Aboriginal & Torres Strait Islander
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Honourable Jarrod Bleijie MP
Attorney-General and Minister for Justice
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BY EMAIL: attorney@ministerial.qld.gov.au

30th September 2013

Dear Mr Attorney,

RE: VIEWS ON REFORMS IMPLEMENTED IN THE CIVIL AND CRIMINAL JURISDICTION REFORM AND MODERNISATION ACT 2010

I refer to the correspondence received in relation to the above Act, and I am pleased to pr0vide our Organisation's thoughts. I also take this opportunity to pass on our appreciation at being afforded an opportunity to have imput into this very important consideration.

Introduction – background as to our ability to meaningfully comment

The Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd ("ATSILS") provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Our primary role is to provide criminal, civil and family law representation. We are also funded by the Commonwealth to perform a State-wide role in the key areas of: Law and Social Justice Reform; Community Legal Education and Monitoring Indigenous Australian Deaths in Custody. As an organisation which, for over four decades has practiced at the coalface of the justice arena, we believe we are well placed to provide meaningful comment. Not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

1. Committal proceedings

a) Registry Committals

The absence of a power in a Judicial Registrar to grant bail (or vary existing bail) is a significant limitation. Bearing in mind the numbers of our clients that might be on remand at any time, the issue of bail is an important one particularly as theoretically by the stage a committal is reached, we should know the prosecution case as evidenced by the Brief of Evidence and therefore be able to form a view about whether a fresh bail application should be made.

As such, registry committals are often inherently unattractive for the reason that a judicial registrar cannot hear bail applications. The same point applies to the situation where it might be necessary, by virtue of changed circumstances, to seek to vary an existing bail undertaking in some material way - such as by deleting a reporting or curfew condition. This significant limitation does not however equate to our Organisation being in any way dismissive of such committals – but such are unlikely to be utilised to any great degree without being more "user friendly".

One consideration might be to allow a Registrar to grant bail (or vary existing bail), where such is unopposed by Prosecutions. Further, consideration could be given to creating a process allowing such applications (where they are opposed) to be brought back before a magistrate for determination of same.

Ex-offico indictments

A consequence of the requirement of the consent of the Director of Public Prosecutions to these proceedings is that they have fallen into desuetude. This restricts the use of this process to progress a number of charges to the District Court in a short time frame. It is unfortunate that this is the case particularly in situations where clients have made full admissions in a fair and proper interview to large number of charges and it seems needless for police officers to be laden with the task of obtaining unnecessary statements for committal. Having noted that, the mechanism of a committal for sentence does alleviate this shortcoming to some extent.

There is certainly scope however to free up the use of ex-officio proceedings and in our view such merits greater scrutiny.

c) Applications to cross-examine witnesses

In regard to offences which may attract a life sentence (of imprisonment), such as for the offence of murder, there are sound and compelling reasons why there should be *no fetter* upon to the 'right' to require the DPP to call a witness, other than an affected child, to attend court and be available for cross-examination.

Such trials tend to be lengthy in our superior courts and committals offer the invaluable efficiency of narrowing issues. We also note the recent Supreme Court Practice Direction of Chief Justice De Jersey in relation to lengthy trials and surmise that 'as of right' committals would dove-tail with and augment that reform.

For 'non-life' offences, it is the case that there is seemingly significant dissatisfaction amongst the legal profession with the approach of the Office of Director of Public Prosecutions as to whether it will or will not consent to cross-examination. Presently the profession awaits the release of a thorough guideline by the DPP to guide the grant of, or refusal to consent to cross-examination. It has certainly been the experience of our Organisation that such applications are not uncommonly opposed by the DPP in situations where it is difficult to fathom the merit of such opposition.

In this context there is much to be said for the proposal floated in your covering letter Mr Attorney, relating to the consideration as to whether there should be an entitlement in the defence to cross-examine complainants and the arresting officer without the need for DPP consent or a court ruling. If further cross-examination of *other* witnesses is sought then the defence could be required to justify such under the current regime (i.e. demonstrate substantial reasons in the interests of justice for cross-examination to occur), failing which the matter would default as presently happens to a committal without cross-examination. This would spare the need for many applications that should not consume the time of the court - not because they are frivolous but rather because they should have been consented to in the first place. That said, frivolous applications are undoubtedly brought from time to time – and such might well give rise to healthy cynicism by the DPP staff in terms of the

majority of justifiable applications. Such is not intended as a criticism – rather as an observation of human nature. By and large the staff and office of the DPP do a sterling job.

The reality is that skilful and focused cross-examination at committal hearings often benefits the prosecution (as well as the defence) by exposing evidential difficulties, fanciful prosecutions or witnesses of obvious discredit. That is advantageous in so many ways, including obviating the need for a Basha enquiry in the District or Supreme Courts, the conduct of which are often inevitable in the absence of cross-examination and thus prolong trials and the demands upon jurors.

Further, cross-examination at a committal hearing stage can also act as a "reality check" for certain defendants in the sense of them re-visiting their initial instructions to proceed to trial.

The opportunity to call arresting officers in all cases is important in terms of assessing the investigation process. We view this as an important process in not only maintaining accountability, but in assessing the manner in which evidence is gained. For example, is it often crucial to clarify any conversations that might have occurred prior to the taking of statements from witnesses and the content of such.

Further, in terms of the use of photo identification boards by police, it is important to gain insight into the surrounding circumstances and any irregularities which might have inadvertently drawn a person's attention to a particular photograph. The ability to call police is a sound suggestion and is seminal to ensuring that just processes relating to evidence gathering and presentation are maintained.

In general, there are efficiencies for defence and prosecution alike in avoiding the many merit-worthy applications that are presently before the Magistrates Court and which could have been consented to. Cross-examination of arresting officers and adult complainants would ameliorate this and enhance timely justice.

2. Summary disposition of indictable offences

a) the test for summary matters linked and heard with matters that must proceed on indictment.

Our experience is that the present test of "exceptional circumstances" [second tier test: section 552D (2)] is often too onerous and unworkable if strictly applied. A test applied by the court worded in simpler terms such as "in the interests of justice" encapsulates both defence and prosecution considerations (and the community's), and would be of greater utility than the current test. Ultimately such would then become a case of simply providing the presiding Magistrate with an opportunity to apply common sense to any given situation.

b) whether changes recommended by Mr Moynihan but not implemented should be implemented.

In relation to the original proposal to remove all defence elections, we suggest that the status quo should be maintained. Presently the offences for which the defence retains an election are minimal and should remain – and for very good reasons. It is particularly important that for cases destined for a trial – that the "right" to a trial by a jury of one's peers is not undercut.

c) whether there should be any changes to the current provisions (e.g., excluding the offence of assault against a police officer from the prosecution election).

The present prosecution election is supportable provided that the Director of Prosecution Guidelines for charging are adhered too. While we acknowledge that the offence of "assault police" covers a broad range of offending behaviour, we have noticed a tendency for matters to be charged as a "serious" assault when there is no objectively serious factor or factors to justify such a charge. This undermines the gravity of 'serious assault' - leads to contention, and therefore protracted proceedings. Such stands in stark comparison to an "obstruct" or "assault police (simpliciter)" charge under the Police Powers & Responsibilities Act – which generally result in a timely sentence – and at far less cost to the taxpayer. The facts alleged to the court and thus what should ultimately be the appropriate penalty, would remain unaffected should such a change be instigated.

Given the current practices in some localities of police proffering the more serious charge, in situations which are often at odds with the Office of the Director of Public

Prosecutions Director's Guidelines, then consideration could be given to removing the Prosecution election and residing such with the presiding judicial officer.

3. **Whether disclosure provisions and practices are working effectively and efficiently.**

At the outset it is probably helpful to clarify the distinctly different ways in which disclosure issues arise.

We interpret this question as primarily referring to the disclosure provisions in the Criminal Code (see 590AB and following). However we also see Disclosure Obligation Directions as encompassed within this topic as well.

It is not uncommon for our Organisation's staff to experience issues and challenges arising in relation to prosecution (non)compliance with disclosure provisions. Hence a key question becomes: are sufficient mechanisms in place for disclosure to occur in a timely and fair manner? We believe the current Criminal Code provisions generally offer just such a structure.

Having observed such, the general absence of committal hearings with cross-examination has encouraged disclosure standards to slip. As an example, in one matter in which we were recently involved, we discovered that a key witness was an un-medicated schizophrenic at the time of the alleged incident. This was something that would have been reasonably obvious to the arresting officer and prosecutor and should have been disclosed to the Defence. It was only the fact that our practitioner with carriage of the file was successful in his application to cross-examine, that this crucial information emerged.

The summary and committal call-overs (where they occur) in the Magistrates Courts, proceed pursuant to Practice Directions that mandate reasonably compressed (albeit very reasonable) timeframes for the progress of matters. That said, we would also encourage a wider implementation of Disclosure Obligation Directions. Our staff have found there to be variability in relation to compliance, depending largely upon the attitude and approach of the particular Prosecutor. In truth, defence lawyers are often required to act proactively in an attempt to gain proper disclosure and to keep a matter on track.

In practice, matters are not infrequently listed for a contested summary hearing due to a refusal or inability of arresting officers to supply sufficient information (in a timely manner) for case conferencing in the Magistrates Court. This is one of the practical ways of "forcing" disclosure when there is non-compliance with Practice Directions. In the absence of appropriate (early) disclosure, it is generally the case that it is only once the brief of evidence is obtained that a client can be meaningfully advised in regard to their situation – which not infrequently would be sage advice from the practitioner to consider a plea of guilty. Another of the practical concerns with this practice is that if a hearing date is imminent when the client pleads guilty, he or she might well receive a very limited concession for their plea of guilty in circumstances where appropriate early disclosure would have prevented this waste of the Court's time – not to mention that of defence lawyers and prosecutors alike.

Our Organisation believes that providing monitoring and ongoing training to prosecutors and arresting police officers about their disclosure obligations generally; and in respect of the case conferencing process - as being critical if the laudable initiative of case conferencing is to deliver all that it promises by way of efficiencies and justice. It will be recalled that Mr Moynihan described proper and timely disclosure as "the lynchpin of our criminal justice process".

Implementation of early discussions between the parties required a significant change in culture from previous practices – and to which there has been a certain resistance. Not just from the police, but on occasions from defence lawyers or indeed, judicial officers. Theoretically, one would surmise that with the passage of time, with ingrained cultures being slowly chipped away at – this very important process of case conferencing should progressively improve.

Plainly, issues with disclosure – or non-compliance in particular - can have disparate effects depending upon where a person lives. For example, a significant number of our clients live in remote communities. While a brief of evidence might be available at a police station fourteen days prior to a hearing, it might not be received by the defence representative for many days thereafter. This challenge is compounded by virtue of the fact that not uncommonly clients might live hundreds of kilometres

from his or her representative's office and be affected by numerous issues including access to telecommunications, language barriers, etc.

Clearly the above example indicates a challenging process for our lawyers and clients. It is important for these challenges to be taken into account when it comes to Directions in relation to disclosure timeframes and hearing dates. This is particularly the case in regional and remote areas.

Expanding the range of indictable offences that can be finalised summarily (whether this would require an increase in the maximum term of imprisonment a Magistrate can impose).

Our view is that the "Moynihan reforms" have increased the number of self – represented persons in the Magistrates Courts as Legal Aid for summary hearings is infrequently granted due to a number of considerations, not the least of which would presumably be budgetary constraints. Such impacts less adversely upon our client base as (subject to merit and an income test), we will generally offer our services in this regard – although such does impact adversely upon our staff and resources due to increased demand without any corresponding increase in staffing levels.

Unrepresented defendants undoubtedly make the task of Magistrates unduly burdensome - particularly where the person is looking at the potential imposition of imprisonment and thus adopts the "head in the sand" stance. It also means that many hearings devoid of merit proceed with related wastage of time for all.

Given the current situation, an increase (from a jurisdictional perspective) in the seriousness of offences that can be dealt with in the Magistrates Courts - and a related increase in the maximum term that can be imposed in these busy courts would likely have a retrograde effect in terms of delays to the courts list, increases to the number of Magistrates to be appointed and a proliferation of appeals. Ultimately a question which also brings into focus a consideration of adequate resourcing (for all key stakeholders).

Potential implications with any such a jurisdictional increase include:

- an increase in the number of matters before the Magistrates Court;
- a larger number of complex matters before the Magistrates Court requiring greater amounts of time allocated to them;
- matters which are too complex to be dealt with quickly by a Duty Solicitor approach; increased sentences due to self-represented litigants not addressing relevant legal points and sentencing matters, in turn leading to distorted comparatives;
- more appeals due to either self-represented litigants not drawing Magistrates attention to pertinent law, or because of errors of law by Magistrates with large caseloads being required decide complex cases;
- a higher likelihood of unjust outcomes and miscarriages of justice; and
- Less opportunities to brief experience counsel from the Private Bar.

On balance and assuming the unavailability of substantial funding increases to legal-aid agencies, additional magistrates and the like, we would currently counsel against any increase in the Magistrates Courts' jurisdiction.

Electronic plea of guilty for simple and minor indictable offences.

While initially attractive in this day and age, we consider that it would, if implemented, discourage defendants from seeking legal advice and legal representation. In terms of Aboriginal and Torres Strait Islander peoples, we also stress language barriers, understanding of mainstream concepts and the ever increasing incarceration rates. All defendants, whether Aboriginal and Torres Strait Islanders or otherwise, should understand the elements of their charge, whether those elements have been met, the content and significance of their criminal history and the implications of a conviction (if any) upon their lives (i.e. employment, travel and so on).

It is currently unclear as to how the person would be sentenced and how the sentence would be communicated to the person. This is also an issue for many of our clients in terms of language and in terms of complying with the sentence – all the more so for those with highly transient live styles (including some whom by choice, choose to live in open spaces).

Finally there is the ever vexing issue of online security and internet fraud/theft.

If such an option were trialled – we would suggest that the relevant police documentation (e.g. the charge sheet or infringement notice etc), should carry the

number of a legal helpline (so that those wishing to dispose of their matter electronically can have access to prior legal advice). Such should be specifically funded by the government. Further, we would suggest that our Organisation's 1800 number be also included on such documentation, so as to ensure culturally competent legal advice for Aboriginal & Torres Strait Islander defendants.

We thank you for inviting us to comment on this legislation, we wish you well in your deliberations and trust that our submission is of assistance. We would welcome the opportunity for further dialogue.

Yours faithfully,

Shane Duffy

Chief Executive Officer