carcass or part of an animal, skin or carcass;
 - (e) an offence against section 419 [Burglary] or 421 [Entering or being in premises and committing indictable offences], if—
 - (i) the offence involved stealing or an intent to steal or an intent to destroy or damage property or the damage or destruction of property; and
 - (ii) the offender was not armed or pretending to be armed when the offence was committed; and
 - (iii) the value of any property stolen, damaged or destroyed was not more than \$1000;
 - (f) an offence against section 425 [Possession of things used in connection with unlawful entry];
 - (fa) an offence against section 427 [Unlawful entry of vehicle for committing indictable offence];
 - (g) an offence against section 408A [Unlawful use or possession of motor vehicles, aircraft or vessels];
 - (h) an offence of a sexual nature without a circumstance of aggravation where the complainant was 14 years of age or over at the time of the alleged offence and the defendant has pleaded guilty;
 - (ha) an offence against section 339(1) [Assaults occasioning bodily harm];
 - (i) an offence involving an assault, other than an offence against section 339(1), if—
 - (i) the assault is—
 - (A) without a circumstance of aggravation; and
 - (B) is not of a sexual nature; and
 - (C) is not an assault mentioned in section 552A; and
 - (ii) the maximum penalty for the offence is not more than 7 years;
 - (ia) an offence against section 316A [Unlawful drink spiking];
 - (j) an offence against section 328A(1) or (2) [Dangerous operation of a vehicle];
 - (k) an offence of unlawful stalking without a circumstance of aggravation;
 - (ka) an offence against chapter 14 [Corrupt and improper practices at elections], chapter division 2 [Legislative Assembly and Brisbane City Council elections and referendums];
 - (l) an offence against chapter 22A [Prostitution];
 - (m) an offence against chapter 42A [Secret commissions];
 - (n) an offence of attempting to commit any of the above offences;
 - (o) an offence of counselling or procuring the commission of any of the above offences;
 - (p) an offence of becoming an accessory after the fact to any of the above offences.
- (2) A charge of an offence mentioned in subsection (1)(a) to (e) or a charge of attempting to commit, or of counselling or procuring the commission of, or of becoming an accessory after the fact to, any of those offences must be dealt with summarily, unless the defendant informs the Magistrates Court that he or she wants to be tried by a jury.
- (3) Also, if—
- (a) the defendant admits that he or she is guilty of an offence to which subsection (2) applies; and
 - (b) the Magistrates Court considers the offence is of a nature that the defendant may be adequately punished on summary conviction; the charge must be dealt with summarily under subsection (2) whether or not the value of any property in relation to which the offence was committed is less than the value mentioned in subsection (1)(a) to (e).

- (4) For subsection (3), it is immaterial that the defendant could be charged with an offence that the Magistrates Court has no jurisdiction to hear and decide because of the value of the property in question.
- (5) A charge of an offence mentioned in subsection (1)(f) to (m), or a charge of attempting to commit, or of counselling or procuring the commission of, or of becoming an accessory after the fact to, any of those offences, must be dealt with summarily, unless the defendant informs the Magistrates Court that he or she wants to be tried by jury.
- (6) This section is subject to section 552D.

Prosecution Election

The Criminal Code, at section 552A, also provides that some charges of indictable offences must be heard and decided summarily upon the election of the prosecution:

552A Charges of indictable offences that must be dealt with summarily on prosecution election

- (1) This section applies to a charge before a Magistrates Court of any of the following indictable offences—
 - (a) an offence against any of the following provisions—
 - section 141 [Aiding persons to escape from lawful custody]
 - section 142 [Escape by persons in lawful custody]
 - section 143 [Permitting escape]
 - section 144 [Harbouring escaped prisoners etc]
 - section 148 [Obstructing officers of courts of justice]
 - section 233 [Possession of thing used to play an unlawful game]
 - section 340 [Serious assaults]
 - (b) any offence involving an assault, not being of a sexual nature or accompanied by an attempt to commit a crime, if the maximum penalty for the offence is not more than 5 years;
 - (c) an offence of attempting to commit any of the above offences;
 - (d) an offence of counselling or procuring the commission of any of the above offences;
 - (e) an offence of becoming an accessory after the fact to any of the above offences.
- (2) A charge of an offence mentioned in subsection (1) must be heard and decided summarily, if the prosecution elects to have the charge heard and decided summarily.
- (3) This section is subject to section 552D.

Magistrate's Discretion

As previously mentioned, both ss 552A and 552B of the Criminal Code are subject to jurisdictional limits as to when a magistrate may deal with a matter summarily.

Section 552D provides:

552D When Magistrates Court must abstain from jurisdiction

- (1) A Magistrates Court must abstain from dealing summarily with a charge under section 552A or 552B if satisfied, at any stage, and after hearing any submissions by the prosecution and defence, that because of the nature or seriousness of the offence or any other relevant consideration the defendant, if convicted, may not be adequately punished on summary conviction.

- (2) If the court abstains from jurisdiction, the proceeding for the charge must be conducted as a committal proceeding.

Appeal Rights

The defendant may appeal against a decision to decide a matter summarily:

552J Appeals against decision to decide charge summarily

(1) This section applies if a person is summarily convicted or sentenced under section 552A or 552B.

(2) The grounds on which the person may appeal include that the Magistrates Court erred by deciding the conviction or sentence summarily.

I recommend that the magistrate's discretion provided by s 552D and the appeal rights of the defendant provided by s 552J should continue to apply.

Why defendants may decide against having their matter heard by the Magistrate

A combination of factors influences the decision not to have a matter heard in the Magistrates Court. These include, for example: perceptions of more lenient sentencing practices in the District and Supreme Court; access to legal aid funding; availability of victim compensation; and a historical lack of confidence in the Magistrates Court. It is clear that some of these perceptions are outdated and inaccurate. For instance, statistics provided by the Productivity Commission indicate that a defendant convicted of s 398(1) (Stealing) is less likely to be incarcerated by a Magistrates Court (21% compared with 6%), with around 90% of those incarcerated by the Magistrates Court receiving a sentence of 6 months or less.¹²⁴ This contrasts with differences in the acquittal rates of the Magistrates Court compared to the District and Supreme Courts. According to Legal Aid Queensland's submission there is a 50% chance of acquittal in the District or Supreme Court but only a single figure rate in the Magistrates Court.¹²⁵

The attached graphs (at Appendix 7) demonstrate the penalties and periods of imprisonment that the Magistrate, District and Supreme Courts impose for a small selection of offences. No doubt complex reasons explain the differences between the Magistrates Court and the District and Supreme Court; however, for the purposes

¹²⁴ Productivity Commission, Australian Government, Report on Government Services 2008 at <<http://www.pc.gov.au/gsp/reports/rogs/2008/justice>> accessed 7/10/2008.

¹²⁵ Legal Aid Queensland submission to the Review, 9 September 2008 at p 17.

of this report it appears that the preconception that the District and Supreme Courts impose more lenient sentences than the Magistrates Court is unfounded.

Legislative change is required to ensure that the prosecution election to deal with a matter in the Magistrates Court does not have the consequence of denying access to compensation. At the moment there is no compensation available to victims of crime when a matter is finalised in the Magistrates Court. The Victims of Crime Review is currently looking to widen the eligibility for compensation to include victims of indictable offences dealt with summarily. I support this approach.

The potential expense involved in mounting a defence makes accessibility to Legal Aid funding a vital issue for a summary trial. It is understandable that defendants elect to have their matter dealt with in the District or Supreme Courts if there is no funding available for the matter to be dealt with summarily. While the number of summary matters that received Legal Aid funding to plead guilty has steadily increased over the last few years, there has been little change to the numbers of summary trials that are funded by Legal Aid:

Table 8(b): Legal Aid Queensland funded summary matters¹²⁶

	2004-05			2005-06			2006-07			2007-08		
	552A	552B	Total									
Summary Plea	176	532	708	281	667	948	274	772	1046	395	982	1377
Summary Trial	2	11	13	6	8	14	3	7	10	4	4	8
Total	178	543	721	287	675	962	277	779	1056	399	986	1385

8.3 Problems with the current arrangements

The current arrangements lack rational structure and clarity and it is difficult and confusing for both practitioners and magistrates to accurately interpret and apply the provisions.¹²⁷

¹²⁶ Legal Aid Queensland submission to the Review, 9 September 2008 at p 17.

¹²⁷ See for example *Fullard v Vera* [2007] QSC 050 per Cullinane J (which explores inconsistencies in the drafting practices of the s 552B); and also the provisions of s 552B(1)(h).

It is virtually impossible to discern any rationality behind either the inclusion of certain offences or the divisions of offences attracting particular rights to elect. There have been considerable efforts made over the years to introduce some rationality, for example, Trevor Pollock (a former Magistrate), produced a 41 page document entitled *Guide to the Jurisdiction of Queensland Courts under the Criminal Code* listing all offences, and whether or not they fall within ss 552A or 552B of the Criminal Code, in order to provide some guidance to magistrates, prosecutors and legal practitioners. The complexity of attempts to distil the provisions simply emphasise the unsatisfactory system that presently exists. Additionally, diverse provisions are found in a scattering of different Acts to be taken into account.¹²⁸

Inclusion of offences within s552A or s552B of the Criminal Code

There is no consistency as to which offences are included within sections 552A and 552B of the Criminal Code, and which are not. Possible criteria for inclusion or exclusion include: the seriousness of the offence; the complexity of the offence; public policy considerations (for example, matters that the public may have more of an interest in scrutinising); and, the type and extent of penalty imposed. At times the deciding factor may be a monetary limit and other times a penalty limit. There are also many other offences that are punishable by less than three years imprisonment, which are not included within sections 552A or 552B of the Criminal Code that would appear suitable for summary disposition.

Temporal Limits

In its submission to the Review the Queensland Law Society proposes that offences 'which attract a maximum penalty on indictment of three years or less obviously should be able to be dealt with summarily, at the election of the defence'. There are 92 offences that the Bar Association of Queensland identified in its submission which fall into this category (Appendix 8) The 2004 Discussion Paper, *Review of the Summary Disposition of Indictable Offences in Queensland*, included an option for making offences carrying a maximum penalty of five years or less, and certain other offences, capable of summary disposition.¹²⁹

¹²⁸ For example: *Summary Offences Act 1995, Penalties and Sentences Act 1992, Juvenile Justices Act 1992, Criminal Practices Rules, Justices Act 1886, Criminal Code 1889, Police Powers and Responsibilities Act 2000, Bail Act 1980.*

¹²⁹ Department of Justice and Attorney-General, Queensland Government, *Discussion Paper: Review of the Summary Disposition of Indictable Offences in Queensland* May 2004 at p 8.

Monetary Limits

Sections 552B(3) and 552B(4) of the Criminal Code provide that as long as the 'Magistrates Court considers the offence is of a nature that the defendant may be adequately punished on summary conviction' then there are no monetary limits that restrict the Magistrates Court's jurisdiction to deal with that matter. However, if the defendant does not enter a plea section 552B(1)(a)-(e) applies¹³⁰ and the Magistrates Court's jurisdiction is limited to offences involving property valued at between \$1,000-\$5,000. For example, if a person charged with stealing a television or a high-end mobile telephone worth more than \$1,000 does not enter a plea, the Magistrates Court is unable to deal with the matter. Suncorp GIO Investigations department advises that the top five items stolen (and covered by insurance) are all valued over \$1000. These are: plasma and LCD televisions, jewellery, work tools and lap top computers.

The value of money has changed over time and it is not in the interests of an efficient criminal justice system to have matters involving comparatively small amounts of money, with little prospect of a custodial sentence, dealt with in the District or Supreme Courts. In my view there is a need to realign indictable offences to the appropriate court. I recommend that matters involving property valued at less than \$30,000 be dealt with summarily and matters involving property valued at \$30,000 or more be dealt with on indictment.¹³¹ Defendants, charged with matters that may be dealt with summarily following my recommendations, will retain the ability to have a matter taken before a jury if, on an application to a magistrate, the magistrate is satisfied by the defendant that there are exceptional circumstances that justify the matter being committed to the District or Supreme Court.

Who decides whether to have the matter dealt with summarily or not?

There is no clear rationale as to why certain offences attract a prosecution election and others a defence election. It is incongruous that the prosecution has the election with regard to serious assault (s 340 of the Criminal Code), yet the defence has the election for assault occasioning bodily harm (s 339). It is evident that there is a

¹³⁰ Sections apply to certain property offences.

¹³¹ Note that in Chapter 7: *Monetary limits for civil jurisdictions* I recommend that the *civil* monetary limit for the Magistrates Court be increased to \$150,000 and that the Small Claims Tribunal monetary limit be increased to \$25,000.

genuine need for modification, with regard to who has the right to election and the types of offences that can be dealt with summarily, the aim of which is a coherent system with clarity and certainty for all involved.

Consequences of the current framework

- a) There may be a lack of congruence as to how similar cases are dealt with in the different courts. It is a fundamental aspect of our justice system that the law is consistent and knowable. By ensuring that similar cases are dealt with by the same court we will come closer to achieving this. There may be policy or other reasons for making exceptions;
- b) More cases are dealt with in the Queensland District and Supreme Courts than in any other Australian jurisdiction. As a corollary of this there are also many more 'court events' than other jurisdictions before resolution. The number of defendants finalised in 2006-2007 in the Queensland District and Supreme Courts, which was significantly greater than in other jurisdictions, are provided in Table 8(c) below. According to the ODPP this is because as many as 60% of the types of matters dealt with in the District and Supreme Courts in Queensland would have been dealt with in the Magistrates Court¹³² in other states including 'matters such as minor assault, minor drug possession, petty theft, motor vehicles crime, minor fraud and lesser property offences';¹³³

Table 8(c): Defendants finalised in District and Supreme Courts¹³⁴

Jurisdiction	Defendants finalised	Total Population ¹³⁵
Queensland	5841	4 253 200
New South Wales	3141	6 947 000
Western Australia	2582	2 149 100
Victoria	2346	5 274 400
South Australia	1235	1 598 000
Tasmania	553	497 300

¹³² Or jurisdictional equivalent.

¹³³ Office of the Director of Public Prosecutions, *Review of Issues Associated with the Recruitment and Retention of Prosecutors in the Queensland ODPP*, (a report to the Attorney-General in response to a request made in January 2008) at p 25.

¹³⁴ Australian Bureau of Statistics 45130DO001 Criminal Courts, Australia 2006-07, *Table 11 Higher Courts Defendants Finalised*, released, 25 January 2008.

¹³⁵ As at end of March quarter 2008, Australian Bureau of Statistics, 3101.0 - Australian Demographic Statistics, March 2008.

Northern Territory	346	218 400
Australian Capital Territory	147	342 700
Total	16 191	21 282 600

District Court Chief Judge P M Wolfe has stated that:

Because of the number of offences that a defendant can elect for trial by jury, many of those charged with offences capable of determination in the Magistrates Courts are not sentenced there, so that the effective and efficient running of the District Court is being hampered by the number of less serious matters coming before it for sentence;¹³⁶

- c) Relatively minor drug matters are being dealt with in the Supreme Court. I have paid individual attention to this issue later in this chapter;
- d) There is a great deal of ambiguity about jurisdiction and processes particularly where the value of property is in issue. Magistrates may be called upon to decide the value of property if disputed, though this may be better dealt with through a mechanism, such as case conferencing, to resolve problems with valuations;
- e) It frequently happens that an accused elects to proceed on indictment, prompting the police to put in considerable time and effort into preparing the brief of evidence; only to have the accused plead guilty summarily at a later court event. LAQ have argued that in some cases it is the disclosure of the brief of evidence that leads to the plea. I accept this may be the case on occasion; but it is desirable that there be greater certainty for QPS about when a brief of evidence is required. My recommendations to extend the number of matters dealt summarily aim at providing certainty as to whether a matter is to proceed summarily or on indictment;
- f) Pleas are not made at the earliest opportunity. While there may be a number of legitimate reasons for this, when proceedings reach the District Court around 90% of defendants plead guilty.¹³⁷ When a plea of guilty is entered at this stage there have already been considerable financial and possibly emotional costs incurred in the proceedings, which may have been minimised with an earlier plea in the Magistrates Court. This is especially the case if a committal is avoided through an early plea as committals involve costs not only for the court, but also for the many witnesses that may be involved;

¹³⁶ Chief Judge P M Wolfe, letter to the Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, dated 18 July 2008.

¹³⁷ Chief Judge P M Wolfe, letter to the Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, dated 18 July 2008.

- g) The majority of sentences handed down in the District Court are within the range that a Magistrates Court could impose;
- h) There is considerable delay incurred in the current arrangements, with an average of 17 mentions per matter prior to resolution. This delay may also impede access to appropriate supervision or rehabilitation facilities for defendants and expose those defendants to a risk of further offending whilst waiting for the original matter to be finalised. Delay in proceedings delay resolution for victims of crime;
- i) Defendants spend time in custody when they would not receive a custodial sentence or, they spend a longer time in custody than the custodial sentence that would be imposed;
- j) There is presently a limitation period of one year to institute summary proceedings. Section 52 of the *Justices Act 1886* stipulates that: 'In any case of a simple offence or breach of duty, unless some other time is limited for making complaint by the law relating to the particular case, complaint must be made within 1 year from the time when the matter of complaint arose'. The ODPP advises that this means that, as often happens, matters not referred to the ODPP until after the expiration of that time can no longer be heard in the Magistrates Court. It is in my view appropriate to extend the time limit for commencement of a matter in the Magistrates Court to two years from the date that the matter of complaint arose. The extension of the time period facilitates the handling of matters summarily rather than having to take inappropriate matters to the District and Supreme Courts.

8.4 Relevant Issues

There is a paucity of valid, accessible data available bearing on the effect of these recommendations. As a result there is a lack of reliable data to indicate how many matters that could be dealt with by the Magistrates Court are currently being dealt with in the District and Supreme Courts. In the absence of the availability of figures but relying on such data as is, and on anecdotal evidence, it would appear that something in the region of half to three quarters of the matters presently heard in the District and Supreme Court could be dealt with in the Magistrates Court.

There is a need to balance justice and the effective use of public resources. It is not in the interests of justice to have matters that could be dealt with in the Magistrates Court being sent on to the District or Supreme Courts; with the resulting additional stress, delay and use of public resources. The Law Society's submission clearly shows that the majority of those matters dealt with in the District and Supreme Courts received sentences wholly within the jurisdiction of the Magistrates Court (see Appendix 9).¹³⁸

The Professionalism of the Magistracy

The Magistrates Court has evolved considerably in recent years. My recommendations are built upon the knowledge that the Magistrates Court is a valuable, professional component of the criminal justice system with access to the same sentencing reference database to which judges in the District and Supreme Courts refer.

Magistrates are no longer a public service appointment: 'from an often dispirited group of lay justices and public servants, lacking complete independence, magistrates throughout Australia have become true judicial officers and thus full colleagues of the judiciary'.¹³⁹ As independent judicial officers, magistrates now come to the court with wide experience of the day to day workings of the criminal law and are recruited from lawyers in private practice, the ODPP, Legal Aid and other bodies.

The professionalisation of the magistracy has been one of the most notable changes in the legal professional life over the past two decades. This is the period over which the magistracy has been transformed in substance from a body of persons largely public service trained to a body of professional trained and legally qualified practitioners.¹⁴⁰

There is now a comprehensive orientation program in place for newly appointed magistrates and ongoing professional development throughout their appointments. To support the magistrates, IT support is now being provided by the Supreme and District Courts Technology Group and all the magistrates have access to the

¹³⁸ Queensland Law Society submission to the Review of the Civil and Criminal Justice System in Queensland dated 8 September 2008 Schedule 1 at p 18. This is an annotated version of the Bar Association table and provides data on indictment penalties and actual sentences imposed by the District or Supreme Courts for each of the offences.

¹³⁹ Hon Justice Michael Kirby AC CMG, 'The Rise and Rise of the Australian Magistracy', Association of Australian Magistrates XVI Biennial Conference, 7 June, 2008, at pp 5-6; 'lacking complete independence' was footnoted: cf *Fingleton v Christian Ivanhoff Pty Ltd* (1976) 14 SASR 530 at 546.

¹⁴⁰ Justice Thomas, 'The Ethics of Magistrates' (1991) 65 ALJ 387.

Queensland Sentencing Information Service (QGIS) that guides judicial officers in the Magistrates, District and Supreme Courts. This justifies the view that the new magistracy is well equipped to deal with any increases in its jurisdiction. Access to QGIS provides 'a comprehensive electronic collection of information on sentencing which helps judicial officers, when considering the imposition of a sentence, to increase their consistency and predictability in sentencing'.¹⁴¹ It is important that the nature and extent of the consequences of the recommended changes in jurisdiction be monitored and magistrates be resourced accordingly in terms of professional development and technological support.

Drug Offences

Serious consideration should be given to allowing magistrates to deal with relatively minor drug offences. Where the prosecution does not rely on any commercial element such as possession for the defendant's own use, or sale to support a personal habit without a commercial interest, these matters should be dealt with in the Magistrates Court. A disproportionate allocation of time and resources are invested in drug cases that are primarily to do with personal use and involve no indicia of commerciality. Experience shows that there is a high rate of pleas of guilty for these matters.

At the moment any matter that involves the supply of a schedule 1 or the aggravated supply of a schedule 2 drug must be dealt with in the Supreme Court. Additionally, production of a schedule 1 drug or the aggravated production of a schedule 2 drug, and also the aggravated possession of a schedule 1 drug or 2 drug must be dealt with in the Supreme Court. As a result, the resources and expenses of the highest court in Queensland are allocated to matters that are relatively minor and do not involve any element of commerciality, for example:

- If a person supplies an ecstasy tablet to a friend, irrespective of the amount, the matter must be dealt with in the Supreme Court. This means if an 18 year old supplies his 17 year old girlfriend with a cannabis sativa cigarette or ecstasy tablet the matter must be dealt with in the Supreme Court. These matters often do not involve the imposition of an actual term of imprisonment;
- Any production of methylamphetamine, even if only a small amount for a defendant's own use, must go to the Supreme Court;

¹⁴¹ Magistrates Court of Queensland, Annual Report 2006-2007 at p 118.

- If a defendant is charged with growing more than 500 grams of cannabis sativa, possibly only one plant, the matter must go to the Supreme Court. This is also the case for possession of more than 500 grams of cannabis sativa; and
- If a defendant is charged with possession of more than 2 grams of ecstasy or methylamphetamine, even though it is for personal use and will almost certainly not attract a custodial sentence, the matter must go before the Supreme Court.

Drug matters involving personal use and low level or non-commercial supply of drugs to friends and associates should be dealt with in the Magistrates Court. This would leave those matters that involve people who deal in drugs for commercial reward, whether that is to support their own habit or as a commercial venture, and matters involving trafficking, to be dealt with in the District or Supreme Courts. The indicia of commerciality that the ODPP employ to determine indictments could be used to calculate which matters should be dealt with summarily and which should not.

There are many factors that the ODPP take into account when calculating if there are indicia of commerciality, these include:

- The amount involved (produced, supplied or possessed). The bigger the amount the more likely that it is for a commercial purpose;
- The number of occasions involved. The more often the more likely that it is commercial;
- Whether the offence is regular, sporadic or a one off;
- The number of persons supplied to, including willingness to supply to strangers;
- The presence of records of people supplied to. This is often a tick list of money owed or text messages requesting drugs;
- The defendant's position in the chain of supply, i.e. street level dealer or supplying to others to on supply;
- Whether there has been payment in return – either as cash or drugs for own use;
- The presence of any profit or intention to sell for profit;
- The period of time involved with the drug;
- Any previous drug convictions; and
- Whether the defendant is drug dependent.

Section 13 of the *Drugs Misuse Act*, and 552A of the Criminal Code, should be amended to allow matters that display no indicia of commerciality to be dealt with in the Magistrates Court. It is not in the interests of an efficient justice system to

continue to use circumstances of aggravation or the amount of the drug to dictate in which court a matter should be heard.

I am of the view that the circumstances of aggravated supply should be revisited and that supply of a Schedule 1 drug should be able to be dealt with summarily upon the election of the prosecution, and that possession and production of a schedule 1 or 2 drug should be able to be dealt with in the Magistrates Court regardless of aggravation; subject always to the magistrate's discretion.

Legal Aid Queensland has stated that 'there is a strong case for reviewing the summary/indictment approach to some drug offences.' An extract from the LAQ submission follows:

In our view there are strong arguments, particularly in light of the recent amendments to the Schedules to the *Drugs Misuse Act 1986*, to reviewing the summary/indictment approach to the disposition of at least some drug offences. It is not uncommon for relatively minor drug offences to proceed (often on an ex officio plea) in the Supreme Court, only resulting in the imposition of small fines, or a bond etc.¹⁴²

In addition to these issues of proportionality the early disposition of such cases in the Magistrates Court provides an opportunity to remove an offender from the drug culture and environment, and the associated risks of continual re-offending, into a supportive supervised environment. The Magistrates Court operate a range of drug diversion initiatives that are not available in the Supreme Court and are therefore better equipped to deal with these matters. A drug user on bail through the committal stage and while waiting for trial or sentence is more at risk of re-offending and is without rehabilitation support which could be supplied by early disposition in the Magistrates Court.

Trial by Jury

As I have already noted, in 1997 changes were implemented that unintentionally resulted in minor offences such as assault attracting the right to a jury. The aim of the *Criminal Law Amendment Act 1997* was to draw together the provisions for summary determinations for indictable offences, previously scattered throughout the *Criminal Code*.

¹⁴² Legal Aid Queensland submission to the Review, dated 9 September, 2008 at p 18. The submission goes on to report that 'recent cases included a client who was found in possession of slightly in excess of the scheduled amount of cannabis. The police took no issue with his account that as a heavy user of cannabis he had accumulated more than he realised'.

There was no intention to radically alter the provisions as evidenced by Hansard at the time of the introduction of the *Criminal Law Amendment Bill 1996* in which the former Attorney-General Hon D E Beanland MP stated that 'Magistrates, practitioners and others will be able to quickly and easily find and understand all provisions in the Code on this subject. The types or categories of offences which may or must be dealt with by a magistrate will generally remain the same as in the current Code'.¹⁴³ This Bill repealed, amongst other sections, Chapter 31 of the *Criminal Code Act 1899* which is reproduced below:

CHAPTER 31—ASSAULTS PUNISHABLE ON
SUMMARY CONVICTION

Jurisdiction of justices

341. Any person who unlawfully assaults another may, subject to the provisions of this Chapter, be summarily convicted before 2 justices.

Some assaults not to be so dealt with

342. If the justices find that the assault complained of was accompanied by an attempt to commit a crime, or if for any reason the justices are of opinion that the charge is a fit subject for prosecution by indictment, they are required to abstain from dealing with the case summarily.

In 1996 the *Criminal Law Amendment Bill 1996* introduced the two sections dealing with election, i.e. ss 552A and 552B of the Criminal Code. The unintentional consequences of these amendments meant that unlawful assaults, which would previously be dealt with summarily, could now be heard in the District or Supreme Courts (primarily the District Court) for trial by jury.¹⁴⁴ There is nothing to suggest that this was the intention of the Bill. Another consequence of these changes was 'additional delay and costs, associated with higher court proceedings'¹⁴⁵ as the District Court list was increased. This error should now be corrected.

The District Court

The Terms of Reference for this Review do not expressly include the jurisdiction of the District Court however it follows that a shift in jurisdiction for the Magistrates Court will naturally result in changes to the jurisdiction of the District Court. The topic

¹⁴³ Beanland, Hon D E, *Criminal Law Amendment Bill 1996*, Second Reading Speech, Queensland Parliamentary Debates, 4 December 1996 at 4874.

¹⁴⁴ Note that the recent *Criminal Code and Jury and Another Act Amendment Bill 2008* has introduced the availability of Judge alone trials for most indictable offences.

¹⁴⁵ Department of Justice and Attorney-General, *Discussion Paper: Review of the Summary Disposition of Indictable Offences in Queensland*, Queensland Government, May 2004.

of the District Court jurisdiction has occurred naturally throughout the discussions and consultations undertaken during this Review; with the overall consensus being that the jurisdiction of the District Court should be extended. It was drawn to my attention that the District Court does not have jurisdiction to try a person charged with an indictable offence if the maximum penalty is more than 14 years.¹⁴⁶ The *Crimes Act 1995* (Cth) makes provision for a wider range of Commonwealth offences than was previously the case. This is particularly so for fraud and sexual offences involving the internet.

Many Commonwealth offences are arguably more congruent with categories of State offences currently dealt with by the District Court. The introduction of many new Commonwealth offences in relation to terrorism, the use of the internet and fraud, with maximum penalties in excess of 14 years has skewed the jurisdiction of the Supreme and District Courts with respect to Commonwealth offences. For example, the offence of 'using a carriage service to procure persons under 16 years of age'¹⁴⁷ carries a maximum penalty of 15 years under the *Commonwealth Criminal Code Act 1995*; while the maximum penalty for the same offending behaviour under section 218A of the *Criminal Code* (Qld) is 5 years imprisonment.

The Hon P de Jersey AC, Chief Justice of Queensland, after discussing the issue with the Judges of the Supreme Court proposed instead that:

another way of approaching the matter would be to amend s 61(1) of the *District Court of Queensland Act 1967* (DCQA) so that it is specified that the District Court does not generally have jurisdiction to try a person charged with an indictable offence if the maximum penalty for the offence is not less than 20 years. A corresponding amendment would be required to s 61(2) of the DCAQ. This would have the consequence of the Supreme Court generally exercising jurisdiction in criminal matters where the maximum penalty specified for the offence is 20 years or more.

I consulted with the District Court, Legal Aid Queensland, the Queensland Bar Association and the Queensland Law Society and none of them opposed the increase in District Court jurisdiction.

The Commonwealth DPP confirmed 'that the Commonwealth Director's office is agreeable to such a proposal'.¹⁴⁸ I agree with this suggestion and recommend that

¹⁴⁶ *District Court of Queensland Act 1967* s 61(1).

¹⁴⁷ *Criminal Code Act 1995* (Cth) s 474.26.

¹⁴⁸ David Adsett, Deputy Director, Commonwealth Director of Public Prosecutions, Brisbane Office, letter to the Review of Civil and Criminal Justice System in Queensland dated 28 October 2008 at p 1.

the jurisdiction of the District Court be extended in such a way to include all offences punishable by a maximum of 20 years or less.

This recommendation means that the ODPP will retain the ability to present an indictment in the Supreme Court, rather than the District Court, under s 560(3) of the Criminal Code, which is subject to s 560(4). This requires consideration of the complexity of the case, the seriousness of the alleged offence, the particular importance attaching to the case and any other relevant consideration.

8.5 Benefits of change

There are notable benefits to increasing the jurisdiction of the Magistrates Court:

- a) There is a benefit to complainant victims and witnesses if more matters are finalised more expeditiously in the Magistrates Court. There is for example: no committal process, Magistrates Courts are more accessible, there are more of them and the process requires fewer public resources;
- b) There is a significant cost benefit to increasing the jurisdiction of the Magistrates Court and widening the range of indictable matters that can be dealt with summarily. In 2006-2007 it costs \$314 in real net expenditure per finalisation in the Magistrates Court in Queensland, compared to \$3988 in the District Court and \$5903 in the Supreme Court,¹⁴⁹
- c) There will be increased access to the drug diversion initiatives uniquely operated by the Magistrates Court such as the Drug Court with the Intensive Drug Rehabilitation orders available to it as a sentencing option. There are also a number of other bail-based and sentencing diversion programs available in the Magistrates Court, such as the Queensland Indigenous Alcohol Diversion Program. There is an additional cost benefit to these initiatives; Corrective Services estimate that it costs around \$160 per day to have a person incarcerated compared to \$10 per day for a person on a court ordered parole;¹⁵⁰
- d) The resources of the District and Supreme Courts will be freed up to deal with more serious matters;

¹⁴⁹ Productivity Commission Report on Government Services 2008, *Table 7A.23 Real net recurrent expenditure per finalisation, criminal, 2006-07*, at <www.pc.gov.au/gsp/reports/rogs/2008/justice> accessed 18 September 2008.

¹⁵⁰ Estimate provided during a consultation with Neil Whittaker, Acting Director-General, Queensland, Corrective Services.

- e) There will be benefits to local communities from having more matters dealt with in the local Magistrates Court and the local community will be able to see justice being done. It follows that there will be savings in circuit time and expense for the District Court;
- f) There will be faster court processes which will decrease the opportunity of defendants re-offending whilst on bail.

8.6 Risks from change

- a) There will be reduced access to trial by jury. In reality only a small proportion of cases end in trial. It has been estimated that as few as 8-10% of all matters committed for trial in the District and Supreme Courts result in trial by jury;
- b) Removing the defence election will in all probability raise strong objections from some sectors;
- c) There is a need to balance fairness and expediency in the public interest. 'The speedy and cost efficient resolution of matters is ... a legitimate public concern. The criminal justice system is often called upon to attempt to balance competing interests. The key to reform in this instance is finding the right balance';¹⁵¹
- d) Does the quality of justice in the Magistrates Court match that of the District or Supreme Courts? As noted earlier in this chapter there have been extensive changes to the face of the Magistracy and the support for Magistrates recently with a resulting increased professionalism;
- e) Current legal aid funding arrangements may mean that a defendant will have trouble obtaining funding for summary trial. The Legal Aid Queensland submission made to the Review indicates that there are an increasing number of ss 552A and 552B matters receiving Legal Aid funding. There was an increase from 721 matters funded in 2004-2005 to 1377 in 2007-2008. However the majority of those were for entering a plea of guilty and from 2004 until 2008 only 45 of all of those matters were funded for a summary trial;¹⁵²
- f) At the moment there is no compensation available to victims of crime when a matter is finalised in the Magistrates Court. Unless there are changes to the

¹⁵¹ Department of Justice and Attorney-General, Queensland Government, *Discussion Paper: Review of the Summary Disposition of Indictable Offences in Queensland* May 2004 at p 3.

¹⁵² Legal Aid Queensland submission to the Review of the Civil and Criminal Justice System in Queensland dated 9 September 2008 at p 17.

arrangements for criminal compensation there is a possibility that changes to summary matters may result in reduced access to compensation. The Victims of Crime Review announced by the Premier and Attorney-General on 26 November 2007 is currently reviewing the Criminal Injury Compensation Scheme. Most importantly for this Review the Victims of Crime Review is looking to widen the eligibility for compensation to include victims of indictable offences dealt with summarily. In a joint statement on 25th November 2008, the Attorney-General together with the Premier, the Hon Anna Bligh, announced that a draft bill outlining a new scheme for funding and support of victims of crime will be released for public consultation early in 2009.¹⁵³ If these changes to the compensation scheme are not implemented it will be necessary to ensure an alternative means by which victims of crime have access to compensation for those matters;

- g) There is a disparity in acquittal rates between the Magistrates Court and the District and Supreme Courts. Legal Aid Queensland's submission to the Review notes that there is a low acquittal rate in the Magistrates Court (in single figures) while approximately 50% of defendants are acquitted in the District or Supreme Courts.¹⁵⁴ The reasons for this are unclear. There are probably a number of them, including that the cases in the Magistrates court are simpler and the evidence more clear cut;
- h) Legal Aid Queensland should be funded to review its current funding policies for summary proceedings with a view to aligning funding to the recommended changes. It should then be appropriately funded to deal with summary matters;
- i) It is acknowledged that:

[t]here is some evidence that Aboriginal and Torres Strait Islander defendants, due to a lack of familiarity with the court processes and cultural issues, may plead guilty in circumstances where there may not be culpability for the offence. It is important that adequate legal representation is provided in the Magistrates Courts.¹⁵⁵

It is crucial to ensure that any changes do not adversely impact upon Indigenous Australian and Torres Strait Islander offenders. This could be prevented by Legal Aid Queensland and the Aboriginal & Torres Strait Islander Legal Service reviewing and amending their funding strategies to reflect any changes that I

¹⁵³ Bligh, Hon Anna, Premier, Queensland Government Ministerial Media Statements at <http://www.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=61564> accessed 2 December 2008.

¹⁵⁴ Legal Aid Queensland submission to the Review of the Civil and Criminal Justice System in Queensland dated 9 September 2008 at p 17.

¹⁵⁵ Department of Justice and Attorney-General, Queensland Government, *Discussion Paper: Review of the Summary Disposition of Indictable Offences in Queensland* May 2004 at p 14.

have recommended regarding the availability of funding for legal representation in the Magistrates Court;

- j) There may be an adverse impact upon people with impaired decision-making capacity. The Office of the Public Advocate's submission to the Review urges that the 'impact on people with impaired decision-making capacity (IDMC) of the current system and the impact of any changes under consideration [be taken into account] when formulating recommendations for consideration by Government'.¹⁵⁶

8.7 Other considerations

Juvenile Justice

Indications are that an extension of the number of indictable offences that can be dealt with summarily would be consistent with the current review of the *Juvenile Justice Act 1992*.

The position in other states of Australia

A table summarising the provisions for the summary disposition of indictable offences of other states is attached (Appendix 10).

Commonwealth Offences

There are Commonwealth indictable offences that may be dealt with summarily. The arrangements as they stand were well summarised in the submission to the Review by the Commonwealth Director of Public Prosecutions and are here extracted (emphasis added).¹⁵⁷

Commonwealth law on classification of Commonwealth offences

The Crimes Act provides that an offence against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months is an indictable offence, unless the contrary intention appears.¹⁵⁸

Commonwealth indictable offences which can be dealt with summarily

¹⁵⁶ Office of the Public Advocate submission to the Review of the Civil and Criminal Justice System in Queensland dated September 2008 at p 2.

¹⁵⁷ Commonwealth Director of Public Prosecutions, Brisbane Office, submission to the Review of the Civil and Criminal Justice System in Queensland, 18 August 2008.

¹⁵⁸ *Crimes Act 1914* (Cth) s 4G.

An offence against a law of the Commonwealth which is not punishable by imprisonment or which is punishable by imprisonment for a period not exceeding 12 months is a summary offence, unless the contrary intention appears.¹⁵⁹

Commonwealth indictable offences punishable by a period not exceeding 10 years may, unless the contrary intention appears, be heard and determined with the consent of the prosecutor and the defendant, by a court of summary jurisdiction.¹⁶⁰

The Crimes Act scheme provides that if a Commonwealth criminal offence punishable by a period of imprisonment not exceeding 10 years is dealt with summarily with the consent of the prosecutor and the defendant, a lower penalty applies. Where the offence is punishable on indictment by imprisonment for a period not exceeding 5 years, when the offence is dealt with summarily, a sentence of imprisonment for a period of 12 months or a fine not exceeding 60 (\$6,600) penalty units,¹⁶¹ or both, may be imposed.¹⁶² Where the offence is punishable by imprisonment for a period exceeding 5 years but not exceeding 10 years, when the offence is disposed of summarily, a sentence of imprisonment for a period not exceeding 2 years or a fine not exceeding 120 penalty units (13,200), or both, may be imposed.¹⁶³

There are some provisions of Commonwealth criminal law outside the *Crimes Act* which relate to the summary disposition of indictable matters. The *Crimes Act* recognises that those other provisions exist and operates subject to them.¹⁶⁴ An example of such a law is found in the *Bankruptcy Act 1966* (Cth).¹⁶⁵ The *Bankruptcy Act* provides that it is a matter for the Magistrate to determine whether a matter should be dealt with summarily.¹⁶⁶ On summary disposal under the *Bankruptcy Act*, a maximum penalty of 1 year imprisonment may be imposed.¹⁶⁷

My recommendations that the jurisdiction of the District Court be extended to include all offences punishable by a maximum of 20 years or less incorporates those Commonwealth offences with a maximum penalty of 20 years or less.

8.8 Conclusion

It is obvious that the implementation of the recommendations of this Review will increase the magistrates' workload in terms of the volume and complexity of the cases that they will be called on to determine. There will be a consequential decrease in the District Court's workload because of the matters that will be dealt with summarily following my recommendations; and, a corresponding impact on the volume of appeals to the District Court.

¹⁵⁹ *Crimes Act 1914* (Cth) s 4H. An example of a Commonwealth criminal offence where a contrary intention appears is the offence in section 100A of the Fisheries Management Act 1991, which although subject to punishment by a fine only is expressed in that section itself to be an indictable offence.

¹⁶⁰ *Crimes Act 1914* (Cth) s 4J(1).

¹⁶¹ Under Commonwealth law one penalty unit is equivalent to \$110.

¹⁶² *Crimes Act 1914* (Cth) s 4J(3)(a).

¹⁶³ *Crimes Act 1914* (Cth) s 4J(3)(b).

¹⁶⁴ *Crimes Act 1914* (Cth) s 4J(2).

¹⁶⁵ *Bankruptcy Act 1966* (Cth) s 273.

¹⁶⁶ *Bankruptcy Act 1966* (Cth) s 272(2).

¹⁶⁷ *Bankruptcy Act 1966* (Cth) s 273(5).

Indictable offences dealt with summarily require realignment to the appropriate court; this realignment will bring Queensland in line with other Australian jurisdictions. I propose that defendants retain the ability to have a matter taken before a jury if, on an application to a magistrate, the magistrate is satisfied by the defendant that there are exceptional circumstances that justify the matter being committed to the District or Supreme Court.

8.9 Recommendations

There needs to be a clear criminal justice process to deal with the summary disposition of indictable offences. I have reviewed this matter with the aim of introducing clarity and structure where there is none. These recommendations will balance the just disposition of offences with the effective use of public resources. The weight of submissions and considerations support this. That is not to say that there is agreement as to how that is achieved or that there will be uniform endorsement of my recommendations such as those that encourage the greater involvement of the ODPP in prosecution.

Chapter 8: With regard to Summary Disposition of Indictable Offences I recommend that:

34. The following offences be heard and determined summarily:

- Offences with a maximum penalty of less than 3 years imprisonment;
- Matters currently prescribed in s 552A;
- Matters where the value of property involved is less than \$30,000;
- Common and serious assault (not being of a sexual nature);
- Assault occasioning bodily harm;
- Dangerous driving simpliciter; and
- Wilful damage;

35. All serious offences continue to be dealt with on indictment. These are:

- Sexual offences committed against children under the age of 14;

- Where the value of property involved is \$30,000 or more;
- Where the prosecution will seek a custodial sentence in excess of two years imprisonment;
- Offences relating to:
 - Homicide;
 - Dangerous driving causing death/GBH;
 - Armed robbery;
 - GBH;
 - Rape;
 - Incest;
 - Arson;
 - Torture;
 - Corruption;
 - Drugs where the ODPP is alleging a commercial element;

36. All other offences may be heard and determined summarily, at the election of the ODPP;

37. Section 552D of the Criminal Code be retained and amended to include a discretion for the magistrate to commit a matter to the District or Supreme Court if satisfied by the defendant that there are exceptional circumstances that justify doing so;¹⁶⁸

38. The time limitation for summary matters provided by section 52 of the *Justices Act 1886* be increased to 2 years from the date that the matter of complaint arose;

39. The District Court be given jurisdiction to deal with all offences where the maximum penalty for the offence is 20 years or less. This would require amendment of ss 61(1) and (2) of the *District Court of Queensland Act 1967* (DCQA);

40. Legal Aid Queensland and the Aboriginal & Torres Strait Islander Legal Service should be funded to review their current funding policies for summary

¹⁶⁸ For an example see section 5 of the Criminal Code (WA) which provides for the defence to make an application to have a matter tried on indictment.

proceedings with a view to aligning funding to the recommended changes. Both agencies should then be appropriately funded to deal with summary matters.

Reform of the Committal Proceedings Process

If you want things to stay as they are, things will have to change¹⁶⁹

...almost every review into committal proceedings has concluded there is a case for change, although there has been a difference of view as to whether the committal proceedings should be reformed or abolished.¹⁷⁰

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9.0 Introduction

Reform of the committal proceedings has been a major focus of attention for this Review. It was the subject of an initial discussion paper and was the principal topic at the first round table. It generated more written submissions than any other topic.

¹⁶⁹ Giuseppe Tomas de Lampedusa.

¹⁷⁰ Referring to the many reviews of committals throughout the common law world: Jackson, John and Sean Doran, *The Future of Committal Proceedings in Northern Ireland*, September 2003, http://www.nio.gov.uk/the_future_of_committal_proceedings_in_northern_ireland.pdf at [4.1].

Strong views have been expressed by members of the legal profession and members of the judiciary. There was much lamenting that I was ‘abolishing committals’. Due to its importance and the strength of views expressed, this chapter is longer and more detailed than some others in this Report. Term of Reference 5 (Case conferences) is also dealt with in this chapter because it is a step in the committals process.

After considering alternative names for the process discussed in this chapter I have decided to continue to use the term ‘committal’. The term is too deeply entrenched in legal culture and language to discard and most other Australian jurisdictions continue to use it.

9.1 What purposes are served by the committal process?

The various purposes of the committal proceeding have been exhaustively canvassed in case law and literature¹⁷¹. I do not propose to revisit this issue at length.

In essence, the principal purposes are to ensure:

- the accused knows the case against him or her. This is dealt with in Chapter 5: *Disclosure*; and
- that trial in the Supreme or District Court is justified (in effect, an evidentiary threshold has been met before a person is required to stand trial).

The committal process has also come to serve a number of additional functions by providing an opportunity for the parties to:

- test evidence;
- filter out weak cases;
- refute evidence;
- identify early pleas;
- clarify issues before trial; and
- refine charges.

¹⁷¹ See for example: Willis, John and David Brereton, *The Committal in Australia*, The Australian Institute of Judicial Administration Incorporated, Carlton South, Victoria, 1990.

It also provides a mechanism for the independent review of the prosecution by the committing magistrate.

9.2 History

The committal process, as we know it, is a product of history and can only be understood in that context. The committal system evolved over hundreds of years to serve needs that are relevant in a particular cultural and historical context. There are many local variations that have evolved across common criminal law jurisdictions from a common source - which is simply to say there is no 'ideal' form.

Our committals procedure, including hearings in their present form, is the result of legislation in England in the mid 1800s¹⁷². It evolved out of the Grand Jury System, originating in England over a millennia ago. The Grand Jury was made up of citizens who gathered to make determinations on a range of public interest matters including criminal prosecutions.

Historically, all criminal complaints were initiated by private citizens who brought a 'bill of indictment' before the grand jury. There was no police force. The grand jury considered whether there was sufficient evidence to justify a trial, whether the behaviour constituted an offence under the law and whether the court had jurisdiction to deal with the complaint. The return of the indictment to the complainant entitled him to pursue the prosecution and in so doing to exercise the power and authority of the Attorney-General.

The purpose of the grand jury was to ensure that a person could not be put to trial without sufficient evidence and to eliminate malicious and vexatious prosecutions. Over time, the right to decide whether a person should stand trial was transferred to justices, and later to magistrates, and in many common law jurisdictions the Grand Jury was abolished.

The administrative nature of the committal proceeding is well established, even now that it is conducted by judicial officers.

¹⁷² *Indictable Offences Act 1848* (UK).

As Dawson J said in *Grassby v The Queen* (1989) 168 CLR 1 the characterisation as an administrative function is a consequence of history:

A magistrate in conducting committal proceedings is exercising the powers of a justice of the peace. Justices originally acted, in the absence of an organised police force, in the apprehension and arrest of suspected offenders.

The justices:

... were required to act upon information and to examine both the accused and the witnesses against him. The inquiry was conducted in secret and one of its main purposes was to obtain evidence to present to a grand jury.

It was the grand jury, not the justices, who committed an accused to trial.

Dawson J went on:

With the establishment of an organised police force in England in 1829, the role of the justices underwent change.

Provision was made for witnesses to appear before the justices to be examined in the presence of the accused and to be cross-examined by the accused or his counsel. Depositions of the evidence were to be taken down in writing and signed by the magistrate and the accused. The accused was no longer obliged to be examined. He was to be invited to make a statement and was to be cautioned (that he was not obliged to answer) ...

... if, in the opinion of the justices such evidence is sufficient to put the accused party upon his trial for an indictable offence, or if the evidence given raise[s] a strong or probably presumption of the guilt of such accused party, then such justice or justices shall, by his or their warrant, commit him to the common goal or house of correction ... or admit him to bail ...¹⁷³

Separate official prosecutorial authorities evolved in common law jurisdictions during the course of the 19th Century, effectively limiting the right of a citizen to initiate a prosecution of a criminal offence. Until this time, the issue of indictment remained with the grand jury; the grand jury is now long gone. The ex officio procedure is a legacy of this historical development. This procedure allows an indictment to be presented by the Attorney-General or the ODPP in the Supreme or District Court without committal by a magistrate.

The Director of Public Prosecution's (or the Attorney-General's) decision to indict replaces the grand jury. Neither is bound by a magistrate's decision to commit or not commit.¹⁷⁴

¹⁷³ *Grassby v The Queen* (1989) 168 CLR 1 per Dawson J at [11].

¹⁷⁴ The most common use of ex officio indictments by the ODPP reflects the outcome of charging offenders differently to those committed for trial, as a consequence of plea bargaining.

The committal process has played a pivotal role in the prosecution of serious offences. Its importance has long been recognised in Australia:

It is now accepted in England and Australia that committal proceedings are an important element in our system of criminal justice. They constitute such an important element in the protection of the accused that a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair.¹⁷⁵

Numerous courts have since acknowledged the fundamental contribution made by a properly conducted committal hearing in ensuring procedural fairness to an accused.¹⁷⁶

Australian jurisdictions have substantially reformed the committal process in recent years. The introduction of the 'paper' or hand-up committal in most jurisdictions in the 1970's and 80's was the first significant reform. This allowed the evidence in chief of prosecution witnesses to be given in statement form. In some jurisdictions this was mandatory, in others it was optional as in Queensland. Where the accused does not wish to cross-examine any witnesses the process is known as a 'full hand-up committal'.

Most jurisdictions have introduced more substantial reforms in the last 15 years. New South Wales, Victoria and South Australia have all imposed limits on the circumstances in which an accused may cross-examine witnesses. Western Australia and Tasmania have gone further by effectively abolishing the committal. The ACT has recently passed a bill adopting reforms along the New South Wales and Victorian models. Queensland and the Northern Territory are now the only Australian jurisdictions that have retained an unrestricted right of an accused to cross-examine prosecution witnesses. The key features of the committal process in different jurisdictions are set out in Appendix 11.

In practice the introduction of the so called paper committal significantly changed the nature and role of the committal process. In the past prosecution witnesses gave oral evidence to ensure that there was sufficient evidence to justify a trial. Examination and cross-examination of witnesses was directed primarily at ensuring that the evidentiary threshold was met. Now, cross-examination of witnesses on their written statements is directed at laying the groundwork for trial, in particular by exposing

¹⁷⁵ *Barton v R* (1980) 147 CLR 75 per Gibbs ACJ and Mason J at 100.

¹⁷⁶ *R v Sloan* (1988) 32 A Crim R 266; *Director of Public Prosecutions v Bayly* (1994) 126 ALR 290; *Purcell v Vernardos* (No.2) [1997] 1 Qd R 317.

inconsistencies in testimony. In other words, cross-examination is directed at 'pinning' down the witness, a purpose which is quite different from the historical purpose of the committal.

As I have observed elsewhere, the criminal justice system continues to evolve. The committal process now is in need of some clarification of purpose and adjustment to align it with the achievement of an early resolution.

Although there is a deep attachment to the current form by many in the legal profession, in my view the current form has been overtaken by social, technological and other developments. It was recently described by the Chief Justice of the Supreme Court of Queensland, as 'an albatross' around our collective necks.¹⁷⁷

The important question is not whether the committal should be abolished but how to meet the essential purposes of the committal in a more effective way, consistent with principles of fairness and access to justice. I consider these questions later, but in my view such an approach is not inconsistent with the judicial statements about the role of committals referred to earlier. It is not the particular form of process that is sacrosanct but the outcome that delivers justice.

As the last State to introduce reforms in this area we have the opportunity to benefit from the successes and failures of developments in other jurisdictions. For example, in New South Wales there has been a series of legislative refinements as well as a significant body of case law. Western Australia on the other hand has experienced some unintended adverse consequences from its abolition of committals (discussed later in this chapter).

Simply because a reform has been effective elsewhere, does not mean, however, that it can be transplanted to a different cultural and social context and be assumed to have the same results. Local legal cultures must be considered and local refinements and adjustments will necessarily be required over time.

¹⁷⁷ Comment of Chief Justice de Jersey at round table No. 1 on 20 August 2008.

9.3 Current Procedure in Queensland

The committal procedure is only relevant to indictable offences. Parliament determines which offences are indictable. The District or Supreme Court, not the Magistrates Court, has jurisdiction to deal with indictable offences, except where parliament has specified that an indictable offence may be dealt with summarily by a magistrate. All criminal matters start in the Magistrates Court. The committal is the primary mechanism for transmitting a criminal matter to the Supreme or District Court.

The committal procedure for indictable offences is contained in the provisions of the Queensland *Justices Act 1886* (Part 5, Divisions 5-9). The *Justices Act 1886* permits different forms of committal proceedings including:

- a full committal with witnesses called for examination in chief, cross-examination and re-examination of all witnesses;
- a full hand-up or 'paper' committal in which the defendant (where represented) consents to all evidence being tendered to the magistrate in the form of written statements in which case the magistrate is not required to make an assessment of the evidence but automatically commits the defendant to the higher court; or
- a combination of the above in which, by consent, some statements are tendered as evidence in chief but some or all of the witnesses may be examined, cross-examined and re-examined by consent.

Who prosecutes committals?

In Queensland the prosecutorial function in committal proceedings for State offences is shared between the Queensland Police Service (QPS) and the ODPP.

Commonwealth offences are prosecuted by the Commonwealth Director of Public Prosecutions. The ODPP estimates that it conducts approximately 25% of all committals across the State.

Since 1996 the ODPP has conducted the prosecution of all matters listed for committal in Brisbane Central Magistrates Court (not suburban Brisbane courts). The committals in the Brisbane Magistrates Court are conducted under the terms of the Brisbane Committals Protocol, an agreement between the QPS, ODPP, Legal Aid

Queensland (LAQ) and the Chief Magistrate (Appendix 5). The ODPP also conducts committals in Ipswich and in sexual offence matters and offences involving violence against women in Southport.

The prosecution of all other committals in Queensland is conducted by the QPS. However, the QPS can request the ODPP to conduct committals in complex or sensitive matters. In practice, the ODPP does not generally become involved in criminal matters that it has not prosecuted at committal until after an accused has been committed to the Supreme or District Court for trial or sentence.

The issue of who should conduct the prosecution of committals is discussed later in this chapter.

Committal Process

Prior to a committal, the police collect evidence from witnesses in the form of written statements and put together the 'brief of evidence' which contains the QP9 (a form prepared by the arresting officer detailing the charges and facts alleged) the witness statements, any confessional material and other relevant material. The prosecution provides a copy of the brief of evidence to the accused or his or her lawyer who then indicates which witnesses, if any, are required to give oral testimony or be available for cross-examination or may indicate agreement to a 'full hand-up committal'.

The accused is generally required to be present throughout the committal (s 104 and s 104A *Justices Act 1886*). At the committal hearing the charges are read. The prosecution then presents its evidence either by tendering witness statements or by the witnesses giving oral evidence. The accused may then enter or decline to enter a plea and he or she can then cross-examine the witnesses.

If the accused has agreed to the 'full hand-up' committal, witness statements are tendered and no witnesses are required. In practical terms consent to a hand-up committal reflects acceptance by a defendant that the matter should be committed to the Supreme or District Court (that there is a case to answer).

If there is no consent the matter is treated as a full committal. This is commonly followed by consent to a hand-up on the day of the committal hearing. This is the

cause of discontent by witnesses who are summonsed but not needed and is a waste of court and police resources.

There are a number of reasons an accused will cross-examine witnesses but primarily it will be to work out the best line of defence for trial. The committal hearing gives the accused the opportunity to test evidence, explore inconsistencies and expose prosecution weaknesses.

The prosecution may also choose to call and examine a prosecution witness at committal, for example if it is not clear whether the witness will be hostile or to see how well they hold up under cross-examination.

After the evidence has been presented the accused may make submissions, for example that there is 'no case to answer' and committal is not justified. It is rare for a magistrate not to commit.

Section 104(2) of the *Justices Act 1886* requires the magistrate to consider whether the evidence is sufficient to put an accused on trial but not in the case of a full hand-up. This test is a relic of the days of when the grand jury not the justices' committed. Case law has determined that whether 'the evidence is sufficient to put the defendant on trial for an indictable offence' means, in effect, whether a reasonable jury properly directed according to law could convict; a 'prima facie' case.¹⁷⁸

Where the accused consents to a 'hand-up' committal, the magistrate is not required to consider whether the evidence (written statements) satisfies this evidentiary question. As I noted earlier, in effect, consent to the full hand-up committal is an acceptance that the committal is justified.

Where the Magistrate is satisfied that a prima facie case has been established by the evidence in relation to all or some of the charges, she or he will commit the accused to the Supreme or District Court for trial or sentence. The magistrate may also commit on different charges from those presented if satisfied that the evidence establishes a prima facie case for those rather than the original charges.

¹⁷⁸ *Purcell v Vernardos* (No.2) [1997] 1 Qd R 317.

At this stage the Magistrate will ask the defendant if they wish to say anything in answer to the charge or enter any plea. Any answer will be transmitted with the deposition upon committal. Depending on whether a plea is entered, the matter will be committed either for trial or for sentence.

Where the magistrate is not satisfied that a prima facie case has been established in relation to all or some of the charges, the charges will be dismissed. Dismissal of a charge or charges is not an acquittal. As I said earlier, the Attorney-General or the ODPP can present an ex officio indictment. The police can initiate the same charges at a later stage if, for example, more evidence comes to light, or they can bring different charges in relation to the same incident.

Where the defendant pleads guilty and it is a matter which may be dealt with summarily and the accused agrees to it being dealt with summarily, the magistrate may sentence him or her (see s 552B (3) *Criminal Code Act 1899*). The Review recommendations in relation to the summary disposition of indictable offences are dealt with in Chapter 8: *Summary Disposition of Indictable Offences*.

Where there is no election or the matter cannot be dealt with summarily and the accused consents to a full hand-up committal the magistrate will commit him or her for sentence to the Supreme or District Court. In this case the accused must be legally represented otherwise a full committal must be conducted.¹⁷⁹

At any point the prosecuting authority can also offer no evidence on the charge (NETO) or may discontinue the prosecution.

9.4 How well does the committal process work?

It is difficult to comprehensively evaluate the effectiveness of the current committal system because of the lack of valid and reliable information. There is also likely to be considerable variation in local court practice, legal and police culture in the various regions represented by the 87 different Magistrates Courthouses in the State. As a result even where information is available, not all observations or inferences will apply to how the committal process works in practice in every region.

¹⁷⁹ *Justices Act 1886*, s 110A(4).

Throughout this Report, I have referred to the endemic problem of the lack of quality, reliable information. Nowhere is this more evident than in relation to the conduct of committal proceedings.

There are a number of separate systems that collect and store data in relation to committals. These systems are maintained by QPS, Queensland Courts, ODPP and Legal Aid Queensland. However, each of these systems has been created for the needs and purposes of the agency which developed it and not for the overall purpose of analysing the effectiveness of committals. These issues are discussed in Chapter 6: *The Information Management Issues*.

Consequentially, the information available from these systems does not give us accurate information about the most fundamental issues concerning the committal process: the proportion of full hand-ups; the average duration or number of witnesses called and cross-examined; the rate of discharge etc.

Ideally, of course, a complete data picture would underpin recommendations for reform. It is clearly preferable that recommendations for reform be 'evidence based'. On the other hand, lack of data does not justify inaction. Most users of the court system acknowledge that the committals process needs improvement.

In the absence of comprehensive data it has been necessary to draw inferences from information collected from Queensland Courts, the Police, LAQ and the ODPP; to rely on interviews with court staff and users of the system; and to observe processes directly. Of necessity, much of this evidence is anecdotal; however there is a surprising amount of concurrence between different sources of information. Future Courts and the Review team have also conducted a survey of a small sample of Brisbane Magistrates Court files and a more extensive review of 68 ODPP concluded files for matters committed for trial only and listed for trial in April, May and June 2008.

From these various sources of information and subject to all of the caveats above, it is possible to draw a number of inferences.

Full hand-up committals

Although 8099 people were committed to the Supreme or District Courts for trial or sentence in 2007-08 it is not possible to accurately determine the number of matters that were committed through a full hand-up, partial hand-up or fully contested committal.

In the absence of reliable data, the Review team has reviewed files and sought anecdotal evidence from a number of sources to give some indication of the rate of full hand-up (that is, acceptance of the committal by tendering written witness statements with no oral testimony or cross-examination).

Table 9(a): Rate of full hand-up*

Source ¹⁸⁰	Estimated proportion of full hand-up
Magistrates Court – Beenleigh	70-75%
Magistrates Court – Brisbane	70%
Magistrates Court – Caboolture	60%
QPS – Beenleigh ¹⁸¹	82.5%
Future Courts ¹⁸²	76%
DPP concluded files ¹⁸³	40%*
ODPP estimate	60%
AVERAGE¹⁸⁴	68.2%

* This figure does not include matters that were committed for sentence which are likely to have a higher rate of full hand-up committal. In addition 10% of files did not record details about the committal process.

¹⁸⁰ Most of these are estimates only. The system is unable to provide accurate data.

¹⁸¹ This is not an estimate but data recorded by QPS for the Beenleigh Court for a six month period.

¹⁸² Small sample of Brisbane Magistrates Courts files.

¹⁸³ A 3 month period from the District Court trial list.

¹⁸⁴ For comparison purposes the highest and lowest figures were removed.

There may be considerable variation of rate of hand-up in different courthouses across Queensland due to local factors. For example, the different rates estimated for Caboolture and Beenleigh may reflect local issues; we have no way to determine this.

It is accepted among those consulted that the vast majority of committals are conducted by way of the full hand-up process.

It is notable that the only accurate data (QPS data for Beenleigh) is higher than the estimated figure for that court.

Last minute acceptance of full hand-up

A significant proportion of matters are set down for a committal hearing where the legal representative for the accused indicates that witnesses are required for cross-examination. However, ODPP staff estimate that 10-30% of these resolve as a full hand-up on the morning of the hearing. Court staff estimate that approximately 25%-40% of cases set down for a committal hearing in Brisbane end up as full hand-ups. Magistrates and police confirm that this late agreement to a hand-up is a serious problem.

This practice causes significant inconvenience to the courts, to witnesses and to the prosecution. It is extremely wasteful of public resources. The cost of this practice is generally borne by others, court time is lost, cases ready to proceed are not dealt with and prosecutions preparation may be wasted.

Lack of preparation and incompetence by some defence lawyers is cited as a common explanation. Some believe that the Legal Aid funding policy has a role (see Chapter 4: *An Overview of the Queensland Criminal Justice System*). In addition, certain law firms are renowned for being unwilling to negotiate or discuss pleas unless all witnesses are made available.

Listing issues

The Brisbane Central Magistrates Court overlists by approximately 30% to take into account the matters that resolve to a full hand-up on the morning of the hearing.

There are also a number of matters set down for committal that change to full hand-up in the week before the hearing date. While these are not as disruptive to witnesses or court lists they do still create administrative problems in terms of making effective use of court resources.

The QPS has also pointed to the high proportion of matters in which the accused elects to have a matter dealt with on indictment but could have elected to have the matter dealt with summarily. As a consequence instead of being resolved early on, these matters are set down for sometimes multiple committal mentions; then perhaps after legal advice there is a change of election and a plea of guilty at a late stage. This creates significant problems for QPS and the courts. (This issue is discussed in Chapter 4: *An Overview of the Queensland Criminal Justice System* and referred to in Chapter 8: *Summary Disposition of Indictable Offences*).

The prevalence of these occurrences makes court management and listing very difficult. Court listing is a vexed art at the best of times but having to accommodate these practices exacerbates the inherent difficulties. As a consequence, lawyers, ODPP, accused and witnesses frequently have to wait around for a magistrate to hear a committal that has been set down because all listed matters are proceeding; or magistrates end up without hearings to conduct because so many matters have resolved as a hand-up or a plea on the morning.

Court staff estimate also that approximately 5% of committals are part heard sometimes resulting in significant delays between hearings and on rare occasions different parts of a committal process being heard by different magistrates. There is significant variation of listing practices between Magistrates Courts. Some courts are renowned for having many part heard matters because of fixed time allocation; if the matter does not finish in the allocated time, it is adjourned to the next available date which may be some months down the track.

Contested Committals

The Review has not been able to ascertain:

- the average number of witnesses required for cross-examination;
- whether the defence or prosecution required witnesses to give evidence; or
- the average duration of committal hearings.

Table 9(a) of full hand-up data however gives a good indication of the likely number of contested committals.

It is well accepted that the majority of contested committals are partial hand-ups in which most evidence is accepted in statement form and only a small proportion of witnesses are cross-examined. ODPP staff estimate that the majority of contested committals involve fewer than 6 witnesses being called and take less than half a day. Brisbane magistrates confirm this estimate.

Both experienced ODPP staff and court staff say that full committals in which most or all witnesses are required to give full oral testimony and be available for cross-examination, are rare and only occur in more serious offences such as rape.¹⁸⁵

Effect of contested committal on outcome

Current information systems do not report on the outcomes in a clear and consistent way.

It is not possible to determine the correlation between a contested committal and the outcome, that is a discontinuance (either by nolle prosequi or no true bill) by ODPP or with verdict at trial.¹⁸⁶ There is no comprehensive information about the proportion of cases in which cross-examination of witnesses results in charges being dropped at trial, verdict or the accused not being committed at all. There are no records kept on the proportion of matters in which a 'no case submission' is made or how often such submissions are successful.

The Review team has sought information on the proportion of matters in which the magistrate dismisses all or some charges at committal, however little information could be found. In a very small sample of cases reviewed by Future Courts, one or more charge was dismissed in approximately 11% of cases. Court staff confirm that this seems about right. The ODPP data on matters which it prosecuted at committal in 2007/08 show that 16% of committals are discharged or withdrawn, however there is no further breakdown of this figure.

¹⁸⁵ The ODPP has recently implemented a new information management system which will provide better and more detailed information in future.

¹⁸⁶ It may be possible to determine this from individual ODPP files but it is beyond the capacity and scope of the review to undertake such a mammoth analysis of ODPP files.

Anecdotally, it is considered to be very rare for all the charges to be dismissed by the magistrate at committal. It is much more common for some only of the charges to be dismissed.

No evidence to offer (NETO)

A small proportion of matters are 'NETO'd' by the QPS. In effect, this means that the QPS discontinue the prosecution because they become aware that there is insufficient evidence to sustain the charges brought – the charges may be inappropriate or there may be a change in the evidence (a witness disappears or scientific tests do not substantiate the charges etc).

Data from the Brisbane Magistrates Court for January to October 2008 indicates that in 3% of all matters there was a NETO on all charges, that is 144 matters out of a possible 5321.¹⁸⁷ This figure is low because the data source (manual court records for Brisbane committals callover) only records it as a proportion of total matters dealt with, including all adjournments for further mention, on a particular day. There is no tracking of which of these later become a NETO at a future date. In the Future Courts sample of Brisbane Magistrates Court matters, charges in 11% of matters were NETO'd.

Number of court events

As I stated in the Chapter 4: *An Overview of the Queensland Criminal Justice System* I prefer the term 'court event' to the commonly used term 'mention'.

The Magistrates Court information system does not record the number of court events that have occurred prior to the committal in any given case or as an average. That is, the court system (QWIC) can be searched by an individual case file, where the number of court events can be counted, but when searched by court events, it can not distinguish whether they are related to the same case file. These issues are canvassed in Chapter 6: *The Information Management Issues*.

¹⁸⁷ 'Matter' here means one person who may have multiple charges.

There are usually a number of court events, some of which do not appear to progress the case, prior to the committal hearing. There are many reasons for this. I refer to the 'Death of the Mention' project earlier in the report (see Chapter 4: An Overview of the Queensland Criminal Justice System).

From the survey conducted of ODPP concluded files for matters committed for trial (not sentence) and listed in the District Court in April, May and June 2008 the average number of court events in the Magistrates Court was 5.6. This is broadly consistent with court staff estimates. It should also be noted that some of these matters are relatively minor: wilful damage, minor assault etc. (This is discussed further in Chapter 8: *Summary Disposition of Indictable Offences.*)

Unnecessary court events are both wasteful of public resources and also contribute to delay in the system. Court staff estimate that it takes 4-6 months from first arrest to committal. In the 68 ODPP concluded files examined there was an average of 7.4 months between arrest and committal.

Effect of prosecuting authority (QPS and ODPP) on outcome

Review staff have endeavoured to assess whether who prosecutes the committal makes a difference to the conduct and outcome of matters. For example, it might be useful to know whether this has an effect on whether: witnesses are cross-examined; charges are dropped by the prosecutor or accused is discharged by the magistrate; and the number and timing of pleas of guilty.

There is some indicative data from the review of ODPP concluded files that the agency which prosecutes at committal might make a difference. For example, matters prosecuted by the QPS:

- were on average more likely to result in a trial and conviction rather than a plea of guilty;
- involved on average a longer delay; and
- more often involved a change of charges from committal.

Whether this is simply a matter of correlation or causation is not clear. However, the implications are obvious – the cost of greater delays, more trials, more changes to charges supports arguments for ODPP conducting a greater number of committals prosecutions. This is discussed later in this chapter.

The ODPP keeps records for the matters which it prosecutes at committal. The results of these are set out below. However there is no single source of data on the balance (approximately 75%) of committals prosecuted by the QPS.

Table 9(b): Committals prosecuted by the ODPP

Total number ¹⁸⁸	2381
Matters referred back to QPS for further investigation	296 (14%)
Committed for Sentence	81 (3%)
Committed for Trial	974 (46%) *
Dealt with Summarily	534 (25%)
Discharged/Withdrawn	384 (18%)

* Approx 80-85% of all matters ultimately resolved by a plea of guilty prior to trial, many in the last week.

9.5 Committal Process in Other Jurisdictions

The committal process has been substantially reformed in all common law jurisdictions. Evidence in statement form rather than calling the witness is now accepted or mandatory in all Australian jurisdictions.

In all states except Queensland the committal has either been abolished or restrictions on the right to cross-examine witnesses have been introduced. The ACT has just passed reforms following the New South Wales model. Western Australia and Tasmania have effectively abolished committal hearings and in each case the committal to the higher court takes place administratively. The Northern Territory and Queensland are the only remaining jurisdictions that do not require some reason or justification to be given before an accused can call and cross-examine a prosecution witnesses.

¹⁸⁸ Committal may involve multiple accused and multiple charges.

The table below outlines some of the key differences in the committal process in other Australian jurisdictions. See also Appendix 11 for more detailed information about the committal process in other jurisdictions.

Table 9(c): Comparative committal processes

	NSW 189	VIC 190	WA 191	TAS ¹⁹²	SA 193	ACT 194 **	NT ¹⁹⁵	QLD 196
Prosecution evidence in statement form	YES	YES	YES	YES	YES	YES	YES	YES
Prosecution disclosure certificate	NO ****	YES ***	YES	NO	NO	NO	NO	NO
Administrative committal by Registry	NO	NO	YES	NO	NO	NO	NO	NO
Committal on the papers	YES	YES	N/A	N/A	YES	YES	YES	YES
Case conference	YES ****	YES	YES	NO	NO	NO	NO	NO
Restricted right to call & cross-examine witness	YES	YES	N/A	N/A	YES	YES	NO	NO
Limitations on scope of questioning	YES	YES	N/A	N/A	NO	YES	NO	NO
Exclusion of category of witnesses from cross-examination (children/witnesses/complainants/sexual offences)	YES	YES	N/A	N/A	YES	YES	YES	YES

¹⁸⁹ *Criminal Procedure Act 1986 (NSW)*.

¹⁹⁰ *VIC – Magistrates Court Act 1989*.

¹⁹¹ *WA – Criminal Procedure Act 2004*.

¹⁹² *TAS – Justices Act 1959*.

¹⁹³ *SA – Summary Procedures Act 1921*.

¹⁹⁴ *ACT – Magistrates Court Act 1930*.

¹⁹⁵ *NT – Justices Act 1886*.

¹⁹⁶ *QLD – Current provisions under the Justices Act 1886*.

** ACT – After commencement of the *Crimes Legislation Amendment Act 2008*.

*** - A case direction notice must be filed by the defendant and the ODPP.

**** - The *Criminal Case Conferencing Trial Act 2008* amends some of the procedures at the Downing Centre, Sydney and Central Sydney Local Courts during the trial period. Pre-conference disclosure certificate and compulsory conference certificate are required during the trial.

Other common law jurisdictions have also substantially reformed or abolished the committal.

The *Criminal Procedure Bill (New Zealand)* (passed June 2008 but not yet in effect at the time of writing) reforms the preliminary hearing process by requiring evidence to be given in writing unless the court orders an oral hearing. Committal for trial is automatic unless one of the parties applies to examine or cross examine witnesses which will only be granted: where the witness is to give evidence concerning identification; in relation to an alleged confession of the accused; the witness is an alleged accomplice or the witness has made an apparently inconsistent statement.

¹⁹⁷

In England and Wales there has been a gradual decline in the use of committals over the past few decades. Paper committals were introduced in 1967. A direct transfer system to the trial court was introduced for some categories of offences in 1987 and this has gradually been extended to all indictable offences. There are limited opportunities for pre-trial examination of witnesses after committal by this process.

In Canada the prosecution can bypass the committal by direct indictment in any case.¹⁹⁸ There have been efforts at abolishing the committal altogether. Recent reforms have not resolved that question, but have been directed at making preliminary inquiries more efficient. A preliminary inquiry is no longer automatic but must be specifically requested with a list of specific issues to be covered.¹⁹⁹

In making changes to the system, it is important to ensure that functions identified earlier in this chapter continue to be served by whatever system is put in place, though perhaps in a different way.

The Western Australian experience is instructive. Western Australia has effectively abolished the committal proceeding with a new regime for more rigorous disclosure and other obligations to be discharged before the indictment is presented.

¹⁹⁷ beehive.govt.nz – the official website of the New Zealand Government.

¹⁹⁸ *Criminal Code RSC 1985* (Canada) s 536(2).

¹⁹⁹ Baer, Nicole, Department of Justice Canada, 'Modern Justice', *Justice Canada* 2 (2008) 4, at <http://www.justice.gc.ca/eng/dept-min/pub/jc/vol2/no4/page3.html>.

It appears that these obligations are not being satisfactorily fulfilled; matters are transferred to the District Court with few progressive steps made by the parties to clarify or resolve the pre-trial issues. One of the unintended consequences of abolishing the committal hearing has been the inadvertent elimination of opportunities for discussion and negotiation between the prosecution and defence. This has led to the need for more intensive judicial supervision in the District Court before there is a plea or a trial.²⁰⁰

It is too early to tell whether these problems are simply teething problems, policy failure or the result of local legal culture.

Similarly, it is too early to make any judgements about the success or otherwise of the reforms in Tasmania which were introduced earlier this year. Some feedback suggests that there are teething problems, particularly with respect to compliance with new time lines.

9.6 Rationale for change

After considering the available information about the committal process, the submissions and views of many people with whom I have consulted, as well as the experience of other jurisdictions, it is clear that the committal process needs reform. The current system does not make effective use of public resources and has adverse effects for many.

There needs to be a more focussed, streamlined, effective committal process.

When the committal is appropriately used with well briefed legal advisors, it can assist the parties to clarify issues, refine the charges before indictment, negotiate pleas and can lead to weak cases being identified and discontinued. In some circumstances, the pre-trial cross-examination of witnesses is necessary to enable an accused to either know the case he or she must answer, or to establish whether there is sufficient evidence to proceed to trial.

²⁰⁰ Personal communication Chief Judge Toni Kennedy District Court Western Australia 26 August 2008.

In other words, sometimes a committal hearing is justified.

I am however convinced that unfettered access to the courts without having to provide a reason can no longer be sustained. It is both inefficient and ineffective. It causes delay and is costly but gives a poor return. Inefficiencies impact on all users of the system, for example witnesses are too often called unnecessarily to give evidence or are cross-examined with no genuine purpose served.

I am particularly concerned about the disproportionate number of matters in which there is agreement to the full hand-up at the last minute. Witnesses, particularly expert witnesses such as doctors, who may be required to give evidence on many different occasions, are put to great and unnecessary inconvenience by this practice. The costs of this are borne by many people, some of whom have nothing at all to do with the case at hand, not even as witnesses (for example, the patients of these doctors).

Review staff witnessed one such case where a host of witnesses were in attendance at the request of the defence, including a doctor who had postponed surgery for his patients, only to be told on the morning at the court that he was no longer required. In this case, the only issue of contention was whether the ODPP would be seeking a custodial sentence for the accused.

The prosecutor in the case advised that at no stage were they seeking a custodial sentence but the legal representative did not ask about that until the morning of the committal. A plea was entered and the accused was committed for sentence. It is not possible to calculate the full cost and consequence of such events, nor on whom the burden of that cost falls. It may reasonably be assumed, however, that the practice leads to considerable frustration and loss of confidence in the justice system.

Anecdotal reports, as well as submissions to this Review, point to a systemic problem of inadequate preparation by legal representatives. One submission refers to the problem of 'incompetence, inexperience, delayed consideration, lack of resources or a lack of focus and diligence on the part of the parties' representatives'. It is easier for defence representatives to ask for all the witnesses to be called than to focus their minds on the issues at an early stage.

The committal process is a relic of an earlier era. With the advent of a professional police service and independent prosecuting authority and other developments, the historical reasons for the committal no longer exist. Many argue that the ODPP is now the more appropriate filtering agent in most cases.

There is a consistent and steady trend towards reform of the committal process in all common law jurisdictions both in Australia and overseas. None of the submissions have pointed to any systemic injustice that has arisen in these jurisdictions.

9.7 A new committal process for Queensland

I reiterate:

The principal purposes of the committal process are to ensure:

- the accused knows the case against him or her; this is dealt with in Chapter 5: *Disclosure*; and
- a committal of the matter for trial in the Supreme or District Court is justified (in effect, an evidentiary threshold has been met before a person is required to stand trial).

The committal process also serves a number of additional functions by providing an opportunity for the parties to:

- test evidence;
- filter out weak cases;
- refute evidence;
- identify early pleas;
- refine charges; and
- clarify issues before trial.

It also provides a mechanism for the independent review of the prosecution case by the committing magistrate.

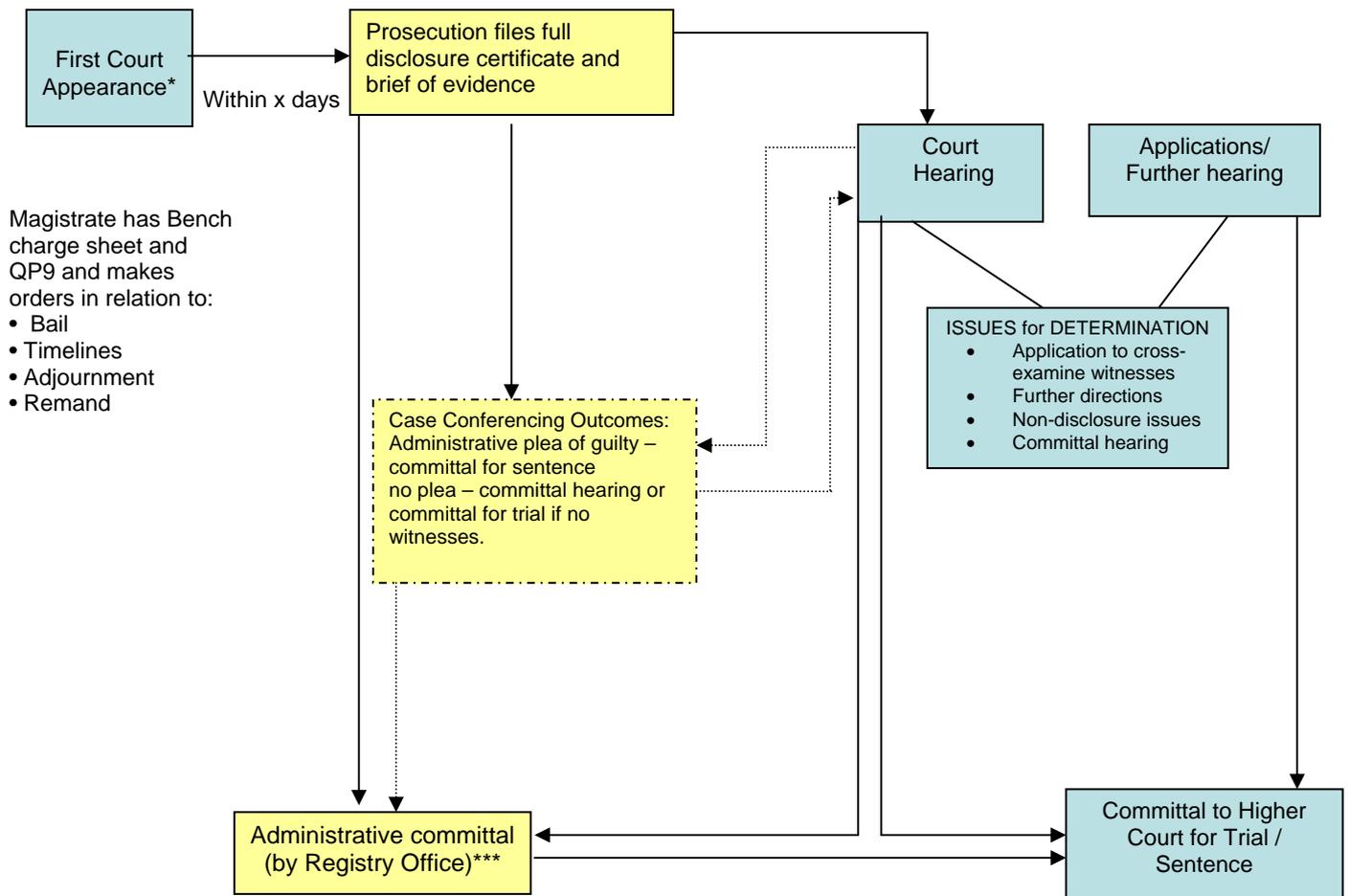
Under current provisions, a committal automatically takes place unless the defence agrees to opt out of the committals process by agreeing to the hand-up process. The defence agrees to this in a large proportion of matters, significantly more than half (see Table 9(a)), many of these at the last minute. Last minute reversal of the defence position erodes confidence in the system for witness and victims and

compromises the effective use of court and prosecutorial time. In any case, it is rare for other than a limited number of witnesses to be cross-examined.

I propose that the process be reversed so that administrative committal is the default position and a committal hearing with examination and cross-examination of witnesses is only conducted where justified. In the absence of agreement witnesses can only be called by the order of a magistrate or by the ODPP.

Set out below is a flowchart showing how the new committal process will work.

COMMITTAL OF INDICTABLE OFFENCES



* This is a simplified "ideal" model for Brisbane committals. There will be variations for local circumstances.

** One intention of the proposed process is to reduce the number of unnecessary court events. There may be circumstances for example where an accused is unrepresented, where additional court events will be necessary. Note the recommendations re: broader definition of 'hearing' and s *Justices Act 1886* (power of clerk to make any orders that magistrate has power to make) mean that if parties agree, parties do not need a court event to get a hearing date.

*** S651 applications could be dealt with simultaneously.

The flowchart provides a framework for a new, integrated process but it does not purport to deal with all variations and contingencies. It demonstrates the interactive nature of the processes.

The new committal system is founded on timely, compliant disclosure, see Chapter 5: *Disclosure*.

The key features of the new process are:

- Prosecution and defence will be obliged to canvass issues bearing on whether there is to be a plea of guilty, for example, clarification of charges, the sentence sought and they will need to work towards narrowing of the issues;
- The magistracy will have responsibility for supervising the process and for intervening when justified. This may happen on the magistrate's own initiative or on the application of a party. The magistrate will have power to:
 - give directions;
 - enforce directions;
 - direct parties to confer and report;
 - set timetables; and
 - deal with non-compliance.
- Protocols should be developed by the Magistrates Court, ODPP and other players to work out the machinery for various processes including:
 - Separate court management of summary offences and indictable offences; and
 - QPS lodgement of the 'brief of evidence' and disclosure certificate;
- It should be mandatory that evidence of witnesses be given in statement form subject to specified exceptions;
- A mandatory case conference will be held and reported on, initially only for matters under the Brisbane Committals Protocol;
- Witnesses can be called by the prosecution, by consent or by order of a magistrate who is satisfied that is justified and sets the parameters for the cross-examination;
- There will be a new committal test; and
- There will be a direct administrative committal unless it is agreed or ordered witnesses can be called.

9.8 Issues

A number of issues arise from this proposal which require more detailed consideration. I will deal with these in the following sequence:

- The prosecution of committals
- Calling witnesses and cross-examination of witnesses at committal
- Administrative committal in the Registry
- Witness statements
- Unrepresented accused
- Case conferencing
- Alignment of administrative committal and ex officio indictments
- The committals test
- Magistracy supervision of committal

The prosecution of committals

Until 14 years ago, the QPS prosecuted all committals in Queensland. The ODPP now prosecute approximately 25% of all committals (in Brisbane, Ipswich and Southport) and in some other limited circumstances. The Queensland Police Service prosecutes the remaining 75% committals throughout the State.

Ideally all committal hearings would be prosecuted by the ODPP as they are in most other Australian jurisdictions. The AIJA recommended nearly 20 years ago that the relevant indicting authority should ultimately be responsible for the conduct of all committals. The best practice model for the determination of indictable offences developed by the National Legal Aid and the Conference of Australian Directors of Public Prosecution proposed that 'the ODPP should have responsibility for the prosecution of matters at committal'. In September 1999, the Standing Committee of Attorneys-General also recommended that the ODPP should be responsible for all committals, including the responsibility for deciding what material to present at

committal.²⁰¹ Twenty years ago the Fitzgerald Report also recommended transferring police prosecution responsibilities to the DPP.²⁰²

This approach was strongly supported by the Bar Association of Queensland, the Queensland Law Society, Legal Aid Queensland and many of those with whom I consulted. No one expressed an opposing view. The QPS did not express a view on the issue.

I support the ODPP having the conduct of all committal proceedings in Queensland.

There are obvious benefits in separating the investigative and prosecutorial functions. The Director of Public Prosecutions (DPP) is an independent statutory office and oversees a specialist, professional prosecutorial office. The ODPP lawyers are independent. In contrast, the QPS is a hierarchical chain of command structure with a focus on detection and investigation of crime.

Further, the culture and structure in which police prosecutors must operate makes it difficult to make independent timely decisions. For example, this Review was told that in order for QPS prosecutors to change a charge at the committal or earlier he or she must write a letter to a superior who must then take the matter to their senior officer for approval. The process generally takes some weeks. This is obviously problematic and frustrating for defence lawyers in trying to negotiate pleas, clarify charges etc. Many defence lawyers understandably do not bother until the matter is transferred to the ODPP after committal.

In addition, police prosecutors are not responsible for prosecution of matters in the Supreme or District Courts and so are not affected by considerations ODPP prosecutors must take into account. This may contribute to over charging practices, indicated by the frequent reduction of charges by the ODPP prosecutors after committal.

Police prosecutors are subject to the obvious constraints of a hierarchical organisation and are often out ranked and may be over borne by experienced

²⁰¹ Standing Committee of Attorneys-General, Deliberative Forum on Criminal Trial Reform, (The Martin Report), June 2000, [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~xxforumreport.pdf/\\$file/xxforumreport.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~xxforumreport.pdf/$file/xxforumreport.pdf) at p 6.

²⁰² Report of a Commission of Inquiry pursuant to orders in Council, 29 June 1989 (the Fitzgerald Report), available at: <http://www.cmc.qld.gov.au/asp/index.asp?pgid=10877>, pp 381-382.

investigators. It is apparently difficult to attract experienced senior investigators to prosecutorial roles.

Other states have moved progressively towards the relevant ODPP having responsibility for the prosecution of all committals. Only Western Australia, South Australia and Queensland rely on police prosecutors.

Table 9(d): DPP prosecution of committals

Jurisdiction	DPP prosecutes all	Police prosecute some	Notes
ACT	YES	NO	DPP does all prosecutions, including summary matters
NT	YES	NO	Rarely, civilian prosecutors handle simple committals in remote locations
NSW	YES	NO	DPP does all prosecutions except In rare instances where police conduct prosecution as agents for DPP for paper committals in remote locations
Vic	YES	NO	The Act requires DPP to prosecute
Tas	N/A	N/A	No committal process
SA	NO	YES	DPP prosecutes committals in Adelaide, four metropolitan courts, high profile and police defendants
WA	NO	YES	Moving towards DPP conducting all prosecutions for committals
Qld	NO	YES	DPP prosecute committals in Brisbane, Ipswich and some matters in Southport. Police can request DPP take over high profile or complex prosecutions. QPS conduct all other prosecutions of committals throughout the State

The involvement of an independent and experienced prosecutor at the committal stage of criminal proceedings greatly facilitates:

- early effective disclosure;
- early identification and resolution of issues that could arise at trial, including agreed statements of facts or areas of dispute;
- decision-making about charges and negotiation of pleas; and
- early pleas of guilty.

I appreciate, however, that there are formidable funding and practical issues to be considered in fully implementing this recommendation. Queensland is a large decentralised State. Given the significant costs involved, the volume of work, the geographic size of the State and the spread of Magistrates Courts and population across the State, the implementation of this recommendation will be a long term project. There will be significant 'up front' costs and practical considerations. One such consideration is the difficulties in attracting and retaining competent and experienced prosecutors who have the option to go to the private bar.

On the other hand there are likely to be significant potential cost savings and other benefits, though these may be difficult to calculate, be diffused and come later. Nonetheless these benefits are real.

The ODPP (NSW) advises that when it took over the prosecution of all committals in that State the number of indictments reduced by about 50%. This was due to better negotiation and disclosure prior to committal proceedings. The ODPP (NSW) set up its offices in regional centres where Legal Aid (NSW) already had offices, in order to facilitate negotiation. The ODPP (NSW) advises that Legal Aid (NSW) are more likely to manage matters in-house where both organisations have offices in the same locality. The ODPP (QLD) and Legal Aid Queensland have similar policies. I have noted previously the anecdotal view that in-house LAQ are more amenable to negotiating and settling matters early on than where private lawyers are engaged by LAQ to act on its behalf.

The ODPP currently has prosecutors in Brisbane, Cairns, Rockhampton, Townsville, Southport, Toowoomba, Beenleigh, Ipswich and Maroochydore. The extension of the ODPP's responsibility for prosecuting committals should initially take place

through these existing offices with a longer term plan for extending beyond these centres.

The extension of ODPP's responsibility for prosecution of committals should, of course, be properly resourced. The office has adopted a successful 'chambers' mode in which there is a mix of senior, experienced and less experienced prosecutors with administrative support. It is essential that the effectiveness of this model not be compromised and the influence or contribution of the senior experienced prosecutors not be diluted in any circumstances.

Calling witnesses and cross-examination of witnesses at committal

This issue was the most canvassed aspect of the Review.

A number of submissions, including the Bar Association of Queensland, the Queensland Law Society and Boe Lawyers argued strenuously in favour of the retention of an unrestricted right to call and cross-examine prosecution witnesses.

The issue was discussed in consultations and at the round tables. The most strident views were in support of unrestricted cross-examination, however, that view was by no means unanimous.

I have set out the purposes served by an effective committals process earlier.

As I said at the second round table, an accused can require the prosecution to call every witness to be available for cross-examination no matter how trivial or insubstantial their evidence. The defence is not required to provide justification. As I have already observed, this has led, perhaps, to carelessness by some legal representatives in demanding a list of witnesses be made available and then at the last moment agreeing to a full or partial hand-up.

It is also the case that, on occasion, witnesses are called and cross-examined with no specific purpose in mind, other than a hope that a line of defence might be revealed, that is, a general 'fishing exercise'. It is also on occasion used for the purpose of intimidating a witness before trial without incurring the jury's disapproval. Requiring legal representatives to justify which witnesses they require for cross-

examination and limiting the scope of questioning will reduce these problems and ensure they put their minds to the issue at an earlier stage.

There is evidence that that many committals are conducted for the primary or sole purpose of testing witness statements prepared by police. I am told that it is not uncommon for the statements of different witnesses to be given in almost identical terms. It is perhaps understandable that police might take short cuts in preparing witness statements where witnesses do give compatible accounts, particularly where it is anticipated that the accused will plead guilty. From a defence perspective, however, multiple statements written in identical terms raises justifiable concerns. Where the evidence relates to a critical question in issue, it is quite reasonable that cross-examination take place.

I anticipate that better quality statements and recording of all witness statements will lead to a reduction in the number of witnesses required for cross-examination (see Chapter 4: *An Overview of the Queensland Criminal Justice System* and recommendations). However, where this does not occur, cross-examination of witnesses will still often be justified.

The committal process will be integrated into a more systematic approach to resolving criminal cases earlier and reducing the number of matters that are dealt with in the Supreme and District Courts (see Chapter 8: *Summary Disposition of Indictable Offences*). It will be founded on compliance with disclosure obligations which I anticipate will also reduce the need for committals. In some cases earlier negotiations between defence and prosecution and compulsory case conference will also assist to resolve matters prior to the committal.

Ultimately, I have not been persuaded that the retention of an unrestricted right to call and cross examine witnesses should be sustained. There are undoubtedly many benefits to the accused, to the prosecution and the criminal justice system generally from a well prepared and conducted committal hearing. On the other hand there are undoubted effects and costs to the system from unnecessary, inappropriate and wasteful use of the committal: court costs, delay, excessive 'churning' through unproductive court events. There are also obvious costs to individuals – witnesses who must be available for cross-examination only to be told at the last minute that they are no longer required and excessive legal costs to accused.

I am satisfied that cross-examination of witnesses should occur only when it is justified.

Circumstances that may justify calling witnesses and conducting a committal hearing include where:

- the defence wants to submit that the evidence does not justify committal, the test is not satisfied;
- the prosecution wants to examine a witness (to see how they will 'hold up'; whether they will be hostile etc);
- the defence can justify cross-examining particular witnesses either to know the case to answer or to expose a weakness in the prosecution case so that a 'no case submission' can be made; or
- a prosecution witness refuses to sign a statement. The examination of a witness in this situation may be the critical factor for the prosecution in deciding to proceed or to discontinue the matter (cf: s 7 *Criminal Procedure Act 1986* New South Wales).

Where the accused wishes to cross-examine a witness he or she will need to identify the witness/es and specify the reasons for requiring them to be available and the scope of the cross-examination.

Where the prosecution consents to the cross-examination of a witness or witnesses, leave is not required. Where no consent is given, the accused may apply to the magistrate for leave.

If the prosecution wishes to call a witness at committal hearing, it should be able to do so. This would normally be for an opportunity to test the evidence of a prosecution witness which is in the interest of both parties and the public.

Where there is no consent, a witness should only be called and cross-examined by leave of a magistrate. A committal magistrate can call a witness if he or she considers it justified.

The *Criminal Procedure Act 1986 NSW* (the Act) provides a model. It has been in place for 20 years, has been tested by judicial considerations and is generally regarded as working satisfactorily.

Section 74 of the Act requires prosecution evidence to be given at committal in written form.

Under Section 91 of the Act an accused must seek leave before the cross-examination of a witness can take place. Leave is automatically granted when the prosecution agrees. Where the ODPP does not agree the defence may apply to a magistrate who will grant leave if 'satisfied that there are substantial reasons why, in the interests of justice, the witness should attend to give oral evidence'. The committal test is discussed later in the chapter.

In addition:

If a person attends to give oral evidence because of a direction under this section, the magistrate must not allow the person to be cross-examined in respect of matters that were not the basis of the reasons for giving the direction, unless the magistrate is satisfied that there are substantial reasons why, in the interests of justice, the person should be cross-examined in respect of those matters.²⁰³

I note that the principles that apply to s 91 applications in NSW are clearly articulated. As a consequence there are few applications to review the magistrate's decision (see Appendix 13).

I anticipate that the ODPP would in many cases consent to reasonable requests by the defence to call a witness. Indeed, the ODPP has emphasised the benefits of a properly conducted committal hearing in terms of testing the witnesses, refining charges and encouraging early pleas of guilty. The office has an equal interest in conducting a committal hearing for the purpose of cross-examination of witnesses if it would assist to progress the matter or would expose a weakness in the prosecution case early on. It is clearly in the ODPP's interest for weaknesses in their case to be exposed as early as possible and to avoid matters ending in trial which could otherwise be disposed of at an earlier opportunity.

I am supported in this view by the submission of the Commonwealth ODPP who wrote:

Feedback I have received about the way the system operates in New South Wales is that a fairly pragmatic approach is taken to the grant of leave. Often the prosecution consents to defence requests. The advantage of the system however is that the

²⁰³ Section 93 of the *Criminal Procedure Act 1986* NSW.

defence are required to consider which witnesses are required for cross-examination and to be able to justify any request.²⁰⁴

Of course, office holders change and different cultures develop but the establishment of a more cooperative culture can endure beyond the tenure of individual office holders.

I encourage the ODPP to consult with LAQ, the QPS and the legal profession with a view to developing guidelines or a protocol to facilitate the calling of witnesses by consent.

Legal Aid Queensland, the Queensland Law Society and Boe Solicitors, in their submissions to this Review, have referred to examples where the committal hearing has served a very useful function by bringing home to an accused the reality of their predicament (thus leading to an early plea); by exposing weaknesses in the prosecution case early on thus leading to discontinuance or refinement of charges. I accept this.

I accept also that it is not always possible to determine prior to the conduct of committal hearings, which cases will benefit from a committal hearing. I point out that most committals are on the basis of a full or partial (some witnesses called) hand-up. It is rare for all witnesses to be called. Perusal of the examples provided emphasises the importance of disclosure and indicates that in most of the cases there was indicia justifying cross-examination.

Finally other jurisdictions have adopted restricted committals.

The recommendation that the ODPP progressively take over the prosecution of committals is of course is connected with issues concerning the need to justify calling and cross-examining witnesses. Since QPS conduct the majority of committals now, and it may be sometime before this position is significantly changed. It will be necessary for the DPP to develop guidelines applying to matters prosecuted by the QPS.

In particular, where police conduct the prosecution of the committal:

²⁰⁴ Commonwealth ODPP submission to the Review of Civil and Criminal Justice System in Queensland.

- the consent of the police prosecutor will be required to cross-examine witnesses;
- the magistrate may need to take this into account and be more proactive in deciding whether to grant leave; and
- the police prosecutor should be guided by written guidelines and protocols developed by the ODPP and the QPS.

Until such guidelines are published the magistrate should determine, on the application of the accused, whether to grant leave.

Administrative committal in the Registry

Under s 104 of the *Justices Act 1886*, the magistrate is not required to consider the sufficiency of evidence in the case of full hand-up committals. Not surprisingly, there is a widely held view that the process has simply become a rubber stamp, particularly since the committal test, considered later, is weak. There is no judicial role involved, it is purely administrative. Anecdotal evidence from court staff indicates that a hand-up will take between 4 and 10 minutes of in-court time plus the time of the Court Services Officer (Depositions Clerk) of perhaps half an hour to an hour doing the paperwork.²⁰⁵ To put this in context, in the order of 7000 people are committed in one year. In addition there are obvious cost implications from the numerous unproductive committal mentions that typically occur.

There is considerable criticism of the hand-up committal process, for example:

The full hand-up committal is a cumbersome outmoded procedure. All those results that are achieved by a hand-up committal can be achieved administratively without the consumption of judicial resources in the Magistrates Court.²⁰⁶

I share this view. Indeed there is broad support for transferring this part of the hand-up process to the registry, it can be done electronically.

I note that the broad support for the simplification of this procedure or abolition of the full hand-up procedure was generally expressed in the context of strong support for the retention of the unlimited right cross-examination; by the same token, at present,

²⁰⁵ A proportion of the courts administrative work involved creating the notices to witnesses under s 123 *Justices Act 1886*. The *Justice and Other Legislation Amendment Act 2008*, which was assented to on 25 November 2008, removed this requirement.

²⁰⁶ Bar Association of Queensland submission at p 7.

the majority of committals are by way of full hand-up and cross-examination is limited in most cases when it occurs.

Unless there are applications for a committal hearing, the mechanism for formally committing a matter to an appropriate court ought to be a court event but managed in the registry.

There are obviously a number of practical and process issues which need to be considered before this recommendation can be fully implemented. These relate to the mechanism for transmission of the bench charge sheet, notification of parties and witnesses, etc. These practical details are best left to the relevant court officers taking into account the effects for the ODPP, QPS, LAQ, private lawyers, accused, witnesses and victims.

I reserve comment to two issues. These are the mechanism for applying to cross-examine witnesses and bail issues.

Prior to an application to the Magistrate to cross-examine witnesses, the prosecution and defence should communicate to see if agreement can be reached. I propose that the party seeking to have a witness called should write to the other party (usually defence to prosecution) identifying:

- the witness or witnesses;
- the issues relevant to the application e.g. identification; and
- the reasons justifying the witness being called.

The correspondence should specify a reasonable time to reply.

The respondent should reply saying whether the request is agreed to, and if not, stating:

- why not; and
- any terms or conditions which should be imposed.

If the respondent does not reply in a reasonable time or if there is a dispute as to any terms and conditions, an application can be made to the court. Note also, the process may be somewhat different where there is a case conference, initially in Brisbane only.

Bail issues also require comment.

Currently initial bail is granted by the QPS or Magistrate, and on occasion the Supreme Court. At any time until committal either party may apply to the court to have bail enlarged or the terms of bail adjusted. Under the provisions of the Bail Act, bail can only be granted until the committal and then a new application for bail must be made upon committal. There is no power enabling the magistrate to simply enlarge bail after committal. Amendments to the *Bail Act 1980* (for example s 17(2) which deals with enlarging bail) should be considered to allow the bail status of the accused before committal to continue after committal until the accused appears in the court to which he or she has been committed with the consent of the accused and the ODPP. This will allow the administrative committal to take place in the registry without the necessity of making a new bail application.

I am aware that this may create some difficulties for an accused held in custody. They are held under a warrant of commitment which requires an end date to bring them back before the court. It may be that the committal of persons in custody must be done by the magistrate, even if it is uncontested.

Witness statements

The traditional form of witness statement is a paper document signed by the witness. In future, I envisage that the paper statement will be an historical relic and the electronic format will become standard.

Most Australian jurisdictions already make provision for the receipt of digital witness statements and evidence in criminal trials in electronic format. Under the *Electronic Transactions (Queensland) Act 2001*²⁰⁷ the electronic transfer of information is supported in some parts, however, some court related documents are excluded from the Act.

²⁰⁷ <http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/E/ElectronTrQA01.pdf>.

²⁰⁷ 'Lothian & Borders Police: Personal Digital Assistant (PDA) Pilot' as detailed in Annex 6 of, Coulsfield, The Rt Hon Lord, *Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland (August 2007)*, at <http://www.scotland.gov.uk/Publications/2007/09/11092728/37>.

²⁰⁷ <http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/E/ElectronTrQA01.pdf>.

There should be a staged progression to electronic based evidence including witness statements (I have already mentioned as much).

I note the Personal Digital Assistant (PDA) Pilot is a scheme currently underway in Scotland.²⁰⁸ Under this pilot, police can take witness statements in the field directly into the e-notebook and then transfer them electronically to other systems. I am sure there will be further developments of this kind.

Police, Courts, ODPP, LAQ and lawyers in private practice already receive some material in digital form. The Queensland Bar Association and the Queensland Law Society may have a role in facilitating legal practitioners further adoption of this technology.

Unrepresented accused

An anomaly with the current hand-up procedure is that an unrepresented accused cannot be committed by way of the full-hand-up process whether or not they intend to plead guilty. In all such cases it is necessary for witnesses to give evidence and be available for cross-examination (s 104 *Justices Act 1886*). It is trite to say that an unrepresented defendant is seldom equipped to do this.

There was abundant support at both round tables and from submissions received by the Review for reform to enable an unrepresented accused to be committed without that being necessary. There is no information available about the number of unrepresented accused appearing at committal. Anecdotally, it is not uncommon but is not a significant proportion of overall committals.²⁰⁹

Accordingly it is necessary to make specific provisions for unrepresented accused in the committals process.

In such circumstances there should be a hearing by a magistrate with the accused present. The magistrate must be satisfied that:

- the accused understands what is happening and the consequences (dismissal; committal for trial or sentence);

²⁰⁸ 'Lothian & Borders Police: Personal Digital Assistant (PDA) Pilot' as detailed in Annex 6 of, Coulsfield, The Rt Hon Lord, *Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland (August 2007)*, at <http://www.scotland.gov.uk/Publications/2007/09/11092728/37>.

²⁰⁹ LAQ funding policies mean that all committals are funded subject to a means test. This is likely to have reduced the numbers of accused who are unrepresented.

- the accused is aware that he or she can apply for legal aid;
- the accused is made aware that she or he has a right to apply to cross-examine witnesses but will need to show that it is justified and there is an explanation of what this involves;
- the evidentiary threshold has been met; and
- the accused understands he or she is entitled to submit that the committals test has not been satisfied and that there is no case to answer.

If these conditions are satisfied, the accused can be committed for trial or sentence without the examination of witnesses.

Case conferences

Term of Reference 5 requires me to consider 'whether there should be a formal system supported by legislation and practice directions to facilitate:

- early identifying and encouragement of pleas of guilty;
- identifying points to be determined by pre-trial rulings;
- narrowing issues to be determined by the jury; and
- the conduct of the trial.'

I have dealt with the issue in this chapter of the Report because to my mind case conferencing is a step in the journey of an indictable offence from initiation in the Magistrates Court through the committal process to resolution, rather than an end in itself. It provides an opportunity for an early resolution.

A number of submissions support the introduction of compulsory case conferences.²¹⁰ It is clear that at present a high proportion of matters committed for trial in the Supreme and District Courts are resolved before trial by a plea of guilty, very often at a late stage of proceedings. The ODPP advise that in 2007/08 81.5% of matters it received for prosecution ended in a plea of guilty. Moreover a significant number of nolle prosequis are entered at the last moment. For example, of 68 matters listed for trial in April, May and June 2008 in the District Court there was a plea of guilty on the morning of trial in 16 matters (23.5%) and a nolle prosequi entered on the morning of trial in 8 matters (11.8%). Charges were changed from those of the committal in more than 30% of matters.

²¹⁰ Submissions from Legal Aid Queensland, Bar Association of Queensland and Queensland Law Society all strongly supported the introduction of case conferencing.

Many of these pleas and prosecution decisions are the result of negotiations and informal case conferences. It is well known that the days leading up to trial are a critical time for this to occur. The cost of this practice is obvious. The resultant pleas and prosecution decision are made very late with the trial preparation having been completed, trial briefs already held by counsel, witnesses and jurors assembled. These costs are then largely 'thrown away' by a late plea or nolle.

It cannot be predicted which cases will proceed and which will not. Courts overlist to compensate for this lack of predictability which causes inconvenience and loss to those involved both in cases that resolve late by plea or nolle or in overlisted cases that cannot go on because a judge is not available. The confidence of victims, witnesses and the accused in the criminal justice system is eroded and costs of preparation in cases which cannot proceed are thrown away.

The purpose of a case conference is to facilitate resolution at a much earlier stage by directing resources to preparation at the front end of the system to ensure accuracy of charges and early refinement of issues and discussions about pleas and trial issues, for example pre-trial rulings.

It is time to provide a framework for and introduce some rigour into the informal processes utilised. This should be targeted at:

- increasing the plea rate (it is already high as we have seen);
- getting pleas and prosecution decisions not to continue the prosecution at a much earlier stage (ideally prior to committal); and
- supporting soon and certain hearing dates for cases proceeding to trial thus reducing the need for courts to overlist.

Other potential long term benefits include:

- more accurate charging by QPS and perhaps fewer matters being prosecuted at all;
- shorter trials because refinement of charges will happen earlier and issues in dispute will have already been narrowed; and
- fewer 'court events' thus significantly reducing court costs. I refer once more to the survey of matters listed for trial in the District Court in April, May and June 2008 in which there was an average of 5.6 mentions in the Magistrates Court

and a further 14.6 mentions in the District Court for each matter. The direct and indirect costs of these mentions alone are substantial.

Appendix 12 sets out a summary of case conferencing schemes in New South Wales, Victoria and Western Australia jurisdictions. I have drawn from these in making recommendations in relation to case conferences.

I am, generally speaking, sceptical about the utility of adding process steps in a case progression through the system. Experience shows that this does not necessarily change the behaviour of the participants in the process or streamline the system. Process steps have a tendency to become simply another charging point or notation in the bring-up system. I will not repeat what I have said about mentions. New process steps do not of themselves necessarily progress a case.²¹¹

Competent legal representatives already contact the ODPP as soon as possible for the purpose of negotiating charges and pleas. Whether requiring others to attend a conference before committal will change behaviours or outcomes or just add an additional step is unclear.

Anecdotal evidence from NSW practitioners does suggest that a more co-operative culture is developing between ODPP and defence lawyers as a result of the compulsory conference scheme and the early results are positive. Early results from NSW are positive. Of 195 matters in which a case conference was held since May 2008, 66% were negotiated to a summary disposal or were withdrawn. This is a significantly higher proportion than other matters and at a much earlier stage. (See Appendix 12).

Anecdotal evidence suggests that a key driver is the determination of the Chief Judge, District Court (New South Wales), to make maximum effectiveness of court time.

I am strongly of the view that the parties should primarily be responsible for the expeditious resolution of cases with a judge or magistrate intervening when that is

²¹¹ When mediation was introduced into civil jurisdiction of the Supreme Court some years ago a common excuse for lack of progress was 'we haven't mediated yet'. Once it was clear that this would not be accepted as a justification it ceased to be offered as an excuse. A case conferencing scheme in London was unsuccessful. The 'decision makers' – the trial counsel did attend conferences, it interfered with court appearances and the fees paid did not encourage them. The people who did attend did not have authority or stature but were relatively well remunerated.

required. In my view this is an effective use of public resources. For this reason I support a conference between the lawyers without a 'third party' involvement. A magistrate should be able, if the circumstances justify it, to convene and conduct a case conference.

The proposed conference regime is founded on compliant and timely disclosure and will take place in an environment shaped by other recommendations; for example the increased use of electronic data transmission; a more rigorous 'committal test', an overall responsibility vested in the magistracy. Put shortly the conference is integrated into an overall scheme arrived at achieving more effective use of public resources.

Case conference proposal:

- There should be an ongoing obligation on the lawyers for parties to engage in discussion with a view to resolving issues and achieving resolution (see, for example, the Victorian Act Rule 19 – Appendix 12);
- For the present, case conferencing should be compulsory if the ODPP is responsible for prosecuting the committal proceedings;
- Ideally the case conference should take place before any committal hearing;
- Legal representatives must have sufficient authority to negotiate and resolve matters and must act reasonably and genuinely in participating;
- At the case conference, lawyers for the parties have an obligation to consider and discuss:
 - the appropriateness of charges;
 - the likely penalty and benefits of an early plea;
 - any issues bearing on the progress of the case or the conduct of the trial; and
 - any offers bearing on a plea of guilty.
- The outcome of the conference should be recorded and sealed and kept in the court file and should only be opened in specified circumstances (see NSW Act);
- A conference may take place:
 - face to face;
 - by video or phone conference;
 - by email;
 - by text messaging; or
 - in writing.

It is desirable but not essential that the accused be present.

- Proper evaluation processes for the process should be built in from the outset.

A pilot project

The Brisbane Committals Project (the protocol is set out in Appendix 5) provides an excellent opportunity to test and evaluate a case conference scheme. Case conferencing could be established as an adjunct to this protocol. A statutory framework can then be developed in the light of this experience.

The ODPP is responsible for prosecution of committals under the protocol. For reasons mentioned elsewhere, the scheme is more likely to succeed if the ODPP conducts the prosecution from the outset. Police prosecutors have limited authority to negotiate charges and are subject to other organisational constraints.

Case conferences should be mandatory for indictable matters currently prosecuted by the ODPP in Brisbane under the protocol. The conference should occur after all of the disclosure issues have been properly resolved and the certificate of disclosure filed and served preferably prior to the committal.

The ODPP has indicated its support for this proposal. Legal Aid Queensland has publicly supported the introduction of case conferencing in Queensland.

A rigorous and properly funded evaluation should be designed and implemented with the pilot. This should be directed at comparing the outcome of matters that have gone through case conferencing with those that have not, to determine whether case conferencing:

- Increases the plea rate;
- Produces earlier pleas or nolles;
- Produces more accurate charging; and
- Reduces court time and over listing.

In NSW an evaluation of the trial is being conducted by the State Bureau of Statistics. Consideration should be given to the involvement of an independent agency with the appropriate skills.

Alignment of 'hand-up' and ex officio procedures

The Attorney-General and DPP have discretion to present an indictment without committal.²¹² Presentation by the Attorney-General is rare. In the case of the DPP this may occur for example, where there is a clear indication of a plea of guilty, where an accused is prepared to plead guilty to charges different from the original charges or where a magistrate did not commit but the DPP decides to proceed.

The ex officio process does not require the presentation of evidentiary material. It should only be done where there is an intention to plead guilty and the Crown agrees.

Although the ex officio procedure is a mechanism for transmitting a case to the Supreme or District Court where an accused intends to plead guilty, in practice, the full hand-up process is often used in preference because it is quicker. For example the LAQ submission states:

It is our experience that it is often quicker to proceed by way of a full hand-up committal, rather than an ex officio indictment, to get the matter into the higher court.(p 31)

Both the ex officio procedure and the full hand-up committal allow a matter to be transferred to the appropriate court without testing the prosecution case. There are good policy reasons for maintaining the ex officio procedure. However, the mechanism for transferring both ex officio matters and matters in which there is no committal hearing to the appropriate court should be aligned.

Currently, a matter proceeding by way of ex officio continues to be listed in the Magistrates Court until it is dealt with in Supreme or District Court. This means that it needs to be managed through repeated 'callovers' in the Magistrates Court, sometimes for months, even though no action can or will be taken in that court. These court events in the Magistrates Court require ongoing defence prosecution appearances and court time until the matter is resolved in the higher court.

An administrative mechanism ought to be available to transmit committed cases to the Supreme or District Courts and these matters be removed from the Magistrates Court list. I propose this be aligned with the registry committal process.

²¹² Section 561 Queensland Criminal Code provides that an ex officio indictment can be presented.

One way to achieve this might be the creation of an ex officio list in the registry which is regularly reviewed, say every 3 months, and culled if there is no progress on the matter.

I note that the ODPP has a protocol in place requiring the indictment to be presented within 8 weeks. If the matter is not resolved by then it is returned to the Magistrates Court.

Bail issues also need to be addressed. This can be addressed in the same way as matters committed administratively, that is, by continuation of the bail status at committal until the indictment is presented.

The Committals Test

The committals test is the test applied by a magistrate to determine whether an accused is committed for trial on indictment in the Supreme or District Court. The *Justices Act 1886* requires the magistrate to consider the sufficiency of the evidence. This is construed to require that 'a reasonable jury properly directed according to law could convict the accused of the offence charged'.²¹³

The test harks back to the days when the decision to commit to trial was made by the grand jury not by a justice of the peace or a magistrate.

The ODPP took the position that the current test should remain, emphasising the administrative nature of the committal function. The ODPP also raised concern that a stronger test might result in committals turning into a series of mini trials and applications for review by the District Court under s 222 *Justices Act 1886*.

As observed earlier in this chapter, the majority of matters proceed by way of full hand-up (approximately 70%). In these cases, the accused accepts that there is a case to answer and that the committal to the higher court is justified.

It has been consistently held that committal proceedings do not constitute a judicial inquiry but are conducted in the exercise of an executive or ministerial function.²¹⁴

²¹³ *Purcell v Venardos* (No.2) [1997] 1Qd R 317.

²¹⁴ *Grassby v The Queen* (1989) 168 CLR 1 per Dawson J at [11].

Although a committal magistrate is not exercising a judicial function and not making a judicial decision, the magistrate is nevertheless bound to act justly and fairly.²¹⁵

It is important to reiterate that the committal process evolved as an administrative mechanism to ensure prosecutions were appropriately brought at a time when there was neither a professional police service nor an independent prosecutorial authority and the decision to commit was made by the grand jury. In many ways, the current committal process is an historical relic, a legacy of these archaic concepts that still underlie the *Justices Act 1886*.

The committals process now takes place in a very different environment. I refer to the roles of the various agencies; police, ODPP, Magistrates Court, processes, disclosure, case conference, electronic document management and other considerations canvassed in Chapter 4: *An Overview of the Queensland Criminal Justice System*, Chapter 5: *Disclosure* and Chapter 8: *Summary Disposition of Indictable Offences* to make that point.

There are three stages at which a decision is made whether a case proceeds towards trial and verdict.

The first is that of a magistrate to commit or not commit. That is dealt with by s 104 *Justices Act 1886* which continues to reflect the environment of that time, with a series of overlays. Section 104 requires the magistrate to consider whether ‘the evidence is sufficient to put the defendant upon trial’ which has been interpreted by case law to mean whether there is a prima facie case.

The second stage is the ODPP’s independent direction to initiate, continue or discontinue a prosecution. The test here is whether ‘there is a reasonable prospect of conviction’.

The third stage is that applied by a judge in determining whether there is a case to go to the jury. That is, whether ‘there is evidence which could legally support a conviction, no matter how tenuous the evidence might be’.²¹⁶ The issue of whether there is an inconsistency in the magistrate applying a test that is broader than that applied by a judge was raised with me in the course of this Review.

²¹⁵ *Grassby per Dawson J* page 15; see also *Ammann v Wegener* (1972) 129 CLR 415 pp 435-436.

²¹⁶ *Doney v The Queen* (1990) 171 CLR 207.

The Bar Association of Queensland advocated that the tests used by the ODPP and the committing magistrate should be aligned. That was opposed by some on the grounds, as I understand it, that it was incongruous for the ODPP to present an indictment when a magistrate had declined to commit and vice versa - to discontinue matters that the magistrate has committed.

The ODPP discontinues approximately 10-17% of matters after committal. Some of these are discontinued immediately after committal; others may be discontinued on the morning of the trial. In 2007/08 there were 1,741 no true bills and nolle prosequis entered by the ODPP out of 5,224 matters received for prosecution.

Although the figures for no true bills and nolle prosequis appear to be quite high this does not necessarily indicate that there is a fundamental incompatibility between the tests applied by the magistrate and the ODPP. I am not convinced, either, that a different decision by the ODPP from the committing magistrate undermines the decision or authority of a magistrate.

The ODPP has a different function and perspective to that of a committing magistrate and must take into account broader public interest considerations for proceeding or not proceeding with a prosecution. There may be many reasons not to proceed. The committal may have exposed weaknesses in the case, a victim may not want to pursue the matter or new evidence may come to light after the committal. In addition, very often the indictment that is 'nolle'd' (discontinued) will be replaced with a new indictment. For example, an indictment for attempted murder may be replaced with an indictment for grievous bodily harm.

The table below sets out the various committals test provided for in other Australian jurisdictions.

Table 9(e): Committal test applied by magistrate

VICTORIA	The court must determine whether or not in its opinion 'the evidence is of sufficient weight to support a conviction' for an indictable offence	<i>Magistrates Court Act</i> schedule 5 s 23
NEW SOUTH WALES	The magistrate must consider all the evidence and determine whether or not 'there is a reasonable prospect, that a reasonable jury, properly instructed, would convict the accused person of an indictable offence'	Section 64 <i>Criminal Procedure Act 1986</i>
AUSTRALIAN CAPITAL TERRITORY	The court must be of the opinion '...that there is a reasonable prospect that the person would be convicted ...'	Sections 1.76 and 1.77 <i>Crimes Legislation Amendment Act 2008</i> amending s 94(a) and (b) and s 97(a) <i>Magistrates Court Act 1930</i> (passed, not yet commenced)
TASMANIA	Automatic committal by registry (Committal hearings abolished but provision for post-committal but pre-trial hearing in exceptional cases)	
NORTHERN TERRITORY	As per Queensland	
WESTERN AUSTRALIA	Automatic committal by registry (Committal hearings abolished)	
SOUTH AUSTRALIA	'evidence will be regarded as sufficient to put the defendant on trial for an offence if, in the opinion of the court the evidence, if accepted, would prove every element of the offence'	Section 107(1)(a) <i>Summary Procedure Act 1921</i>

It may fairly be said that these other jurisdictions apply a more stringent test than that presently applied in Queensland.

In my view a more stringent test should be applied. This reflects the following considerations:

- the proportion of contested committals;
- the recommendations designed to make disclosure and case conferencing more effective;

- the focus on issues brought about by the need to justify the calling and cross examination of witnesses; and
- a strengthened test will dispose of more cases at an early stage.

Other factors include the changes in the composition and role of the magistracy which I have referred to earlier in Chapter 4: *An Overview of the Queensland Criminal Justice System*.

The Queensland Law Society, Legal Aid Queensland and Boe Lawyers in their submissions support adopting the New South Wales test. The test has been in place for a long period. It has been the subject of judicial consideration; inquiries indicate that it is generally regarded as working satisfactorily. The ACT has recently reformed its committal process and adopted the NSW test (see *Crimes Legislation Amendment Act 2008*).

I recommend the New South Wales test for the committal of an accused be adopted. I note that the Attorney-General and the DPP retain their discretion to present an indictment if a magistrate does not commit and that the court in which the indictment is presented will retain a power to stay the indictment if that is justified.

Magistracy supervision of committal

The magistracy should be given overall responsibility for supervising committal proceedings and summary matters.

- A magistrate's intervention should not depend on the application of a party, it can be on the magistrate's own initiative provided the parties are given the opportunity to make submissions in respect of the proposed intervention;
- Without diminishing any general powers, a magistrate has power to give directions and set timetables; and
- With particular reference to disclosure the magistrate should have power to:
 - determine whether or not specific material information is disclosable;
 - inspect any information to determine whether it should be disclosed and the terms in which it should be disclosed;
 - give directions as to how the disclosure requirements are to be met;
 - set timetables; and
 - deal with issues of non-compliance with the disclosure requirements or any direction.

A further issue which arose in the course of the Review is whether magistrates should be given more specific power to control proceedings, in particular to curb excessive and inappropriate cross-examination of witnesses. The question is whether existing powers are adequate. Comment from some legal practitioners indicated that this issue is not a lack of power but a lack of consistency between magistrates in exercising their powers about when and how far to intervene. I was told that some magistrates appear reluctant to intervene, particularly where senior counsel is appearing. The view was expressed to me that magistrates should take a more robust approach to proceedings.²¹⁷

I note that existing statute already provides wide discretionary powers to all courts.

- Section 21 *Evidence Act 1977(C)(a)* deals with inappropriate cross-examination. It gives the court discretion to stop certain questioning that is not relevant to the proceeding. The court may disallow a question put to a witness in cross-examination if the court considers the question is improper, that is 'misleading, confusing, annoying, harassing, intimidating, offensive or repetitive'.
- S20 *Evidence Act 1977* provides that the court may 'disallow a question as to credit put to a witness, or inform the witness the question need not be answered if the court considers an admission of the question's truth would not materially impair confidence in the reliability of the witnesses' evidence.'
- Section 23EA *Justices Act 1886*: Additional powers of court or justices. Under this section the court has power to give any direction the court or justices consider appropriate; and
- Section 50 *Justices Act 1886*: Under this section the court has power to deal with contempt.

Put shortly, in my view magistrates have adequate powers to control proceedings.

²¹⁷ The professional associations also impose professional standards on their members in respect to questioning of witnesses (see Bar Association of Queensland Rule 40 and Queensland Law Society Rule 16.4). Breaches of these requirements can be referred to the professional association or to the Legal Services Commissioner for investigation and action.

9.9 Conclusion

The committal process is overdue for reform to bring it into line with the contemporary world. The framework put forward in this, and earlier chapters, seeks to:

- Encourage legal representatives to take responsibility for early disposition of cases supported by funding to achieve this;
- Facilitate the earlier resolution of indictable matters through targeted court supervision and case conferencing;
- Reserve court involvement to situations requiring a judicial officer by transferring the administrative committal process to the registry;
- Reduce the number of matters that require committal, through comprehensive disclosure provisions and by increasing the summary jurisdiction of the Magistrates Court; and
- Streamline the committal process so that committals are more productive when they do occur by requiring parties to justify calling witnesses and by introducing a more rigorous committal test.

Implementing the recommendations to the committal process will be a significant task. This should not be underestimated in terms of time or resource requirements. Not only will it require legislative change, it will require considerable system change - both human and technological systems. A number of agencies will be required to develop system documentation through written policies and procedures. It will also require training for staff across a number of agencies throughout the State.

Though change is necessary and will bring many benefits it also carries risks and generates fear. There appears to be concern from some legal practitioners that 'the sky will fall in' if there is reform of the committal process.

This is despite the fact that every jurisdiction in Australia, except the Northern Territory, and nearly all in the common law world, has reformed the committal process by either abolishing it or modifying it significantly, as I propose.

No one with whom I consulted was able to point to any systemic injustice that has occurred in these other jurisdictions.

A particular concern raised about the proposed changes is that they may lead to more pre-trial applications and in particular more 'Basha' inquiries. A 'Basha' inquiry refers to a pre-trial hearing conducted at the start of a trial but before a jury is empanelled to allow the defence to examine a witness where the witness was not available at committal or where the matter was presented directly in a higher court by way of ex officio indictment. It takes its name from a New South Wales case *R v Basha* (1989) 39A Crim R 337. Such an inquiry cannot be held unless the accused can establish that there is a risk of an unfair trial without one.

Proper attention to disclosure and case conferencing should facilitate the identification of witnesses prior to any decisions to seek to cross-examine a witness at committal.

Another concern is that the requirement for leave to cross-examine witnesses will lead to a large number of applications to review a magistrate's decision to grant or refuse leave, thus increasing cost and delay in these matters. In the years following the introduction of reforms in New South Wales undoubtedly there were many such applications.

This is, perhaps, an inevitable part of the reform process which is necessary until there is sufficient jurisprudence to clarify the meaning of statutory provisions. There is now clear judicial guidance on this issue in NSW.

The principles that apply to s 91 applications for leave under the NSW legislation are very clearly articulated (see Appendix 13). As a consequence I am told there are now few applications to review a magistrate's decision to grant or withhold leave.

A similar process of jurisprudential development may occur in Queensland; however the adoption of the wording of the NSW legislation means that Queensland also imports the jurisprudence that has developed in that State.

Although many of the reforms proposed in this chapter will involve significant up-front funding, it is anticipated that they will lead to clear measurable efficiency gains over the medium to long term. It is axiomatic that the success of these reforms depends on proper funding.

It has been a recurrent theme throughout this Report that there is better alignment of funding with the outcomes sought. In particular, funding should be directed at achieving earlier disposition, reduction of unnecessary delay and improved clarity of process. The reforms proposed in this chapter are directed to these ends.

It is anticipated that they will also lead to greatly improved public confidence in the justice system.

9.10 Recommendations

Chapter 9: With regard to committals I recommend that:

41. The magistracy be given overall responsibility for supervising committal proceedings.

A magistrate's intervention should not depend on the application of a party, it can be made on the magistrate's own initiative provided the parties are given the opportunity to make submissions in respect of the proposed intervention.

Without diminishing any general powers, a magistrate should be given power to give directions, set timetables and deal with any non-compliance with statutory provision, practice direction or order.

With particular reference to disclosure the magistrate should have power to:

- determine whether or not specific material information is disclosable;
- inspect any information to determine whether it should be disclosed and the terms on which it should be disclosed;
- give directions as to how the disclosure requirements are to be met;
- set timetables; and
- deal with issues of non-compliance with the disclosure requirements or any direction;

42. The ODPP be given an increased role in:

- providing advice and support to QPS in relation to the investigation of serious crimes (a protocol should be developed);
- the summary disposition of indictable matters; and
- prosecution of committal proceedings; the long term objective being, that the ODPP take over responsibility for the prosecution of all committals in Queensland.

This recommendation is subject to the following consideration:

It is imperative that the implementation not over-stretch or erode the capacity of the Office of the Director of Public Prosecutions to effectively carry out its work, or dilute the quality of the work of the ODPP. It is, for example, vital that the effectiveness of the chamber system presently in place (which should be replicated in areas of expansion) not be compromised. The strength of the chamber system is that it allows a mixture of experienced and less experienced prosecutors to take responsibility for a mix of cases;

43. Prosecution evidence be given in statement form;

44. There be provision for the transition from a paper based system to full electronic data base and electronic proceedings;

45. A witness may only be called to give evidence at a committal hearing:

- by the prosecution;
- with prosecution consent (the DPP should consider issuing guidelines as to the circumstances in which consent will be given);
- by leave of a magistrate on the application by an accused; or
- by a magistrate on his or her own motion.

Before granting leave or in acting on his or her own motion, a magistrate must be satisfied that there are substantial reasons why in the interests of justice the witness should attend the committal hearing to give oral evidence or be available for cross-examination on their written statement (see s 91 *Criminal Procedure Act* NSW. Note the principles that apply to such applications have been clearly articulated in NSW (see Appendix13));

46. Where the QPS is prosecuting the committal, the DPP should consider issuing written guidelines for QPS prosecutors in relation to the circumstances in which consent should be given to a witness being called and any other considerations;
47. Where leave has been given to cross-examine a witness, questioning should be limited to reasons for which leave/consent was granted (cf s 92 Criminal Procedure Act (NSW));
48. Prior to an application to the Magistrate to cross-examine witnesses, the prosecution and defence should communicate to see if agreement can be reached. I propose that the party seeking to have a witness called should write to the other party (usually defence to prosecution) identifying:
- the witness or witnesses;
 - the issues relevant to the application, for example, identification or expert opinion; and
 - the reasons justifying the witness being called.

The correspondence should specify a reasonable time to reply.

The respondent should reply saying whether the request is agreed to, and if not, stating:

- why not; or
- any terms or conditions to be imposed which would make it acceptable for the witness to be called.

If the respondent does not reply in a reasonable time or if there is a dispute as to any terms and conditions, an application can be made to the court;

49. A pilot case conference project be established in conjunction with the Brisbane Committals Project (the protocol for which is set out in Appendix 5) to test and evaluate a case conference scheme. A statutory framework can then be developed in the light of this experience.

Under the pilot, case conferences should be mandatory for indictable matters currently prosecuted by the ODPP in Brisbane under the protocol. It should take

place after disclosure issues have been properly resolved and the certificate of disclosure filed and served preferably prior to the committal.

ODPP and LAQ should have responsibility for driving this project;

50. A rigorous and properly funded evaluation process should be designed and implemented with the case conference pilot. This should be directed at comparing the outcome of matters that have gone through case conferencing with those that have not to determine whether case conferencing:

- Increases the plea rate;
- Produces earlier pleas or nolles;
- Produces more accurate charging;
- Reduces court time and over listing; and
- Any other relevant considerations.

I note that in NSW an evaluation of the trial is being conducted by the State Bureau of Statistics. Consideration should be given to the involvement of an independent agency with the appropriate skills;

51. Subject to the outcome of the case conference pilot, a mandatory case conference between the prosecution and the legal representatives for the accused be introduced in Queensland to facilitate the earlier resolution of indictable matters. Legislation establishing this regime should provide that::

- There is an ongoing obligation on the lawyers for parties to engage in discussion with a view to resolving issues and achieving resolution (see, for example, Victorian Magistrate Court rule 19 (see Appendix 12));
- Where the ODPP is responsible for prosecuting the committal proceedings, case conferencing is compulsory;
- The case conference should take place after the certificate of disclosure has been filed and before any committal hearing;
- Legal representatives with sufficient authority to negotiate and resolve matters should attend and act reasonably and genuinely;
- At the conferences lawyers for the parties must consider and discuss:
 - the appropriateness of charges;
 - the likely penalty and benefits of an early plea;

- any issues bearing on the progress of the case or the conduct of the trial; and
- any offers bearing on a plea of guilty;
- The outcome of the conference should be recorded and sealed and kept in the court file and should only be opened in specified circumstances (see NSW Act);
- A conference may take place:
 - face to face;
 - video or phone conference;
 - email;
 - text messaging; or
 - in writing.
- It is desirable but not essential that the accused be present;

52. Where there is no application to call or examine a witness, there should be an administrative committal in the registry. This may occur before, for example a committal for sentence, or after a compulsory case conference. Where there is an application to call a witness but it is not upheld, the magistrate may commit at the time of hearing the application;

53. The *Bail Act 1980* be amended to allow the bail status of an accused before committal to continue after the committal until the accused appears in the court to which he or she has been committed. This is subject always to the right of the ODPP to apply to have bail revoked, or to have conditions added or modified, and the right of the accused to make an application to vary bail conditions.

This provision will allow administrative committals in the registry to take place without the necessity of making a new bail application. Other considerations may apply where the accused is held in custody at the time of committal;

54. The management for ex officio indictments should be transferred to the registry and the process aligned with the registry process for administrative committals.

55. The NSW test applied by the magistrate in deciding to commit an accused be adopted, that is, the magistrate must consider all the evidence and determine whether or not 'there is a reasonable prospect, that a reasonable jury, properly

instructed, would convict the accused person of an indictable offence': s64 *Criminal Procedure Act (NSW) 1986*.

This does not diminish the power of the DPP or the Attorney-General to bring an ex officio indictment if it is in the public interest that there is a prosecution.

A committing magistrate should be enabled to make recommendations to the DPP with respect to issues such as the appropriateness of charges and other issues that may arise with respect to the indictment. This does not in any way limit the DPP's discretion;

56. It be noted that funding issues for LAQ and other agencies will arise as a result of the recommendations of this Review.

I endorse LAQ's stated intention to develop a single committals funding policy (see Appendix 14).

I endorse the recommendation of the National Conference of Directors of Legal Aid and Directors of Public Prosecution that 'grants of legal aid be structured to encourage early resolution of matters prior to committal'.

Sentencing Discounts for an Early Plea of Guilty

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10.0 Introduction

Sentencing discounts for an early plea of guilty is the fourth Term of Reference for the Review.

The Terms of Reference posed the question of whether section 13 of the *Penalties and Sentences Act 1992* (PSA) should be amended to encourage defendants to make earlier pleas of guilty, and provided the following examples as possible areas for amendment:

- Provide that a court must give a discount for an early plea for any offence.
- Provide that a Magistrates Court must give a discount for an early plea for an indictable offence dealt with summarily.
- Provide that a court, when reducing a sentence for a plea of guilty, must set out how the sentence is reduced, that is, indicate what the sentence would have been without the guilty plea (as recommended by the Victorian Sentencing Advisory Council).
- Provide that a court imposing a sentence on a plea of guilty make either no or a limited reduction in penalty by reason of that plea where: (a) it was not entered at the committal hearing; or (b) where the sentence which would be imposed without any such reduction would not exceed the maximum sentence a Magistrate could impose for that offence.
- Provide as in section 8(2) *Sentencing Act 1995* (WA) that ‘a plea of guilty is a mitigating factor and the earlier in the proceedings that it is made, or indication is given that it will be made, the greater the mitigation’.

Pleas of guilty provide time and cost savings which contribute to the efficient running of the justice system. A plea of guilty means that victims and witnesses are spared appearances at trial, which is often a harrowing experience. In most Australian jurisdictions there are provisions for the court to take a plea of guilty into account when handing down a sentence. Without the incentive of a sentencing discount there would not be any reason for an accused to plead guilty:

If a plea of guilty ... cannot be regarded as a factor in mitigation of penalty, there is no incentive ... for an accused to admit ... guilt ... If the offender has nothing to gain by admitting guilt, he will see no reason for doing so.²¹⁸

Of defendants in the District and Supreme Courts around 80% plead guilty.²¹⁹ Sentence discounting encourages early pleas of guilty but there is a great deal of room for improvement as late pleas of guilty have been found to be the 'single most common reason that criminal trials do not proceed on the day of listing'.²²⁰ For example, 16 of the 68 ODPP concluded files listed for trial in April, May and June 2008 were resolved by a plea of guilty on the morning of the trial. It is in the interests of an efficient justice system to ensure that defendants are provided with all that is necessary to support the submission of a plea of guilty at the earliest reasonable opportunity.

10.1 Sentencing

Sentencing deals with punishment for criminals, the purposes of which are various: 'protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform'.²²¹ An early plea means minimum trial preparation and court time can be allocated to cases which are not proceeding. The need to 'protect the Queensland community from the offender'²²² is paramount²²³ yet as always there are considerations to be balanced. Ryan and Bosscher Lawyers noted that a judicial officer, in imposing a sentence, needs to 'balance the competing

²¹⁸ *Shannon* (1979) 21 SASR 442 at 452-3; as cited in Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice*, Cambridge University Press, Port Melbourne, 2007 at p 211.

²¹⁹ Australian Bureau of Statistics, 4513.0 - Criminal Courts, Australia, 2006-07 at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/597451D3883AA2F3CA2573DA0016C35E?opendocument> (accessed 11 November, 2008).

²²⁰ Payne, Jason, *Criminal trial delays in Australia: trial listing outcomes*, Australian Institute of Criminology, Australian Government, Research and Public Policy Series No. 74 at p 24.

²²¹ *Veen v The Queen (No. 2)* (1988) 164 CLR 465 at 476 per Mason CJ, Brennan, Dawson and Toohey JJ.

²²² *Penalties and Sentences Act 1992* s 9(1)(e).

²²³ *Penalties and Sentences Act 1992* s 9(1)(e) and s 3(b).

interests of society's need for protection and deterrence of criminal acts on the one hand, against the prospect of rehabilitating the offender on the other'.²²⁴

Judicial officers now have a wide range of sentencing options available to them including: fines, good behaviour bonds, probation, community service, intensive correction orders, suspended sentence and imprisonment served. The range and flexibility of sentencing options makes it difficult to identify when and how a timely plea of guilty is reflected in the sentence. For example, it is no longer just a matter of reducing a sentence from 12 months to 9 months. Instead, discounts for timeliness might be reflected in an order for immediate parole release or an intensive correction order rather than a term of imprisonment.

An additional complexity in sentencing is the reality that many offenders are sentenced for multiple offences, across a range of sentences, and often together with co-offenders. There may be issues of proportionality of sentences involved between co-offenders.

Sentencing discounts

A discounted sentence is 'the reduction of an otherwise appropriate sentence warranted by the seriousness of the offence by reason of some factor mitigating the severity of the sentence for reasons of policy rather than because of subjective matters personal to the offender'.²²⁵ Discounts may be given to 'encourage the accused to plead guilty and to save court time and money';²²⁶ and they may be given for assisting the authorities.²²⁷ It is generally 'not necessary for the court to particularise the amount given by way of discount'²²⁸ although as will be seen later in this chapter, Victoria has recently introduced changes in this respect.

²²⁴ Ryan & Bosscher Lawyers, Trial Procedure, AussieLegal.com.au (accessed 11 November, 2008).

²²⁵ Encyclopaedic Australian Legal Dictionary, entry for discount of sentence at <http://www.lexisnexis.com/au> (accessed 10 November 2008).

²²⁶ *Winchester* (1992) 58 A Crim R 345; *R v Shannon* (1979) 21 SASR 442 ; (CTH) Crimes Act 1914 s 16A(2)(g); (NSW) Crimes Act 1900 s 439; Encyclopaedic Australian Legal Dictionary at <http://www.lexisnexis.com/au> (accessed 10 November 2008).

²²⁷ *R v Gallagher* (1991) 23 NSWLR 220; 53 A Crim R 248; *R v Harris* (1992) 59 SASR 300; (CTH) Crimes Act 1914 s 16A(2)(h); (NSW) Crimes Act 1900 s 442B, Penalties and Sentences Act 1992 (QLD) s 13A; Encyclopaedic Australian Legal Dictionary at <http://www.lexisnexis.com/au> (accessed 10 November 2008).

²²⁸ *R v Nagy* [1992] 1 VR 637 ; (1991) 57 A Crim R 64 ; but see (CTH) Crimes Act 1914 s 21E and (ACT) Crimes Act 1900 s 449(1) in relation to a discount given for future assistance: Encyclopaedic Australian Legal Dictionary, entry for discount of sentence at <http://www.lexisnexis.com/au> (accessed 10 November 2008).

10.2 When is a plea early?

It appears obvious that sentence discounts encourage early pleas of guilty, and there is a persuasive weight of anecdotal evidence to suggest that they do. There are strong reasons for having this encouragement as a 'guilty plea saves the community the expense of a contested hearing, reduced court delays and spares witnesses the stress of giving evidence'.²²⁹ Whilst I acknowledge that there is concern over people pleading guilty to get a matter over with, it is imperative that all defendants have access to legal advice so that all considerations may be conveyed to the defendant before pleading guilty.

Whether a defendant can be said to have pleaded early is often not a straightforward matter. This was raised in *Cameron v The Queen* [2002] HCA 6 (Cameron) by Gaudron, Gummow and Callinan JJ at [20] and [21] as follows:²³⁰

The question whether it was possible for a person to plead at an earlier time is not one that is answered simply by looking at the charge sheet. As was acknowledged in *Atholwood*²³¹ by Ipp J, in the Court of Criminal Appeal of Western Australia, the question is when it would first have been reasonable for a plea to be entered.

In *Atholwood*, the person concerned had been charged with several counts. After a process of negotiation, the prosecution withdrew a number of the charges and the offender pleaded guilty to one of the remaining charges. Ipp J said this:

"It is particularly important in such circumstances to establish the time when it could first be said that it was reasonably open to the offender to plead guilty to the offence of which he was convicted. Regard should be had to the forensic prejudice that the offender would have suffered were he to have pleaded guilty to counts persisted in by the prosecution while others (that were subsequently withdrawn) remained pending against him. During the period that the prosecution maintains counts that are ultimately abandoned, there is a strong incentive for a person who recognises his guilt on other counts ... to persist in a not guilty plea to all counts. In such circumstances it should not be assumed, mechanically, that the offender has delayed pleading guilty because of an absence of remorse, or that, reasonably speaking, he has not pleaded guilty at the earliest possible opportunity."²³²

Justice Kirby also agreed with Ipp J that there is a 'need to examine closely the circumstances preceding the plea of guilty in order to reach a conclusion as to the credit for the plea proper to the circumstances'.²³³

²²⁹ Edney, Richard and Mirko Bagaric, *Australian Sentencing: Principles and Practice*, Cambridge University Press, Port Melbourne 2007 at p 203.

²³⁰ *Cameron v The Queen* [2002] HCA 6 was cited by the Queensland Court of Appeal in *R v Woods* [2004] QCA 204 at [8]-[9].

²³¹ *Atholwood* (1999) 109 A Crim R 465.

²³² *Atholwood* (1999) 109 A Crim R 465 at 468.

²³³ *Cameron v The Queen* [2002] HCA 6 per Kirby J at [74].

The key to this whole matter is to define what a *timely* plea is. In my view no defendant can be expected to enter a plea until the following criteria have been fulfilled:

- The final charges pleaded to have been decided;²³⁴
- The defendant is aware of those charges;
- There has been full disclosure; and
- The defendant has had reasonable time to take, and consider, legal advice and to give instructions.

I am inclined to make a recommendation that sentencing judges and magistrates take these factors into account in deciding whether a timely plea has been made, along with any other factors that the judicial officer considers relevant in the particular circumstances of the case.

In order to facilitate the early plea it is essential that all parties participating in the matter, such as the Queensland Police Service, the prosecution, and the defending legal representatives, efficiently and accurately fulfil their obligations in regard to informing of the charges, ensuring full disclosure has occurred, engaging in necessary negotiations and giving and taking legal advice.

If a plea is entered late in the proceedings because one or more of these criteria were not satisfied until a late stage or it was erroneously believed that they were satisfied, the defendant should still benefit from the discount as if they had made the plea early in the proceedings. This is because the plea was made at the earliest reasonable opportunity.

In Chapter 9 of this Report, *Reform of the Committal Process*, I make recommendations in relation to establishing a case conferencing scheme, with the case conference to be held prior to the committal, which would canvas a number of issues including those relating to an early plea of guilty.

²³⁴ In this respect the role of conferencing is vital. Conferencing provides an opportunity for charges to be negotiated between lawyers for the defence and the prosecution.

10.3 Queensland provisions for pleas of guilty

In Queensland the *Penalties and Sentences Act 1992* (PSA) states that the court must take the guilty plea into account and may reduce the sentence because of it:

13 Guilty plea to be taken into account

(1) In imposing a sentence on an offender who has pleaded guilty to an offence, a court—

- (a) must take the guilty plea into account; and
- (b) may reduce the sentence that it would have imposed had the offender not pleaded guilty.

(2) A reduction under subsection (1)(b) may be made having regard to the time at which the offender—

- (a) pleaded guilty; or
- (b) informed the relevant law enforcement agency of his or her intention to plead guilty.

(3) When imposing the sentence, the court must state in open court that it took account of the guilty plea in determining the sentence imposed.

(4) A court that does not, under subsection (2), reduce the sentence imposed on an offender who pleaded guilty must state in open court—

- (a) that fact; and
- (b) its reasons for not reducing the sentence.

According to s 13(2) the timing of the plea is a relevant factor in determining whether a reduction should be made.

Sentences can also be reduced for cooperation with the law enforcement authorities, pursuant to PSA s 13A. For these matters, according to PSA s 13A(7)(b), after imposing the penalty the sentencing judge or magistrate must 'state in closed court— (i) that the sentence is being reduced under this section; and (ii) the sentence it would otherwise have imposed...'. We are not considering this in any great detail here because the statement is made in closed court, is often secret for obvious reasons, and is of little assistance to the general issue. Moreover, there were no issues raised about the working of this aspect of early pleas in the consultation process.

A random sample of cases in the District and Supreme Courts was examined by the Review team and it became apparent that while judicial officers consistently state that the defendant's guilty plea is taken into account, as required by PSA s 13(3), it is often difficult to discern the nature or extent of any discount that may have been received for that plea. An efficient justice system is one in which there is transparency: lack of transparency in this regard does not engender confidence in the system of discounting for early pleas. Confidence in the justice system will

support defence lawyers in providing accurate advice as to their client's best interests.

I have refrained from making any recommendation obliging a sentencing court to state the sentence which would have been imposed but for the plea of guilty, although it should be encouraged. Sentencing involves the weighing and balancing of many interactive variables, the weighting of which varies from case to case. In different cases different values may be imposed though ultimately the sentences fall within an acceptable range. I would, however, strongly encourage sentencing courts to indicate the nature of the discount that has been given for an early plea. For example if, but for the plea of guilty, a judicial officer would have imposed a custodial sentence I suggest that they provide an indication of why one type of sentence has been imposed rather than other options which were open to them. For this reason I recommend that the PSA be amended to include a discretion for a sentencing judge or magistrate, when handing down their decision, to state the sentence that would have been imposed but for the plea of guilty to the offence.

Again, while I do not propose that judicial officers be required to state the sentence that would have been imposed but for the plea of guilty, it must be acknowledged that such a statement can have an important role in avoiding a miscarriage of justice. Justice Kirby (dissenting) noted in *Cameron* that despite the sentencing judge in that matter 'clearly identify[ing] the sentence that would have been imposed but for the plea of guilty and the discount considered proper to the appellant's case':

it is appropriate to observe that, effectively, this appeal would not have been possible (and a miscarriage of justice might have been irreparably masked) had the sentencing judge contented himself with stating generally that he had taken the plea of guilty into account and simply announced his "instinctive synthesis" represented by the sentence of nine years imprisonment. The appeal would have been without redress.²³⁵

Sentencing appeals do not rely solely upon the statements made by the sentencing judge or magistrate. The Queensland Court of Appeal, in assessing the validity of any sentence, refers to comparable sentences in similar cases,²³⁶ and here the resources of the Queensland Sentencing Information Service (QIS) prove useful to the judiciary, the defence and the prosecution. QIS is an on-line database service operated as a joint initiative of the Department of Justice and Attorney-General and

²³⁵ *Cameron v R* (2002) HCA 6; 209 CLR 339 per Kirby J at [72].

²³⁶ For example in the judgment of Jerrard JA, Atkinson J, and Phillipides J in *R v Woods* [2004] QCA 204 at [7].

the Judicial Commission of New South Wales. The service provides a 'day-to-day guide on precedents, comparable cases, and the application of the principles of sentencing laws'.²³⁷

10.4 Provisions for pleas of guilty in other jurisdictions

Courts around Australia are given the jurisdiction to reduce a sentence upon a plea of guilty being entered by the defendant.

New South Wales

In New South Wales section 22 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) stipulates that guilty pleas are to be taken into account:

- (1) In passing **sentence** for an offence on an **offender** who has pleaded guilty to the offence, a **court** must take into account:
 - (a) the fact that the **offender** has pleaded guilty, and
 - (b) when the **offender** pleaded guilty or indicated an intention to plead guilty, and may accordingly impose a lesser penalty than it would otherwise have imposed.
- (2) When passing **sentence** on such an **offender**, a **court** that does not impose a lesser penalty under this section must indicate to the **offender**, and make a record of, its reasons for not doing so.
- (3) Subsection (2) does not limit any other requirement that a **court** has, apart from that subsection, to record the reasons for its decisions.
- (4) The failure of a **court** to comply with this section does not invalidate any **sentence** imposed by the **court**.

Whilst both New South Wales and Queensland require the court to state when it is not giving a discount²³⁸ the other Australian jurisdictions have no such provisions.

Victoria

Victoria's *Sentencing Act 1991* (VIC) at part 2 section 5(2)(e) states that in sentencing an offender a court must have regard to 'whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so'. A recent addition to this statute is s 6AAA which stipulates that, for sentences involving a custodial order and certain fines, if 'in sentencing an offender, a court imposes a less severe sentence than it would otherwise have imposed because the offender pleaded guilty to the offence ... the

²³⁷ Queensland Sentencing Information Services, User Guide, at p 5.

²³⁸ *Penalties and Sentencing Act 1992* (Qld) s 13(3); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(2).

court must state the sentence and the non-parole period, if any, that it would have imposed but for the guilty plea'.²³⁹

Section s 6AAA(3) provides for a discretion for the court to state the sentence that would have been imposed for those matters that do not fall within the previous two sections; I am inclined to recommend such a discretion for all sentences handed down in Queensland.

The introduction of s 6AAA followed the recommendations, in part, of the Sentencing Advisory Council's (Victorian SAC) report on 'Sentence Indication and Specified Sentence Discounts'.²⁴⁰ The Victorian SAC report was undertaken to explore the potential of sentence indications and specified sentence discounts to 'encourage defendants who are minded to plead guilty to do so at an early stage of proceedings and save participants and the criminal justice system the time, resources, stress and cost of preparing for a trial'.²⁴¹

The Victorian SAC found that 'there is a very high incidence of matters resolving as pleas of guilty at a late stage in the proceedings [and that] many of these matters could be resolved 6-12 months earlier'.²⁴² This also appears to be the case in Queensland. I agree with The Honourable Attorney-General and Minister for Racing in Victoria, Rob Hulls, that it is often not clear whether a plea of guilty actually changed the sentence imposed and that 'this lack of transparency can reduce the confidence of the victim and the community in the sentencing process and can fuel scepticism among defendants about whether an early plea of guilty will make any difference to the sentence imposed on them'.²⁴³

The Victorian SAC also concluded that an early indication of the likely sentence to be imposed would encourage earlier pleas of guilty. I am disinclined to recommend the formal introduction of sentence indications in Queensland but strongly encourage the continuation of the commendable open and frank communication that exists between

²³⁹ The new section 6AAA was introduced by the *Criminal Procedure Legislation Amendment Act 2008 (No.8 of 2008)* Sect 3.

²⁴⁰ Sentencing Advisory Council, *Sentence Indication and Specified Sentence Discounts Final Report*, www.sentencingcouncil.vic.gov.au (accessed 11 November, 2008).

²⁴¹ Sentencing Advisory Council, *Sentence Indication and Specified Sentence Discounts: Discussion Paper Summary*, www.sentencingcouncil.vic.gov.au (accessed 11 November, 2008).

²⁴² Hulls, Rob, Criminal Procedure Legislation Amendment Bill, Second Reading speech, Vichansard, 22 November 2007 at p 4099.

²⁴³ Hulls, Rob, Criminal Procedure Legislation Amendment Bill, Second Reading speech, Vichansard, 22 November 2007 at p 4100.

the defence and the prosecution as to the nature of the sentence sought and the range of terms sought if there is to be a sentence of imprisonment. An early indication by the Director of Public Prosecutions that a custodial sentence is not being sought is a catalyst for the early resolution of the case. As an example, a defendant informally interviewed told Review staff that he would have entered a plea earlier had his defence lawyer approached the prosecution to find out that they were not seeking a custodial sentence. I have made recommendations in Chapter 9: *Reform of the Committal Process*, for a case conference scheme that will provide further opportunities for discussion of this and other issues.

Western Australia

In Western Australia the *Sentencing Act 1995* provides at section 8(2) that 'a plea of guilty by an offender is a mitigating factor and the earlier in the proceedings that it is made, or indication is given that it will be made, the greater the mitigation'. Refer to the submission by the Commonwealth Director of Public Prosecutions, summarised later in this chapter, which considers the 'fast track' plea system that operated in Western Australia.

Australian Capital Territory

The Australian Capital Territory's *Crimes (Sentencing) Act 2005* at section 35 states:

- (2) In deciding how the offender should be sentenced (if at all) for the offence, the court must consider the following matters:
 - (a) the fact that the offender pleaded guilty;
 - (b) when the offender pleaded guilty, or indicated an intention to plead guilty;
- ...
- (5) For subsection (2) (b), the earlier in the proceeding that the guilty plea is made, or indication is given that it will be made, the lesser the penalty the court may impose.

Northern Territory

In the Northern Territory the *Sentencing Act (NT)* states at section 5 that in sentencing an offender a court shall have regard to 'whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so'.

South Australia

By contrast to other states' provisions South Australia's *Criminal Law (Sentencing) Act 1988* at section 10(1)(g) stipulates that the court should have regard to the fact that the defendant has pleaded guilty to the charge of the offence but does not expressly tie this to the timing of the entering of the plea.

10.5 Commonwealth provisions for pleas of guilty

The Commonwealth provisions are similar to the South Australian provisions. The *Crimes Act 1914* (Cth) states, at section 16A(2)(g), that when passing sentence the court must take into account, in addition to other matters, 'if the person has pleaded guilty to the charge in respect of the offence – the fact'. There does not appear to be any condition of timeliness. The only specification of a discount under Commonwealth legislation relates to cooperation with the authorities and in this provision there are positive obligations on the court, as follows:

- 21E Director of Public Prosecutions may appeal against reductions where promised co-operation with law enforcement agencies refused
- (1) Where a federal sentence, or a federal non-parole period, is reduced by the court imposing the sentence or fixing the non-parole period because the offender has undertaken to co-operate with law enforcement agencies in proceedings, including confiscation proceedings, relating to any offence, the court must:
- (a) if the sentence imposed is reduced—specify that the sentence is being reduced for that reason and state the sentence that would have been imposed but for that reduction; and
 - (b) if the non-parole period is reduced—specify that the non-parole period is being reduced for that reason and state what the period would have been but for that reduction.²⁴⁴
- ...

10.6 Submissions received by the Review

A number of submissions regarding sentencing discounts were received by the Review. In response to the Terms of Reference Legal Aid Queensland submitted that:

There must be an incentive for defendants to enter early pleas, and where an election exists, to do that through electing summary jurisdiction rather than proceeding to the higher courts. The best way to do this is to provide a statutory framework that accords clear sentencing benefits for taking the above actions. There must be a system that provides real encouragement to accused persons to plead guilty summarily to a wider range of offences (while maintaining the right of those who wish to plead not guilty to be tried by a jury), and to enter timely pleas to purely indictable matters too. As we have noted, these outcomes will be sooner achieved by a process that ensures proper and timely prosecution disclosure and meaningful negotiation. But explicit, legislated recognition of the early plea, which sounds in the sentence imposed, will also facilitate these outcomes.²⁴⁵

²⁴⁴ *Crimes Act 1914* (Cth).

²⁴⁵ Legal Aid Queensland submission to the Review, dated 9 September 2008, at p 40.

Boe Lawyers submitted that an optimum framework would include 'a discernable discount given to those who elect to notify a guilty plea *prior* to the prosecution being required to meet full disclosure obligations'.²⁴⁶

The Office of the Public Advocate raised concerns that:

adults with impaired decision-making capacity are disadvantaged in a system which provides discounts for an early plea. Disadvantage may arise in a variety of ways. Firstly, because of their impairment they may not understand the consequences, even if explained to them clearly. It is understood that not infrequently prisoners with impaired capacity spend more time in custody on remand, than they would if convicted and sentenced following an early guilty plea.²⁴⁷

These are valid concerns that highlight the importance of early access to legal advice for defendants; particularly those defendants with impaired decision making capacity. The capacity of a defendant is highly relevant to the question of whether a plea by such a defendant was early or not. The time at which it would be reasonable to consider a plea of guilty from a person with impaired decision making capacity as having been entered early, may be later than for a defendant who does not have impaired decision making capacity. If a defendant with impaired decision making capacity is unrepresented, the magistrate, in order to be satisfied that the defendant is fit to plea and that that plea should be accepted, should take lack of legal representation into consideration.

The Commonwealth Director of Public Prosecutions (DPP Cth) question whether any State provisions would apply to a Queensland court imposing a sentence for a Commonwealth offence; but note that there is High Court authority that might allow for State provisions to apply.²⁴⁸ The DPP Cth point out that Western Australia operated a scheme which was similar to the new Victorian positive legislative requirement in s 6AAA of the *Sentencing Act 1991* (Vic). The WA scheme was known as the 'fast track' plea system and the legislation has since been repealed and the court has, to a large extent, abandoned the practice of making overt statements as to the quantity of the discount being given in percentage terms.

The two main issues that the DPP Cth raise as problematic are that (1) percentage discounts in sentencing do not necessarily translate appropriately to non-custodial sentences and that (2) 'the announcement of what in effect is 2 sentences one that

²⁴⁶ Boe Lawyers submission to the Review, at p 6.

²⁴⁷ Office of the Public Advocate submission to the Review, at p 2.

²⁴⁸ The DPP Cth refer to: *Putland v The Queen* (2004) 218 CLR 174 at [23], [24], [42] and [43] and generally on the operation of aspects of State sentencing law in relation to Commonwealth offenders, see *Leeth v Commonwealth of Australia* (1992) 174 CLR 455 at 470-471.

would have been imposed had the defendant not pleaded guilty and one a discounted sentence will have the effect of broadening the range of potential appeal points'.²⁴⁹ The difficulty for the WA Court of Appeal was that

...the process of taking a proportion expressed as a percentage of a notional starting point, even one articulated by the sentencing Judge, and endeavouring to demonstrate that the sentence imposed is manifestly excessive having regard to the percentage figure, is an illusory process because the so-called "starting point" is not the sentence, the adequacy or proportionality of which the appellate court is required to measure so that the appeal will succeed if it can be demonstrated that the exercise of sentencing discretion has miscarried because the sentence finally imposed is manifestly excessive.²⁵⁰

The DPP Cth also questions whether there might be a challenge as to the constitutional validity of circumscribing the sentencing discretion of a judge by requiring a specified discount to be given in the event of an early plea.²⁵¹

10.7 Conclusion

After considering the submissions made to the Review and provisions in other jurisdictions I am not persuaded to recommend the introduction of a fixed discount for an early plea of guilty. However, there is a need for change. The current arrangements do not provide sufficient encouragement to enter an early plea and they lack transparency; in many cases it is very difficult to discover whether a discount has actually been given to a defendant upon an early plea of guilty.²⁵² Transparency provides a basis for confidence in the working of the justice system and also ensures individual's rights of appeal are secured.

As I noted earlier the Victorian provisions now require the court to state, in certain matters, the sentence that would have been imposed but for the plea of guilty. This is not a recommendation that I propose, however I do believe that there would be a great benefit to the criminal justice system in making changes to the current practices to encourage greater transparency and greater clarity as to the benefit of entering a plea of guilty at the earliest reasonable opportunity. The following recommendations are also designed to make it easier for sentencing judges and magistrates to identify factors relevant to a discount for an early plea given in the case.

²⁴⁹ Commonwealth Director of Public Prosecutions letter to the Review, dated 18 August 2008, at p 9.

²⁵⁰ *Grimwood v The Queen* [2002] WASCA 135 at [17], [18] and [19] per Murray J.

²⁵¹ Commonwealth Director of Public Prosecutions email to the Review, dated 26 September 2008, at p 9. In this email the Deputy Director expressed a reservation as to whether a specified discount would be seen by the High Court as an impermissible limit on the discretion of the court following *Cable* (1996) 189 CLR 51; and, *Wong v The Queen and Leung v The Queen* (2001) 207 CLR 584.

10.8 Recommendations

Chapter 10: With regard to Sentencing Discounts for an Early Plea of Guilty I recommend that:

57. The *Penalties and Sentences Act 1992* be amended to provide for when it may be reasonable to consider that a plea of guilty has been entered at the earliest available opportunity. This may include, amongst other things: the charges pleaded to have been decided; the defendant is aware of those charges; there has been full disclosure; and, the defendant has had reasonable time to take, and consider, legal advice and to give instructions;
58. The *Penalties and Sentences Act 1992* be amended to include a section similar to the Western Australian section 8(2) of the *Sentencing Act 1995* (WA) which stipulates that 'a plea of guilty is a mitigating factor and the earlier in the proceedings that it is made, or indication is given that it will be made, the greater the mitigation';
59. The *Penalties and Sentences Act 1992* be amended to include a section which specifically provides for a discretion for sentencing judges and magistrates to state the sentence that would have been imposed but for the plea of guilty, with a view to encouraging this to be done more frequently;
60. If a discount for an early plea of guilty is given in a form other than, or in addition to, a reduction of the term of imprisonment, (such as an early parole release date) the *Penalties and Sentences Act 1992* be amended to encourage sentencing judges and magistrates to identify the benefit other than or in addition to the reduction in the term of imprisonment that has been received by the defendant.

Where to from here

'No problem can be solved from the same level of consciousness that created it': *Albert Einstein*

'If you don't know where you are going, any road will get you there': *Lewis Carroll*

Objectives for the criminal justice system

Provide equal justice to all according to law by disposing of cases impartially, fairly and expeditiously with the minimum but necessary use of public resources.

Maintain public confidence in the criminal justice system.

Here and now

This Review has identified and analysed system failures. These include:

- an archaic legislative framework;
- major deficiencies in the collection and use of valid data to provide for evidence based decisions for the evaluation, adjustment, abandoning of procedural steps;
- lack of coherence in a system made up of a number of narrowly focussed but interactive criminal justice agencies. This both reflects and generates cultural differences between agencies;
- flaws in the effectiveness of disclosure by the prosecution – the lynchpin of the system; and
- significant room for improvement in the committals process, a key component of the criminal justice system.

The next steps

More than twenty recommendations have been made directed to those issues and to achieving effective use of public resources.

Recommendations with respect to Term of Reference 2: *Summary Disposition of Indictable Offences* and Term of Reference 4: *Sentencing Discounts for an Early Plea of Guilty* will give additional impetus to the change process by simplifying the disposition of some categories of cases and providing an incentive for an early plea of guilty.

The Report reflects a view that court procedures and processes will increasingly be based on electronic collection, transfer, storage and evaluation of data.

It recognises the need for staged, prioritised and incremental implementation for the development of processes based on reliable data to evaluate the effectiveness of processes and procedures aligned to the resolution of criminal cases and the effective use of public resources in the disposition of criminal cases.

A consolidated, up-to-date Criminal Procedure Act and Uniform Criminal Procedure Rules will provide a foundation. It is long overdue and will give coherence to the system. It is recommended that this Act provide for the establishment of the Criminal Justice Procedures Co-ordination Council (see Appendix 6) whose role it would be to facilitate and evaluate implementation of those recommendations endorsed by Executive Government, and to develop, oversee and coordinate the implementation of effective electronic data and evaluation systems.

The Report supports the use of protocols (agreements between agencies) while recognising the potential for delay and failure to agree. The effective use of protocols fosters finding common ground and hence the appreciation of cross agency issues so that effective processes can be implemented.

The process of change is ongoing, the implementation of recommendations will itself generate changes and the need to adjust and modify procedures. The recommendations made are designed to accommodate these considerations.

Glossary of Terms

Agency:

An administrative unit of government ie; Director of Public Prosecutions, Legal Aid, Department of Corrective Services.

Accused:

A person charged with a criminal offence.

Adjourn:

To put something off to another time eg: if a court case cannot proceed when it comes before the court, it may be adjourned to a later date.

Admissibility:

In a [court of law](#), is any testimonial, documentary, or tangible [evidence](#) that may be introduced, usually to a [judge](#) or [jury](#), in order to establish a point put forth by a party to the proceeding.

Apprehend:

To take somebody into custody of police.

Arrest:

The procedure where a person is taken into police custody to be charged with a criminal offence or to be brought before a court, and must remain in police custody until they receive bail or until a court deals with their charges.

Attorney General:

The primary law officer of the State, and is usually also the government minister responsible for the administration of justice.

Bail:

The release of a person from custody based on a written commitment or promise by a person that they will appear in court on the next occasion when their case comes before the court.

Barrister:

A lawyer who specialises in court appearances and providing written opinions. Usually not able to act for clients directly and is engaged through a solicitor. In some courts they are required to wear wigs and gowns.

Bench charge sheet:

A sheet of paper which sets out brief details of a charge against a person.

Bench warrant:

A warrant issued by a court calling for the immediate arrest of a person so that they can be brought before the court. Usually issued when a person fails to appear in court.

Beyond reasonable doubt:

The standard of proof in criminal matters, ie it must be proved beyond reasonable doubt that a person has committed an offence before they can be convicted. This is higher than the civil standard of proof which is the "balance of probabilities".

Breach:

The breaking of a condition eg: breach of contract, breach of parole.

Breach of bail:

Breaking a condition of bail, eg: failing to appear in court, not reporting to police, contacting a victim of crime.

Burden of proof:

The obligation to prove that allegations made in court are true by calling evidence to support the allegations. In criminal cases, the prosecutor has the burden of proof and the defendant is presumed innocent until proven guilty.

Call over:

A day on which the court goes through the list of cases waiting to come before the court and indicates a date on which they might be dealt with.

Charge:

A formal procedure where a person is accused of committing a criminal offence.

Commit for trial/sentence:

A matter is sent from the Magistrates Court to a higher court for trial or sentence.

Committal:

A procedure in the magistrates court where the court hears evidence in relation to an indictable offence in order to decide whether the matter should be sent to a higher court.

Committal hearing:

A procedure in the magistrates court where the court hears evidence in relation to an indictable offence in order to decide whether the matter should be sent to a higher court.

Committal proceeding:

A procedure in the magistrates court where the court hears evidence in relation to an indictable offence in order to decide whether the matter should be sent to a higher court.

Common law:

The law which is based on decisions of courts in previous cases rather than contained in an Act of Parliament.

Convict:

Where a person accused of committing a criminal offence is said by the court to be guilty of that offence.

Conviction:

Where a person accused of committing a criminal offence is guilty of that offence and a record of their guilt is recorded on their criminal history sheet.

Counsel:

A lawyer who appears in court on behalf of clients. In the higher courts counsel are usually barristers, but in the lower courts eg: Magistrates Court, solicitors often appear as counsel.

Criminal Code:

The *Criminal Code 1899*, which is an Act of the Queensland Parliament setting out criminal offences under Queensland Law.

Criminal history:

A record of offences of which a person has been convicted.

Criminal offences:

Breaches of criminal law.

Criminal proceedings:

Court action against a person accused of committing a criminal offence.

Criminal responsibility:

In most cases a person cannot be criminally responsible unless it can be shown that they had criminal intent or the capacity to form the intent.

Cross examine:

Questioning a person in court about evidence they have given to the court.

Crown:

A name sometimes given to government because the Queen is the formal head of government.

Defence:

A legal reason why a claim made against a person should not succeed.

Defendant: see Accused

A person against whom legal action is being taken.

Department of Child Safety:

The government department responsible for administering law in relation to child protection and state welfare.

Department of Justice:

The government department responsible for administration of justice eg: courts, criminal prosecutions.

Discharge without conviction:

To be found guilty of an offence, but have no conviction recorded. A penalty is usually imposed even though the conviction is not recorded.

Disclosure:

Refers to a process that may form part of legal proceedings, whereby parties inform ("disclose") to other parties the existence of any relevant documents that are, or have been, in their control.

District Court:

The Court which deals with most criminal offences that cannot be dealt with in the Magistrates Court and which hears civil disputes involving amounts of more than \$50,000 and less than \$250,000. It also deals with most appeals from the Magistrates Court.

Enlargement of bail:

An extension of bail conditions to a later date, usually the next required Court appearance.

Evidence:

The facts relied on in court to prove a case.

Ex officio:

An ex officio indictment is a bill of indictment found for an offence in respect of which there has been no committal for trial.

Fail to appear:

An offence of not appearing in court when required to, usually in breach of a bail undertaking.

Hearing:

Where evidence is heard from all parties involved in the matter and a judgment is made

Hearsay:

Information that was heard by one person about another; evidence based on the reports of others rather than on personal knowledge; normally inadmissible because not made under oath.

Higher court:

Either the District Court or the Supreme Court, depending on the nature of the criminal charge.

Indictment:

Formal accusation charging someone with a crime. It takes the form of a written document containing brief details of the accusation.

Indictable offence:

More serious crimes heard by a higher court eg break and enter, stealing, rape.

Indictable offences heard summarily:

Where some serious crimes eg: stealing, assault or drug charges are dealt with finally in the magistrates court instead of being sent to a higher court.

Intent:

To be convicted of most crimes, a person must have an intention to commit a criminal act.

Imprisonment:

Where a court imposes a period of time where a person is to be detained as part or the whole of a sentence in a criminal matter.

Judge:

The court official who presides in the higher courts and makes decisions about law and about facts in cases where there is no jury, and imposes sentences and awards damages.

Judgment:

The decision of a court.

Judicial proceeding:

A proceeding heard before a judge or magistrate.

Jurisdiction:

The extent of the authority of a court to decide matters brought before it and the geographical limit within which a court order can be enforced.

Jury:

A panel of people who decide questions of fact in a court proceeding. 12 jurors are used for all criminal trials in higher courts and 4 jurors in some limited civil cases in higher courts. Juries are not used in the Magistrates or Family Courts.

Lawyer:

A person who holds a legal qualification and is approved by the Supreme Court as being entitled to practice as either a solicitor or a barrister.

Legal Aid Office:

The previous name for the body which delivered Legal Aid.

Legal representation:

Having a lawyer to act on behalf of a person.

Legal representative:

A lawyer who acts on behalf of a person.

Magistrate:

The court officer who presides in the Magistrates Court and makes all findings about law and fact, imposes sentences and awards damages.

Magistrates Court:

The Court where criminal proceedings start and which deals with the less serious offences and sends the more serious offences to a higher court to be dealt with. Deals with civil claims involving property up to \$50,000 and with limited family law matters.

Mental Health Court:

Decides if a person charged with an offence was of unsound mind, or unfit for trial or where the charge is murder, was of diminished responsibility.

Mention:

A date when a matter is listed in court but on which the full hearing of the matter will not take place.

Natural Justice:

Rules and procedures to ensure fairness which must generally be followed by a person or body which has power to resolve disputes.

Oath:

A promise that statements made by a person are true or that the contents of an affidavit are correct made by swearing on the bible. A person who has no religious belief or who objects to making an oath may make an affirmation.

Offence:

Something which the law prohibits.

Offender:

A person who does something which is prohibited by law.

Penalties & Sentences Act:

Penalties and Sentences Act 1992, the Act of Parliament which sets out the principles for sentencing offenders and the sentencing options.

Plea of guilty:

A statement by an alleged offender that they have committed the offence with which they are charged.

Plea of not guilty:

A statement by an alleged offender that they do not admit to having committed the offence with which they are charged.

Police prosecutor:

The police officer responsible for appearing in the Magistrates Court to bring charges against an alleged offender.

Prima facie case:

A case which on its face is sufficient and evidence is required to prove otherwise.

Prosecution:

The bringing of a court action against a person.

Prosecutor:

The lawyer representing the state who tells the court the police version of the case.

Queensland Law Society:

The body which represents solicitors, deals with some complaints about solicitors and regulates professional conduct. Can provide a list of all solicitors in Queensland and referrals to individual solicitors.

Queensland Police Service:

The Queensland Police force.

Registry:

That part of the court where all documents are filed.

Remand:

The period of time before a criminal charge is finally dealt with by the court.

Rules of evidence:

The rules that govern the method of presentation and admissibility of oral and documentary evidence at Court hearings.

Sentence:

The penalty for committing an offence.

Sittings:

The name given to a period of weeks in which the District/Supreme Court hears cases from the list of cases waiting to be heard.

Solicitor:

A lawyer who advises clients and represents them in legal matters. A solicitor may engage a barrister for court work or for specialist advice on behalf of the client.

Summarily:

In the Magistrates Court.

Summary Offences:

A summary offence, is a criminal act in some common law jurisdictions that can be proceeded with summarily, without the right to a jury trial and/or indictment.

Summary trial:

A trial in the Magistrates Court.

Supreme Court:

The Court which deals with the most serious crimes eg: murder and which deals with civil claims of amounts exceeding \$250,000.

Trial:

A hearing in court when all evidence is heard and a final decision is made.

Trial date:

The date on which a trial is due to take place.

Verdict:

A verdict is the formal finding of fact made by a jury on matters or questions submitted to the jury by a judge.

Victim impact statement:

A statement presented to the court which outlines the effect of a crime upon the victim.

Victim of Crime:

A person who has a crime committed against them.

Victim support group:

A group to provide personal support to victims of crime.

Watchhouse:

The part of the police station where people who have been charged with an offence are held until they appear in court or are granted bail.

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Appendices

- Appendix 1: Terms of Reference
- Appendix 2: Discussion Paper
- Appendix 3: Acknowledgments
- Appendix 4: Legal Aid Queensland Flowchart
- Appendix 5: Brisbane Committals Protocol
- Appendix 6: Criminal Justice Procedure Co-ordination Council
- Appendix 7: Penalty and imprisonment comparisons
- Appendix 8: Qld Bar Association Submission – table of offences carrying a 3 years or less penalty
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Review of the civil and criminal justice system in Queensland



Background

The Reviewer is to examine and report on the working of Queensland Courts in the civil and criminal jurisdictions with a view to making more effective use of public resources.

In recognition of the increasing volume and complexity of demands on the State's civil court system and increases in the time and resources consumed by the litigation process, it is timely to examine whether the current jurisdictional limits of Queensland's courts are appropriate.

In recognition of the desirability of early identification and encouragement of pleas of guilty in the District and Supreme Courts and the potential for a greater number of less serious indictable offences to be finalised in the Magistrates Court, it is timely to review the criminal jurisdiction, including the jurisdictional limits of Queensland's courts, and to consider new models for progressing criminal matters.

Terms of reference

The Reviewer is to report on:

1. Monetary limits for the civil jurisdiction

Are the monetary limits of the District Court and Magistrates Court appropriate?

2. Summary disposition of indictable offences

Identify the range of indictable offences which can be dealt with summarily.

The range of indictable offences capable of summary disposition

Chapter 58A of the Criminal Code allows certain offences to be dealt with summarily either at the election of the prosecution (section 552A) or the defendant (section 552B). Pursuant to section 552D, a magistrate retains a residual discretion not to deal with a matter if satisfied that the nature or seriousness of the offence is such that the defendant could not be adequately punished upon summary conviction.

Should the list of offences in sections 552A and 552B be expanded to include, for example, all offences carrying a maximum of 5 years imprisonment?

Should offences that have a yet higher maximum penalty such as assault occasioning bodily harm; burglary, stealing and unlawful use of a motor vehicle; wounding be included in chapter 58A?

Section 552B of the Criminal Code imposes the following monetary limitations: offences of dishonesty - \$5,000; offences of wilful destruction - \$5,000; burglary or enter premises - \$1,000.

Are the current monetary limits appropriate or should they be increased or removed?

Are the current rights of election appropriate?

3. Reform of the committal proceedings process

The *Justices Act 1886* permits different forms of committal proceedings from a full committal with examination in chief, cross-examination and re-examination of witnesses; a full hand-up or “paper” committal in which the defendant (where represented) consents to all evidence being tendered to the magistrate in the form of written statements and the magistrate is not required to make an assessment of the evidence but automatically commits the defendant to the higher court; and a combination of the above whereby some statements are tendered as evidence in chief but some or all of the witnesses may be examined, cross-examined and re-examined.

Should the committal proceeding process be reformed, for example to:

- Abolish committal proceedings.
- Abolish the full hand-up committal proceeding (with these matters to proceed directly to the higher court) but retain committal proceedings with cross-examination.
- Abolish committal proceedings but introduce enhanced prosecutorial disclosure obligations.
- Abolish committal proceedings but introduce an election to cross-examine witnesses in a pre-trial hearing by agreement or ordered by the higher court.
- More closely align the committal test with the test applied by the prosecution in deciding whether to present an indictment.

4. Sentencing discounts for an early plea

Section 13 of the *Penalties and Sentences Act 1992* states that the court must take the guilty plea into account and may reduce the sentence because of it. The timing of the plea is a relevant factor in determining whether a reduction should be made. If the sentence is not reduced because of the guilty plea, then the court must state its reasons for not reducing the sentence. However, if the sentence is reduced, the court is not required to state what the actual reduction in sentence was.

Should section 13 be amended to encourage defendants to make earlier pleas of guilty, for example:

- Provide that a court must give a discount for an early plea for any offence.
- Provide that a Magistrates Court must give a discount for an early plea for an indictable offence dealt with summarily.
- Provide that a court, when reducing a sentence for a plea of guilty, must set out how the sentence is reduced, that is, indicate what the sentence would have been without the guilty plea (as recommended by the Victorian Sentencing Advisory Council).

- Provide that a court imposing a sentence on a plea of guilty make either no or a limited reduction in penalty by reason of that plea where: (a) it was not entered at the committal hearing; or (b) where the sentence which would be imposed without any such reduction would not exceed the maximum sentence a Magistrate could impose for that offence.
- Provide as in section 8(2) *Sentencing Act 1995* (WA) that “a plea of guilty is a mitigating factor and the earlier in the proceedings that it is made, or indication is given that it will be made, the greater the mitigation”.

5. Case conferencing

Whether there should be a formal system supported by legislation and/or practice directions to facilitate:

- Early identifying and encouragement of pleas of guilty.
- Identifying points to be determined by pre-trial rulings.
- Narrowing issues to be determined by the jury.
- Facilitating the conduct of the trial.

Discussion paper

Reform of the Committal Proceedings Process



Reform of the Committal Proceedings Process **Discussion Paper**

At the launch of the Review of the Civil and Criminal Justice System in Queensland on the 28th July, the Hon Martin Moynihan AO QC announced that the review team would be publishing a short discussion paper on committal proceedings.

This discussion paper has been produced in a very short time frame for the purpose of stimulating debate and discussion only. It does not purport to be a comprehensive analysis of all of the issues, nor does it represent the final views of the Review.

It does not represent the views of the Attorney-General or the Queensland Government.

DISCUSSION DRAFT

1. Introduction/Terms of Reference

The committal procedure for indictable offences is contained in the provisions of the Queensland *Justices Act 1886* (Part 5, Divisions 5-9). The *Justices Act 1886* permits different forms of committal proceedings including:

- a full committal with examination in chief, cross-examination and re-examination of witnesses;
- a full hand-up or “paper” committal in which the defendant (where represented) consents to all evidence being tendered to the magistrate in the form of written statements in which case the magistrate is not required to make an assessment of the evidence but automatically commits the defendant to the higher court; or
- a combination of the above in which some statements are tendered as evidence in chief but some or all of the witnesses may be examined, cross-examined and re-examined.

The Terms of Reference specifically require the Review to consider the following question:

Should the committal proceeding process be reformed? For example to:

- Abolish committal proceedings.
- Abolish the full hand-up committal proceeding (with these matters to proceed directly to the higher court) but retain committal proceedings with cross-examination.
- Abolish committal proceedings but introduce enhanced prosecutorial disclosure obligations.
- Abolish committal proceedings but introduce an election to cross-examine witnesses in a pre-trial hearing by agreement or ordered by the higher court.
- More closely align the committal test with the test applied by the prosecution in deciding whether to present an indictment.

Reform of committals has been the subject of many reviews throughout Australia over the past two decades. It is a well ploughed field and has led to important changes in many other jurisdictions. (Appendix A outlines the principal reforms in other jurisdictions). Rather than duplicate this research, it is the intention of this review to draw on the extensive research already available and to enhance this with a conceptual “map” of the current criminal justice process in Queensland to identify both the crucial functions the “committals system” discharges, and how its operations might be improved so that appropriate recommendations can be made.

a. Environmental context

One of the most significant environmental factors affecting reform in the criminal justice system is the way information is collected, stored and accessed. We are rapidly moving away from a paper-based system. Data itself is increasingly in

digital/electronic form (for example, photographs, recorded conversations, video-recordings etc) is becoming the norm. Police (QPS), Director of Public Prosecutions (DPP) and the Courts are increasingly developing and applying software to make data more accessible and useful (for example the Future Courts program, the development of electronic briefs and police capture of evidence). This change brings with it greater capacity to map processes as well as to streamline and simplify information flows within the criminal justice system. To be effective reform of any aspect of the criminal justice system must move with this development.

b. Underlying Principles

The important issue is not whether committal proceedings, as commonly understood, should be retained or abolished, but rather whether its essential purposes can be met in a more streamlined and effective way, consistent with principles of fairness and access to justice.

Some of the principles which inform the consideration of reform of the committal process in this review include:

- The effectiveness and fairness of the criminal justice system should be considered as a whole. The impact of changes in one part of the system on other parts must be fully considered. There should be an alignment between the flow of information and the available technology. Specifically there needs to be a “better interface between the committing court and the superior court” to enable matters to be determined more efficiently.¹
- An accused should not face trial unless there is sufficient evidence against him or her.
- Pre trial procedures should be designed to narrow the issues, filter out weak cases, and ensure the smooth and expeditious flow of cases through the system. Screening mechanisms need to be open to public scrutiny to ensure accountability and public confidence in the justice system.
- Before a person is committed for trial on a serious offence she or he should know the case they have to answer. Full and frank disclosure at the earliest opportunity enables both prosecution and defence to make informed decisions about how to proceed. Compliance mechanisms need to be practical and effective.
- Pre trial court appearances and court listings should be minimised and in general limited to contentious issues. Effective administrative processes will ensure the smooth flow of criminal processing. Active judicial oversight and

¹ National Legal Aid, and the Conference of Australian Directors of Public Prosecution “a best practice model for the determination of indictable charges”

opportunities for court intervention for defined exceptional cases will ensure there is no compromise of fairness.

- The provision of legal aid funding should be congruent with these principles.
- There should be congruence in treatment of cases dealt with summarily and those dealt with by indictment.

2. Purpose of committal proceedings

The system of committal proceedings in Queensland is a legacy of our British heritage. Historically, the primary, if only purpose of committals was to ensure that an accused did not face trial on a serious criminal matter without sufficient evidence. In practice, however, it is uncommon for a Magistrate to discharge a matter because of a failure of the prosecuting authorities to adduce sufficient evidence.²

The importance of the committal process was reaffirmed by the High Court in *R v Barton* 1981 147 CLR 75 at 99-100 which emphasised that:

“... the principal purpose of that examination is to ensure that an accused will not be brought to trial unless a prima facie case is shown...”

Fairness to the accused also requires that he or she knows the case he or she has to answer and is given a fair opportunity to meet it. A secondary purpose for the committal has thus evolved to ensure the accused is fully informed about the nature and detail of the case against him or her (disclosure). In Queensland statutory disclosure obligations are linked to the committal process. (See Appendix B for relevant provisions of the Criminal Code). In the majority of cases, oversight of disclosure obligations has become the primary purpose.

Committal proceedings, when properly used, can also play an important role in filtering out weak cases. In particular, the committal can:

- lead to earlier pleas of guilty (where the accused recognises the strength of the prosecution case)
- lead to refinement or dropping of charges (where the prosecution recognises the weaknesses in their case or where evidence is produced that discloses other charges)
- narrow the issues for trial
- lead to better concession-making on both sides
- enable the defence to “test” the crucial links in the case against them.

3. Problems

² The Review Team in conjunction with Future Courts is currently gathering data on this issue and many other aspects of the functioning of committals to enable a better “map” of the system to be drawn.

The various purposes and benefits of the committal, however, are in practice often more theoretical than real. The majority of committals in Queensland are full hand ups in which the Magistrate (or judicial registrar) simply rubber stamps the committal. In such cases the Magistrate is not required to consider the sufficiency of evidence question.

Other concerns about the committal process include:

- The committal is ineffective at weeding out weak cases. Almost all committal proceedings result in a committal to a higher court. Queensland has the largest actual number of matters committed for trial of any state. This is a consequence of both limitations on the jurisdiction of magistrates as well as problems with the committal process.
- It is questionable whether committals generally assist in producing early pleas of guilty. In 2006/07, 83% of matters committed resulted in pleas of guilty after committal, often after being set down for trial.
- The disclosure function may be more effectively achieved by other mechanisms or by adjusting the linkage between disclosure and the committal.
- The impact of the committal on witnesses can be severe. The trauma of having to relive a terrible experience and of being cross-examined twice (initially without the moderating effect of the jury) has been widely recognised in the reports of many law reform bodies³. In addition, a witness may be deterred by the experience of the committal process from later giving evidence at trial. Giving evidence multiple times can also affect its quality and reliability⁴.
- It is likely that the committal process adds considerably to both cost and delay in the processing of criminal cases. This is a difficult contention to prove, however, anecdotal evidence from court staff, lawyers, witnesses and victims indicates the committal process adds significant cost and delay, tying up resources that could be better used elsewhere. Brisbane court staff estimate the average delay between arrest and committal to be approximately 4 -6 months by which time there has often been multiple “committal mentions”. Late consents to the full-hand up or late changes to the witnesses required for cross-examination often mean inefficient allocation of court resources. Difficulties with accurately estimating the length of committals mean that it is not uncommon in some Queensland courts for committals to be interrupted by significant delays.

³ See for example, Review of the Criminal and Civil Justice System in Western Australia

⁴ This is strong justification for the video-recording of certain categories of evidence as early as possible, even at the crime scene. For example, eye witnesses.

- It is claimed that the contested committal is too often used by defence as a “fishing” exercise or to bully the witness, and is open to misuse by both sides with lengthy and unnecessary and unproductive cross examination of witnesses.
- There are issues of equity. For example, limitations of legal aid funding mean that contested committals may be more likely when the defendant can either afford private legal representation or is unrepresented (in which case the Magistrate must conduct a full committal even if the accused intends to plead guilty). However, effective disclosure and compliance mechanisms could go a long way to achieving equity.
- The role of the Magistrate in determining sufficiency of evidence or appropriate charges is largely theoretical. Very few cases are “knocked out” in this way. Irrespective of the Magistrate’s determination, the DPP may proceed by ex officio indictment, or can alter the charge or decide not to proceed with the indictment.⁵
- Opportunity costs. It is not known what opportunities (for the system and the individual) are lost because of persistence with an outdated system.

4. What happens now in Queensland

The conduct of criminal law prosecution begins with the reporting of a crime and proceeds through investigation, arrest of suspects and the determination of charges by the Queensland Police Service (QPS). In simple (summary offences) the Magistrate will hear and determine the matter either by way of trial or sentence. In the case of serious (indictable) offences a committal proceeding is conducted.

In Queensland the prosecution role in committals for State offences is divided between the police and the DPP. Since the favourable evaluation of the Brisbane Central Committals Project by the Criminal Justice Commission in 1996 the DPP has conducted the prosecution of all matters listed for committal in Brisbane Central Magistrates Court (not suburban Brisbane courts). It also conducts committals in Ipswich and in sexual offence matters and offences involving violence against women in Southport. The DPP estimates that it conducts approximately 25 -30% of all committals in the State.

There has been no objective evaluation of the effectiveness of the committals project since 1996.

The prosecution of all other committals in Queensland are conducted by the QPS. However, the QPS can request the DPP to conduct committals on their behalf in complex or sensitive matters. In cases where the committal is conducted by the QPS, the DPP does not generally become involved until the end of the committal process.

⁵ DPP figures for 2006.07 indicate that 1.7% of matters it receives contain insufficient evidence to proceed and were discontinued.

At this stage, the DPP will consider the evidence, reassess the charge and prepare the indictment for either sentence or trial.

Prior to committal, the prosecution collects evidence from witnesses in the form of written statements. Copies of these are given to the defence. The QP9 is generally provided at around time of first appearance with the brief of evidence provided before committal.

Mandatory prosecution disclosure obligations are set out in the Criminal Code. Disclosure obligations on prosecutors in Queensland were codified in 2004. (Prior to this, prosecution obligations of disclosure were found in a number of different QPS and DPP guidelines, procedures and policies, as well as case law, unwritten rules, and general practice). These strict and detailed provisions give recognition to the prosecution obligation of fairness. The review is currently obtaining information about how they work in practice. Appendix B sets out the relevant provisions of the Criminal Code

The prosecuting authority then decides which witnesses will be required to give oral testimony or be available for cross examination.

At the conclusion of the contested committal, where no plea has been entered or the accused has pleaded not guilty, the magistrate must satisfy him or herself as to whether there is sufficient evidence upon which the accused could be found guilty on the charges before him or her. If satisfied, the magistrate then commits the accused for trial.

Where the defendant pleads guilty and it is not a matter which can be dealt with summarily and he or she is legally represented and consents to a full hand-up committal the Magistrate will commit him or her for sentence

A flowchart outlining the Queensland Criminal Law Prosecution Process is set out at Appendix C. This is an unpublished document prepared by the Business Analysis Unit, Legal Aid Queensland. There will be some differences where the defendant has private representation, nonetheless it gives a useful overview of the entire process.

5. Issues

In considering reform of committals the three critical issues are: disclosure, screening and the right to cross examine witnesses:

a. Disclosure

- ⇒ Are the current disclosure mechanisms adequate to achieve full and frank disclosure? How are these being utilised in practice? Are there any improvements that could be made? See Appendix A
- ⇒ Are there additional incentives and sanctions that could be put in place to ensure compliance? (Sanctions might include: disciplinary; monetary; stay of proceedings; a committal/mention date not set until brief is delivered; adverse comments at trial. Incentives could include early hearing dates, professional acknowledgement);
- ⇒ What are the implications of the increased use of electronic data in legal processes? How can disclosure mechanisms be facilitated by, and aligned with, available technological solutions?
- ⇒ What is the role of the Magistrate's court in ensuring compliance with disclosure obligations? What preliminary steps should be put in place prior to application to a court for intervention? (refer to the UCPR disclosure provisions for civil matters)
- ⇒ Is the linkage between disclosure obligations and the committal the appropriate one? What changes to the statutory provisions would be necessitated by any changes to the committal process?

b. Screening

- ⇒ How can weak cases most effectively be filtered out?
- ⇒ Should the Magistrate retain the power to discharge? Since the Magistrate does not consider the "sufficiency of evidence" question in the majority of cases (full hand ups), the de facto screening is already conducted by the DPP.
- ⇒ In deciding whether to commit, the magistrate must determine whether there is evidence from the prosecution capable of satisfying a jury beyond reasonable doubt that the defendant has committed an indictable offence whereas the DPP has a mandate to consider broader public interest issues. If the Magistrate is to retain power to discharge, how can the tests/standards used by magistrates and the DPP are better aligned? Should they be better aligned? Are both needed?

c. Cross examination of witnesses

- ⇒ Should a preliminary right to cross-examine witnesses be retained?
- ⇒ If so, in what circumstances or in what category of case? According to Magistrate's court staff, the offence types most often the subject of contested committals are: indecent dealing, sexual offences, fraud and drug offences. What are the essential features of these types of cases which make them more likely to go through a contested committal and can overriding principles be distilled that might apply more generally to the right to cross-examine?
- ⇒ In Victoria, for example, in determining whether cross-examination is necessary, the court must consider whether: there has been adequate disclosure, the issues have been adequately defined; there is sufficient evidence to support a conviction; a fair trial can take place if it proceeds to trial etc. Trivial, vexatious and oppressive cross-examination is not permitted and the interests of justice must be served by the cross-examination. In South Australia, there must be "special reasons". In Tasmania it must be "in the interests of justice" to do so. See Appendix A for further discussion of reforms in other jurisdictions.
- ⇒ Section 21AG Evidence Act Queensland 1977 sets out limitations on the right to cross-examine child witnesses (see end of Appendix C). What lessons can be drawn from the operation of this provision?
- ⇒ What impact will any additional disclosure and compliance mechanisms have on the need for preliminary cross-examination of witnesses?

Reform of the Committal Proceedings Process **Discussion Paper – Appendix A**

Committal Proceedings in Other Jurisdictions

Committal proceedings have been the subject of extensive reform across Australian jurisdictions over the last two decades. During the 1970's and 1980's statutory changes were made in most jurisdictions to permit committal on the papers. In recent times, reforms have taken three directions: the abolition of the committal with statutory disclosure; making the hand up committal mandatory with provision for cross-examination of witnesses in special circumstances, and the exemption of certain categories of witness from giving oral evidence or from being cross-examined at committal.

- **Abolition of committal proceedings and statutory disclosure obligations.**

Western Australia and Tasmania have recently introduced significant reforms which have effectively abolished the committal.

In 2004 *Western Australia* introduced an administrative committal process with strict disclosure obligations on both prosecution and defence.

Under the new system, the prosecution is required to provide a committal brief to the defendant 14 days before the committal hearing. At the committal mention day hearing, the defendant is required to enter a plea and all documentary evidence is tendered. Parties are not required to attend the hearing in uncontested matters. Once the court is satisfied that disclosure obligations have been complied with, an administrative committal for trial or sentence is made. (*WA Criminal Procedure Act 2004*)

Tasmania introduced far reaching reforms in 2007. Committal proceedings were abolished. The accused is now committed directly to the Supreme Court for trial or sentence. In certain circumstances an accused may apply to conduct a post-committal but pre-trial hearing to cross-examine witnesses before a Magistrate (in sexual offences and homicide) and before a Justice of the Peace in other matters. There are also stricter disclosure provisions. (*Criminal Procedure Act 1986; Justices Act 1902*)

- **Retention of hand-up committals with statutory disclosure and rights to examine witnesses in exceptional cases**

There has been a steady move towards mandatory “hand-up” committals in many jurisdictions. These reforms are generally accompanied by disclosure obligations with the retention of a statutory right to cross examine witnesses in exceptional cases. This model aligns the court process with what has become standard practice i.e. that the majority of committals are non-contested (hand-ups) whilst making provision for exceptional cases where cross examination of witnesses is necessary.

In *South Australia* it is mandatory for the evidence of prosecution witnesses to be tendered in the form of written statements. Witnesses may only be cross-examined with the leave of the Court if satisfied that there are special reasons. (see *SA Summary Procedure Act 1921*)

In *New South Wales* paper committals are mandatory with restrictions on the right to call witnesses. The defendant is given a brief before the committal. Where a defendant requires a prosecution witness to give evidence or be available for cross-examination, he or she must apply to the court and provide substantial reasons why, in the interests of justice, the witness is required to give evidence. There is no absolute right to require a witness to give evidence. (see *NSW Justices Act 1902*)

Victoria introduced mandatory paper committals in 1999. Witnesses may be cross-examined only where the magistrate is satisfied that it will introduce evidence of “substantial relevance” to the facts in issue. (*Magistrate’s Court (Amendment) Act 1999; Crimes (Criminal Trials) Act 1999*)

In the *ACT* mandatory paper committals are currently under consideration. (see Department of Justice and Community Safety Discussion Paper *Reforms to court jurisdiction, committal processes and the election for judge alone trials* May 2008)

- **Exemption of categories of witnesses exempt from having to give oral testimony.**

In *Queensland* hand up committals are the norm but are not mandatory. Amendments to the *Evidence Act 1977* have exempted child witnesses from giving oral testimony and it is only necessary to give evidence once. The evidence of a child is pre-recorded and they can not be cross-examined unless a stringent test is met, that is:

- identified an issue to which the proposed questioning relates;
- provided a reason why the evidence of the witness is relevant to the issue;
- explained why the evidence disclosed by the prosecution or before the court at the committal does not address the issue; and
- identified the purpose and general nature of the questions to be put to the witness to address the issue.

The magistrate must also be satisfied that the interests of justice cannot adequately be served by leaving cross-examination of the affected child about the issue to the trial. In other words, if the interests of justice would be served by the child being cross-examined about the issue at the trial, then there is no reason to also do so at the committal.

Without limiting the matters to which the magistrate should have regard in considering the interests of justice and whether cross-examination at committal is justified, the court must consider whether the case for the prosecution is adequately disclosed; and whether the charge is adequately particularised.

Appendix A

The magistrate must also have regard to the vulnerability of children and the undesirability of requiring a child to be cross-examined at the committal.

This test is designed to link the ability to cross-examine to an identified issue relevant to the proper purposes of the committal.

In *New South Wales* a victim of a crime involving violence cannot be required to give evidence at a committal without “special reasons... in the interests of justice”. (see s 93 *Criminal Procedure Act* 1986)

Reform of the Committal Proceedings Process **Discussion Paper – Appendix B**

Provisions of the Criminal Code relating to disclosure obligations

Chapter division 3 - Disclosure by the prosecution

Chapter subdivision A - Preliminary provisions

590AB Disclosure obligation

- 1) This chapter division acknowledges that it is a fundamental obligation of the prosecution to ensure criminal proceedings are conducted fairly with the single aim of determining and establishing truth.
- 2) Without limiting the scope of the obligation, in relation to disclosure in a relevant proceeding, the obligation includes an ongoing obligation for the prosecution to give an accused person full and early disclosure of—
 - a) all evidence the prosecution proposes to rely on in the proceeding; and
 - b) all things in the possession of the prosecution, other than things the disclosure of which would be unlawful or contrary to public interest, that would tend to help the case for the accused person.

590AC Chapter division does not have particular consequences

- 1) Nothing in this chapter division—
 - a) requires the disclosure of a thing it is unlawful to disclose under this or another law; or
 - b) affects an accused person's right to a thing under another law.
- 2) Failure to comply with this chapter division in a proceeding does not affect the validity of the proceeding.

Chapter subdivision B - Interpretation

590AD Definitions for ch div 3

In this chapter division—

affected child see the *Evidence Act 1977*, section 21AC.⁵²

arresting officer, for a person charged with an offence, means—

- a) the police officer who arrested the person or, if the person was not arrested, the police officer who brought the charge against the person; or
- b) at any time the person mentioned in paragraph (a) is unavailable, another police officer the police commissioner, or a delegate of the police commissioner, designates as the arresting officer for the person.

court means the court for the relevant proceeding.

criminal history of a person includes every finding of guilt, or acceptance of a plea of guilty, whether or not a conviction was recorded, other than a spent conviction.

disclose a thing, other than particulars, means disclose the thing by—

- a) giving a copy of the thing or a written notice about the thing as required under section 590AH; or
- b) giving a copy of a thing or notice about the thing as required under section 590AJ; or
- c) giving a written notice about the thing under section 590AO.⁵³

disclose particulars means disclose the particulars by giving the particulars as required under section 590AJ.

exculpatory thing, in relation to an accused person, means reliable evidence of a nature to cause a jury to entertain a reasonable doubt as to the guilt of the accused person.

original evidence means a thing that may be tendered as an exhibit in a relevant proceeding.

possession of the prosecution see section 590AE.

prescribed summary trial means a summary trial of an offence prescribed under a regulation for this definition.

prosecution means the person in charge of the prosecution or a person appearing for the prosecution.

relevant proceeding means—

- a) a committal proceeding; or
- b) a prescribed summary trial; or
- c) a trial on indictment.

sensitive evidence see section 590AF.

spent conviction means a conviction—

- a) for which the rehabilitation period under the Criminal Law (Rehabilitation of Offenders) Act 1986 has expired under that Act; and
- b) that is not revived as prescribed by section 11 of that Act.⁵⁴

statement of a person means—

- a) a statement signed by the person; or
- b) a statement of the person that is potentially admissible under the Evidence Act 1977, section 93A;⁵⁵ or
- c) any other representation of fact, whether in words or otherwise, made by the person.

590AE Meaning of *possession of the prosecution*

- 1) For a relevant proceeding, a thing is in the possession of the prosecution only if the thing is in the possession of the prosecution under subsection (2) or (3).
- 2) A thing is in the possession of the prosecution if it is in the possession of the arresting officer or a person appearing for the prosecution.
- 3) A thing is also in the possession of the prosecution if—
 - a) the thing is in the possession of—
 - i) for a prosecution conducted by the director of public prosecutions—the director; or
 - ii) for a prosecution conducted by the police service—the police service; and
 - b) the arresting officer or a person appearing for the prosecution—
 - i) is aware of the existence of the thing; and
 - ii) is, or would be, able to locate the thing without unreasonable effort.

590AF Meaning of *sensitive evidence*

- 1) Sensitive evidence means anything containing or displaying an image of a person (the imaged person)—
 - a) that, disregarding the fact the thing was brought into existence, or is in the possession of the prosecution, for the purpose of providing evidence of an offence, is obscene or indecent; or
 - b) the disclosure of which to another person, without the imaged person's consent, would interfere with the imaged person's privacy.
- 2) Child exploitation material under chapter 22, or material alleged to be child exploitation material, is sensitive evidence.

590AG Particular references to an accused person include references to a lawyer acting for the accused person

- 1) A reference in this chapter division to giving or disclosing a thing to an accused person includes a reference to giving or disclosing the thing to a lawyer acting for the accused person.
- 2) A reference in this chapter division to an accused person viewing a thing includes a reference to a lawyer acting for the accused person viewing the thing.

Chapter subdivision C - Disclosure

590AH Disclosure that must always be made

- 1) This section applies—
 - a) without limiting the prosecution's obligation mentioned in section 590AB(1); and
 - b) subject to section 590AC(1)(a) and chapter subdivision D.
- 2) For a relevant proceeding, the prosecution must give the accused person each of the following things—
 - a) a copy of the bench charge sheet, complaint or indictment containing the charge against the person;
 - b) the following things in relation to the accused person—
 - i) a copy of the accused person's criminal history in the possession of the prosecution;
 - ii) a copy of any statement of the accused person in the possession of the prosecution;
 - c) the following things in relation to witnesses—
 - i) for each proposed witness for the prosecution—
 - (1) a copy of any statement of the witness in the possession of the prosecution; or
 - (2) if there is no statement of the witness in the possession of the prosecution— a written notice naming the witness;
 - ii) for each proposed witness for the prosecution who is, or may be, an affected child—a written notice naming the witness and describing why the proposed witness is, or may be, an affected child;
 - iii) if the prosecution intends to adduce evidence of a representation under the *Evidence Act 1977*, section 93B,⁵⁶ a written notice stating that intention and the matters mentioned in section 590C(2)(b) to (d);
 - d) the following things in relation to tests or forensic procedures—

- i) a copy of any report of any test or forensic procedure relevant to the proceeding in the
- ii) possession of the prosecution;
- e) a written notice describing any test or forensic procedure, including a test or forensic procedure that is not yet completed, on which the prosecution intends to rely at the proceeding;
- f) a written notice describing any original evidence on which the prosecution intends to rely at the proceeding;
- g) a copy of any other thing on which the prosecution intends to rely at the proceeding;
- h) a written notice or copy of any thing else in the possession of the prosecution prescribed under a regulation.

590AI When mandatory disclosure must be made

- 1) This section applies if—
 - a) the prosecution must give an accused person a written notice or copy of a thing under section 590AH(2); or
 - b) the prosecution must give an accused person a written notice of a thing under section 590AO(2) and, apart from section 590AO, the prosecution would have to give the accused person a copy of the thing under section 590AH(2).
- 2) The prosecution must give the accused person the written notice or copy—
 - a) for a committal proceeding or prescribed summary trial—at least 14 days before evidence starts to be heard at the relevant proceeding; or
 - b) for a trial on indictment—no more than 28 days after presentation of the indictment, or if the trial starts less than 28 days after presentation of the indictment, before evidence starts to be heard at the trial.
- 3) Subsection (2) is not intended to discourage the prosecution from voluntarily giving the accused person the written notice or copy at a time before the latest time the subsection may be complied with.
- 4) The court may, at any time, shorten the period mentioned in subsection (2)(a) or extend the period mentioned in subsection (2)(b).

590AJ Disclosure that must be made on request

- 1) This section applies—
 - a) without limiting the prosecution's obligation mentioned in section 590AB(1); and
 - b) subject to section 590AC(1)(a) and chapter subdivision D.⁵⁸
- 2) For a relevant proceeding, the prosecution must, on request, give the accused person—
 - a) particulars if a proposed witness for the prosecution is, or may be, an affected child; and
 - b) a copy of the criminal history of a proposed witness for the prosecution in the possession of the prosecution; and
 - c) a copy or notice of any thing in the possession of the prosecution that may reasonably be considered to be adverse to the reliability or credibility of a proposed witness for the prosecution; and
 - d) notice of any thing in the possession of the prosecution that may tend to raise an issue about the competence of a proposed witness for the prosecution to give evidence in the proceeding; and

- e) a copy of any statement of any person relevant to the proceeding and in the possession of the prosecution but on which the prosecution does not intend to rely at the proceeding; and
 - f) a copy or notice of any other thing in the possession of the prosecution that is relevant to the proceeding but on which the prosecution does not intend to rely at the proceeding.
- 3) If the prosecution gives notice of a thing under subsection (2) that is not original evidence, the prosecution must advise the accused person that the thing may be viewed on request by the accused person at a stated place.
 - 4) In this section—
particulars means particulars of a matter alleged in the bench charge sheet, complaint or indictment containing the charge against the accused person.

590AK When requested disclosure must be made

- 1) This section applies if—
 - a) an accused person requests particulars or a copy or notice of a thing under section 590AJ(2); and
 - b) either—
 - i) the prosecution must give the accused person particulars or a copy or notice of the thing under section 590AJ(2); or
 - ii) the prosecution must give the accused person written notice of a thing under section 590AO(2) and, apart from section 590AO, the prosecution would have to give the accused person a copy of the thing under section 590AJ(2).
- 2) The prosecution must give the accused person the particulars, copy or notice as soon as practicable after the request is made.

590AL Ongoing obligation to disclose

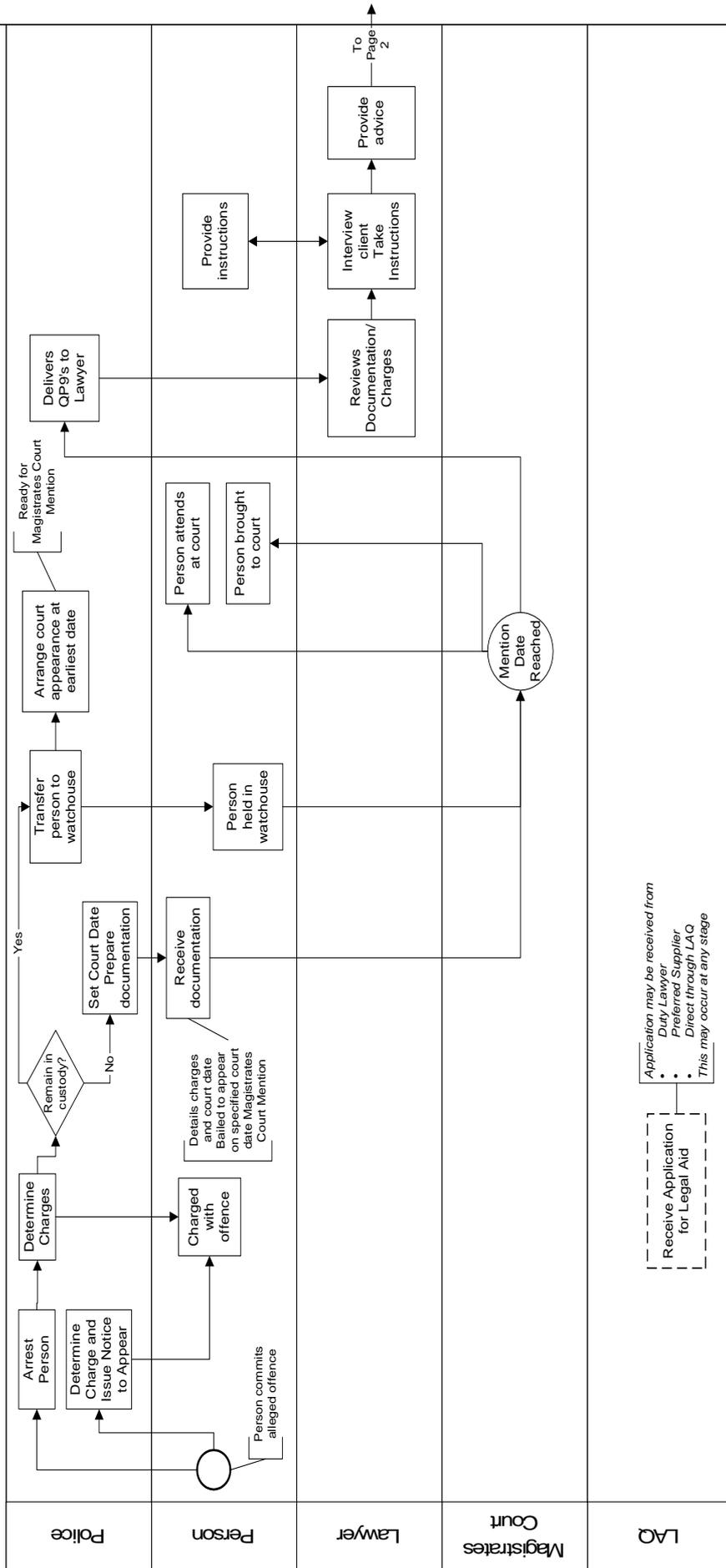
- 1) If the prosecution can not comply with a time requirement because the thing to be disclosed was not in the possession of the prosecution in sufficient time, including, for example, because the thing did not exist at the time, the prosecution must disclose the thing to the accused person as soon as practicable after it comes into the possession of the prosecution.
- 2) The obligation to disclose a thing, other than an exculpatory thing, to the accused person continues despite a failure to comply with a time requirement or subsection (1) until the prosecution ends, whether by the accused person being discharged, acquitted or convicted, or in another way.
- 3) If a thing is an exculpatory thing, the obligation to disclose it to the accused person continues despite a failure to comply with a time requirement or subsection (1) until 1 of the following happens—
 - a) the accused person is discharged or acquitted;
 - b) the accused person dies.
- 4) In this section—
time requirement means a requirement under section 590AI or 590AK.

Appendix B

590AM How disclosure may be made

- 1) If a written notice or copy of a thing must or may be given to the accused person under this chapter division, it is sufficient for—
 - a) a document advising that the written notice or copy of the thing is available for collection at a stated place to be served on the accused person—
 - i) if a lawyer acts for the accused person—at the lawyer’s address for service; or
 - ii) otherwise—at the accused person’s place of business, or residential address, last known to the prosecution; and
 - b) the written notice or copy of the thing to be available for collection at the stated place.
- 2) If notice of a thing must or may be given to the accused person under this chapter division, it is sufficient for notice to be given in a way the prosecution considers appropriate.

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Application may be received from

- Duty Lawyer
- Preferred Supplier
- Direct through LAQ

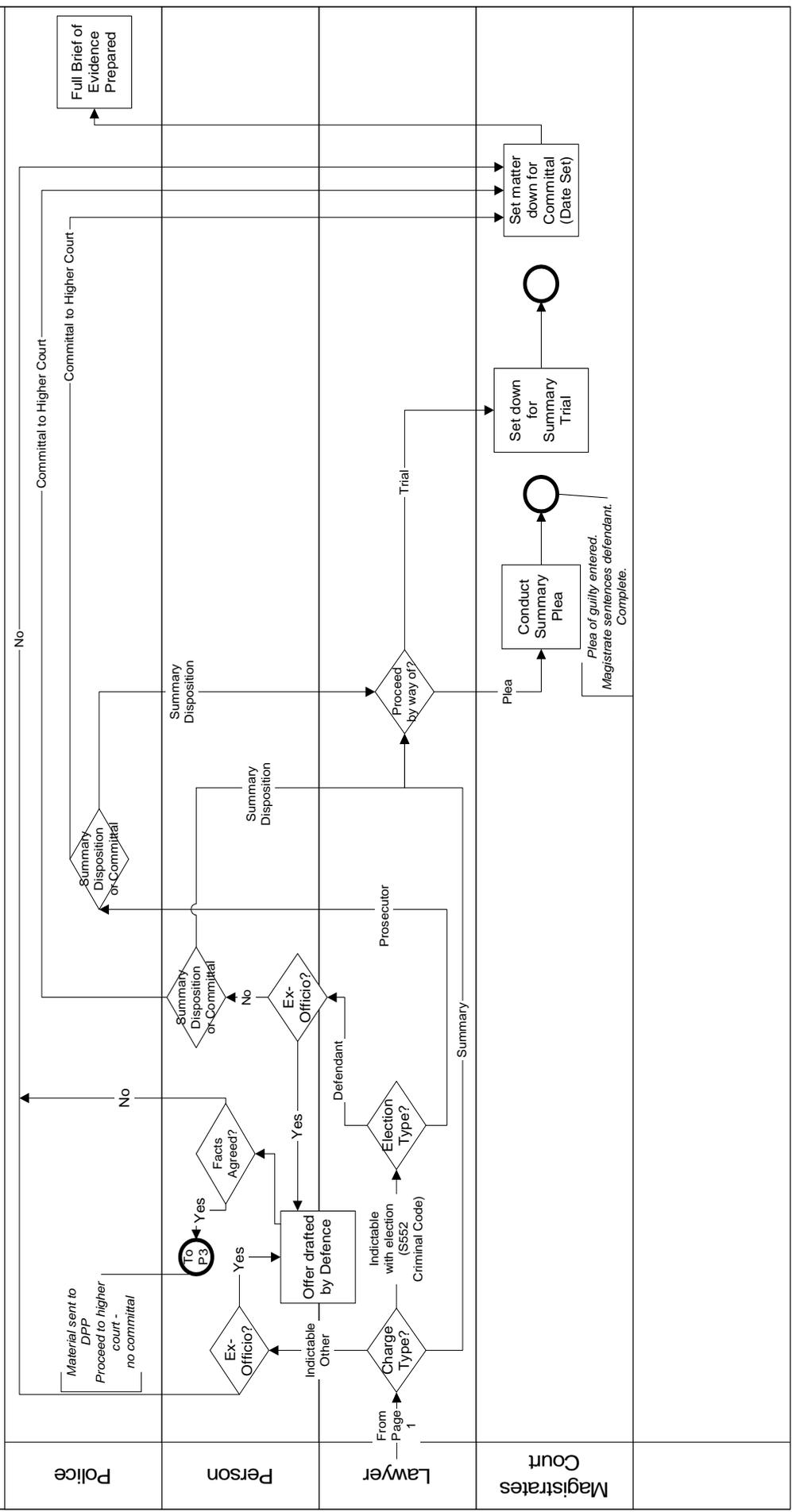
This may occur at any stage

Receive Application for Legal Aid

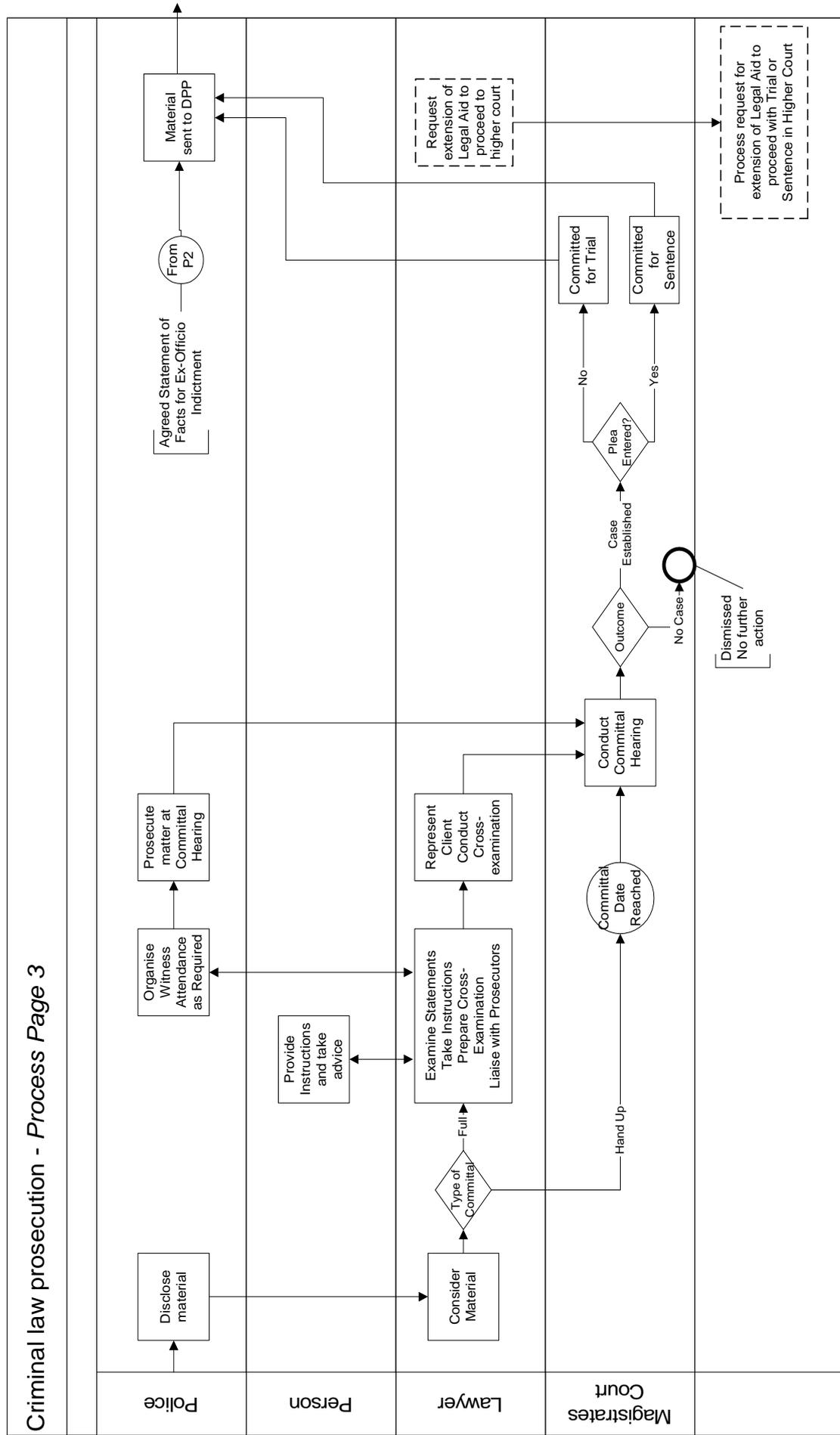
May apply for Legal Aid

- Summary Plea
- Summary Trial
- Hand-up Committal
- Full Committal
- District Court Proceedings inc
- Ex-Officio Mentions

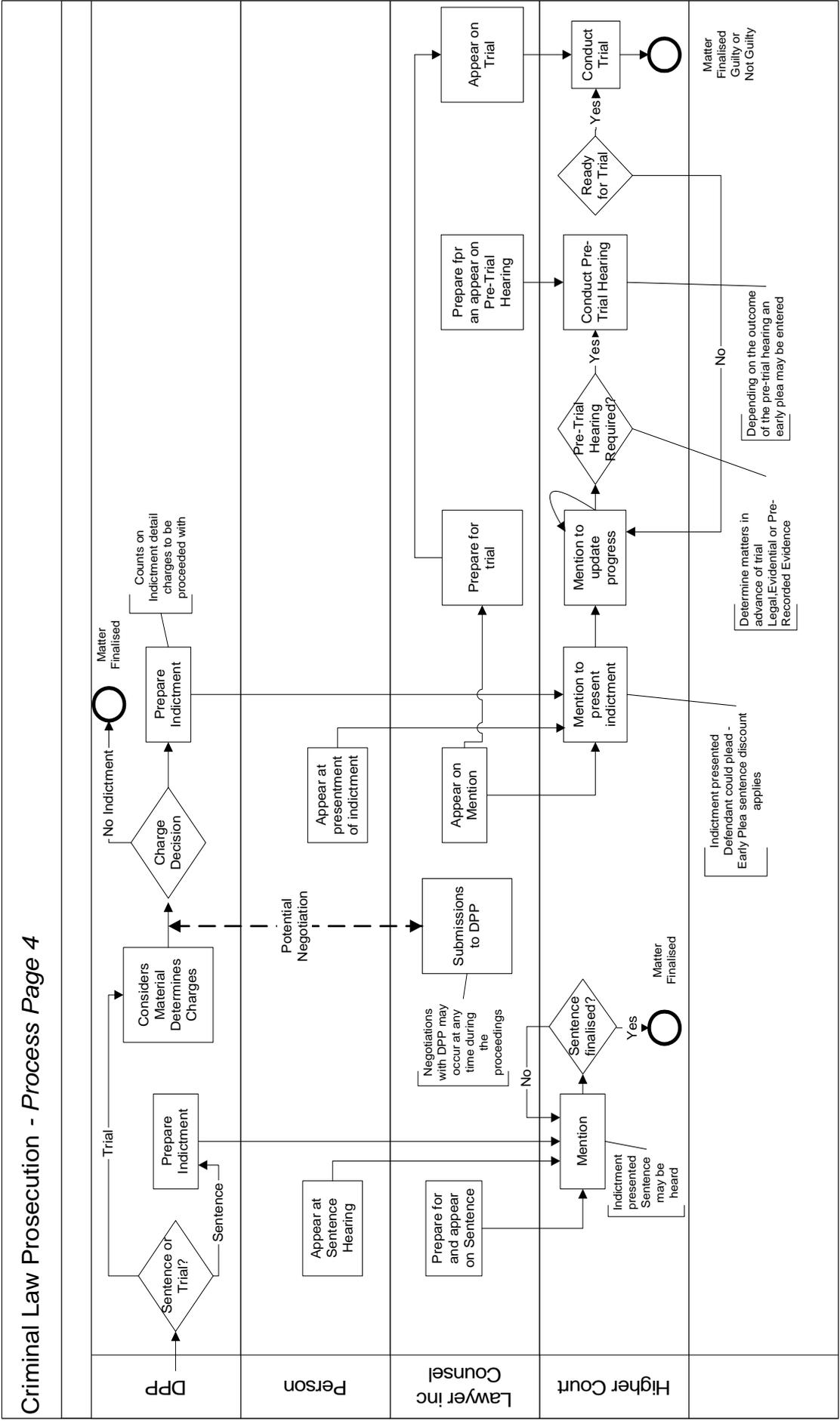
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Appendix C



Appendix 3

ACKNOWLEDGMENTS

The reviewer, The Honourable Martin Moynihan AO QC wishes to acknowledge the contribution of the review team.

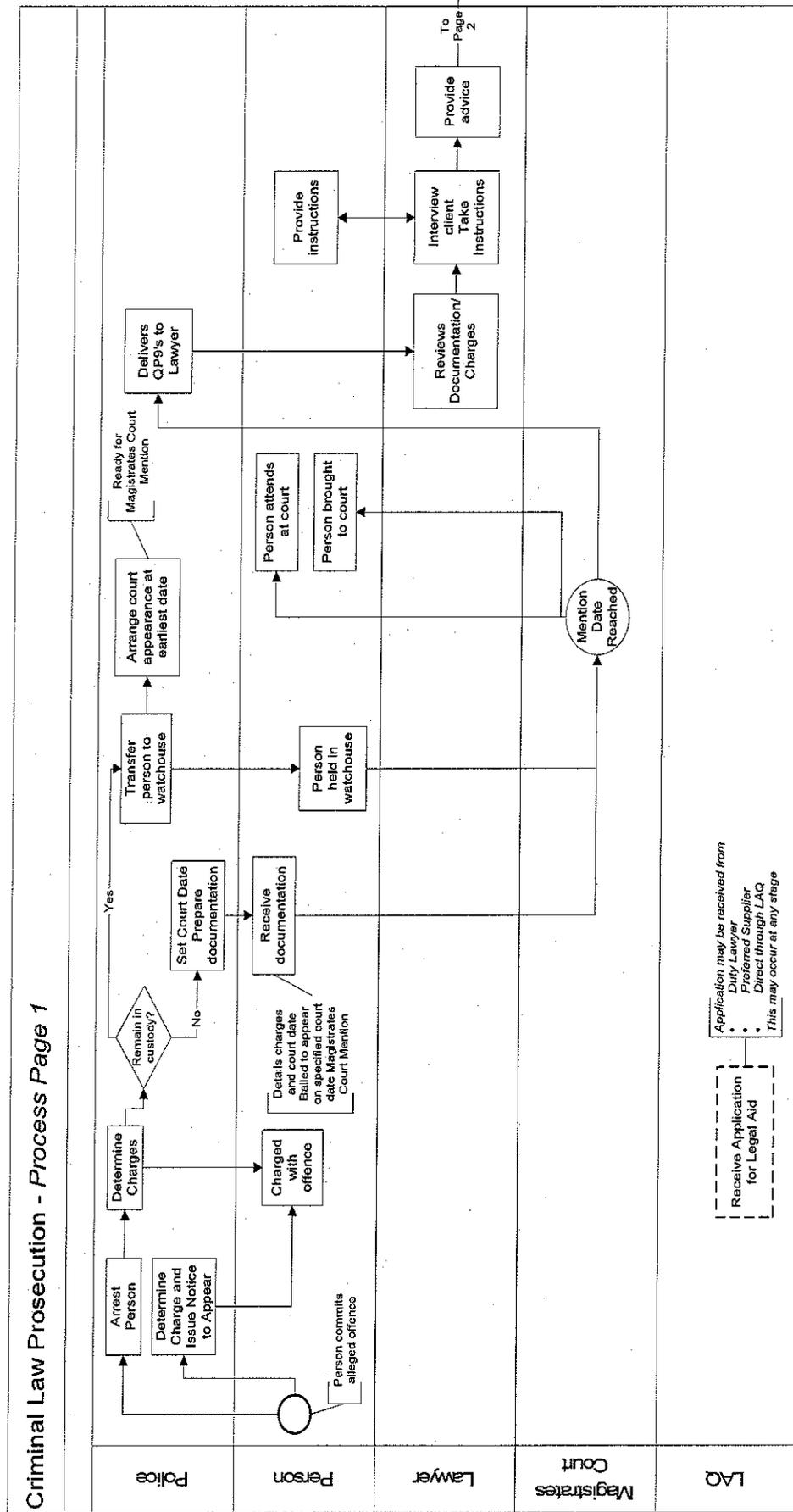
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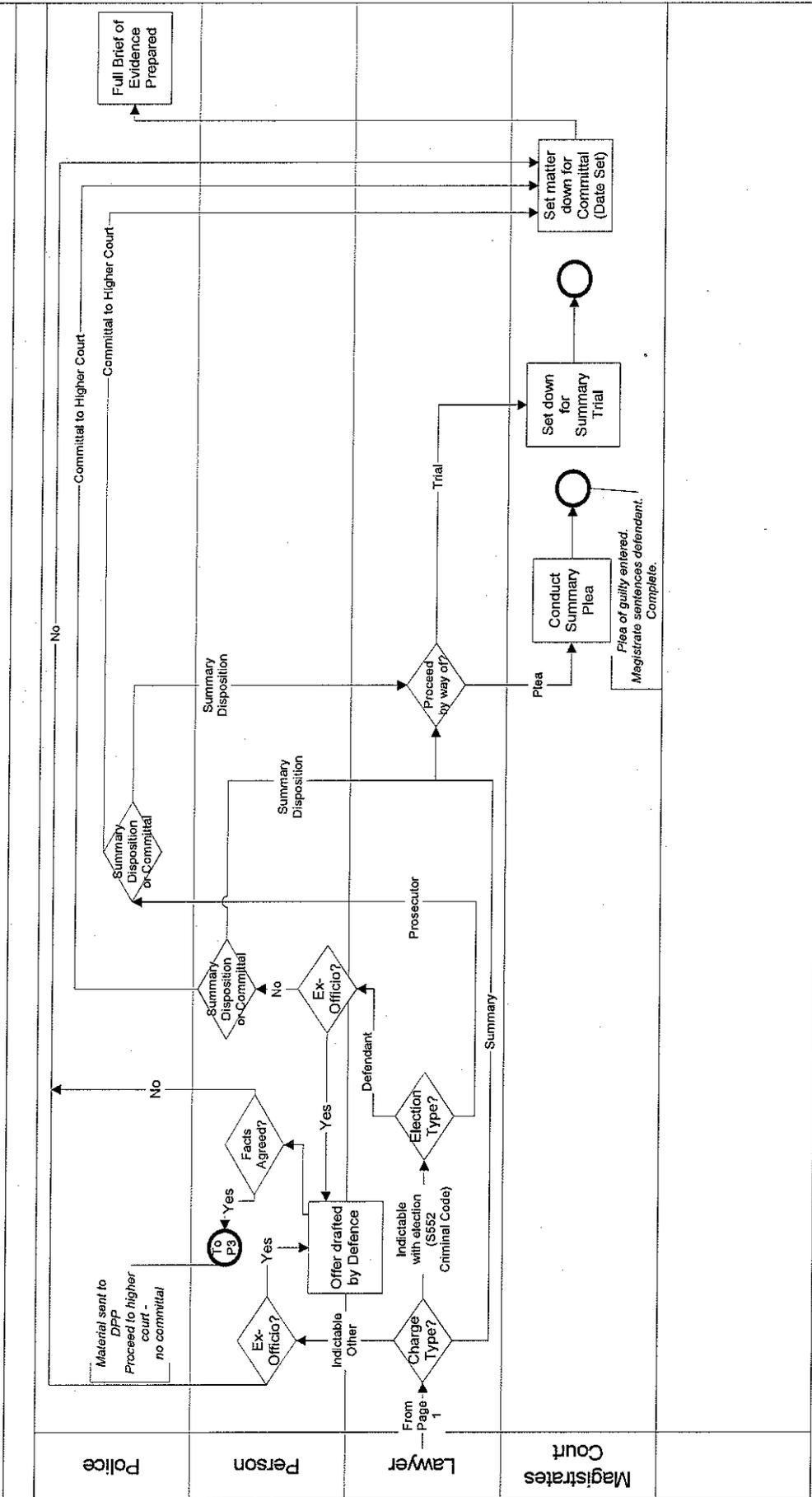
The following individuals and organisations contributed to the Criminal and Civil Justice Review by making submissions, attending round table discussions and imparted their valuable experience to assist in the delivery of the report and others who wish not to be named. As is apparent, I am indebted to the generosity and efforts of many people in compiling this report. It is almost inevitable that I overlook some contributors. For that I apologise. A large number of individuals and organisations made invaluable contributions to the Review by attending roundtables, meeting with review staff and assisting the Reviewer. I have attempted to name all those who have provided this assistance. Others who wish not to be named also contributed.

Mr David Adsett	District Court Judges
Bar Association of Queensland	Legal Aid Queensland
Ms Elise Barker	Mr Duncan Mackellar
Coroner, Michael Barnes	Mr Leigh Madden
Ms Sue Bell	Ms Megan Mahon
Mr Ian Berry	Ms Karen Mant
Mr Mark Biddulph	Mr Paul Marschke
Mr Michael Bosscher	Judge Terry Martin SC
Ms Kate Bradley	Mr Lee McDonell
Ms Imelda Bradley	Ms Claire McGreevey
Brisbane Magistrates Court staff	Mr Simon Moodie
Mr Kevin Brown	Mr David Morgan
Mr John Briton, Legal Services	Mr Tony Moynihan SC

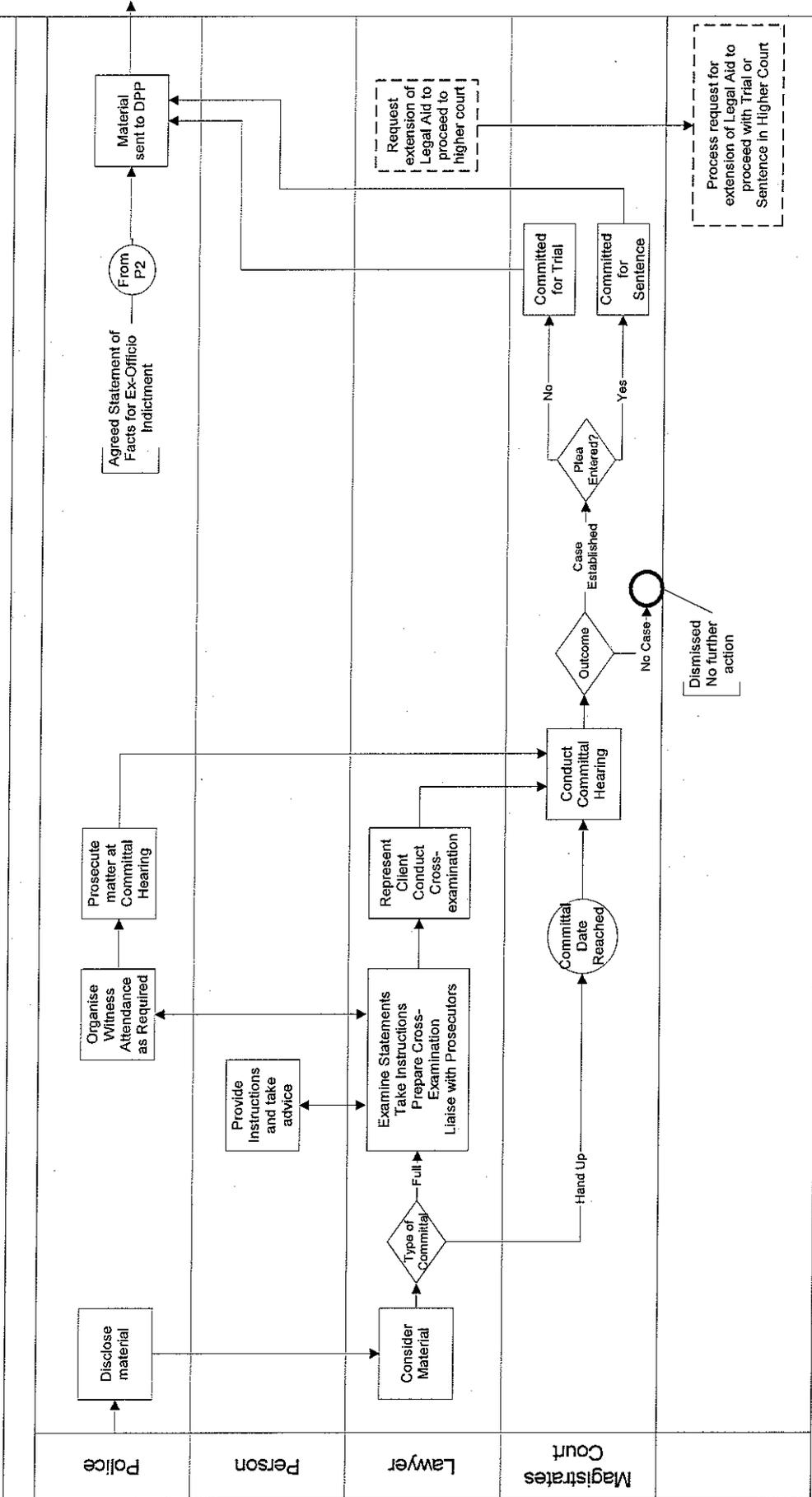
Commissioner	Justice Debra Mullins
Ms Jonty Bush	Mr Robert Needham
Chief Magistrate, Judge Brendan Butler	Mr Nick Koschnitsky
Senior Judge Administrator Justice John Byrne	Ms Carli Ladewig
Magistrate Chris Callaghan	Ms Jenny Lang
Mr John Callanan	Mr Michael Lillas
Commonwealth Director of Public Prosecutions (Qld)	Ms Amanda O'Brien
Mr Stewart Copeland MLA	Mr Andrew O'Brien
Mr Dean Corless	Judge Administrator, Judge O'Brien
Mr Aaron Couder	Mr Greg Obst
Mr Michael Cran	Mr Dan O'Connor
Mr Glen Cranny	Office of the Director of Public Prosecutions Office (Qld)
Mr Paul Davey	Magistrate Leanne O'Shea
Mr Peter Davis SC	Ms Katrina Overell
Chief Justice Paul de Jersey	Superintendent Mr Dale Pointon
Mr Brian Devereaux SC	Queensland Law Society
Judge Julie Dick SC	Ms Fiona Rafter
Mr Peter Fordyce	Mr Sean Reidy
Mr Todd Fuller	Judge John Robertson
Ms Claire Giroto	Mr Terry Ryan
Mr Simon Hamlyn-Harris	Dr Gerard Sammon
Ms Jenny Hardy	Mr Gregory Shadbolt
Ms Julie Harvey	Mr David Shepherd
Mr Ashley Hill	Mr Scott Smith
Ms Robyn Hill	State Reporting Bureau
Magistrate Brian Hine	Mr Michael Stewart SC
Mr Malcolm Hinton	Mr Warren Strange
Judge Marshall Irwin	Ms Virginia Sturgess
JAG – Corporate Communications Unit	Ms Fleur Sullivan
JAG – Crown Law	Supreme Court Judges
JAG – Departmental Library	Supreme Court Library
JAG – Strategic Policy	Supreme and District Court staff
Ms Narelle Kendall	Mr Peter Talbot
Ms Helen Kentrotis	Sergeant Ian Taylor
Ms Judy Kellermeier	Mr Neil Whittaker
Mr Tony Keyes	Ms Deborah Wilson
	Chief Judge Patsy Wolfe
	Mr Jade Wraight



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BRISBANE COMMITTALS PROTOCOLS

(Effective from 15 September 2008)

Introduction

1. These protocols:
 - 1.1 Provide the standard operating procedure for Brisbane Committals;
 - 1.2 Apply to the Brisbane Central Magistrates Court only;
 - 1.3 Do not apply to:
 - 1.3.1 Matters which are exclusively Commonwealth offences; and
 - 1.3.2 Matters in the Childrens Court.
2. Principal stakeholders are:
 - 2.1 The Chief Magistrate (CM)
 - 2.2 The Commissioner of Police (QPS)
 - 2.3 The Director of Public Prosecutions, Queensland (DPP); and
 - 2.4 The Chief Executive Officer, Legal Aid Queensland (LAQ).

Aims

3. The Brisbane Committals Protocols will provide for efficient and timely disposition of indictable offences through:
 - 3.1. The division of responsibilities between QPS and DPP for the prosecution of offences in the Brisbane Central Magistrates Court;
 - 3.2. Efficient preparation, delivery and disclosure of evidence which may be the subject of committal proceedings;
 - 3.3. Subject to financial eligibility and defendants agreeing to any special conditions imposed by LAQ, provision of legal aid to defendants who may be the subject of committal proceedings; and
 - 3.4. Uniform administrative procedures by the Brisbane Central Magistrates Court for mentions and hearing of matters which may be the subject of committal proceedings.

Terms

4. For the purpose of these protocols:
 - 4.1. Committal proceedings includes committal hand-up with or without cross-examination or a full committal hearing;

- 4.2. The "Pros Index" means the computerised index attached to the QPS computer system by which information of pending and completed Court commitments is communicated to QPS members and any equivalent computer index or similar means of communication which may be adopted by the QPS from time to time.
- 4.3. Magistrates Court means the Brisbane Central Magistrates Court.
- 4.4. Brisbane Central Magistrates Court is the Court within the Central Division of the Brisbane Magistrates Court District.
- 4.5. Investigating Officer includes an Arresting Officer.
- 4.6. Agency means either the DPP or Police Prosecutions Corps (PPC).
- 4.7. Brisbane Committals Brief Manager means an officer appointed by the QPS to the role of Brisbane Committals Brief Manager as a liaison between QPS and DPP for the purposes of these Protocols.
- 4.8. District Officer means a commissioned officer appointed by the QPS for the purposes of these protocols.
- 4.9. Branch Manager means a person appointed as such by the QPS for the purposes of these protocols.

Liaison officer

5. Each stakeholder will appoint liaison officers.
6. Liaison officers will liaise with other stakeholders for co-ordination.

Statistics

7. Statistics as determined by the Court will be maintained by it for the purpose of evaluating the Brisbane Committals Protocol.
8. These statistics will be open and accessible to all stakeholders.

Division of responsibility

9. The duties of the DPP are to:
 - 9.1. Prosecute committal mentions and committal proceedings;
 - 9.2. Prosecute ex-officio callovers;
 - 9.3. Prosecute pleas of guilty with respect to indictable offences for which the DPP has responsibility;
 - 9.4. Prosecute all bail applications, revocations and variations affecting matters under the DPP control; and
 - 9.5. Prosecute pleas of guilty with respect to summary matters where those matters are associated with indictable offences for which the DPP has responsibility. Whether

summary charges are associated with indictable offences for which the DPP has responsibility shall be determined in accordance with the Guidelines issued by the Director of Public Prosecutions pursuant to S.11 of the Director of Public Prosecutions Act 1984.

10. The duties of the PPC are to prosecute all other matters for which the DPP has not assumed responsibility.

Division of responsibility in relation to the prosecution of indictable offences

11. The "charge location" method shall be adopted as the method of determining the division of responsibilities between the DPP and the QPS for the prosecution of indictable offences in the Brisbane Central Magistrates Court.
12. The "charge location" method involves the identification of the Magistrates Court in which the indictable offence originated. This means the Magistrates Court in which the defendant was first charged or first required to appear in response to a Notice to Appear or Complaint and Summons regardless of the location of the alleged commission of the indictable offence.
13. The DPP shall assume responsibility for the prosecution of indictable offences which originate in the Brisbane Central Magistrates Court and the PPC will assume responsibility for the prosecution of indictable offences which originate outside the Brisbane Central Magistrates Court.
14. Notwithstanding clause 11, PPC will retain responsibility for appearing upon the mentions referred to in clauses 28, 29 and 30 in relation to such indictable offences until the DPP have assumed responsibility. The DPP will assume responsibility for the prosecution of such indictable offences upon the listing of them for committal mention in accordance with these Protocols.
15. Where a prosecution has been commenced in the Brisbane Central Magistrates Court for an indictable offence alleged to have been committed in a Division outside the Central Division of the Brisbane Magistrates Court District or in a Magistrates Court District other than the Brisbane Magistrates Court District, the agency which has responsibility for the prosecution of the indictable offence may apply to the Brisbane Central Magistrates Court for the hearing of the proceedings in relation to the indictable offence to be transferred to such other Magistrates Court as may be appropriate. It will be the responsibility of whichever agency appears in such other Magistrates Court to then assume responsibility for the prosecution of the indictable offence.

16. Nothing in these Protocols should be construed as encouraging the charging of defendants in or the service of Notices to Appear or Complaint and Summons returnable in the Central Division of the Brisbane Magistrates Court District for indictable offences which were allegedly committed outside the Central Division of the Brisbane Magistrates Court District.
17. Should the QPS be desirous of the DPP assuming responsibility for the prosecution of an indictable offence which, according to the charge location method, originated outside the Central Division of the Brisbane Magistrates Court District, then the QPS shall send a written request to the DPP requesting the DPP assume responsibility for the indictable offence and the reason/s for such request. The DPP shall determine whether or not it will assume responsibility for the prosecution of the indictable offence and if so, upon what terms and conditions. Upon acceptance of such terms and conditions by the QPS, the DPP shall then assume responsibility for the prosecution of the indictable offence.

Limitations and exceptions

18. Where a summary trial emerges in the course of a matter which has become the responsibility of the DPP, the DPP will pass carriage of the matter to the PPC at least 20 clear working days prior to the date of the trial.
19. Where a matter has been set down for summary trial and within 20 clear working days of the scheduled date the defendant changes his/her election to committal, the PPC will retain carriage of the matter.
20. LAQ will:
- 20.1. Provide legal aid to financially eligible persons who may be the subject of committal proceedings;
 - 20.2. Represent defendants or refer cases to private legal practitioners undertaking legal aid work; and
 - 20.3. Make all reasonable efforts to ensure these protocols are adhered to by such private legal practitioners.
21. The Watchhouse Keeper will provide to a defendant a notice to seek legal advice and other documents required by law.

Preparation, checking and delivery of court briefs (QP9's)

22. The investigating officer will complete a Form QP9 containing a summary of the prosecution case and submit it in accordance with instructions from their District Officer/Branch Manager. The QP9 is to be submitted as soon as practicable and prior to the initial appearance date, but no later than 7 days after the arrest, swearing of summons or issuing of a notice to appear.
23. The Arresting Officer is to ensure that the QP9,
 - 23.1. Satisfies:
 - 23.1.1.1. The sufficiency of evidence test; and
 - 23.1.1.2. The public interest test.
 - 23.2. District Officers/Branch Managers must ensure that QP9s are delivered to the PPC as soon as practicable and prior to the initial appearance date.
24. Prior to the first mention, the QP9 (with the exception of the last page which has the personal details of the complainant and other confidential/privileged material) is to be provided to the defence by the prosecuting agency which has carriage of the matter at the time of the request. The QP9 is to be provided personally to a defendant who is not legally represented.

Maintenance of Indices

25. The PPC will:
 - 25.1. Commence the Pros Index; and
 - 25.2. Maintain the Pros Index of all matters for which it has responsibility.
26. As long as the DPP has access to the Pros Index, the DPP will maintain the Pros Index for all matters for which it has responsibility. Should the QPS commence the use of a computer system which either does not make use of the Pros Index or to which DPP staff do not have access (the change of the QPS computer system), then the QPS shall immediately assume responsibility for maintaining the Pros Index in respect of all matters in the Brisbane Central Magistrates Court regardless of which agency has the responsibility for the conduct of the prosecution and regardless of the date of the change of the QPS computer system.
27. In order to ensure integrity – maintenance will include daily checks to ensure that matters which have passed before the courts 7 days prior have been updated.

Mention procedures

28. At the first mention, depending on jurisdiction, a matter may be:

- 28.1. Determined by plea;
- 28.2. Remanded to a second mention;
- 28.3. Remanded for a summary trial; or
- 28.4. Remanded for committal mention

29. At any second mention, depending on jurisdiction, a matter may be:

- 29.1. Determined by plea;
- 29.2. Remanded for summary trial; or
- 29.3. Remanded for committal mention

30. Subsequent mentions remain a matter for the discretion of the Court. Further or lengthy adjournments will not be granted in the absence of sufficient reasons.

Sufficient reasons may include:

- 30.1. Delays caused in preparing scientific, fingerprint or technical evidence;
- 30.2. Forecasted difficulties in obtaining statements from intrastate, interstate and international witnesses;
- 30.3. Matters which have a large volume of witnesses; and
- 30.4. Leave and courses for investigating officers (except where a defendant is in Custody.

It will be a matter for the Court to determine whether in the circumstances of each case, these reasons are sufficient to warrant the granting of an adjournment.

31. Matters remanded for committal mention will be remanded:

- 31.1. for forty two days (or to the next committal callover date thereafter) from date of the first or any second mention; or
- 31.2. Longer, where circumstances make a 42 day adjournment inappropriate.

32. Where a matter or matters have been remanded for committal proceedings and the investigating officer and/or his or her superior officer subsequently becomes aware that it is impracticable to have the brief of evidence completed in accordance with these protocols, the DPP officer who has conduct of the matter and the Brisbane Committals Brief Manager shall be notified forthwith.

Early Communication and Continuity Principle

33. Following receipt of the QP9, the DPP officer who has conduct of the matter will:

- 33.1. Subject to clause 25, advise the investigating officer by Pros Index of his/her name and contact details; and
- 33.2. Advise the defendant's legal representative of his/her name and contact details and commence communications with a view to early resolution.
34. The QPS, DPP, and LAQ will establish practices aimed at early identification of matters which appear suitable for resolution by early plea. This includes, in appropriate cases, plea to indictable offences at summary level, plea to summary offences, voluntary committal for sentence or ex-officio indictment and sentence procedures.
35. The DPP and LAQ will implement a continuity principle whereby a single officer will, if at all possible, retain responsibility for a matter throughout its entire course through the committal system, and if appropriate, to the taking of pleas in the superior courts. The major exception will be matters which become identified as ex-officio indictments in which case the matter will be handled by the ex-officio section of the DPP but with the same goal of continuity within that section being observed.

Brief of Evidence

36. The investigating officer will:
- 36.1. Deliver the brief of evidence in accordance with instructions from their District Officer/Branch Manager no later than 17 days prior to the committal mention;
- 36.1.1. The brief of evidence shall include a copy of each electronically recorded interview including field taped conversations and, where applicable, copies of any relevant documentary evidence; and
- 36.1.2. The brief of evidence shall have the statements endorsed with original signatures in accordance with the provisions of the *Justices Act 1886* or *Oaths Act 1867*.
- 36.2. Retain a copy of the brief of evidence with original signatures endorsed under the *Justice Act 1886* or *Oaths Act 1867*; and
- 36.3. Retain possession of original exhibits unless otherwise determined by the DPP officer who has conduct of the matter.
37. The District Officer/Branch Manager will cause delivery of the brief of evidence to the DPP no later than 14 days before the committal mention.
38. The DPP will advise the defence that the brief of evidence is available for collection no later than 14 days prior to the committal mention or immediately upon receipt of the brief of evidence.

39. Difficulties and delays will be reported and resolved through the appropriate liaison officers and the Brisbane Committals Brief Manager.
40. The QPS consents to the presiding magistrate requiring the appearance before the court of the investigating officer and/or the member's officer in charge for the purpose of explanation in those cases where an adjournment of a matter is necessitated because the brief of evidence is late, not done or incomplete.
41. District Officers/Branch Managers within the QPS are responsible for investigating instances where there is a failure to comply with these protocols by investigating officers under their control.
42. District Officers/Branch Managers within the QPS will implement case management database systems and procedures to ensure compliance with these protocols and will cause every instance where a brief is not submitted in accordance with these Protocols to be investigated and the outcome to be reported in a timely manner to the relevant Prosecution Office.

Exhibits

43. Where necessary, arrangements between the DPP and QPS will be made for the inspection of original exhibits through the DPP officer who has conduct of the matter and the investigating officer.

Ex-officio

44. The procedure for ex-officio matters will be in accordance with Practice Direction No 3 of 2004.
45. The QPS, LAQ and DPP will identify the minimum necessary components of the ex-officio brief but allowing for additional material where necessary.
46. Where a matter is positively identified as proceeding by ex-officio indictment, the DPP will immediately notify the arresting officer and/or his/her District Officers/Branch Managers
47. The arresting officer and/or his/her District Officers/Branch Managers will cause to be provided any additional material requested by the DPP.
48. Notwithstanding Clauses 11, 12 and 13 above, the DPP shall assume responsibility for the prosecution of indictable offences which are to proceed by way of ex officio indictment in either the Supreme Court at Brisbane or the District Court at Brisbane regardless of where such indictable offences originated.

49. Should, for whatever reason, indictable offences referred to in Clause 48 no longer be able to proceed by way of ex officio indictment, then responsibility for the prosecution of those indictable offences which originated outside the Central Division of the Brisbane Magistrates Court District shall be assumed by the PPC.

Committal proceedings and committal mentions

50. A weekly callover will be held in Court 18 on the first working day of the week to allow the magistrate to determine those matters remanded for committal mention.

51. Where possible, matters will proceed by way of hand up committal under the provisions of section 110A of the *Justices Act 1886* without cross-examination of witnesses and/or consideration of evidence. Otherwise, matters will be set down for committal proceedings at least 14 days after the committal mention.

52. LAQ and defence representatives shall be in a position to advise the magistrate which prosecution witnesses, if any, will be required to give evidence at committal proceedings and which physical exhibits they require to be then available at court.

53. The magistrate may require the defence representative to stipulate which witnesses are required for cross-examination to avoid frivolous and wasteful practices.

54. Defence representatives may be required to justify any blanket demands for all prosecution witnesses to be called or exhibits to be produced.

55. LAQ will emphasise the importance of these initiatives to private legal practitioners representing accused persons under a grant of aid.

56. Exhibits which are not required to be produced will be retained by the investigating officer or the DPP – a schedule of exhibits will be produced to the Court at the committal proceedings.

57. These protocols acknowledge that at a committal proceeding the Court retains its discretion to dismiss the charge and discharge the defendant and that the Court, in its discretion, may take into account the effect of any non-compliance with the provisions of these protocols.

Timetable

58. This timetable is a guide to the timelines in the Brisbane Committals.

Date of arrest/issue of notice to appear/complaint and summons	Day 1
First mention	In case of arrest/remaining in custody – next reasonably practicable court date pursuant to the provisions of s393(1) of the <i>Police</i>

	<p><i>Powers and Responsibilities Act 2000</i></p> <p>In case of arrest/granted bail – on or about 14 days after the arrest.</p> <p>In case of notice to appear – at least 14 days after the notice is served. (s384(3) of <i>Police Powers and Responsibilities Act 2000</i>)</p> <p>In case of complaint and summons – at least 21 days after the summons is served: s.56 <i>Justices Act 1886</i></p>
Second mention (if any)	14 days after first mention (or as determined by the presiding magistrate) for the purpose of setting the matter for committal mention in Court 18
Police brief delivered to DPP no later than	14 days prior to committal mention date
Police brief delivered to defence no later than	14 days prior to committal mention date
Committal mention (Court 18)	42 days (or the next available committal callover date) after first mention (or any second mention) unless otherwise ordered by the Court.
Committal Proceedings	14 days after the committal mention date unless longer adjournment granted.

59. The timetable for committals requiring evidence from child and intellectually impaired complainants of sexual abuse will be in accordance with Practice Direction No. 2 of 2004.

Withdrawal or changing of charges

60. Where the DPP is considering the withdrawal or changing of a charge it will:

- 60.1 Consult with the investigating officer; and
- 60.2 Consult with the complainant in cases involving sexual offences or other crimes of violence.

Legal aid

61. Subject to the person agreeing to any special conditions imposed by LAQ, LAQ will provide legal aid to all financially eligible persons seeking legal assistance in the Magistrates Court in respect to those matters which are likely to be the subject of committal proceedings.

62. Legally aided matters will either be referred to an in-house lawyer or referred to a private legal practitioner undertaking legal aid work.

63. LAQ will implement all reasonable measures to ensure that aid is granted in a timely way so that matters are not unnecessarily delayed in proceeding according to these protocols.

DPP assistance

64. DPP case officers will be available at all reasonable times to assist QPS officers with advice on matters of law and procedure arising out of matters under DPP control which may be subject to committal proceedings.

65. Advice may be rendered in a formal or informal way depending on the circumstances.

66. All advices given shall be noted on QPS and DPP files.

Brisbane Committal Protocols

67. These protocols do not in any way interfere with the traditional and proper role of the QPS in the discharge of its duties.

68. These protocols are to be re-assessed at the end of 12 months.

69. Each of the below mentioned stakeholders agrees to be bound by these protocols;

Chief Magistrate

Dated: / /

Director of Public Prosecutions, Queensland

Dated: / /

Commissioner of the Queensland
Police Service

Dated: / /

Chief Executive Officer
Legal Aid Queensland

Dated: / /

Criminal Justice Procedure Co-ordination Council

Why a Co-ordinating Council?

The criminal justice system is made up of a number of interactive agencies which operate largely independently. What is done (or not done) in one agency impacts across the agencies; a benefit to one agency may be a cost to another. Inconsistent terminology and processes are rife. These issues are canvassed in Chapter 4: *An Overview of the Queensland Criminal Justice System* and in Chapter 6: *The Information Management Issues*. Consultation and co-operation is random and often dependent on fortuitous and temporary connections between individuals. The need for better collaboration and information sharing across agencies is obvious.

A Criminal Justice Procedure Co-ordination Council should be established.

Role of the Council

The role of the Criminal Justice Procedure Co-ordination Council is to facilitate:

- The identification of criminal justice system priorities and share information;
- The collaboration across agencies with respect to the implementation of the recommendations of the Report endorsed by executive government;
- The development of integrated, valid and consistent data across criminal justice agencies;
- The implementation of effective electronic data collection, management and use across the criminal justice system;
- The development of process and data systems, for sound evidence based decisions, to evaluate the effectiveness of criminal justice system practices and procedures with a view to:
 - improving;
 - modifying;
 - changing; or

- abandoning processes and procedures.
- The identification of interactions impacting across agencies and identifying costs and benefits across agencies so as to:
 - encourage ongoing positive interaction between agencies and to avoid duplication of effort and inconsistencies in the development of processes and procedures, particularly if they impose disproportionate costs on some agencies to the benefit of others; and
 - liaise with the courts focus group (Chief Justice, President of the Court of Appeal, Deputy Director-General, Directors of Courts of Supreme, District and Magistrates Court).

The Co-ordination Council is NOT concerned with:

- substantive law; or
- matters dealt with by the Rules Committee, Practice Directions and the like.

The Co-ordination Council should:

- be created by the Criminal Justice Procedure Act;
- be appointed by and report to the Attorney-General and Minister for Justice for 5 years (a sunset clause) unless its term is extended (though individual membership terms could be staggered);
- be required to meet quarterly and report annually; and
- be made up of 12 members, not 'ex officio' members or a 'representative assembly', but rather people with relevant positions, skill set, etc. Non-government employee members should be paid and the Council should comprise:
 - 1 x neutral chair;
 - 1 x JAG (Director-General or nominee);
 - 1 x ODPP (DPP or nominee);
 - 1 x Legal Aid Queensland (CEO or nominee);
 - 1-2 x The Bar Association of Queensland / Queensland Law Society (one member agreed or by annual rotation);
 - 2 x Queensland Courts (Directors of Supreme, District and Magistrates Courts) or nominees; and
 - 4 remaining members – specific skills for example, business process analyst, statistician, effective IT use expert.

- have the power to co-opt individuals, to appoint sub-committees and convene 'round tables' to consider specific issues; and
- receive administrative support from JAG.

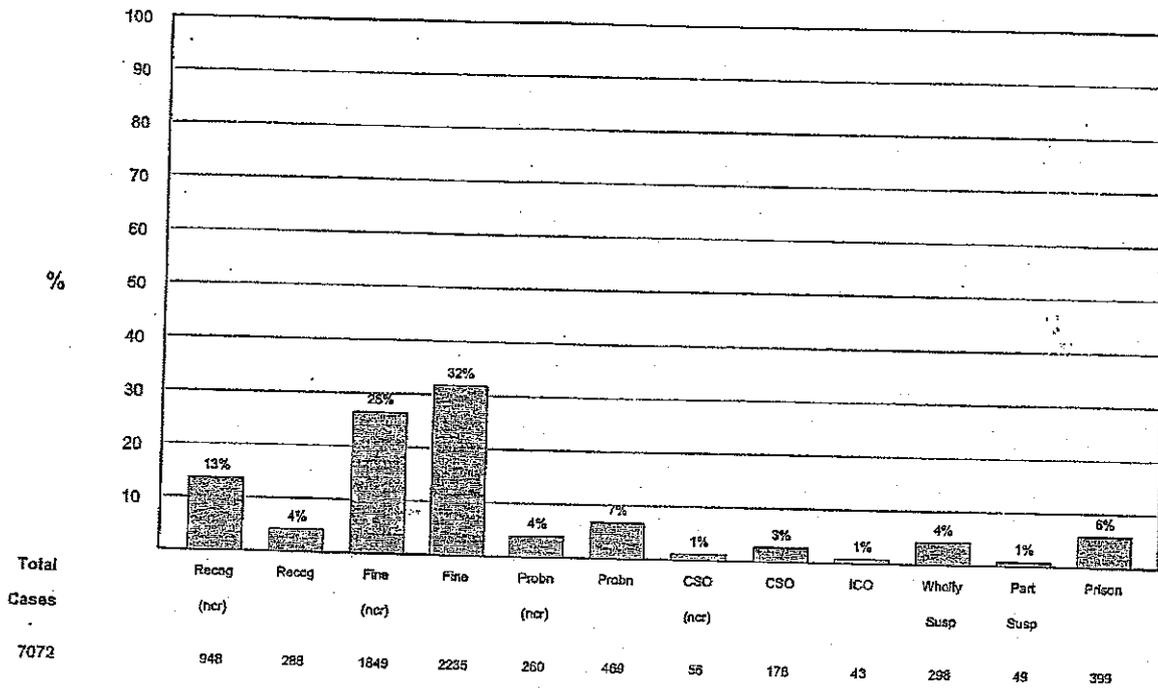
I am aware that the government is currently reviewing its approach to Government Boards, Committees and statutory authorities. In relation to this, I note that:

- There is no similar body in existence which can undertake these functions;
- No single government agency has the capacity or independence to undertake the functions of the Council;
- It is critical to attract innovative and skilled outsiders in order:
 - to transcend the culture of any given agency;
 - to allow a range of perspectives, with new thinking and new systems approaches, to inform the policy process;
 - to generate the trust of agencies in the reform process; and
 - to generate a sense of ownership in the reform process.
- The Council is not a decision-making body but an advisory body; and
- There is a sunset clause.

CRIMINAL CODE ACT 1899 (QLD)
s.335 - COMMON ASSAULT

Magistrates Courts - as at May 2008
Sentences from Jul 2002 to Dec 2006

Penalty Type
All Offenders

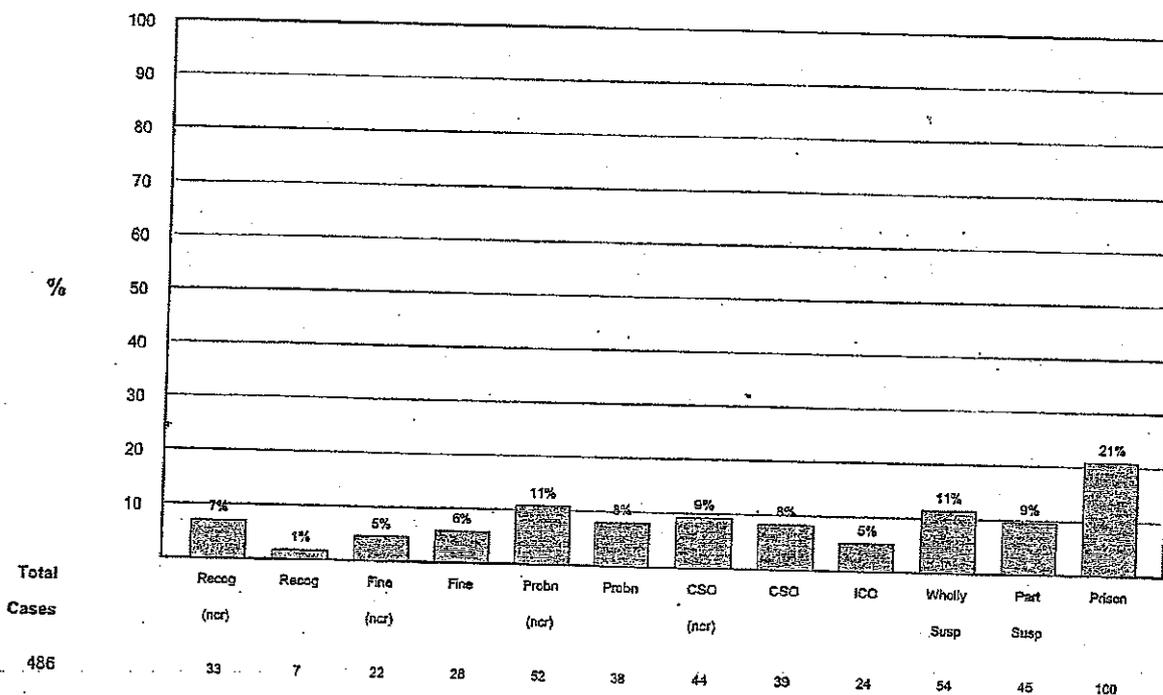


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CRIMINAL CODE ACT 1899 (QLD)
s.335 - COMMON ASSAULT

Supreme and District Courts - as at May 2008
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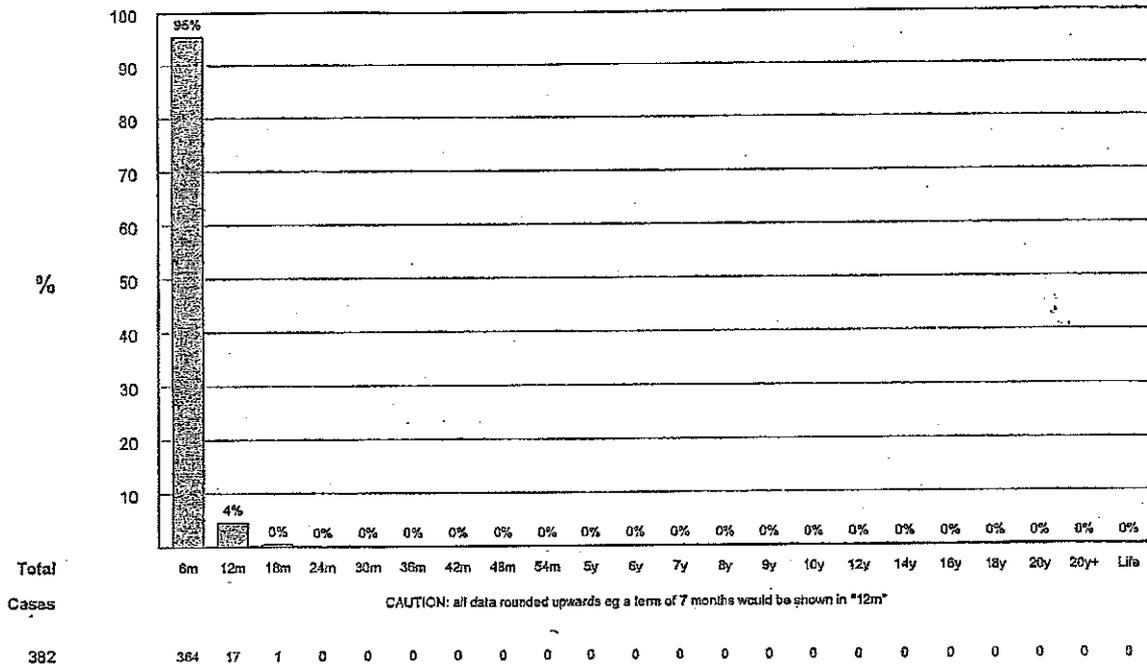
Penalty Type
All Offenders



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Imprisonment

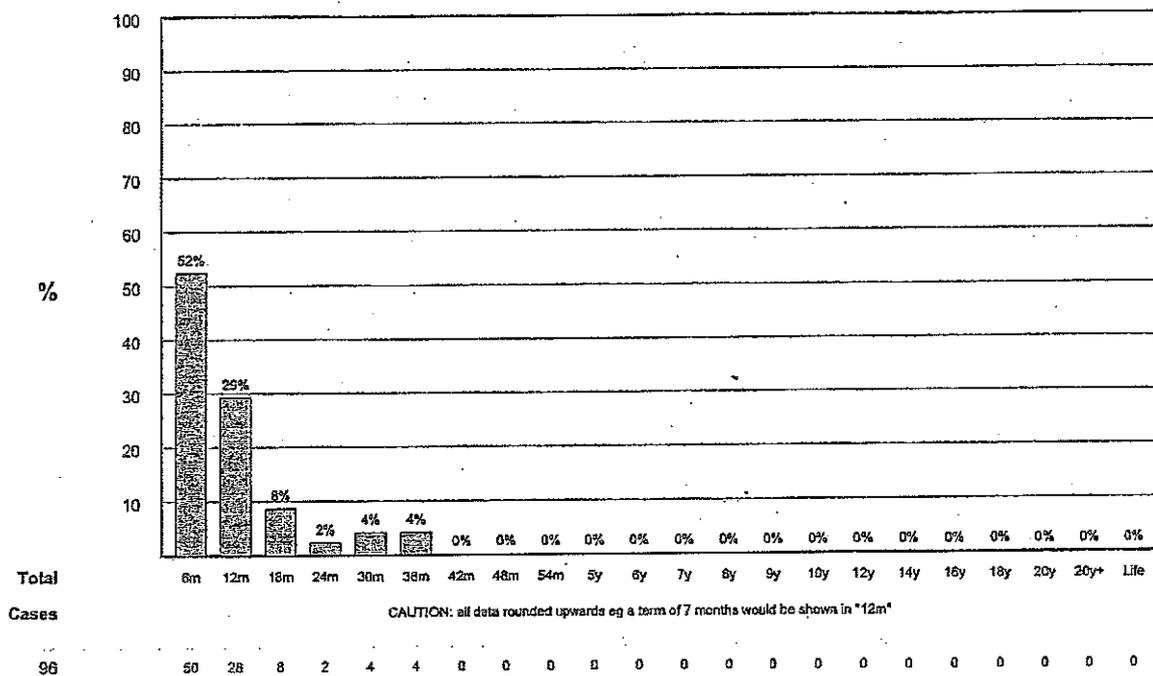
All Offenders



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Imprisonment

All Offenders



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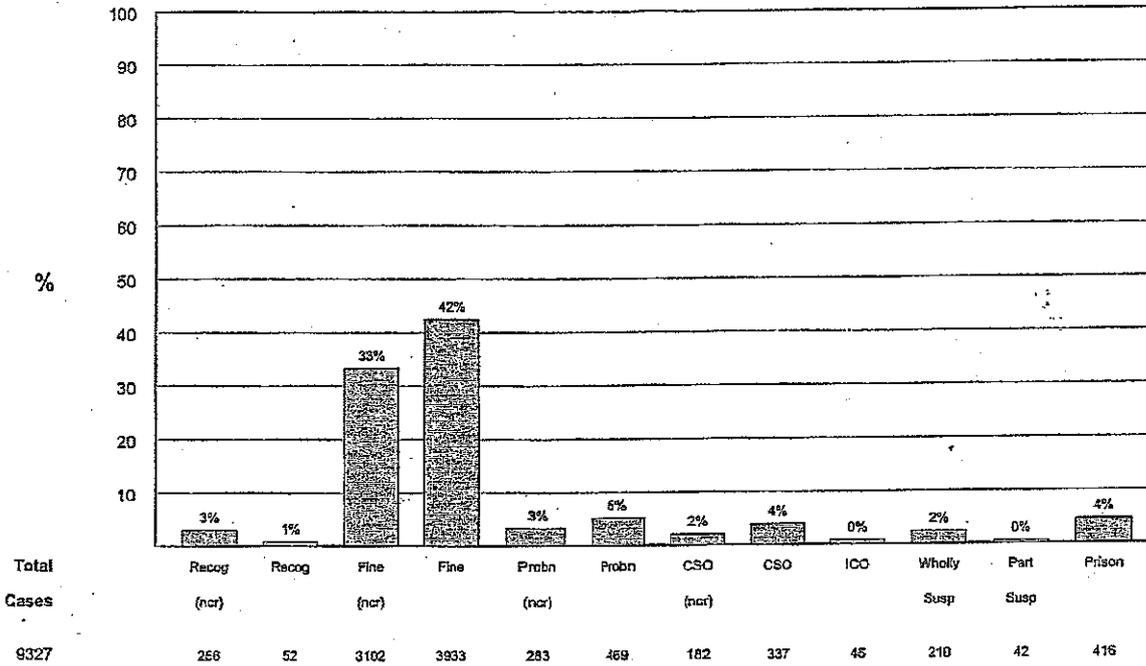
CRIMINAL CODE ACT 1899 (QLD)

s.469 - WILFUL DAMAGE / DESTRUCTION

Magistrates Courts - as at May 2008

Sentences from Jul 2002 to Dec 2006

Penalty Type
All Offenders



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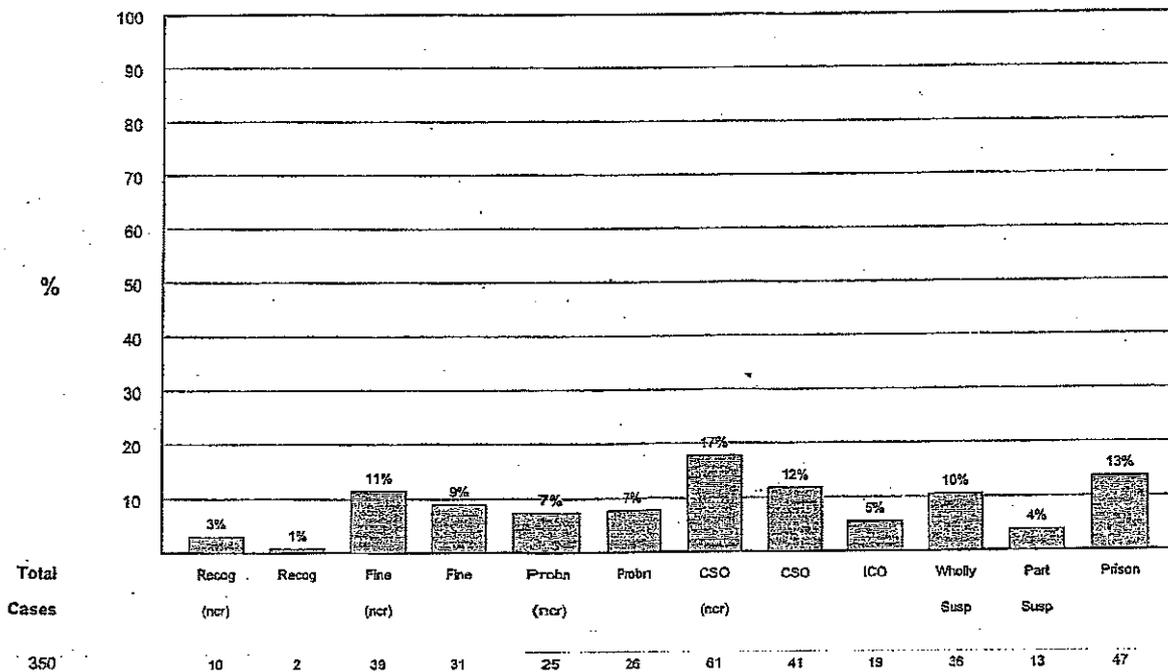
CRIMINAL CODE ACT 1899 (QLD)

s.469 - WILFUL DAMAGE OR DISTRUCTION

Supreme and District Courts - as at May 2008

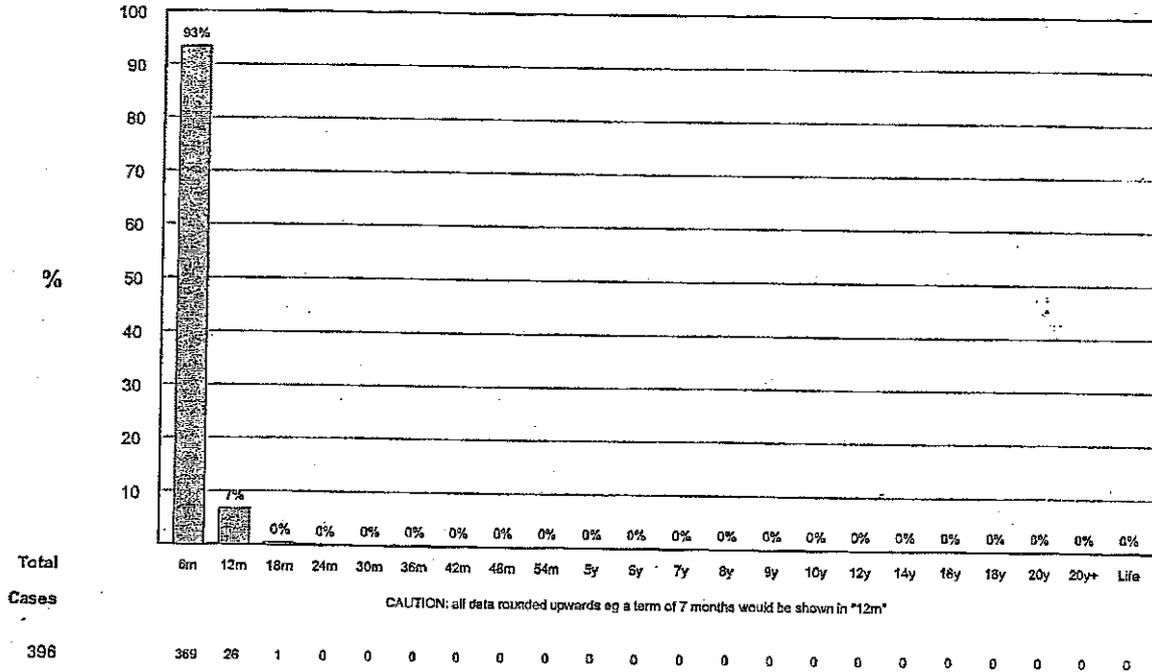
Sentences from Jul 1999 to Dec 2006

Penalty Type
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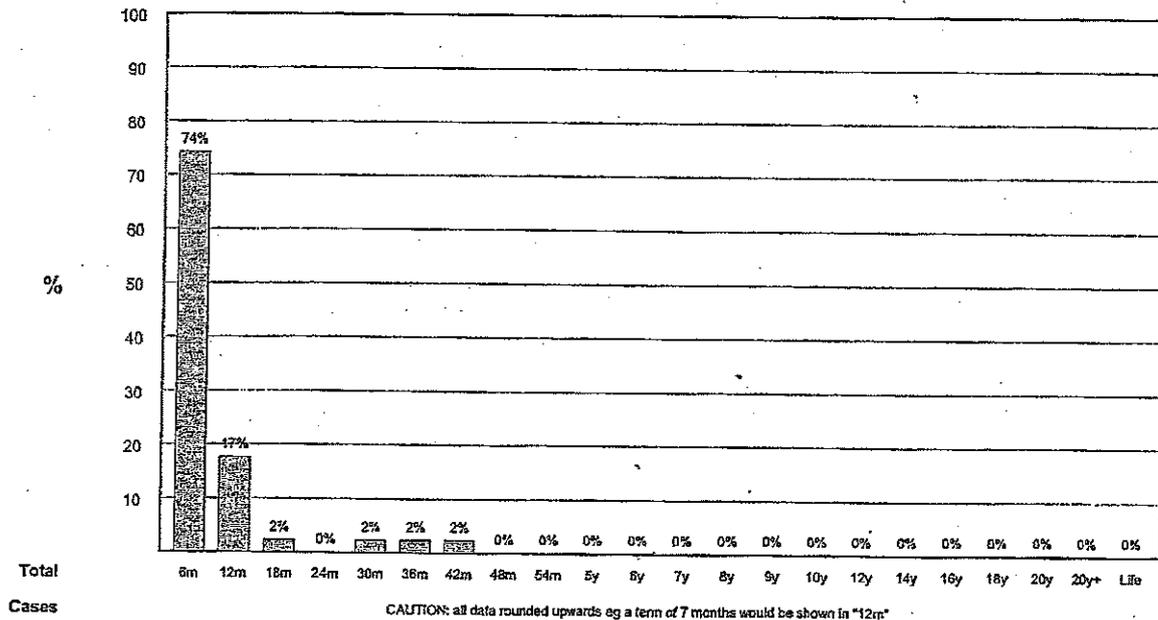
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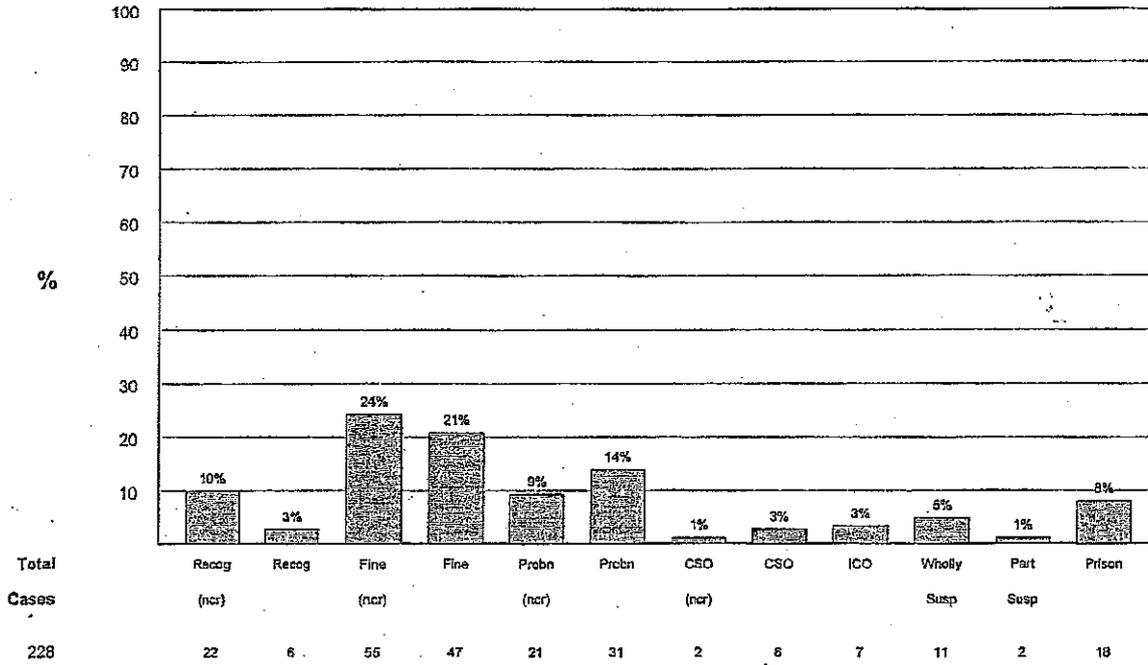
CRIMINAL CODE ACT 1899 (QLD)

s.359E - UNLAWFUL STALKING

Magistrates Courts - as at May 2008

Sentences from Jul 2002 to Dec 2006

Penalty Type
All Offenders



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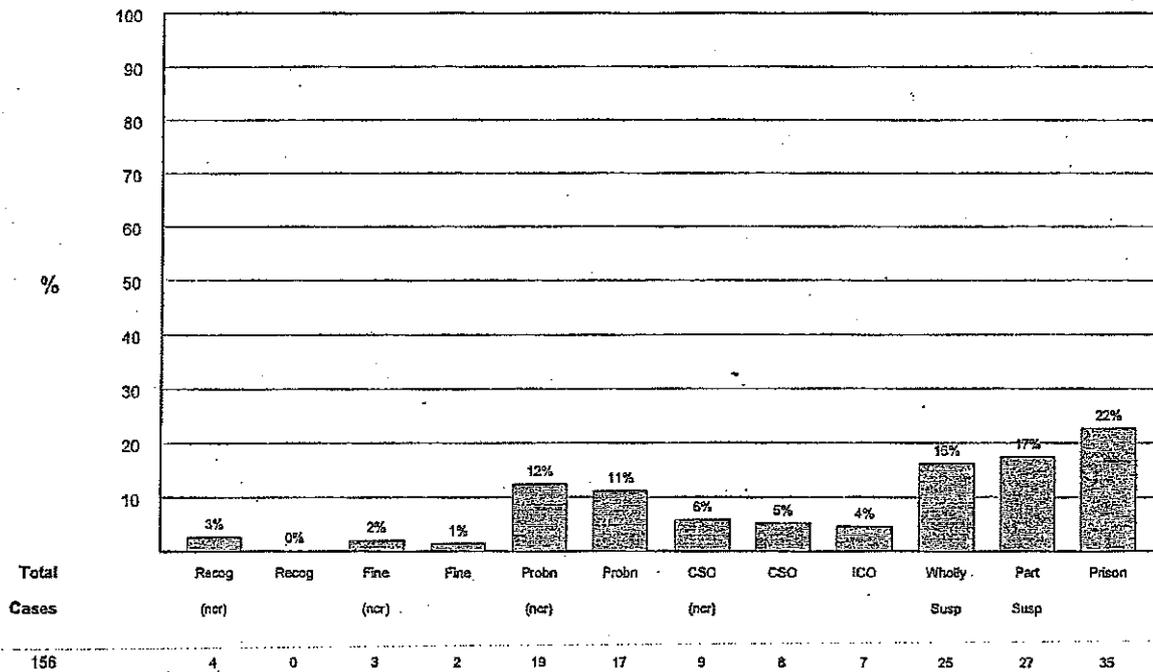
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s.359E - UNLAWFUL STALKING

Supreme and District Courts - as at May 2008

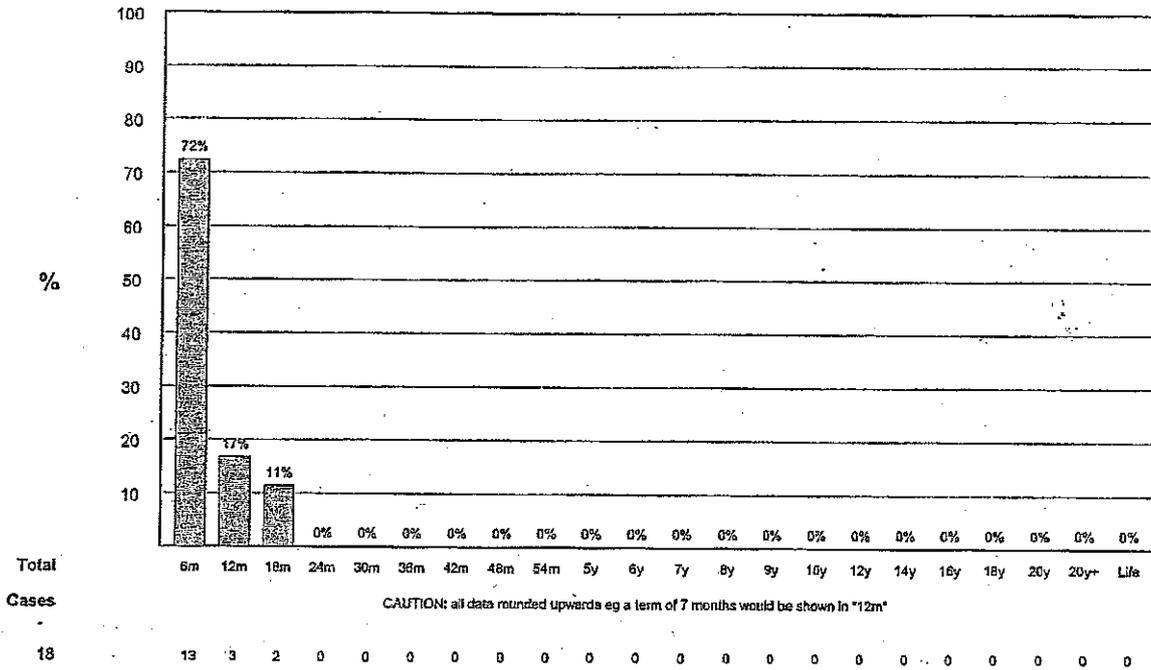
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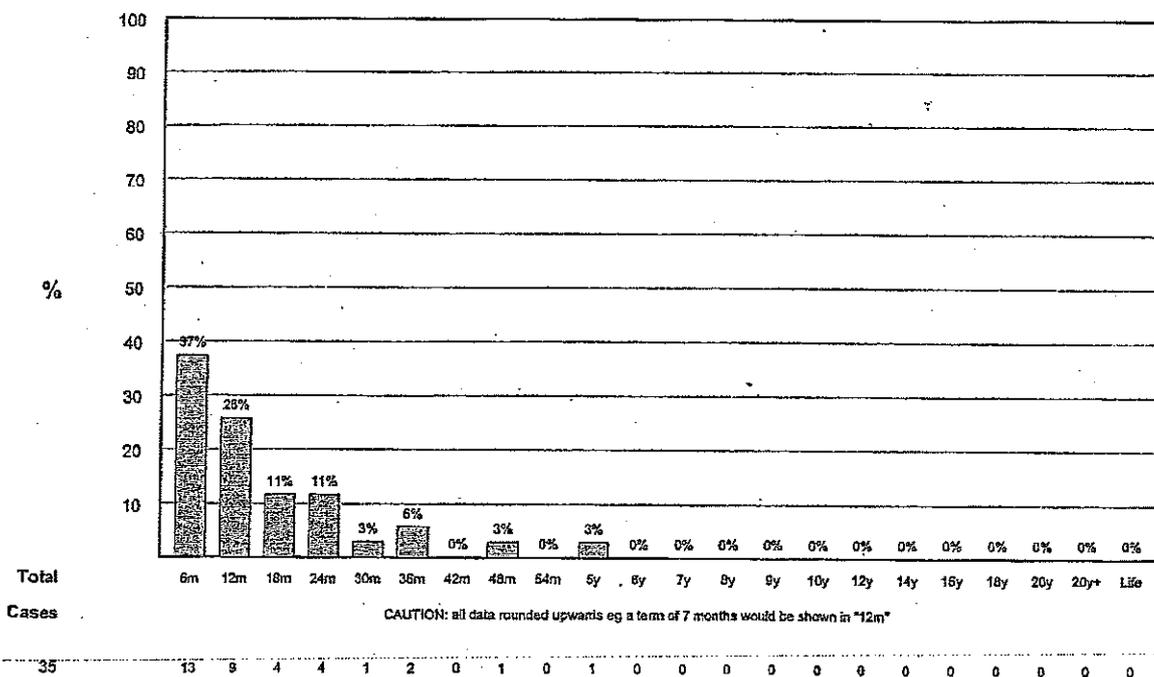
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Imprisonment
All Offenders



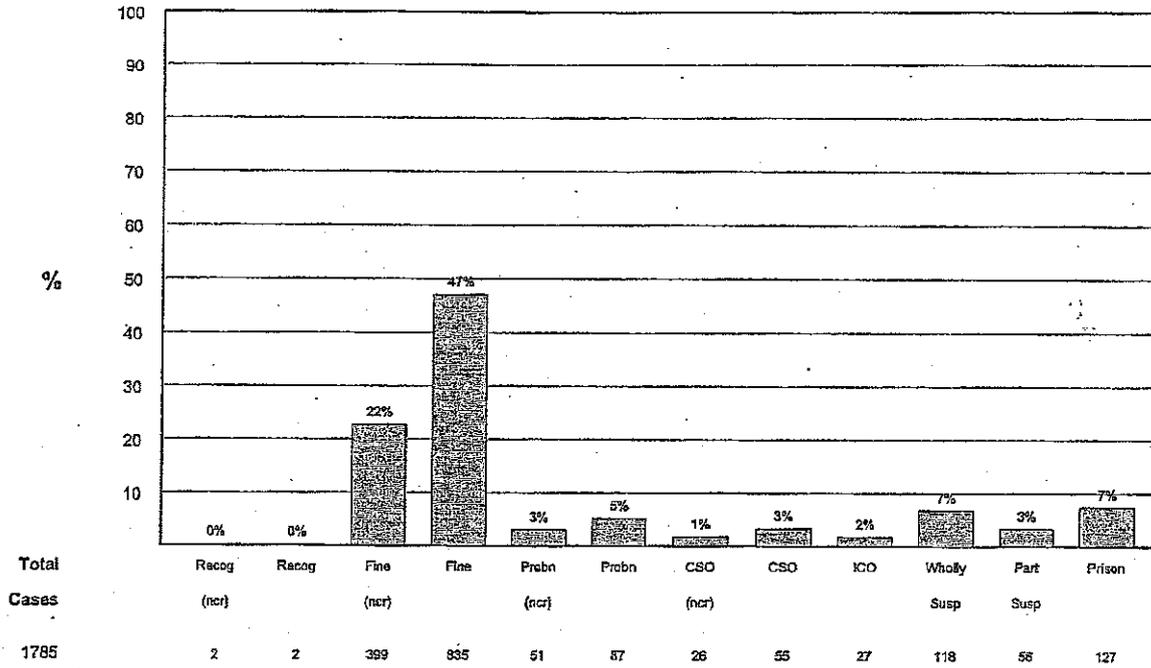
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Imprisonment
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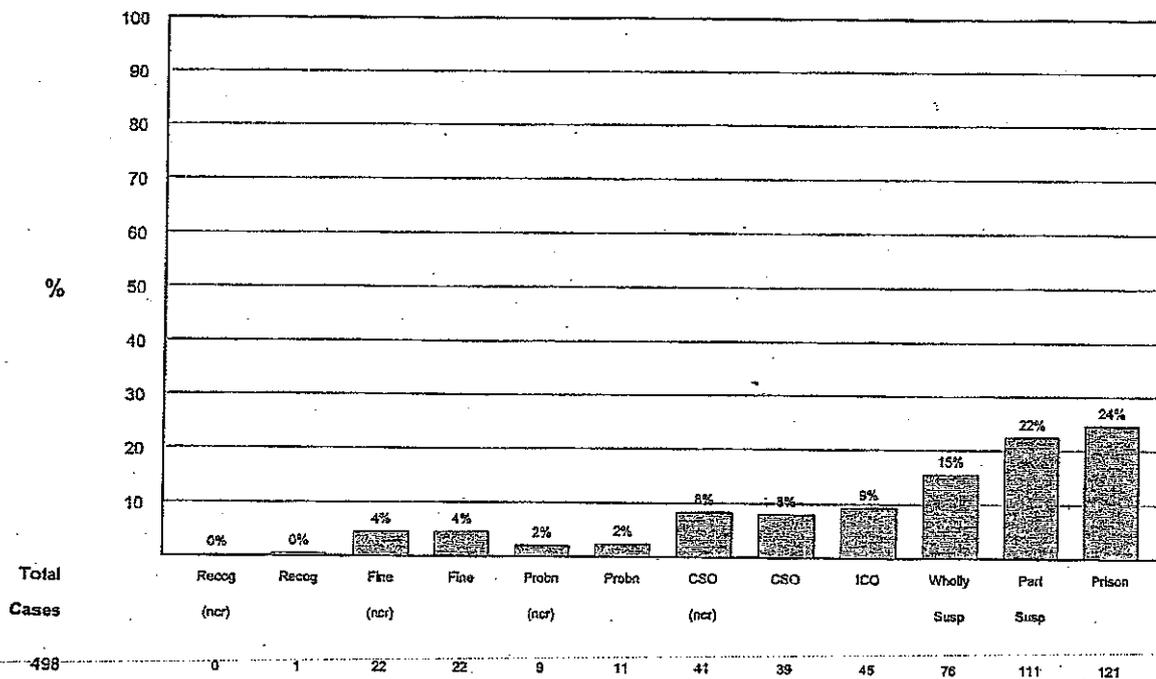
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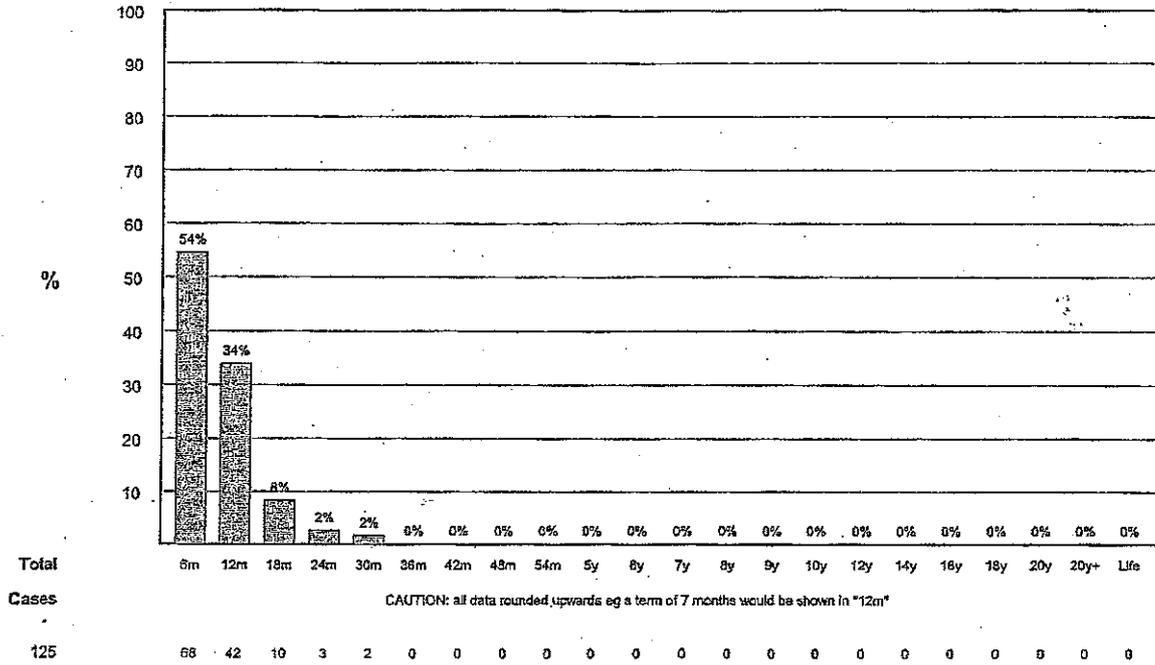
CRIMINAL CODE ACT 1899 (QLD)

Magistrates Courts - as at May 2008

s.328A - DANGEROUS OPERATION OF A VEHICLE

Sentences from Jul 2002 to Dec 2006

Imprisonment
All Offenders



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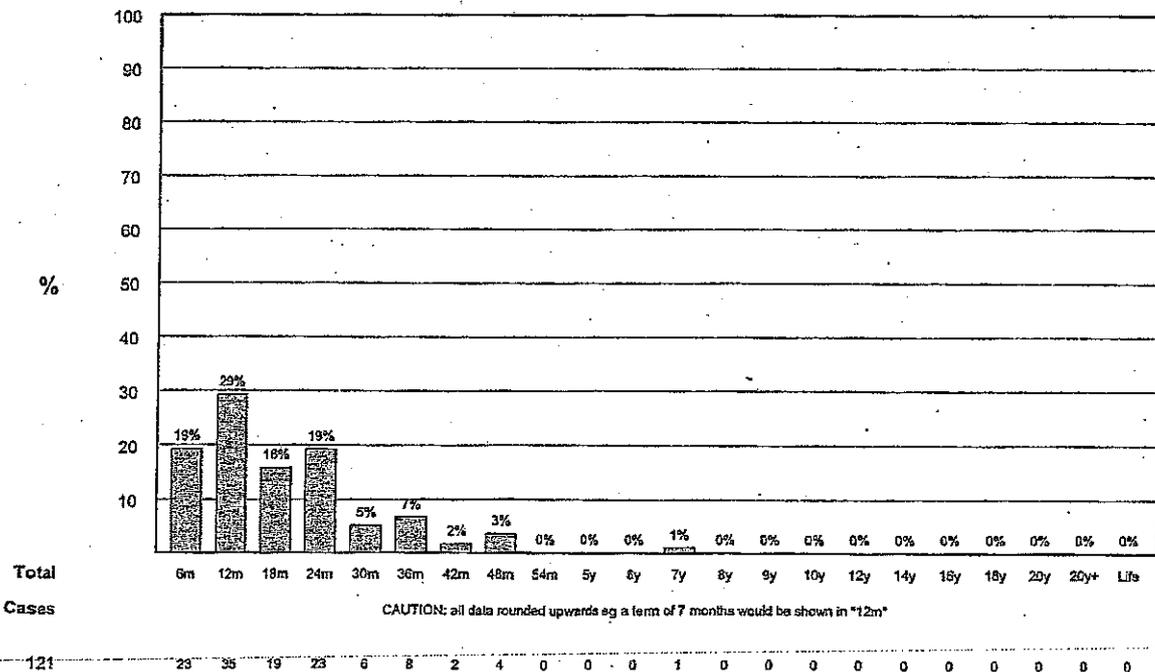
CRIMINAL CODE ACT 1899 (QLD)

Supreme and District Courts - as at May 2008

s.328A - DANGEROUS OPERATION OF A VEHICLE

Sentences from Jul 1999 to Dec 2006

Imprisonment
All Offenders



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Appendix 8

OFFENCES WHERE THE MAXIMUM PRESCRIBED SENTENCE IS THREE YEARS OR LESS AND WHICH COULD THEREFORE BE DEALT WITH SUMMARILY

Sentence	Offence	Indictment Penalty
54	Interference with Governor or Ministers	3 years
55	Interference with the Legislature	3 years
62	Unlawful assembly	1 year
69	Going armed so as to cause fear	2 years
70	Forcible entry	1 year
71	Forcible detainer	1 year
72	Affray	1 year
73	Challenge to fight a duel	3 years
74	Prize fight	1 year
75	Threatening violence	2 years or 5 years (at night)
78	Interfering with political liberty	2 or 3 years
85	Disclosure of official secrets	2 years
88	Extortion by public officers	3 years
89	Public Officers interested in contracts	3 years
90	Officers charged with administration of property of a special character or with special duties	1 year and a Fine
91	False claims by officials	3 years
92	Abuse of office	2 or 3 years
93	Corruption of surveyor and valuator	3 years
94	False certificates by public officers	3 years
95	Administering extra-judicial oaths	1 year
96	False assumption of authority	3 years
97	Personating public officers	3 years
99	Personating at an election	2 years
100	Double voting	2 years
101	Treating	1 year or a Fine
102	Undue influence	1 year or a Fine
103	Bribery re election	1 year or a Fine
105	Illegal practices re elections	1 year or a Fine
108	Interference at elections	3 years
109	Electors attempting to violate secrecy of ballot	3 years
110	Other attempts of like kind	3 years
112	Offences by Presiding officers at Elections	3 years
114	Interfering with secrecy at elections	2 years
115	Breaking seal of packets used at elections	2 years
118	Bargaining for offices in public service	3 years and a Fine
128	Deceiving witnesses	3 years
129	Destroying evidence	3 years
130	Preventing witnesses from attending	1 year
133(3)	Compounding crimes	3 years??
134	Compounding penal actions	1 year
136	Justices acting oppressively or when interested	3 years and a Fine
137	Delay to take person arrested before Magistrate	2 years
138	Bringing fictitious action on penal statute	2 years
139	Inserting advertisement without authority of court	2 years

Sentence	Offence	Indictment Penalty
140	Attempting to pervert justice	2 years
146	Rescuing patients under Mental Health Act	3 years
147	Removing property under lawful seizure	3 years
193	False statements in statements required to be under oath or solemn declaration	7 years
194	False declarations	3 years
199	Resisting public officers	2 years
200	Refusal of Public Officers to perform duty	2 years and a Fine
201	Neglect of officers to suppress riot	2 years
202	Neglect to aid in suppressing riot	1 year
203	Neglect to aid in arresting offenders	1 year
204	Disobedience to statute law	1 year
205	Disobedience to lawful order issued by statutory authority	1 year
206	Offering violence to officiating ministers of religion	2 years
226	Supplying drugs or instruments to procure abortion	3 years
227	Indecent acts	2 years
228(1)	Obscene publications and exhibitions	2 years ???
230	Common nuisance	2 years
232	Gaming houses	3 years
234	Lotteries	200 penalty units
236	Misconduct with regard to corpses	2 years
240	Dealing in contaminated goods	3 years
242	Frauds on land laws	2 years
243	Dealing with land fraudulently acquired from the ??	1 year
323	Wounding and similar acts	7 years
324	Failure to supply necessities	3 years
325	Endangering life or health of apprentices or servants	3 years
326	Endangering life of children by exposure	3 years
328	Negligent acts causing harm	2 years
331	Endangering steamships by tampering with machinery	3 years
333	Evading laws as to equipment of ships and shipping dangerous goods	3 years
334	Landing explosives	3 years
355	Deprivation of liberty	3 years
356	False certificates by officers charged with duties relating to liberty	3 years
357	Concealment of matters affecting liberty	3 years
358	Unlawful custody of insane person	2 years
359	Threats	5 years or a Fine
361	Unlawful celebration of a marriage	3 years
362	Unqualified persons procuring registration as persons qualified to celebrate marriages	2 years and a Fine
414	Demanding property with menaces with intent to steal	3 years
432	Pretending to exercise witchcraft or tell fortunes	2 year
476	Removing boundary marks	3 years
477	Obstructing railways	2 years
501	False statements for the purpose of registers of births, deaths and marriages	3 years
502	Attempts to procure unauthorized status	3 years
540	Preparation to commit crimes with explosives	3 years
542	Conspiracy to commit other offences	3 years
543	Other conspiracies	3 years

Appendix 9

SCHEDULE 1

BAR ASSOCIATION TABLE SETTING OUT OFFENCES WHICH COULD BE DEALT WITH SUMMARILY

Section	Offence	Indictment Penalty	Data from QSiS Supreme/District Court where relevant
54	Interference with Governor or Ministers	3 years	Wholly suspended or six months
55	Interference with the Legislature	3 years	
62	Unlawful assembly	1 year	
69	Going armed so as to cause fear	2 years	No QSiS case records sentence of greater than 2 years
70	Forcible entry	1 year	
71	Forcible detainer	1 year	
72	Affray	1 year	No QSiS records sentence of greater than 6 months
73	Challenge to fight a duel	3 years	
74	Prize fight	1 year	
75	Threatening violence	2 years or 5 years (at night)	QSiS data appears misleading – records 1 sentence of 5 years for breach of s.75(1) i.e. in excess of max. Otherwise all sentences less than 3 years imprisonment
78	Interfering with political liberty	2 or 3 years	
85	Disclosure of official secrets	2 years	1 case – 12 months imprisonment
88	Extortion by public officers	3 years	
89	Public Officers interested in contracts	3 years	
90	Officers charged with administration of property of a special character or with special duties	1 year and a Fine	
91	False claims by officials	3 years	
92	Abuse of office	2 or 3 years	
93	Corruption of surveyor and valuator	3 years	
94	False certificate by public officers	3 years	1 case – fine only
95	Administering extra-judicial oaths	1 year	
96	False assumption of authority	3 years	
97	Personating public officers	3 years	
99	Personating at an election	2 years	
100	Double voting	2 years	
101	Treating	1 year or a Fine	
102	Undue influence	1 year or a Fine	
103	Bribery re election	1 year or a Fine	
105	Illegal practices re elections	1 year or a Fine	
108	Interference at elections	3 years	
109	Electors attempting to violate secrecy of ballot	3 years	
110	Other attempts of like kind	3 years	

SCHEDULE 1

BAR ASSOCIATION TABLE SETTING OUT OFFENCES WHICH COULD BE DEALT WITH SUMMARILY

Section	Offence	Indictment Penalty	Data from QSIS Supreme/District Court where relevant
112	Offences by Presiding officers at Elections	3 years	
114	Interfering with secrecy at elections	2 years	
115	Breaking seal of packets used at elections	2 years	
116	Offences at elections when voting by post	1 year or a Fine	
118	Bargaining for offices in public service	3 years and a Fine	
128	Deceiving witnesses	3 years	
129	Destroying evidence	3 years	
130	Preventing witnesses from attending	1 year	
133(3)	Compounding crimes	3 years??	
134	Compounding penal actions	1 year	
136	Justices acting oppressively or when interested	3 years and a Fine	
137	Delay to take person arrested before Magistrate	2 years	
138	Bringing fictitious action on penal statute	2 years	
139	Inserting advertisement without authority of court	2 years	
140	Attempting to pervert justice	2 years	Highest recorded penalty is 18 months imprisonment
146	Rescuing patients under Mental Health Act	3 years	
147	Removing property under lawful seizure	3 years	Fine (NCR)
193	False statements in statements required to be under oath or solemn declaration	7 years	Wholly suspended/recog
194	False declarations	3 years	Only 2 out of 12 went to prison, and then only for 6 months
199	Resisting public officers	2 years	
200	Refusal of Public officer to perform duty	2 years and a Fine	
201	Neglect of officers to suppress riot	2 years	
202	Neglect to aid in suppressing riot	1 year	
203	Neglect to aid in arresting offenders	1 year	
204	Disobedience to statute law	1 year	
205	Disobedience to lawful order issued by statutory authority	1 year	
206	Offering violence to officiating ministers of religion	2 years	
226	Supplying drugs or instruments to procure abortion	3 years	
227	Indecent acts	2 years	29% of cases receive imprisonment, none for more than 18 months
228(1)	Obscene publications and exhibitions	2 years ???	

SCHEDULE 1

BAR ASSOCIATION TABLE SETTING OUT OFFENCES WHICH COULD BE DEALT WITH SUMMARILY

Section	Offence	Indictment Penalty	Data from QJIS
			Supreme/District Court where relevant
230	Common nuisance	2 years	1 case – probation
232	Gaming houses	3 years	
234	Lotteries	200 penalty units	
236	Misconduct with regard to corpses	2 years	
240	Dealing in contaminated goods	3 years	
242	Frauds on land laws	2 years	
243	Dealing with land fraudulently acquired from the ??	1 year	
323	Wounding and similar acts	7 years	524 cases. 150 prison (28%), 155 (29%) part suspension Of the 150, 143 received 3 years or less
324	Failure to supply necessaries	3 years	6 cases – all wholly suspended
325	Endangering life or health of apprentices or servants	3 years	
326	Endangering life of children by exposure	3 years	15 cases, prison or part prison in 3; all 6 months or less
328	Negligent acts causing harm	2 years	19 cases – 1 prison, 6 months or less
331	Endangering steamships by tampering with machinery	3 years	
333	Evading laws as to equipment of ships and shipping dangerous goods	3 years	
334	Landing explosives	3 years	
355	Deprivation of liberty	3 years	Out of 42 cases, 13 receive imprisonment, 11 receive 2 years or less
356	False certificates by officers charged with duties relating to liberty	3 years	
357	Concealment of matters affecting liberty	3 years	
358	Unlawful custody of insane person	2 years	
359	Threats	5 years or a Fine	
361	Unlawful celebration of marriage	3 years	
362	Unqualified persons procuring registration as persons qualified to celebrate marriages	2 years and a Fine	
414	Demanding property with menaces with intent to steal	3 years	9 cases, 2 prison, both 12 months or less
432	Pretending to exercise witchcraft or tell fortunes	2 year	
476	Removing boundary marks	3 years	
477	Obstructing railways	2 years	
501	False statements for the purpose of registers of births, deaths and marriages	3 years	1 case – 6 months or less
502	Attempts to procure unauthorized status	3 years	1 case – fine only
540	Preparation to commit crimes with	3 years	1 case – wholly suspended

SCHEDULE 1

BAR ASSOCIATION TABLE SETTING OUT OFFENCES WHICH COULD BE DEALT WITH SUMMARILY

Section	Offence	Indictment Penalty	Data from QJIS Supreme/District Court where relevant
	explosives		
542	Conspiracy to commit other offences	3 years	
543	Other conspiracies	3 years	

Appendix 10

Chapter 8

Interstate comparisons of summary jurisdiction by election¹

State	Legislation	Offences which may be dealt with summarily by election	Maximum penalty	Who has election
New South Wales	<i>Criminal Procedure Act 1986</i> sections 258-262 schedule ¹	<p>All offences listed in Table 1. These are too numerous to list. The following is a sample:</p> <ul style="list-style-type: none"> • use or possession of weapon to resist arrest • abandoning or exposing child under 7 years • breaking into house and stealing or damaging property not exceeding \$15,000 in value • stealing motor vehicle or vessel • offences involving cannabis plant and leaf with more than indictable quantity but less than commercial quantity <p>All offences listed in Table 2. These are too numerous to list. The following is a sample:</p> <ul style="list-style-type: none"> • assault with intent to commit serious indictable offence or assault officer 	<p>12 years</p> <p>5 years</p> <p>14 years</p> <p>10 years</p> <p>10 years</p> <p>5 years</p> <p>5 – 7 years</p>	<p>Defendant and Prosecutor</p> <p>Prosecutor</p>

¹ This table was produced internally by Strategic Policy, Department of Justice and Attorney-General in approximately 2004. It has been updated to reflect any amendments made to the provisions as at 21 October, 2008.

State	Legislation	Offences which may be dealt with summarily by election	Maximum penalty	Who has election
		<ul style="list-style-type: none"> • assault occasioning actual bodily harm • possession housebreaking implements • making or using false instruments 	<p>7 years</p> <p>10 years</p>	
Victoria	<p><i>Magistrates' Court Act 1989</i> section 53 schedule 4</p>	<p>All offences listed in schedule 4. These are too numerous to list. The following is a sample:</p> <ul style="list-style-type: none"> • causing serious injury recklessly • extortion with threat to kill • theft offences not exceeding \$25,000 in value or is a motor vehicle • robbery offences (not armed) not exceeding \$25,000 in value • burglary offences not exceeding \$25,000 • possession of data with intent to commit serious computer offence • gift or secret commission not exceeding \$25,000 in return for advice given • drug offences with no element of commerciality <p>Plus, all offences which are level 5 or 6 offences.</p>	<p>15 years</p> <p>15 years</p> <p>10 years</p> <p>15 years</p> <p>10 years</p> <p>3 years</p> <p>10 years</p> <p>3 years</p> <p>level 5 = 10 years level 6 = 5</p>	Defendant

State	Legislation	Offences which may be dealt with summarily by election	Maximum penalty	Who has election
Western Australia	<i>Criminal Code</i> section 5	<p>Each offence in the Code that is capable of summary disposition has this indicated in the actual offence provision. The following is a sample:</p> <ul style="list-style-type: none"> • impersonating a public officer • escape lawful custody • Acts or omissions causing bodily harm or danger • fraud 	<p>years</p> <p>2 years (on indictment)/ 12 months (summarily)</p> <p>7/3 years</p> <p>5/2 years</p> <p>7 – 10 years/ 3 – 2 years</p>	Magistrate (prosecution or defence may apply to have matter tried on indictment section 5(2)(a))
South Australia	<i>Summary Procedure Act 1921</i> sections 5 and 103 (have three categories of offence: minor indictable offence, major indictable offence, summary offence)	<p>All offences for which the maximum penalty does not exceed 5 years (minor indictable offences)</p> <p>These offences for which the maximum penalty does exceed 5 years:</p> <ul style="list-style-type: none"> • an offence of damage to property where resulting loss does not exceed \$30,000 • recklessly causing harm to another • indecent assault where victim 14 years or more • offences of dishonesty up to value of \$30,000 (theft, money laundering), but not robbery and no violence 	<p>5 years</p> <p>2 – 5 years</p> <p>7 years</p> <p>8-10 years</p> <p>various, up to 20 years</p>	Defendant

State	Legislation	Offences which may be dealt with summarily by election	Maximum penalty	Who has election
		<ul style="list-style-type: none"> • indecent assault • indecency • stalking <p>All offences in schedule 3 part 2 for which the value of the property is between \$5,000 and \$20,000:</p> <ul style="list-style-type: none"> • stealing • killing animals with intent to steal • unlawfully branding animals • obtaining goods by false pretence • cheating • acquiring a financial advantage • fraud in respect of payment for work • receiving stolen property • being an accessory after the fact 	25 years	Defendant

CHAPTER 9: COMMITTALS

COMMITTAL PROCEDURE – outline of process in other jurisdictions

<p>VICTORIA</p>	<ol style="list-style-type: none"> 1. <u>Plea brief</u> or <u>hand-up brief</u> served on accused within time limit. 2. Court may order <u>committal case conference</u> conducted by magistrate. 3. Parties must jointly file <u>case direction notice</u> setting out names of witnesses required for <u>cross-examination</u>; whether DPP consents/opposes; issues for <u>cross-examination</u> and why witness evidence is relevant. 4. <u>No cross-examination of certain witnesses</u> – sexual offences, child or person with cognitive impairment 5. <u>Leave to cross-examine other witnesses</u> <ul style="list-style-type: none"> • if consent, leave granted unless “inappropriate to do so” • if no consent, court must be satisfied that – <ul style="list-style-type: none"> ○ the defendant <u>has identified an issue</u> to which questioning relates ○ cross-examination is justified having regard to whether: <ul style="list-style-type: none"> ▪ prosecution case adequately disclosed ▪ issues are adequately defined; and - weight of evidence would support conviction - fair trial will take place - matters relevant to plea of guilty or nolle prosequi clarified - trivial, vexatious or oppressive cross-examination is not permitted 	<p>Magistrates Court Act 1989 schedule 5 ss 5,6 and 7 Magistrates Court Act 1989 schedule 5 s 4A Magistrates Court Act 1989 schedule 5 s 11AA</p> <p>Magistrates Court Act 1989 schedule 5 s 11A Magistrates Court Act 1989 schedule 5 s 13</p> <p>Magistrates Court Act 1989 s 13(5)(a) Magistrates Court Act 1989 s 13(5A)</p>
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	<p>- interests of justice otherwise served</p> <p>Other factors are to be considered if witness is under 18</p> <p>With leave prosecution may call witness to give evidence in chief orally</p> <p>Cross-examination limited to issues identified or questions justified</p>	<p>Magistrates Court Act 1989 s 13(5B)</p> <p>Magistrates Court Act 1989 s 15(2)</p> <p>Magistrates Court Act 1989 s 16</p>
<p>NEW SOUTH WALES</p>	<ol style="list-style-type: none"> 1. Prosecution evidence to be in <u>written form</u> (vulnerable person – may be a transcript of recording) 2. Copies of statements and exhibits must be <u>served within timeframe</u> (or opportunity to inspect) 3. Circumstances in which prosecution evidence may be given in other ways – e.g. orally 4. Accused may waive committal 5. <u>Compulsory case conference</u> – for committals at the local court sitting at Downing Centre, Sydney and Central Sydney. Prosecution must file Pre-conference Disclosure Certificate. Parties must file Compulsory Conference Certificate. 6. Accused must serve notice requesting attendance of witness 7. Magistrate may direct attendance of witness on own motion or application of accused or prosecutor where consent or in other circumstances “only if satisfied there are substantial reasons why, in the interests of justice, the witness should attend to give oral evidence” and cross-examination limited to “reasons for giving the direction” unless “substantial reasons, why, in the interests of justice, the person should be cross-examined in respect of those matters” 8. Alleged victim witnesses where offence involves violence cannot be directed to attend unless there are “special reasons ... in the interests 	<p><i>Criminal Procedure Act 1986</i> ss 74 and 76</p> <p><i>Criminal Procedure Act 1986</i> ss 75 and 60</p> <p><i>Criminal Procedure Act 1986</i> s 27</p> <p><i>Criminal Procedure Act 1986</i> s 68</p> <p><i>Criminal Case Conferencing Trial Act 2008</i></p> <p><i>Criminal Procedure Act 1986</i> s 92(1)</p> <p><i>Criminal Procedure Act 1986</i> s 91</p> <p><i>Criminal Procedure Act 1986</i> s 91 (7)</p> <p><i>Criminal Procedure Act 1986</i> s 93</p>

<p>AUSTRALIAN CAPITAL TERRITORY</p>	<p>of justice”</p> <p>Witnesses in relation to sexual offence are not to be cross-examined at committal</p> <p>Other witness must not be cross-examined unless on application by either party court is satisfied that</p> <ul style="list-style-type: none"> - issue identified; - reason why evidence of witness is relevant; - reasons evidence disclosed by prosecution does not address issue; and - purpose and general nature of questions identified <p>and “the interests of justice cannot adequately be satisfied by leaving cross-examination of the witness about the issue to the trial”</p>	<p><i>Crimes Legislation Amendment Act s 1.71</i> amending s 90AB <i>Magistrates Court Act 1930</i> not yet commenced</p>
<p>TASMANIA</p>	<p>1. Court of Petty Sessions committal abolished</p> <p>2. Police disclosure obligations (7 weeks)</p> <p>3. Plead, summary election or committal. Committal order</p> <p>4. DPP to take over conduct of prosecution</p> <p>5. Parties may request a Supreme Court preliminary proceedings order to facilitate discussions or examine witnesses (convened by Magistrates or JP’s).</p> <p>Request must:</p> <ul style="list-style-type: none"> - identify witnesses and why their evidence is relevant and reasons examination or cross-examination is justified - be “exceptional circumstances” in sexual offences and “necessary in the interests of justice” in other cases 	<p><i>Justices Amendment Act 2007</i> Justices Act 1959 s 56</p> <p><i>Criminal Amendment (Directions Hearing) Rules 2005</i> <i>Criminal Code s 331B</i></p>
<p>NORTHERN TERRITORY</p>		
<p>WESTERN</p>	<p>DPP prosecutes all indictable offences.</p>	<p><i>Criminal Law (Procedure) Act</i></p>

<p>AUSTRALIA</p>	<p>3 stage disclosure process. Preliminary hearings abolished</p> <ol style="list-style-type: none"> 1. 1st appearance - initial disclosure 2. Committal brief 14 days before committal mention 3. Committal / disclosure hearing (accused can consent to committal and need not attend hearing) <ul style="list-style-type: none"> - require defendant to plead - written statements etc tendered - committal for plea or sentence to appropriate court 4. Prosecution can examine witnesses 5. Indictment, further disclosure 6. Pre-trial directions hearing 	<p>2004 s 39</p> <p><i>Criminal Law (Procedure) Act</i> 2004 ss 42, 43, 44</p>
<p>SOUTH AUSTRALIA</p>	<ol style="list-style-type: none"> 1. Prosecutor must file and serve statements of witnesses, copies of relevant documents, description of other evidentiary and relevant material that it will rely on as “tending to establish the guilt of the defendant” 2. Statement must be in written form, a copy of video or audio tape of any record of interview must be given (exceptions for special witnesses) 3. Documentary material may be given in electronic form 4. At committal, the prosecutor will call a witness if defence has given <u>notice</u> and the court grants permission if satisfied that there are “special reasons” having regard to the need to ensure that the case for the prosecution is adequately disclosed; the issues for trial are adequately defined; the courts need to ensure that the evidence is sufficient to put the defendant on trial; and the interests of justice. 5. Court must not grant permission in relation to a child under 12 or an alleged victim of a sexual offence unless “the interests of justice cannot be adequately served except by doing so ...” 6. No specific provision restricting “scope” of cross-examination. 	<p><i>Summary Procedure Act</i> 1921 (SA) s 104</p> <p><i>Summary Procedure Act</i> 1921 (SA) s 104(3)</p> <p><i>Summary Procedure Act</i> 1921 (SA) s 104(7)</p> <p><i>Summary Procedure Act</i> 1921 (SA) s 106</p> <p><i>Summary Procedure Act</i> 1921 (SA) s 106(3)</p>

Appendix 12

Case Conferencing in NSW, VIC and WA

In New South Wales a compulsory criminal case conference trial began in the Downing Centre and Central Local Courts in May 2008. An administrative conference scheme had been underway for some years prior to this.

The *Criminal Case Conferencing Trial Act 2008* (NSW) provides a statutory framework for the trial. The trial applies to all legally represented adults charged with State indictable offences. The purpose is to encourage meaningful discussions and charge negotiations.

The key features of the New South Wales scheme¹ are:

1. The New South Wales ODPP provides advice to police about charges and sufficiency of evidence. Advice from the NSW ODPP indicates, however, that this service has not been effective in practice because of police reluctance to use the service.
2. New South Wales ODPP provides a disclosure certificate within 28 days of the second mention and following the service of the full brief of evidence. It effectively certifies the sufficiency of the brief. It must state, among other things, what pleas would be accepted.
3. A case conference is held (usually face to face) between ODPP and the defence lawyer to discuss charges, possible pleas and other issues before any committal. The effectiveness of the conference depends on whether there is a complete brief; full instructions have been obtained from the accused; legal representatives on both sides have analysed the brief and have sufficient seniority to consider the likely outcome of a trial and authority to enter a binding agreement.
4. The NSW scheme does not involve the use of a mediator or judicial officer to conduct the conference.

¹ See: http://www.lawlink.nsw.gov.au/lawlink/irc/ll_irc.nsf/pages/IRC_procedures_legislation_pracdir

5. A compulsory conference certificate is signed by both parties specifying the agreed outcomes. The certificate must state among other things:
 - a. what offences have been charged, what alternatives canvassed;
 - b. whether there have been offers to plead or rejections of offers;
 - c. what facts are agreed and areas that are disputed; and
 - d. whether the brief of evidence is adequate or any areas of inadequacy
6. The outcomes are sealed and placed on the court file for future reference. Once any negotiated pleas are entered and any charges withdrawn in the Magistrates Court, it is not possible to renege on the agreement. The magistrate has no authority to intervene or reject the terms of any agreement.
7. If no plea is negotiated applications to cross-examine witnesses are made and a hand-up committal or preliminary hearing occurs.
8. If a plea is not negotiated at the conference and a late plea is entered for example on the morning of the trial, the sealed outcomes can become relevant if an 'early discount' is claimed by the defence because the prosecution refused to accept the same plea at the conference or to prove that this plea was not previously offered.

Outcomes of NSW trial

It is early days but initial indications are positive. Since May 2008, 195 cases have progressed through the system. The outcome of these is:

- 14% were committed for trial (compared with usual commitment rate of 27–33%);
- 20% were committed for sentence; and
- 66% were withdrawn or negotiated to summary disposal.

Another 400+ cases are still under way.

LAQ also point out in their submission that 31% of investigations referred to the NSW ODPP for advice on charges resulted in no charges being laid. It is not clear from the submission, however, to what period this figure relates. As noted above, the advisory service is now not well utilised.

Other jurisdictions

Some other jurisdictions have provision for case conferences to be held.

Western Australia

In November 2006, the Supreme Court commenced a pilot program providing for mediation of criminal cases. Early results of this initiative led the court to widening the scope of the program and a second mediator was appointed. The two mediators operate together and decide which cases will be allocated to whom. In some matters, case conferences may be conducted by the two mediators together.

The offer of mediation services is made at the committal stage to encourage case conferencing at the time of prosecution disclosure under s 42 of the *Criminal Procedure Act*.

Importantly, this is the period during which the defence first learns the strength of the prosecution case, and the DPP formulates the terms of the indictment. It is the ideal time for the parties to confer and try to agree on a sensible way forward.²

Key features:

- It is voluntary;
- There is no statutory framework; and
- It is convened by a third party mediator.

The case conference is conducted in accordance with a protocol which can be found at:

<http://www.supremecourt.wa.gov.au/content/procedure/general/crimcaseconfprot.asp>

[X](#)

² Supreme Court Western Australia Notice to Practitioners Circular to Legal Profession 7/2/07

Victoria

Under the *Magistrates Court Act 1989* (Victoria) Magistrates Court (Committals) (Amendment) Rules 2007 s 4A: 'The court may direct the parties to a committal proceeding to attend a committal case conference to be conducted by a Magistrate'.

The purpose of the conference is 'to assist in the effective management of the committal proceeding'.

In addition, under Rule 19 of the Magistrates Court Rules defendants or their lawyers are required to discuss their case with the prosecutor. The purpose of the discussion is to consider:

- any plea intention;
- any intention to argue a no case submission;
- whether there will be an application to cross-examine any witnesses and whether the prosecution consents or objects;
- whether the defence will be calling any of their own witnesses to give evidence;
- any requests to inspect evidence; and
- any summary disposition issues.

This discussion can take place by phone or otherwise.

Appendix 13

In *Sim v Magistrate Corbett & Anor* [2006] NSWSC 665 AT [20], Whealy J set out, in summary form, his Honour's understanding of a number of the relevant principles enunciated in decisions involving the application of s 91. As his Honour noted, contemporary and earlier authorities are listed in the *Director of Public Prosecutions (NSW) v O'Conner* [2006] NSWSC 458 at (42) per Johnson J.

I respectfully adopt his Honour's summary of the relevant principles as follows:-

- “1. The purpose of the legislation is to avoid delays in the criminal process by unnecessary or prolix cross-examination at committal.
2. The onus is on the defence to satisfy the Local Court that an order should be made directing the attendance of witnesses.
3. The process is an important part of the committal proceedings. The refusal of an application may have a significant impact upon the ability of the defendant to defend himself. As well, the prosecution has a real interest in ensuring only appropriate matters are sent for trial.
4. In relation to matters falling within s 91 of the Criminal Procedure Act 1986, the defendant must show that there are reasons of substance for the defendant to be allowed to cross-examine a witness or witnesses.
5. The obligation to point to substantial reasons is not as onerous as the reference to “special reasons” in s 93; nevertheless it raises a barrier, which must be surmounted before cross-examination will be permitted.
6. Each case will depend on its own facts and circumstances. It is not possible to define exhaustively or even at all what might, in a particular case, constitute substantial reasons. It may be a situation where cross-examination may result in the discharge of the defendant or lead to a successful no-bill application; it may be a situation where cross-examination is likely to undermine substantially the credit of a significant witness. It may simply be a situation where cross-examination is necessary to avoid the defendant being taken by surprise at trial. The categories are not closed and flexibility of approach is required in the light of the issues that may arise in a particular matter.
7. Substantial reasons might exist, for example, where the attendance of a witness is sought to enable cross-examination in respect of a matter which itself might give rise to a discretion or determination to reject evidence at trial.

8. The expression “substantial reasons” is not to be ascertained by reference to synonyms or abstract dictionary definitions. The reasons advanced must have substance in the context of the committal proceedings, having particular regard to the facts and circumstances of the particular matter and the issues, which critically arise or are likely to arise in the trial.”

Appendix 14

LEGAL AID FUNDING ARRANGEMENTS

There are a number of obvious constraints and competing priorities for LAQ in structuring its funding to achieve early resolution and fairness. These include:

- a limited budget;
- rising demands on the budget through increasing applications for legal aid. For example, 2007/08 saw an increase in applications for aid of 3 % over the previous year. LAQ submission page 4;
- changing number and types of applications for aid which depend on demands created in other parts of the system. In particular, policing priorities and practices determine the nature and number of charges against individuals. In addition, legislative changes (new offences) and court practices (new initiatives) can also affect demands on the legal aid budget; and
- funding agreements with state and federal governments which set clear priorities for the allocation of aid. For example, the state government has determined that priority should be given first of all to District and Supreme court proceedings because of the likely seriousness of the outcome for individuals.

LAQ attempts to manage these constraints by the development of policies and guidelines for granting aid. These involve excluding certain classes of case from grants of aid, providing differential amounts for representation in different courts and the imposition of either or both a means test which takes into account the income and assets of an accused and a merit test (likely success). In addition funding arrangements try to take into account the many different ways that a matter may progress through the courts. Circumstances change as a matter progresses through the courts.

Demands on the limited legal aid budget are directly affected by policies and practices in other parts of the system, so too the policies and practices of LAQ have

a significant impact on other parts of the system and also become “drivers” of the system.

LAQ has attempted to address concerns about its funding arrangements. In December 2007 it produced and disseminated “Criminal law legal aid fees: a discussion paper”.

Consultations were then conducted in regional offices with preferred suppliers and barristers. A report on the consultation process was presented to the Legal Aid Board in May 2008. The Board determined to:

- Maintain existing fee structures for the time being and implement the second round of agreed fee increases (10%) from 1 July 2008;
- Adopt a staged process to restructuring the current fee regime addressing the most pressing issues identified in the consultation process and reduce the risks associated with the absence of robust data;
- Implement a data collection strategy to provide accurate and relevant data on which to analyse proposed policy changes and supporting fee structures;
- Develop and document a business model for legal aid matters to assist LAQ to assist it to develop sustainable business practices and make informed decisions about policies and fees.

The priority areas for further investigation are:

- Single funding policy for committals
- Operation of circuit courts
- Pre-charge aid for juveniles/adults
- Duty lawyer arrangement
- Videoconferencing facilities

