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Criminal Justice Procedure in Queensland

Discussion paper

Department of Justice and Attorney-General

Queensland Government

Criminal Justice Procedure in Queensland: Discussion Paper

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Minister's Foreword

In July 2009 the Queensland Government announced a suite of reforms to Queensland's justice system based on the report *Review of the civil and criminal justice system in Queensland* by the Honourable Martin Moynihan AO QC.

Mr Moynihan's report highlights the archaic and fragmented legal structure that currently underpins the criminal justice system in Queensland.

The second stage of the Queensland Government's response to the report involves development of a Criminal Justice Procedure Act and uniform criminal procedure rules and forms to consolidate, modernise and streamline criminal justice procedure legislation in Queensland.

Release of this discussion paper is the start of that second stage. It sets out a possible framework for the development of a bill for the new Criminal Justice Procedure Act and invites public comment on general issues as well as specific issues associated with the development of the legislation.

This paper is not Government policy. It has been developed to invite public feedback and encourage consideration of key issues arising in the development of more appropriate, cohesive and modern criminal justice procedure legislation for Queensland that is relevant to the 21st century.

The Queensland Government recognises the need for ongoing community involvement in such an important reform process.

The Honourable Cameron Dick
Attorney-General and
Minister for Industrial Relations
April 2010

Introduction

In July 2008 the Honourable Martin Moynihan AO QC was appointed to conduct a review of the civil and criminal justice system in Queensland. On 21 July 2009 Mr Moynihan's report entitled *Review of the civil and criminal justice system in Queensland* (the Moynihan report) and the Queensland Government Response were publicly released.

Consistent with the Moynihan report's approach to implementation, the Queensland Government has announced a staged legislative reform program based on the report recommendations focused on delivering critical efficiencies and improvements to Queensland's justice system.

On 13 April 2010 the government introduced the Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2010 (Stage 1 Bill). This legislation contains the first stage of reforms stemming from the Moynihan report. The Bill comprises legislative reforms regarding: monetary limits for the civil jurisdiction; disclosure; summary disposition of indictable offences; and committal processes. It also incorporates a number of additional reforms aimed at ensuring increased efficiency and consistency across Queensland Courts.

The second stage of legislative reforms focuses on the implementation of the following recommendations:

- a comprehensive overhaul of all criminal justice procedure legislation and rules to consolidate, modernise and streamline criminal justice procedure;
- increased adoption of electronic processes via electronic acquisition, collection, lodgement, filing, transfer, storage and access to data as well as electronic hearings and conferencing.

The second stage will involve the development of a new Criminal Justice Procedure Act for Queensland (Stage 2 Bill). The development of rules, regulations, forms and fees will take place after the Stage 2 Bill is developed.

This discussion paper provides an overview of a possible framework for the Stage 2 Bill. To a large extent the framework follows the chronology of a criminal proceeding and attempts to keep common procedures consistent between courts where appropriate. The framework is subject to change having regard to feedback received in this consultation process and any issues that may arise during the development of the Bill.

General comment is invited on the framework. The paper also poses some questions about issues relevant to the development of the Stage 2 Bill. Feedback is encouraged in relation to these questions or on any matter relevant to the framework and/or existing legislation. In particular information about issues and problems experienced with the current criminal procedure legislation and suggested improvements is sought. Suggestions about areas for streamlining, consolidating and modernising procedures are also welcome.

How to provide feedback

All interested persons and organisations are invited to make a submission by no later than close of business on Friday 18 June 2010:

By email to: legalpolicysubmissions@justice.qld.gov.au; or

By writing to: Assistant Director-General, Policy, Legislation and Executive Services, Department of Justice and Attorney-General, GPO Box 149, Brisbane Qld 4001.

Unless marked 'Confidential' all submissions will be treated as public documents and may be placed on the Department of Justice and Attorney-General website. Submissions treated as confidential remain subject to the provisions of the *Information Privacy Act 2009* and *Right to Information Act 2009*.

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A. DRAFT FRAMEWORK FOR A CRIMINAL JUSTICE PROCEDURE BILL

1. PRELIMINARY

1.1. Purpose/Objective

This Part outlines, through identifying the purpose and objectives, the intentions of the Bill. The key objective and purpose of the Bill is to consolidate, streamline, modernise and increase consistency in criminal procedure in Queensland, having regard to provisions from existing procedural legislation (and some rules) including (but not limited to) provisions in the following legislation:

***Justices Act 1886* (as amended by Stage 1 Bill) relating to**:

- the commencement of criminal proceedings, including those provisions about complaints, summonses, and warrants;
- the conduct of criminal proceedings in court including when courts are open, evidence, witnesses, remands/adjournments, proceedings for indictable and non indictable offences, disclosure, recordings and records of the court, appearances, applications, committals, hearings, sentences, orders, and costs;
- facilitating proceedings such as the use of video link facilities; and
- appeals.

Part 8 of the Criminal Code relating to:

- where and how proceedings are commenced in higher courts;
- matters relating to indictments, including presentation of indictments, form (such as particulars and amendments to indictments), circumstances of aggravation, and alternatives;
- pre trial processes such as directions hearings, applications, separation of trials, disclosure and adjournments;
- trial processes including how pleas are made and received, trial by judge alone, appearances, order of proceedings, evidence, verdict and judgments; and
- appeals.

***District Court of Queensland Act 1967* relating to**:

- criminal procedure in Part 4, including for example provisions relating to change of venue and the issuing of subpoenas by registrars;
- the use of video link facilities (Part 7A); and
- appeals (Part 8 and 9).

***Supreme Court of Queensland Act 1991* relating to:**

- appeals (Part 6);
- removal and remission of matters from the Court of Appeal to other courts (Part 5); and
- the use of video link facilities (Part 8A).

Chapter 14, Part 5 of the *Police Powers and Responsibilities Act 2000* relating to the form, content, particulars and filing of Notices to Appear.

It is not intended that the Bill will incorporate substantive legislation, including, for example those provisions relating to bail, evidence, penalties and sentencing or justices of the peace. However, some procedural and consequential issues are likely to require consideration in respect of these matters.

1.2. Scope of Bill

The Bill is to apply to criminal procedure for all jurisdictions (that is, the Supreme Court, District Court and Magistrates Courts) within the Queensland criminal justice system unless specified otherwise. It is intended that common procedures between jurisdictions, where possible and appropriate, be consolidated and consistent.

Questions for consideration:

1.2.1 Throughout this paper there are references to procedures that are common in all jurisdictions, for example sentences and adjournments. Where common procedures exist and it is appropriate to consolidate existing provisions relevant to such procedures, this is flagged in this paper. Comments are sought as to which is the preferable process to adopt and why.

1.2.2 Apart from the procedures already identified in this discussion paper, are there any procedures in a specific jurisdiction, for example the District Court, that should or should not apply to other jurisdictions for example the Magistrates Courts?

1.2.3 Where procedural provisions exist in legislation which apply to all proceedings (criminal as well as non criminal proceedings, for example, *Oaths Act 1867* regarding the administering of oaths for witnesses and jury members, *Evidence Act 1977* in relation to procedures associated with special/affected child witnesses), should those provisions be replicated within the Bill in so far as they relate to criminal procedure (and limited in their existing form to non criminal proceedings), or simply referenced?

1.2.4 Should the Bill incorporate the procedural provisions currently located within the *Youth Justice Act 1992* (formally the *Juvenile Justice Act 1992*)? Alternatively, should the procedural provisions remain within the *Youth Justice Act 1992* but be referenced by the Bill?

1.2.5 To achieve the objective of consolidating criminal procedure, it is proposed that the Bill transfer appropriate procedural provisions from Part 8 of the Criminal Code. It is not proposed to transfer provisions relating to the summary disposition of indictable offences.

Comments are sought about whether there are likely to be any problems with this approach, including for example:

- **will removing the provisions from codified legislation into a non-codified piece of legislation have any effect?**
- **will placing the provisions into a non penal statute have the effect of significantly changing how they are interpreted having regard to restrictions ordinarily given to provisions within penal statutes?**

1.3. Definitions

Definitions of relevant terms used within the Bill will be contained in a schedule. This schedule is likely to incorporate many definitions used in existing legislation. This will also provide an opportunity to establish increased consistency amongst terms and clarify the meaning where uncertainties or inconsistencies in terminology currently exist.

Questions for consideration:

1.3.1 Are there existing terms that require clarification, amendment or removal?

1.3.2 Should the term "the court" be used instead of judge/justice/magistrate/justice where a provision applies to all jurisdictions?

1.3.3 Should the term "accused" or "defendant" be used and should it be used consistently in all jurisdictions?

1.3.4 The Bill, by implication will identify what falls within a criminal proceeding. Is it sufficient to refer to the term "criminal proceeding" without defining it, or should a definition be included? If so, what could be incorporated into the definition?

2. COMMENCING CRIMINAL PROCEEDINGS

This Part of the Bill will outline the formal process for the commencement of criminal proceedings in the Magistrates Courts.

2.1. How criminal proceedings are commenced

This division will specify the documents that need to be filed in the Magistrates Courts to commence a criminal proceeding. Commencement of criminal proceedings in higher courts is set out under Part 4 below.

This Part will also set out how, by whom and when an initial court date is issued. It will also deal with discontinuing proceedings during the preliminary stages.

Provisions will be included setting out the requirements of form and content of initiating documents, including the minimum details required in order to establish a charge (like section 47(1) of the *Justices Act 1886*).

Questions for consideration:

2.1.1 What should determine the commencement of a criminal proceeding? For example, should the Bill define commencement by reference to the arrest or the charging of a person or does the proceeding commence when formally registered by police or by the courts?

2.1.2 **Should this part also include the commencement of criminal proceedings in higher courts rather than dealing with the higher courts under a different part of the Bill as proposed in this framework?**

2.1.3 **The Moynihan report identified inconsistencies associated with the use of a complaint and summons to institute proceedings. Mr Moynihan recommended there be a review of the complaint and summons form and processes associated with it. He considered confining the use of the complaint and summons to criminal matters and determining whether some actions (for example civil matters and *Peace and Good Behaviour Act 1982* orders) could be better initiated by an originating application.**

As part of developing the Stage 2 Bill, commencement procedures will be reviewed, in particular complaint and summons (including private complaints), notices to appear, other associated methods of notification/service of the accused, and mechanisms of getting an accused before the court under such processes.

As part of this review whether there should also be a single method of commencing criminal proceedings will be considered. For example, a "notice" or "complaint" that does not need to be made on oath before a justice of the peace, similar to the Notice to Appear process under the *Police Powers and Responsibilities Act 2000* may be appropriate. Views are sought about this issue including the possibility of creating a standard form that could still cater for different prosecuting agencies' needs, such as adding additional information to provide particulars and details of the charge.

2.1.4 **Chapter 60 of the Criminal Code currently sets out prescriptive rules relating to form and particulars for all indictable offences (whether dealt with on indictment or disposed of summarily). These provisions are more detailed than those in the *Justices Act 1886*.**

Most of the provisions under Chapter 60 of the Criminal Code, while not specifically stated, would in principle apply to non indictable proceedings.

Should the provisions in the Stage 2 Bill incorporate more prescriptive requirements similar to Chapter 60 for all offences?

2.1.5 **Currently sections 47(4) & (5) of the *Justices Act 1886* and sections 570, 630 and 635 of the Criminal Code set out police and prosecutors' obligations to notify of a previous conviction where such previous conviction will result in an increase in the penalty for the accused.**

These obligations relate to principles of fairness and the need to ensure the accused is aware of the full extent of the charge against him or her.

Under section 47(5) of the *Justices Act 1886* the obligation requires the service of a notice with any complaint (or in the case of a notice to appear, with that notice or within a reasonable time before the time appointed for the accused's appearance). Under the Criminal Code, details in the indictment itself are sufficient and there is no requirement for the service of a separate notice.

The distinction between simply stating the previous conviction in the

charge/indictment and the additional service of a notice seems to stem from practical difficulties encountered by police issuing Notices to Appear for traffic offences. That is, where Notices to Appear are issued for traffic offences at the roadside, difficulties in confirming previous convictions are encountered. It is not always practical to transfer a person to be charged with a traffic offence back to a police station to conduct traffic history checks and then include such circumstances in the Notice to Appear. Section 47(5) and (6) of the *Justices Act 1886* allow the issuing of a Notice to Appear and the later service of the notice of previous convictions on the accused if police wish to pursue the person for that circumstance of aggravation.

- **Should the distinction between the *Justices Act 1886* and the Criminal Code be maintained?**
- **If the distinction is maintained, should the *Justices Act 1886* provisions be amended to excuse the requirement of a separate notice and allow a prosecutor to rely on the previous conviction and therefore increase in penalty where an accused attends a Magistrates court, admits a previous conviction and is prepared to waive the necessity of the notice?**

2.2. Where criminal proceedings are commenced

This division will detail where a proceeding is commenced for Magistrates Courts, including:

- The general rules about where matters are to be lodged and heard and processes for lodging initiating proceedings; and
- Processes and rules associated with the transfer of cases between locations.

Questions for consideration:

2.2.1 Currently sections 560A and 561 of the Criminal Code provide flexibility about where an indictment can initially be presented. This is facilitated by the concept of the single Supreme and District Courts under the *Supreme Court of Queensland Act 1991* and *District Court of Queensland Act 1967.*

The current structure of the Magistrates Courts is decentralised with individual Magistrates Courts across Queensland. Provisions under the *Justices Act 1886* (in particular sections 23C and 139) as well as the decentralised structure limit where proceedings can be commenced.

As outlined in Annexure A, creating a single Magistrates Court structure for Queensland is being considered. This proposal would not change the locations and places at which Magistrates Courts may be constituted across Queensland.

In the context of commencing proceedings (that is, lodging commencement documentation rather than where a matter is heard), are there any possible repercussions of such amendments?

3. PROCEDURES IDENTIFYING HOW OFFENCES ARE DEALT WITH ONCE PROCEEDINGS ARE COMMENCED

This Part will outline how courts are to deal with certain offences. It will also identify procedures in relation to the progress of indictable offences through the system. For those offences that must be dealt with on indictment it will identify where and when the preliminary proceedings, intermediary procedures, and committal processes take place. It will also recognise the summary jurisdiction of higher courts for matters currently covered under sections 651 and 652 of the Criminal Code.

Questions for consideration:

3.1 Rather than relying on an inherent power, should a provision identifying when matters can be remitted to the Magistrates Courts from higher courts be included? If so, in what circumstances would such a provision operate? For example, when a non indictable offence is committed to a higher court in error.

4. PROCESSES AND ISSUES RELEVANT TO CRIMINAL PROCEEDINGS PRIOR TO DETERMINATION

This Part will set out a number of intermediary processes and issues that are relevant after proceedings are commenced and prior to the determination of a case throughout the criminal justice system.

4.1 Appearance of the accused

This division will identify:

- when an accused person's appearance is necessary or optional;
- appearance provisions applying to corporations; and
- proceedings that can take place in the absence of all parties, including the accused.

Questions for consideration:

Death of the mention

The Moynihan report identified that court events are resource intensive, involve direct costs in the presence of judges, lawyers, court staff and accused persons as well as indirect opportunity costs associated with these attendances.

Concerns with the current "mention" system in Queensland courts were also identified, in particular that they are sometimes used as bring ups and to clarify issues rather than to progress a case to resolution.

Mr Moynihan endorsed a project running in the criminal jurisdiction in England ("death of the mention") using electronic communications and dispensing with appearances. Consistent with this project, he further endorsed that communications between parties/stakeholders occur via electronic communication to arrange hearing dates and adjournments, and to minimise time spent attending or waiting for court appearances or in hearings.

4.1.1 Having regard to the "death of the mention" recommendation, when

is it essential or necessary for a court to be convened requiring an accused, his or her legal representatives and prosecutors to be present? For example, the first court event or only at a stage in the process in which a determination is to take place (in particular sentence, trial, committal, pre trial hearing).

4.1.2 Are there any alternative options to minimise the attendance of parties in court subsequent to the initial appearance and prior to determination? For example:

A number of other jurisdictions in Australia allow for the lodgement or filing of an indictment rather than a formal "presentation" process. Is presentation necessary, and if so, in what circumstances?

Absence of the accused

Sections 142 and 142A of the *Justices Act 1886* currently outline when a court can deal with a matter in the absence of the accused. These provisions only allow for such procedure where the offence is a simple offence or a breach of duty and further restrict matters where a court intends to order imprisonment, or the disqualification, cancellation or suspension of a licence.

Section 389 of the *Police Powers and Responsibilities Act 2000* provides a court with discretion to deal with a case in the absence of an accused where a Notice to Appear was originally issued.

The mandatory restrictions under the *Justices Act 1886* provisions would appear to override the discretion under the *Police Powers and Responsibilities Act 2000* where the restrictions in sections 142 and 142A arise.

4.1.3 Is there a need to retain the restrictions in section 142 and 142A regarding imprisonment or licence disqualification for simple offences? Should the power under the *Police Powers and Responsibilities Act 2000* be extended to leave the decision to the courts' discretion in all proceedings initiated other than by arrest?

4.1.4 In relation to these types of provisions, is there a need to incorporate legislative recognition that parties who are present may be heard on the exercise of this discretion before a court decides whether or not to deal with the case in the absence of the accused, or is this implicit in the application of principles such as procedural fairness?

4.2 Disclosure

This division will contain the provisions about disclosure in criminal proceedings which are currently located in Chapter 62 of the Criminal Code (as amended by the Stage 1 Bill).

Questions for consideration:

4.2.1 In relation to the current obligations on an accused to provide a Notice of Alibi under section 590A, should the "prescribed period" (currently 14 days after committal) be reviewed? For example, this period could be linked with a time when the indictment is presented/lodged/served?

4.3 Committal proceedings

This division will contain the committal proceeding provisions from the *Justices Act 1886* (as amended by the Stage 1 Bill).

4.4 Indictments in Higher Courts

This division will incorporate procedures associated with indictments in the higher courts. It will include:

- existing provisions about what an indictment is;
- how and when indictments are provided to a court and an accused person or their legal representative; and
- provisions relating to the venue at which an offender may be tried.

Questions for consideration:

4.4.1 Currently section 590 of the Criminal Code provides that an indictment must be presented within six months of the date of committal from the Magistrates Court.

What should the time frames for lodging or presenting an indictment be? Should there be specific limitations on all indictments, or only for matters committed up from the Magistrates Court?

If timeframes are changed, for example reduced, and imposed for all indictments, does this also mean that the consequences where timeframes are not met, for example under section 590(4) where the accused is discharged, need to be reconsidered?

4.4.2 Section 560 requires that an indictment be presented by a Crown Law Officer, a Crown Prosecutor or some other person appointed in that behalf by the Governor in Council. Should section 560 be maintained and why? For example, does it matter who presents an indictment if an authorised person has already signed it?

4.4.3 Is it necessary to maintain sections 553 and 554 of the Criminal Code relating to the jurisdiction of courts and laws relating to committals/examination of witnesses?

4.4.4 Should electronic options for appearances on the presentation of indictments and notifications of nolle prosequi be available?

4.4.5 Should provisions under Chapter 59 of Part 8 of the Criminal Code relating to jurisdictional issues such as the jurisdiction within which an offender may be tried in various circumstances (section 557) be simply transferred in their current form? Have there been practical issues arising from the current wording and operation of the sections?

For example, under section 557 "place of trial" – is it necessary to maintain the specifics of this provision or is it sufficient if an element of the offence is committed in Queensland?

4.4.6 Is there a basis for maintaining section 63 of the *District Court of Queensland Act 1967* and section 559 of the Code regarding change of venue applications?

If not incorporated elsewhere, this division will also incorporate aspects of Chapter 60 of the Criminal Code relating to the form of charges, amending of charges, joinder, accessories and provision of particulars for offences prosecuted on indictment.

This division will also incorporate existing provisions regarding applications about indictments in Chapter Division 7, Chapter 62 of the Criminal Code.

Questions for consideration:

4.4.9 Should the provisions specified under Chapter 60 be located under this division or are they more appropriately located earlier in the Bill as suggested under Part 2 of this paper?

4.4.10 Are there ways the current provisions in Part 8 of the Criminal Code relating to the form of indictments can be modernised, improved or simplified?

4.4.11 Should the provisions in Chapter Division 7 apply to all proceedings and not just proceedings on indictment?

4.5 Separate Trial Provisions

This division will in essence incorporate the separate trial provisions that currently exist in the Criminal Code (sections 597A-597B).

Question for consideration:

4.5.1 Section 43 of the *Justices Act 1886* currently sets out when complaints can be joined. It distinguishes between indictable and non indictable offences. Given similar principles regarding joinder of complaints are likely to be argued in relation to non indictable offences, is there benefit in applying the more formal provisions under the Criminal Code (currently applicable to indictable offences) more broadly to non indictable offences in the Magistrates Courts?

4.6 Pre hearing/trial directions

This division will set out the basis upon which a direction from a court about any aspect of the conduct of proceedings may be made.

The division will amalgamate what is currently provided for under section 83A of the *Justices Act 1886* and section 590AA of the Criminal Code. The provisions will need to recognise some jurisdictional differences, for example application to cross examine witnesses at committal proceedings.

5. PLEAS

This Part will:

- identify the process for all jurisdictions regarding the taking of pleas including requirements regarding the reading of charges, what a court must be satisfied of, and issues to identify when receiving a plea;
- outline the steps a court is to take in relation to each type of plea with reference to Parts 6 and 7; and
- identify the process for dealing with circumstances in which no plea is entered.

Questions for consideration:

5.1 Some jurisdictions specifically list in their legislation the types of pleas that can be entered, that is more detail than is currently listed in section 598 of the Criminal Code including identifying pleas of unfitness or unsoundness, referencing mental health legislation. Is this approach appropriate for Queensland?

5.2 Is it necessary to formalise processes for pleas in bulk to apply to all offences in a more detailed manner than appears in section 597C(2) of the Criminal Code or is this a matter to be incorporated into the rules?

5.3 Should the common law processes and basis of change of plea applications be incorporated into this Bill?

5.4 Should sentencing processes be standardised across all courts? If so, is it preferable to formalise the lower court processes or reduce the formalities in the higher courts to align with the lower court process?

6. TRIALS

This Part will identify the procedure for all jurisdictions for matters proceeding by way of a trial. It will set out the order of proceedings, issues relating to evidence currently contained in Chapter 63 Part 8 of the Criminal Code, how a court deals with pleas received during a trial, and verdicts and orders that can and should be made.

Where possible, in keeping with the purpose of the Bill, the legislation should reflect consistent processes and terminology where possible. There are, however, likely to be some distinctions maintained between summary proceedings and proceedings in the higher courts.

In relation to proceedings on indictment, Part 6 will include provisions relevant to the involvement of a jury, provisions relating to judge alone trials and the delivering of verdicts.

Questions for consideration:

6.1 There are currently some differences in how trials are run before higher courts and those run before Magistrates. There is little technical detail in the *Justices Act 1886* regarding the trial processes in the Magistrates Courts compared with Part 8 of the Criminal Code (in particular Chapters 62 - 64).

The Stage 1 Bill will expand the jurisdiction of Magistrates Courts to deal

with indictable matters. However, Magistrates Courts will have a broad range of jurisdiction over a large quantity of less serious simple and regulatory offences where accused persons often represent themselves. For these reasons, is it appropriate to retain the differences in processes or should the formalities of Part 8 of the Criminal Code apply to summary proceedings? Are there any other reasons for retaining the current approach?

Is it more appropriate to reduce the formalities applying in the higher courts as contained in the Part 8 provisions (in particular: Chapter 61; 62 Chapter Divisions 1, 5, 7 and 11; and Chapters 63 and 64)? If so, which provisions and why?

6.2 Is there any basis to retain the current differences in terminology in relation to trials (that is, "hearing" and "trial")?

6.3 The *Evidence Act 1977* will not be incorporated into this Bill. However, Chapter 63 of Part 8 of the Criminal Code incorporates a number of evidentiary provisions. Is it appropriate to include these provisions in the Bill or should these provisions be relocated into the *Evidence Act 1977*?

6.4 Parts 5 and 6 of the *Jury Act 1995* include provisions relevant to the formation, selection, and discharging of jurors in criminal trials as well as court processes relating to juries once the trial has commenced including accommodation, verdicts and circumstances where a juror is discharged or absent once selected. A number of these provisions apply to both civil and criminal proceedings. Should the provisions relevant to criminal proceedings be incorporated, or simply referenced in this Bill?

7. SENTENCES

This Part will identify the sentencing procedures for all jurisdictions. It will outline how matters where an accused is convicted (whether on his or her own plea or by a finding of guilt) are to proceed. It is not intended to incorporate substantive provisions relating to sentencing in the *Penalties and Sentences Act 1992*, in particular the types of sentencing orders a court can make upon conviction under that Act.

The Part will include a system for all courts for recording orders and obligations of court staff to notify relevant parties of outcomes of sentences. It will also outline a process for sentencing in the absence of the accused having regard to existing provisions under the *Justices Act 1886* for offences dealt with summarily.

Questions for consideration:

7.1 Is there a need to distinguish between processes for indictable offences and non indictable offences, or is it preferable to have the same process for all offences. In particular, should the current process in section 648 of the Criminal Code for higher courts of calling upon a person convicted to show cause be the same across all offences? If differences should be maintained what is the basis for the differences?

7.2 Section 132C of the *Evidence Act 1977* sets out certain rules about fact finding on sentences in criminal proceedings. It identifies what a judge or magistrate can act on and the degree to which a court must be satisfied where facts are challenged or not admitted. This provision guides the process for "contested" sentences. Should section 132C be incorporated into this Bill?

8. PROCEDURES APPLICABLE TO PROCEEDINGS GENERALLY

The purpose of this Part is to detail processes and issues which are common to criminal proceedings.

This Part will incorporate processes relating to the following:

- supply of exhibits and copies of records
- appearances by persons representing an accused person
- appearances by witnesses
- powers of court for dealing with the non appearance by one or all of the parties, in particular the provisions for the issuing of warrants
- witnesses including adopting a standardised approach regarding the appearance of witnesses and powers of the court where a witness does not attend
- evidence provisions in legislation outside of the *Evidence Act 1977* (for example, provisions relating to applications for return of evidence as set out in section 39 of the *Justices Act 1886*); and
- use of Audio/visual links amalgamating existing provisions in the *Justices Act 1886*, *District Court of Queensland Act 1967* and *Supreme Court of Queensland Act 1991*.

Questions for consideration:

8.1 Is there a justification for maintaining a difference in processes and terminology regarding summons and subpoenas?

If one process is adopted, which is preferable?

Please consider this issue having regard to the maintaining of a complaint and summons process as well as the proposals in this paper for a single method for commencing proceedings.

8.2 Should this Part adopt the provisions of the *Evidence Act 1977* relating to the procedure for criminal proceedings for special/affected child witnesses or simply reference them?

8.3 Is it necessary to incorporate provisions in the *Evidence Act 1977* (Part 3A) that relate to the use of these facilities for the purposes of taking or receiving evidence and making of submissions interstate and within Queensland, or alternatively simply refer to those provisions?

Is there a preference for increased use of these facilities in proceedings? If so, are there any restrictions or safeguards to be considered in expanding their use?

8.4 The Bill is intended to incorporate, as much as possible, all aspects of criminal procedure. Is it appropriate to include provisions regarding the following under a criminal procedure Bill, or should they be located in other pieces of legislation or rules:

8.4.1 Open/Closed courts

8.4.2 Powers prohibiting publication and to make suppression orders

8.4.3 Recording of proceedings

8.4.4 Alternate dispute resolution, for example sections 53A and 53B of the *Justices Act 1886*

8.4.5 Transcripts (for example section 154 of the *Justices Act 1886* and section 671K of the Criminal Code).

9. RE-HEARING/RE-OPENING OF PROCEEDINGS

This Part will incorporate procedures relating to the re-hearing or re-opening of cases. This will include the re-opening of sentences having regard to section 188 of the *Penalties and Sentences Act 1992.* It will be the intention of the Part to standardise where possible existing procedures for all jurisdictions.

10. APPEALS FROM CRIMINAL PROCEEDINGS

In keeping with the purpose of the Bill, consideration is being given to co-locating all appeal provisions from various criminal jurisdictions. The co-locating would be done for ease of reference and by association with criminal procedure, and not with any intention to interfere with or change rights.

Questions for consideration:

10.1 Are there any unintended consequences with such an approach?

10.2 It is acknowledged that some appeal provisions contain substantive issues such as rights of appeal rather than purely procedural aspects. Is it appropriate to extricate the procedural aspects of the existing provisions and place them into this Bill? Should the provisions relating to appeals be relocated into the Bill or should they be left in their entirety in their existing locations?

10.3 Appeal processes are currently treated as falling within the civil jurisdiction of the courts. Would there be any impact on the rights of parties if this process was recognised as a criminal application rather than a civil application?

11. ELECTRONIC PROCESSING

The purpose of this Part will be to identify and set up parameters regarding electronic processes associated with criminal proceedings and documents, such as what can be transferred, when, how and responsibilities at certain stages. It is intended that this Part would facilitate the electronic lodgement of initiating documents, indictments, briefs of evidence, and applications relevant to criminal proceedings (for example, bail documents, appeal documents, applications for DNA/identifying particulars).

It is anticipated the specifics of the processes are likely to be contained in rules; however the Bill will set up a framework to facilitate these processes. Provision for hard copy processes will be maintained, however the intention is to build electronic

options into the framework. Safeguards may also be needed to cover privacy and security issues such as how the information is stored and accessed.

The consolidation of current legislation is likely to require amendments to the wording of existing provisions, rules and regulations relating to original documents.

This Part is likely to require minor amendments to the *Electronic Transaction (Queensland) Act 2001* and the development of rules within the proposed Uniform Criminal Procedure Rules, similar to those that exist under Part 1, Division 4 of the Uniform Civil Procedure Rules.

Questions for consideration:

11.1 Is it necessary to redefine "record" within legislation to contemplate any extension to electronic processes?

12. COSTS

This Part will incorporate existing provisions regarding costs.

Section 127 of the *Drugs Misuse Act 1986* provides that no cost orders shall be awarded with respect to any proceedings arising out of a charge of having committed an offence defined in that Act. This creates an inconsistency with other offences dealt with in the Magistrates Courts where cost orders are allowed for under Division 8 of Part 6 of the *Justices Act 1886*.

No equivalent provision existed under the *Health Act 1937*, the precursor to the *Drugs Misuse Act 1986.* Prior to 1986 it would seem, the *Justices Act 1886* provisions would have applied.

Question for consideration:

12.1 To ensure consistency, is it appropriate to amend the *Drugs Misuse Act 1986* to allow costs awards in summary hearings in accordance with the existing provisions of the *Justices Act 1886*? Alternatively, should section 127 be removed and the *Justices Act 1886* provisions replicated for all offences dealt with in the Magistrates Courts?

13. MISCELLANEOUS MATTERS

This Part will incorporate the balance of procedural provisions not already covered in the above Parts. This will include:

- offences against the Act by replicating existing offences within criminal procedure legislation. For example: the offence under the *Justices Act 1886* (section 71B) relating to the taking of photos or producing pictures of a court room without consent; and the offence under the *District Court of Queensland Act 1967* prohibiting a registrar to act as a bailiff and vice versa (section 48); and

- regulation and rule making powers which will provide for the making of Uniform Criminal Procedure Rules and forms to ensure consistent application of rules across all jurisdictions.

Questions for consideration:

13.2 Are there any other aspects of criminal procedure not covered by other Parts that would be appropriate to include in this Part of the Bill?

B. CONSEQUENTIAL, TRANSITIONAL AND ADDITIONAL MATTERS

14. CONSEQUENTIALS AND TRANSITIONALS

A number of consequential amendments to existing legislation will be required as a result of the Bill. For example, several provisions in the *Justices Act 1886* relate to the setting up, jurisdiction and powers of the Magistrates Courts and do not relate to criminal procedure. These provisions will need to be retained but transferred to other appropriate Acts (such as the *Magistrates Courts Act 1921*). Significant consequential amendments to the Criminal Code will also be required regardless of the degree to which Part 8 is absorbed.

Questions for consideration:

14.1 What other legislation may require consequential amendments arising from the development of the Criminal Justice Procedure Bill?

14.2 Feedback is encouraged on any aspect of criminal procedure discussed in this paper that should or should not be included in the Bill and would be more appropriate to locate in other existing legislation, or within rules/regulations/practice directions. Are there aspects of provisions not already identified that could be streamlined and modernised?

15. ADDITIONAL MATTERS

This process will provide an opportunity to consider further legislative reforms to provide efficiencies and flexibility for Queensland courts.

15.1. Single Magistrates Court for Queensland

Annexure A to this paper outlines the history of the current structure of Magistrates Courts in Queensland. The Supreme and District Courts and other states and territories have adopted a single court structure.

Questions for consideration:

15.1.1 Consideration is being given to incorporating in the Bill amendments to facilitate the creation of one Magistrates Court of Queensland under statute. This change would make the Magistrates Courts' structure consistent with the Supreme and District Courts in Queensland. It would allow for increased efficiency within the registry as well as flexibility of lodging of proceedings and other processes.

15.2. Amendments to the *Recording of Evidence Act 1962*

In addition to the issues regarding the *Recording of Evidence Act 1962* outlined above, consideration is being given to incorporating amendments to overcome difficulties currently associated with access to the Queensland Sentencing Information Service (QSIS).

As a result of various pieces of legislation restricting access to and disclosure/publication of personal information, access to sentencing remarks in QSIS has been restricted since July 2007. These restrictions have meant that some agencies do not have access to the sentencing remarks collection in QSIS.

There appears to be merit in extending the restricted access to relevant organisations to ensure fair distribution of information amongst key legal stakeholders.

As each of the legislative provisions which restrict the provision of information in QSIS (for example, the *Youth Justice Act 1992*, the *Criminal Law (Sexual Offences) Act 1974* and the *Child Protection Act 1999*) is different in its application, the changes could be implemented by amending the *Recording of Evidence Act 1962,* in particular to:

- allow the chief executive of the Department to establish a data base of recordings and/or transcripts of legal proceedings;
- include limitations on the persons who could be given access to the database;
- prohibit general access to the database; and
- ensure provisions overcome the privacy legislation where necessary.

Questions for consideration:

15.2.1 Is this proposal appropriate? Are there any problems or concerns which should be noted?

15.3. Increase to Magistrates Courts' maximum penalty

Section 552H of the Criminal Code empowers magistrates to impose up to three years imprisonment for indictable offences dealt with summarily. Section 13 of the *Drugs Misuse Act 1986* also provides for up to three years imprisonment for drug offences dealt with summarily. Further, provisions in the *Drug Court Act 2000* and Criminal Code provide for a maximum of up to four years imprisonment in the Drug Court when certain criteria are met.

Consideration is being given to increasing the maximum penalty a magistrate can impose when dealing with an indictable offence to five years.

In Victoria, South Australia and New South Wales Magistrates are empowered to impose up to two years imprisonment when dealing with indictable offences. In Western Australia, they can impose up to three years imprisonment.

Northern Territory, Tasmania and the Australian Capital Territory (ACT) have allowed Magistrates to impose up to five years imprisonment since 1997, 2000 and 2008 respectively. In the ACT the limit was originally two years and the amendment in 2008 was made to align the maximum penalty with that applying in Tasmania and the Northern Territory, which are also jurisdictions with a two-tier court system, and to complement changes made at that time to the threshold for summary matters.

Such an increase in Queensland may facilitate the resolution of more matters by the Magistrates Court and reflects the professionalism of our magistrates.

Questions for consideration:

15.3.1 Should the maximum penalty that can be imposed on summary disposal of an indictable offence be increased to 5 years?

A SINGLE MAGISTRATES COURT

Queensland's Magistrates Courts are descendents of the system of summary justice administered by justices of the peace which was operational in England as early as the 14th Century.[1] This system of justices of the peace was transported directly to Australia by an exercise of the royal prerogative in the earliest days of settlement.[2] Courts of Petty Sessions constituted by two or more justices sitting together were formally established in New South Wales in 1832.[3] By the time of separation, New South Wales had established a number of Courts of Petty Sessions in Queensland.[4] Upon separation in 1859 Queensland adopted the New South Wales laws, which were subsequently revised and reformed under the *Justices Act 1886*.[5] Under the *Justices Act 1886* the Courts of Petty Sessions were continued in existence. The civil jurisdiction of magistrates was significantly expanded with the *Magistrates Courts Act 1921*.[6] In 1964 the *Justices Act 1886* was amended and the Magistrates Courts subsumed the Courts of Petty Sessions thus giving the Magistrates Courts a civil and criminal jurisdiction.[7]

Section 22 of the *Justices Act 1886* in its current form recognises the continued existence of the Queensland Magistrates Courts. The *Justices Regulation 2004* sets out the districts and divisions appointed throughout the State for the purposes of holding Magistrates Courts. There are currently 144 separate places appointed for holding Magistrates Courts in Queensland which means that there are technically the same number of separate courts. This approach can give rise to unnecessary jurisdiction issues and difficulties.

Most other Australian States have introduced legislation establishing a single Magistrates Court or Local Court.[8] A similar approach was taken in Queensland with respect to the District Court. Prior to the enactment of the *Justice and Other Legislation (Miscellaneous Provisions) Act (No. 2) 1997* the District Court in Queensland existed as separately constituted District Courts across the State. The amendments required to achieve this change were relatively simple but affected a wide range of legislation which referenced the District Courts.

While it is not proposed to change or restrict the locations at which a Magistrates Court can be constituted across Queensland, as outlined in the Discussion Paper there are likely to be benefits associated with the establishment of a single Magistrates Court structure under legislation.

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[1] Dean, Gordon, *Here Comes the Judge: The Queensland Magistrate*, Department of Justice and Attorney General, Brisbane 2008, p. 5.
[2] Sikk, Edward *Avoiding Delay in Magistrates' Courts*, Research project sponsored by the Australian Criminology Research Council, Hobart 1985, p. 49.
[3] Report 38 (1983) *The Magistracy: Interim Report – First Appointments As Magistrates under the Local Courts Act, 1982,* New South Wales Law Reform Commission, Sydney 1983 accessed at http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R38TOC on 24 February 2010.
[4] Dean, p. 14
[5] Dean, p. 24
[6] Dean, p. 38.
[7] Dean, p. 39.
[8] See for example: *Magistrates' Court Act 1989* (VIC); *Magistrates Court Act 2004* (WA); *Local Court Act 2007* (NSW).