

# Criminal justice procedure reform

An information paper for criminal justice  
stakeholders and the community

# Minister's Foreword

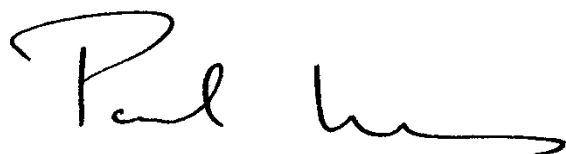
An effective criminal justice system is an essential element of society. It must provide equal justice for all according to the law. It must use public resources responsibly to ensure community safety and the fair and expeditious determination of criminal charges.

Since the 2009 release of a report by the Honourable Martin Moynihan AO QC, the Queensland Government has embarked on a process to deliver the biggest change to Queensland's criminal justice procedure in 100 years.

The *Review of the civil and criminal justice system in Queensland* set out an ambitious program of reform. Delivery of these reforms is well underway. In November 2010, the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* commenced and delivered the first stage of the reforms envisaged by the Report.

Alongside the Criminal Code, the Criminal Justice Procedure Bill (the Bill) once enacted will be the key piece of legislation in Queensland for criminal laws, streamlining and consolidating criminal justice practice and procedure. The Bill will pull together a modernised version of the *Justices Act 1886* and aspects of part 8 of the Criminal Code, as well as make some key reforms outlined in this paper. It will be supplemented by new Criminal Justice Procedure Rules. It is intended that all persons with criminal justice involvement, from law students, to defendants, to lawyers and judges are able to easily and readily access criminal procedural laws in this State.

It is appropriate that those who apply procedural laws every day, those who represent defendants and those who prosecute for the State are provided with opportunities to input on such a law. This is one opportunity to do so. The entire Bill itself will also be later released for consultation purposes.



**PAUL LUCAS MP**  
**Attorney-General,**  
**Minister for Local Government**  
**and Special Minister of State**

February 2012

# Criminal Justice Procedure Reform

## An information paper for criminal justice stakeholders and the community

### Part 1

#### Introduction

In November 2010, the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* commenced and delivered the first stage of the reforms envisaged by the *Review of the civil and criminal justice system in Queensland*<sup>1</sup> (the Moynihan Report). This Act comprised legislative reforms about: the monetary limits for the civil jurisdiction; disclosure in criminal cases; summary disposition of indictable offences; and committal processes.

The Queensland Government is now working towards delivering the second stage of the legislative reforms. The second stage focuses on the recommendation of the Moynihan Report for a comprehensive overhaul of all criminal justice procedure legislation and rules to consolidate, modernise and streamline criminal justice procedure. It involves the development of a new Criminal Justice Procedure Act for Queensland, court rules, regulations and forms.

In April 2010, a discussion paper was released inviting suggestions for improvements for criminal justice procedure. The feedback received from stakeholders has been invaluable in the development of a proposed new framework to comprehensively consolidate, modernise and streamline criminal justice procedure.

Drafting of the main Bill to deliver the reforms – the Criminal Justice Procedure Bill – is underway. Consultation on the draft Criminal Justice Procedure Bill will take place later this year. A further Bill dealing with consequential amendments from the reforms – the Criminal Justice Procedure (Consequential and Other Legislation) Amendment Bill – will also be developed.

This information paper explains the government's goals for the second stage of reforms, how the Criminal Justice Procedure Bill will achieve these goals and highlights proposals for change in criminal justice procedure.

Feedback on the proposals and issues raised in this paper should be provided no later than **31 March 2012**:

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<sup>1</sup> [www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/past-activities/review-of-the-civil-and-criminal-justice-system-in-queensland](http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/past-activities/review-of-the-civil-and-criminal-justice-system-in-queensland)

By email to: legalpolicysubmissions@justice.qld.gov.au or  
In writing to: Assistant Director-General  
Strategic Policy Legislation and Executive Services  
Department of Justice and Attorney-General  
GPO Box 149  
BRISBANE QLD 4001

We will assume that you do not want your comments to be treated confidentially and may make your comments publicly available on our website. If you would like your comments, or any part of them, to be treated as confidential, please indicate this clearly. All comments however are subject to disclosure under the *Right to Information Act 2009* and *Information Privacy Act 2009*, and applications for access will be determined in accordance with those Acts.

## Part 2

# What we want to achieve

Procedural laws that are **easily accessible** by all – judges and magistrates, criminal justice professionals such as defence counsel and prosecutors, defendants, victims, witnesses and the community.

An **efficient criminal justice court system** where less time is wasted on sourcing the laws contained in many places or interpreting laws that are unnecessarily complex and impenetrable. Efficiency means less delay and ultimately less cost.

Procedural laws that are **fair** by preserving and making clear the rights and responsibilities of all participants in the criminal justice system.

Procedural laws that can continue to be **modern and appropriate** and facilitative of **electronic** transactions.

## How we will do this

The Queensland Government is developing criminal justice procedure laws that will be expressed as **simply** as possible and in **plain English**.

Procedures will be reduced so far as possible to one **consistent** discipline for all three courts. Special provision will be made where appropriate to reflect the differences in make up of courts and the manner of their determination of charges.

Through consolidation, almost all primary legislation on criminal procedure will be contained in **one single location** – the Criminal Justice Procedure Act. The Act will be supplemented by the Criminal Justice Procedure Rules.

By revising the split between primary and secondary legislation and devolving more provisions to the rules – which can be quickly updated – the legislation will be more **flexible**.

By introducing or carrying over important **law reforms**, such as ensuring compliance with requirements about timely disclosure of relevant evidence; ensuring committal proceedings are conducted where they will assist in examining important issues and the increase in the criminal jurisdiction of the Magistrates Court and District Court, the legislation will be modern and appropriate.

## Part 3

# Present state of the law

The Moynihan report highlighted the archaic and fragmented nature of the law underpinning criminal procedure in Queensland and recommended the creation of a single piece of procedure legislation relevant to the 21st century.

Currently criminal procedural law for the three levels of courts is primarily contained in two 19th century Acts: the *Justices Act 1886* (Justices Act) and part 8 of the *Criminal Code Act 1899*. Other procedural provisions are located in the *District Court of Queensland Act 1967* and the *Supreme Court of Queensland Act 1991*. These provisions frequently overlap or do not work well together.

The Criminal Justice Procedure Bill will consolidate and rationalise the statute law, while taking into account the application of the common law and practice that has developed over time and been judicially considered.

The procedural laws are supplemented by a network of related laws which will also require consequential amendments to align them with the new Act. These include the *Bail Act 1980*, the *Penalties and Sentences Act 1992*, the *Evidence Act 1977*, the Criminal Practice Rules 1999 and the *State Penalties Enforcement Act 1999*.

The Justices Act, which governs summary and committals procedure in the Magistrates Court, will be repealed. This Act has been substantially amended over the past 100 years with many of these amendments ‘bolting on’ to the original provisions. It is archaic and difficult to understand in parts and often does not reflect modern practice.

Part 8 of the Criminal Code governs procedure in the higher courts. However, some provisions apply to proceedings in the Magistrates Court.

The provisions of the current statute law do not follow a logical sequence – related provisions may be located in entirely separate chapters or parts of the relevant Acts. For example, provisions about change of venue in the Justices Act are located both at the beginning and towards the end of the Act despite the fact that these provisions should be read together.

The Criminal Justice Procedure Bill will be written in a logical and sequential fashion. The Bill will be supplemented by new Criminal Justice Procedure Rules.

# Part 4

## Overview of the Bill

### 4.1 Application of the Bill

The Bill will apply to a proceeding for a charge of an offence in any court.

The Bill will apply to criminal offences (simple offences and indictable offences) and regulatory offences. Unlike the Justices Act which presently applies to non-criminal breaches of duty, breaches of duty will not be captured by the Bill. Legislation enabling the use of the Justices Act for non-criminal matters will be reviewed during the drafting of a Consequential Amendment Bill to determine the procedures appropriate for the particular type of matter.

The definition of 'simple offence' has always differed between the Justices Act and the Criminal Code.

Justices Act, section 4: 'A simple offence means any offence (indictable or not) punishable, on summary conviction before a Magistrates Court, by fine, imprisonment, or otherwise'.

Criminal Code: the effect of section 3 is that a simple offence is an offence not designated as an indictable or regulatory offence.

The Criminal Code approach will be adopted in the Bill.

The Bill will not be a code of procedural law. The common law will continue to apply where it is not displaced by statute law.

If another Act creating an offence is inconsistent with the Bill, that Act will prevail over the Bill. This might occur for good reason where, for example, a new offence is created to respond to a particular social issue that requires a particular response and particular requirements about proceedings.

The Bill will apply to proceedings against children, subject to express overriding provisions contained in the *Youth Justice Act 1992* or the *Childrens Court Act 1992*.

### 4.2 Incorporation of Stage 1 reforms

The first stage of the Moynihan reforms has taken effect. The *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* commenced on 1 September and 1 November 2010. The Act contained reforms including:

- Expansion of the jurisdiction of the Magistrates Court to determine indictable offences in the Criminal Code and the *Drugs Misuse Act 1986*.

- An increase in the general criminal jurisdiction of the District Court from offences with a maximum penalty of 14 years or less, to those with a maximum penalty of 20 years or less.
- Simplification of prosecution disclosure provisions and increased compliance measures.
- Streamlining the committal process and the management of matters in the Magistrates Court which proceed by way of ex officio indictment.

These reforms aimed to ensure that the administration of justice in Queensland is modern, accessible and responsive to community needs and expectations.

Victims of crime are seeing justice administered sooner, witnesses are making fewer court appearances and defendants are having matters heard sooner as a result of the reforms.

The Bill incorporates the criminal law amendments made in Stage 1. Stage 2 does not as a rule revisit the policies behind Stage 1.

While it is too early to draw conclusions on Stage 1, the following data for the period 1 December 2010 to 31 December 2011, is provided for readers' information.

- Registry committals

328 applications: 311 granted; 16 refused; 1 withdrawn.

- Applications for disclosure direction

11 applications: 5 granted; 1 dismissed; 1 struck out; 3 withdrawn; 1 pending.

- Applications to allege non-compliance with disclosure order

Nil.

- Applications for cross-examination at committal

57 applications: 34 granted; 9 adjourned; 2 adjourned to date to be fixed; 4 dismissed; 4 refused; 2 withdrawn; 1 struck out; 1 pending.

### 4.3 Consolidating procedural law

The Bill will generally consist of a consecutive flow of clauses following the progress of a matter through the courts from initial charge to appeal. The likely layout of the Bill is:

**Chapter 1** will deal with preliminary matters such as the Act's date of commencement; its objects; its application and its relationship with other Acts.

**Chapter 2** will deal with starting proceedings by notice to appear. This will:

- provide who may commence a criminal proceeding (whether a public prosecution or private prosecution)
- provide the time limits for commencing
- set out the two types of notices to appear (see further under Key Reforms below) – namely the police notice to appear (currently in existence) and a longer form notice to appear (to replace a complaint and summons/complaint made for the issue of a warrant)
- set out what a notice to appear must contain
- provide for the service of a notice to appear
- provide for the filing of a notice to appear
- allow for a warrant to be issued alongside a long form notice to appear
- provide for serving documents showing an intention to rely, for the purposes of penalty, upon a previous conviction or circumstance of aggravation.

**Chapter 3** will provide for mediation, as currently contained in sections 53A and 53B of the Justices Act.

**Chapter 4** will deal with summary proceedings in the Magistrates Court.

This chapter of the Bill will state which offences may be finally determined by a Magistrate and will therefore set out the current law on summary disposition of indictable offences. As these laws are procedural in nature they will be brought over from the Criminal Code. See Appendix A for a discussion of these clauses and Appendix B for a copy of the re-drafted laws.

This chapter will also take the reader through the key steps in the Magistrates Court towards the final determination of a charge. It will include provisions derived from the Justices Act, but significantly re-drafted in plain English, to cover:

- dismissal of a notice to appear
- transfer of proceeding to another place
- entering of a plea
- non-appearance of the prosecutor
- non-appearance of the defendant
- re-opening a proceeding
- re-hearing a proceeding.

**Chapter 5** will deal with committal proceedings. It will carry over the reforms made by the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010*. These provisions will be of the same substance as the current part 5 of the Justices Act, but re-drafted as a coherent re-organised set of procedural laws.

**Chapter 6** will provide for proceedings upon indictment in the higher courts:

- where and how proceedings are commenced in the higher courts

- matters relating to indictments, including filing of indictments, form of indictments (such as particulars and amendments to indictments), circumstances of aggravation, and alternative verdicts
- ex officio indictments including private prosecutions
- 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, verdict and judgments.

**Chapter 7** will provide for all provisions on appeals. This chapter will involve a significant relocation of appeals provisions from the Justices Act, the *District Court of Queensland Act 1967* and the *Supreme Court of Queensland Act 1991*. The chapter will cover:

- appeals to the District Court from the Magistrates Court
- appeals to the Court of Appeal from the District Court on appeal originally from the Magistrates Court
- appeals to the Court of Appeal from a trial or sentence in the Supreme Court or District Court
- appeals and references by the Attorney-General
- common provisions on how to start an appeal
- pardons.

**Chapter 8** will be an important and new chapter for Queensland criminal justice procedure law, dealing with general procedure and legislating common provisions for all courts, as further detailed in 4.4 below.

**Chapter 9** will make special provision for private prosecutions in the Magistrates Court by general notice to appear and in the higher courts by ex officio indictment.

## 4.4 Streamlining procedural law

The Bill will not just consolidate the various existing statutes but will also streamline provisions common to the three courts.

Powers and procedures relevant to both summary proceedings and proceedings on indictment will be located in one chapter of the Bill. The general procedural provisions will include:

- appearances
- adjournment powers
- joinder
- pre-trial directions
- disclosure obligations of the prosecution and the defence

- amendment and applications to set aside
- pleas
- compelling witnesses
- disclosure obligations
- conducting proceedings by audio link or audio visual link
- recording of proceedings
- costs.

The complexities involved in streamlining these laws have given rise to issues on which stakeholder views are sought under Part 6 below.

## 4.5 Modernising procedural law

The Criminal Code and the Justices Act, devised in the 19th century, have served Queensland well. But it is time to update their language. Therefore, even where the substance of the law contained in a provision is retained, we will be avoiding the archaic language, complexity and impenetrability of the existing provisions.

Non-English terms will be replaced, along the following lines:

<i>Existing term</i>	<i>New term being considered</i>
Nolle prosequi	Notice of discontinuance
No true bill	Notice of discontinuance
Subpoena	Summons or notice to attend
Ex officio indictment	Direct indictment
Autrefois convict	Previously convicted

# Part 5

## Key reforms

### 5.1 A single Magistrates Court

Section 22 of the Justices Act recognises the continued existence of Queensland Magistrates Courts. Multiple Magistrates Courts are an inheritance of the structure of magistrates courts from the 19th century. In contrast, most other States have a single Magistrates Court or Local Court. In Queensland, Magistrates are appointed to a particular court house as stated in their appointment, that is, the place at which they are to constitute a Magistrates Court. However, a Magistrate can constitute a court at any place for holding a Magistrates Court in Queensland.

The *Justices Regulation 2004* sets out districts and divisions, their areas and places for holding Magistrates Courts. For example, the district of Bowen has the place 'Bowen' appointed for holding a Magistrates Court. The district of Brisbane is the only one broken into divisions. The metropolitan division has the place 'City' for holding a Magistrates Court.

For simple offences and indictable offences that may be determined by a Magistrate, the Justices Act requires prosecutors to file, and permits magistrates to hear, matters within the district or division in which the offence is alleged to have occurred. By virtue of the filing and hearing rules, a Magistrate has power to only determine matters which occurred and are brought before him or her in the district in which he or she is sitting.

Under the Bill, parameters will still need to be set around place of filing and hearing of charges, but expressed in simpler terms than the present convoluted law. Crucially, the Bill will depart from the effect of sections 23C and 139 of the Justices Act. It will be made clear that starting a proceeding in a place other than that provided for in the legislation is not fatal to the proceeding. Rather than incorrect filing leading to invalidity of a proceeding, the magistrate in such a case will have the discretion to hear the matter or may adjourn it to the place where the matter should have been filed in accordance with the rules

Under the reforms, proceedings will need to be commenced at the courthouse nearest to where the offence occurred and at which a magistrate will be sitting on the date for the first appearance. This requirement means a case continues to be dealt with in the locality at which it occurred. Despite these parameters, the aim of the legislation will be to permit greater flexibility in disposing of cases. It will allow greater use of audio and video links where that is convenient and appropriate; will permit the Chief Magistrate to provide for filing and hearing by practice direction that derogates from the general rule to take account of local conditions and specific types of offences, such as offences during journeys; and will ensure that bail where refused by police, can be applied for to the nearest courthouse.

## 5.2 A single way of starting proceedings

### The 'who' of starting a criminal proceeding

This will be unchanged in the Bill. A criminal proceeding in the Magistrates Court will continue to be able to be started by a public officer (a public prosecution) or a citizen in their personal capacity (a private prosecution).

Presently, public prosecutions are started in the Magistrates Court by police officers and public officers enforcing particular legislation.

Private prosecutions are rare but have an important role in our criminal justice system. The ability to bring a private prosecution provides the victim with an avenue to protect their interests if the public prosecution agency declines to prosecute. Depending on the type of offence, private prosecutors are subject to additional procedural rigours and these will be maintained in the Bill. Given the rarity and special nature of the private prosecution, provisions governing it will be located separately towards the end of the Bill.

### The 'how' of starting a criminal proceeding

This is changing.

The Moynihan Report noted that there are many inconsistencies in the use of a complaint and summons, that the procedure for lodging one should be reviewed, that the suitability of the forms be reviewed, and that the procedures be simplified along the lines of the notice to appear.

At the moment a criminal proceeding starts – upon an arrest without warrant; upon the signing of a warrant for arrest; upon the issue of a notice to appear; or upon the signing of a complaint, followed by the issue of a warrant or a summons by a justice. A complaint can be made to a magistrate or justice of the peace by an authorised officer (such as an RSPCA officer or environment protection agency officer), a police officer or a private prosecutor. A complaint need only be sworn where a warrant is sought. Notices to appear can only be issued by police officers and may be issued on the spot or after arrest as an alternative to charging and bailing the person.

Criminal proceedings in the Magistrates Court will be started by notice to appear, arrest without a warrant, or the issue of a warrant for a person's arrest. The Bill will abolish the complaint and summons/warrant process and a second form of notice to appear will be introduced in its place.

#### Starting a proceeding by notice to appear

It is proposed there will be two types of notice to appear under the Bill:

- a police notice to appear for use by police officers only
- a general notice to appear for use by any person starting a criminal proceeding in the Magistrates Court.

A notice to appear notifies the defendant of the offence alleged to have been committed and requires the defendant to appear before the court in relation to the offence at a specific date, time and place.

The police notice to appear is modelled on the existing notice to appear process used by police under the *Police Powers and Responsibilities Act 2000* (PPRA). Police officers will continue to be able to commence a proceeding by the current notice to appear, a physically small form capable of being carried and issued on the spot. That form is supplemented later in the proceeding by the filing of a bench charge sheet, which contains additional information. This will also be maintained in the Bill.

The general notice to appear is a physically larger notice to appear that will be used in place of a complaint and summons/warrant. It will be used by officers enforcing legislation and private prosecutors, but will also be used by police officers (for example, in the same way the police officers currently use a complaint and summons for a traffic offence). A general notice to appear does not need to be issued by a justice, in contrast to the complaint and summons process, in which a summons must be issued by a justice. It is envisaged that private prosecutors would be required to swear a notice to appear before a justice of the peace.

The Bill will also provide for an application to a justice for a warrant to arrest a defendant in connection with a general notice to appear issued by an authorised officer other than a police officer. This carries over the ability under the Justices Act for the person starting the proceedings to apply for a warrant in the first instance rather than a summons upon a complaint to ensure the defendant's attendance at court. Police officers are not covered by these provisions as they may make an arrest warrant application under the PPRA.

### Starting a proceeding by arrest without warrant or by the issue of a warrant

If a proceeding is commenced by arrest without warrant or by the issue of a warrant, the Bill will provide that a bench charge sheet must be filed and must also be served on the defendant to notify the defendant of the offence alleged to have been committed. This new provision will reflect the existing practice.

The Bill will provide for the form for the general notice to appear and the bench charge sheet. The contents will be aligned to ensure that the court, lawyers and defendants have similar details upon which to rely once a matter is before the court, regardless of the manner of its commencement

### **Question 1:**

**Do you have a view about the proposal to provide the notice to appear as the way of starting proceedings (other than arrest without warrant or issue of a warrant for arrest)?**

### The 'when' of starting a criminal proceeding

This is not changing. The law on limitation periods for starting proceedings for simple and indictable offences will be continued.

A proceeding for a simple offence may only be started within one year from the time when the act or omission constituting the offence was done or omitted. This is subject to an exception introduced by the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010*. The limitation period is two years rather than one year where a proceeding commenced for an indictable offence under the Criminal Code or *Drugs Misuse Act 1986* is discontinued and replaced with a proceeding for a simple offence.

For the purposes of commencement the *issue* of a notice to appear which starts the proceeding is the completing and signing of the notice to appear.

An Act creating an offence may provide a different limitation period for the offence.

A proceeding for an indictable offence may be started at any time. However, if another Act allows or requires an indictable offence to be decided summarily and that Act is silent as to when the proceeding must be started, the proceeding must be started within one year from the time when the act or omission constituting the offence was done or omitted.

**Question 2:**

**Consideration is being given to removing the one year limitation period for commencing summary proceedings for an indictable offence, other than Criminal Code offences, as the vast majority of indictable offences prosecuted in Queensland are Code offences and most other Acts override the limitation period in any case. What is your view?**

# Part 6

## Specific issues on which stakeholders' views are sought

### 6.1 Joinder and separate trials

Feedback from stakeholders on the 2010 discussion paper indicated that the Bill should contain streamlined provisions for joinder of charges and defendants which would apply to all charges.

The effect of section 43 of the Justices Act and sections 567, 568, 569, 597A and 597B of the Criminal Code will be combined as provisions in chapter 8 of the Bill (general procedure). Sub-section 43(2) of the Justices Act and sub-sections 567(3), (4) of the Criminal Code will be devolved down to the Criminal Justice Procedure Rules.

#### General rule 1

A notice to appear, arrest charge document or indictment must not allege both an indictable offence and a simple offence (the effect of section 43(1)(a) of the Justices Act and section 567 of the Criminal Code).

It has been suggested that it may be appropriate for legislation to enable joinder of charges for simple and indictable offences in the one notice to appear or arrest charge document, if there is compliance with the general joinder rules set out below.

#### **Question 3:**

**Should the Bill allow joinder of charges for simple and indictable offences in a notice to appear or arrest charge document?**

#### General rule 2

A notice to appear, arrest charge document or indictment must only charge one offence, unless expressly permitted by the Bill or another Act (section 43(1) of the Justices Act and section 567(1) of the Criminal Code).

Exceptions to this general rule:

A notice to appear, arrest charge document or indictment may charge two or more offences if the offences:

- are alleged to substantially arise out of the same or closely related facts, or
- are, or form part of, a series of offences of the same or similar character, or
- are, or form part of, a series of offences committed in the prosecution of a single purpose.

This proposed provision incorporates subsections 43(1)(b)(ii), (iii) and (iv) of the Justices Act and 567(2) of the Criminal Code which are identical.

A further exception for simple offences:

A notice to appear or arrest charge document may charge two or more simple offences if the offences are alleged to be constituted by the same act or omission.

This replicates section 43(1)(b)(i) of the Justices Act which enables charges for simple offences to be joined if the offences are alleged to be constituted by the same act or omission on the part of the defendant.

#### **Question 4:**

**Section 43(1)(b)(i) of the Justices Act could be extended to cover all offences, not just simple offences, as part of the streamlining of joinder laws. Will this approach result in any unintended consequences of applying the exception in section 43(1)(b)(i) of the Justices Act to all offences?**

The effect of sub-sections 568(6), (7), (8), (9), (10) of the Criminal Code which allow joinder of specific offences as alternative charges will be included in the Bill.

### **General rule 3**

A notice to appear, arrest charge document or indictment must relate to one defendant only, unless expressly permitted by the Bill or another Act.

Exceptions to this general rule are:

- The effect of sub-section 568(11) Criminal Code will be included.
- The effect of sub-section 568(12) Criminal Code will be included.
- The effect of section 569 Criminal Code will be included.

Currently, these provisions only apply to indictable offences. It is proposed to extend their application to simple offences.

#### **Question 5:**

**Do you have any concerns about enabling two or more defendants charged with simple offences to be charged together?**

### **General rule 4**

A charge in a notice to appear, arrest charge document or indictment must allege one offence only unless expressly permitted by the Bill or another Act.

An exception to this general rule is:

The existing effect of sub-sections 568(1), (2), (2A), (3), (4), (5), (5A) Criminal Code will be included in the Bill.

## The effect of joinder

The effect of the current law will be continued in the Bill.

If one notice to appear, arrest charge document or indictment contains two or more charges, the charges must be tried together unless the court makes an order for separate trial.

If one notice to appear, arrest charge document or indictment charges two or more defendants, the defendants must be tried together unless the court makes an order for separate trial.

## Separate trials

The Bill will contain the effect of section 43(3) of the Justices Act which declares the common law, enabling a defendant to object to the joinder of charges on the ground of non-compliance and, if no such objection is taken, enabling the court to proceed to determine the charges. This will apply to all offences.

The Bill will also contain the combined effect of section 43(4) of the Justices Act and section 597A(1) of the Criminal Code enabling the court to order separate trials where the defendant may be prejudiced or embarrassed in his or her defence because of the joinder of charges or because it is desirable for any other reason for the charges to be heard separately.

The effect of section 597B of the Criminal Code enabling the court to order separate trials for co-defendants at any time during the trial will also be included in the Bill.

### **Question 6:**

**Do you have any concerns with the overall approach to joinder of charges and defendants?**

## 6.2 Conviction and the administration of the allocutus

Section 648 Criminal Code provides:

When an accused person pleads that the person is guilty of any offence, and when, upon trial, an accused person is convicted of any offence, the proper officer is required to ask the person whether the person has anything to say why sentence should not be passed upon the person, but an omission to do so does not invalidate the judgement.

The Criminal Practice Rules 1999 require the proper officer to state the following words (the allocutus) to the defendant upon a plea or finding of guilt:

AB, you have been convicted [for a plea of guilty say ‘on your own plea of guilty’] of [state the offence charged in the words on the indictment or by stating the heading of the schedule form for the offence]. Do you have anything to say as to why sentence should not be passed on you?

The administration of the allocutus constitutes the court’s acceptance of the verdict or the defendant’s plea of guilty (*R v Collins, ex parte Attorney-General* [1996] 1 Qd R 631). At that point the defendant is convicted and the court moves to sentencing. It also gives the defendant the opportunity to apply for arrest of judgment on a point of law.

Stakeholder feedback on the 2010 discussion paper indicated that, while there was support for a uniform sentencing process across the courts, the strict formality of the higher courts should not be imposed on proceedings in the Magistrates Court. There was also some criticism of the form of the allocutus as misleading in that a defendant would think that he or she is being invited to make submissions in mitigation.

The Magistrates Court has not traditionally administered the allocutus. Recent Queensland case law (*Brown v Queensland Police Service* [2011] QDC 301) has confirmed that section 648 applies to proceedings in the Magistrates Court. The administration of the allocutus to unrepresented defendants who have pleaded guilty in the Magistrates Court causes confusion and delays.

The failure to administer the allocutus is not fatal as, as at common law, it is only one way of indicating the court’s acceptance (section 648 Criminal Code and *R v Collins, ex parte Attorney-General* [1996] 1 Qd R 631 per Fitzgerald P at 634). It is proposed to include a general provision in the Bill requiring the court to take some action that indicates its acceptance of the verdict or plea of guilty.

**Question 7:**

**How should the court be required to indicate its acceptance of a verdict of guilty or plea of guilty?**

Section 19B of the *Crimes Act 1914* (Cwlth) provides for the discharge of the defendant without conviction. Section 145 of the Justices Act does not make it mandatory to convict. The Criminal Code does not provide for formal conviction and, at common law, ‘conviction’ can have different meanings.

**Question 8:**

**Should the Bill clarify the point at which a conviction occurs?**

**If so, how should this be expressed?**

## 6.3 Section 149 Justices Act – preserving law on double jeopardy

Section 149 (dismissal of complaint) of the Justices Act provides:

If the justices dismiss a complaint, they may, if required so to do, and if they think fit, make an order of dismissal, and give the defendant a certificate thereof, which certificate shall upon production and without further proof be a bar to any subsequent complaint for the same matter against the same person.

Section 149 complements the effect of section 17 (former conviction or acquittal) of the Code, providing an aspect ‘missing’ from section 17, namely the defence in the scenario where a person is in jeopardy for an offence for which he was previously acquitted summarily in the Magistrates Court. Section 700 of the Criminal Code also points to section 149 for the effect of summary dismissal of a charge. Both sections 149 and 700 will be repealed as part of the Stage 2 reforms. The effect of these sections will be folded into section 17 of the Code.

This follows the approach taken in Western Australia, where section 17 of the Western Australian Criminal Code was amended to include summary dismissal. In doing so, the Western Australian Parliament followed the treatment recommended by the Murray Report on the Review of the Criminal Code<sup>2</sup>.

### Question 9:

**Section 17 is not otherwise intended to be amended. The point of the amendments will be to preserve the current law, not to change it. What is your view on this approach?**

## 6.4 Section 76 Justices Act – where a complaint negatives an exemption etc., persuasive burden of proof shifts to defendant

Section 76 (proof of negative etc.) provides:

If the complaint in any case of a simple offence or breach of duty negatives any exemption, exception, proviso, or condition, contained in the Act on which the same is framed, it shall not be necessary for the complainant to prove such negative, but the defendant shall be called upon to prove the affirmative thereof in the defendant’s defence.

Section 76 applies to simple offences and indictable offences dealt with summarily. It does not apply to indictable offences dealt with on indictment.

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<sup>2</sup> *The Murray Report: the Review of The Criminal Code prepared for the Attorney-General* issued in June 1983 by the Honourable Justice Murray.

Section 76 is declaratory of the common law, save perhaps for the requirement for the prosecution to state the exemption etc which applies.

The case law on section 76 and on the common law rule it encapsulates requires a court to undertake an exercise in statutory interpretation to determine whether an alleged exemption is truly an exemption etc for the defendant to legally prove, or an element of the offence for the prosecution to legally prove.

It is proposed to re-enact the provision, either in the Bill or in the *Evidence Act 1977*, and apply it to *all* offences. The requirement to state the exemption etc would be extended to indictable offences dealt with on indictment and it is noted that there are a few examples of these (reasonable excuse examples) within the Criminal Code (sections 229HC, 229I). Outside of the Code, no impact of this amendment can be discerned.

**Question 10:**

**Should section 76 of the Justices Act be re-enacted?**

**If so, should the provision be placed in the Criminal Justice Procedure Bill or the *Evidence Act 1977*?**

## 6.5 Clearer laws on magistrates determining indictable offences

The provisions governing when indictable offences are to be dealt with summarily in the Magistrates Court (sections 552A to 552J of the Criminal Code) will be transferred to the Bill, as they are by nature procedural.

These provisions have been drafted and are attached at Appendix B. Readers familiar with the law in this area will notice immediately that the provisions have been re-drafted to make them easier to follow. Appendix A is a guide to the clauses, and contains queries for feedback. Appendix A also contains reference to the ‘legislative history’ of a clause contained in Appendix B. This is a reference to the current Criminal Code sections from which a clause is derived and is included for the purposes of reader cross-referencing.

All indictable offences capable of summary disposition are described as indictable offences that must be dealt with summarily (providing various criteria, including an election to do so, is fulfilled). Apart from clarifications proposed in Appendix B, the way in which the offences fall within the summary jurisdiction has not changed and includes the amendments made by the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010*.

## 6.6 Scale of costs for criminal proceedings

As part of stage 2 the existing costs provisions of the Justices Act will be relocated to the Criminal Justice Procedure Bill. The scale of costs in the *Justices Regulation 2004* will be relocated to the Criminal Justice Procedure Rules.

The Justices Act provides that costs may be awarded to a successful defendant or successful complainant in summary proceedings in a Magistrates Court (sections 157 and 158). Costs may also be awarded to a party in related appeals to the District Court (section 226).

Costs may only be awarded for items allowed under a scale of costs, and up to the amount allowed for the item under the scale. However, a higher amount may be allowed for costs in cases of special difficulty, complexity or importance (sections 158B and 232A).

The scale of costs, in part, is prescribed in the *Justices Regulation 2004* schedule 2 part 1 and part 2:

**Part 1 General**

**1 Scale sets out amounts up to which costs may be allowed**

This scale sets out—

- (a) the only items for which costs may be allowed for part 6, division 8 and part 9, division 1 of the Act; and
- (b) the amount up to which costs may be allowed for each item.

*Note—*

A higher amount for costs may be allowed under section 158B(2) or 232A(2) of the Act.

**2 Item of costs covers all legal professional work**

An item in part 2 covers all legal professional work, even if the work is done by more than 1 lawyer.

**3 Only necessary or proper costs may be allowed**

A cost is to be allowed only to the extent to which—

- (a) incurring the cost was necessary or proper to achieve justice or to defend the rights of the party; or
- (b) the cost was not incurred by over-caution, negligence, mistake or merely at the wish of the party.

**4 Appeal to District Court judge—professional costs are 20% higher than for complaint**

For an appeal to a District Court judge under part 9, division 1 of the Act, the amount up to which costs may be allowed for legal professional work is the amount that may be allowed under part 2, as if the work were for a complaint, increased by 20%.

**Part 2 Amounts up to which costs may be allowed for legal professional work**

**Work for hearing of complaint up to and including day 1**

1 Instructions and preparation for the hearing,  
including attendance on day 1 of the hearing. . . . . up to \$1500.00

**After day 1**

2 For each day of the hearing after day 1 . . . . . up to \$875.00

**Other court attendances**

3 Court attendance, other than on the hearing  
of the complaint . . . . . up to \$250.00

The monetary amounts allowed for legal professional work in the scale of costs have not been adjusted since the scale commenced on 17 July 1999. The reform of criminal justice procedure presents an opportunity to consider whether the monetary amounts in the scale of costs continue to reflect the reasonable costs of competent legal representation in simple matters.

The following sets out what the monetary amounts in the scale of costs would be if the amounts were recalculated today on the same basis (legal officer rates) used to calculate the amounts in 1999, or, alternatively, if the amounts had been adjusted by the consumer price index annually.

**Recalculation of scale of costs items to reflect current legal officer rates**

Item 1 provides an amount up to \$1,500 for instructions and preparation for the hearing, including attendance on day 1 of the hearing. This amount was originally calculated on the basis of approximately 11 hours work (for an ordinary matter) at a rate of \$135/hour (the rate for a Queensland Government employed senior legal officer to conduct matters in the criminal jurisdiction of the Magistrates Court). Based on the current rate of \$300/hour for a senior legal officer, the equivalent amount for item 1 would be \$3,300.

Item 2 provides an amount of up to \$875 for the second or subsequent day of hearing. The prevailing view at the time was that the scale should be guided by the top end of the civil scale (then \$690), with a slight increase due to the capped costs in item 1. The amount prescribed in the civil scale for the appearance of counsel is now \$1,065.

Item 3 provides an amount of \$250 for court attendance other than on hearing. This amount was originally calculated on the basis that the majority of these matters are dealt within in approximately two hours at \$135/hour (the rate for a senior legal officer), rounded to \$250. Based on the current rate of \$300/hour for a senior legal officer, the equivalent amount for item 3 would be \$600.

**Recalculation of scale of costs items to reflect changes in the consumer price index**

If the amounts in the scale of costs had been annually increased by the consumer price index since their commencement on 17 July 1999, the amounts for items 1 to 3 would be:

Item 1 - \$2,241.70

Item 2 - \$1,307.66

Item 3 - \$373.62

**Question 11:**

**What is your view about the adequacy of the amounts up to which costs may be allowed for legal professional work under the scale of costs, i.e. should the amounts be updated as part of the Stage 2 Moynihan Reforms?**

**Which option should be used to update the scale if it were to be updated?**

**Do you have any other comments you wish to make about operation or adequacy of the scale?**

# Appendix A

## Guide to summary disposition clauses

### Part 1 – Preliminary

Clause 1 - When relevant circumstances test is satisfied for chapter 4 indictable offence

Legislative history: sections 552BA, 552BB, 552A, 552B Criminal Code.

The ‘relevant circumstances test’ is defined as it is used in part 2 to determine by virtue of considering schedules 1 to 3 whether an indictable offence may be determined summarily by a magistrate.

Schedule 1 lists indictable offences that must be decided summarily (present sections 552BA and 552BB Criminal Code).

Schedule 2 lists indictable offences that must be decided summarily if the prosecution so elects (present section 552A Criminal Code).

Schedule 3 lists indictable offences that must be decided summarily if the defendant elects a jury trial (present section 552B Criminal Code).

Clause 2 - Value or property or damage to property

Legislative history: section 552G Criminal Code

This clause defines the value of property as being that which the court decides is the value, as is presently the case under section 552G of the Criminal Code.

### Part 2 – charges decided summarily

The substantive law on summary disposition of indictable offences will not change under the Bill. Clarifications have been made to the way sections 552A and s552B were drafted to reflect case law and more accurately state the way the offences are treated. An important purpose of this paper is to check that the way the provisions are drafted do actually make it easier to work out what offences are in or out of the jurisdiction of the Magistrate Court.

Readers familiar with chapter 58A of the Criminal Code will notice three main differences:

- For schedule 1, rather than describe the subsets of the offences in part 6 chapter 58A of the Criminal Code that cannot be summarily determined (i.e. a description in the negative), the approach has been taken to set out exactly which offences and subsets of offences in part 6 chapter 58A can be dealt with summarily (i.e. a positive description).

- The terminology for indictable offences capable of summary disposition upon either prosecution or defendant election has been changed. This is now labelled ‘indictable offences that *must* be decided summarily’ *upon election*, as opposed to the present label of indictable offences that *may* be decided summarily. The effect is the same – an election must still be made (by the prosecutor to have the matter dealt with by the magistrate or by the defendant to require the matter to proceed to a jury trial); and
- For the prosecution election offences and the defendant election offences in schedules 2 and 3 respectively, where only a subset of an offence may be dealt with summarily, this is set out as a ‘relevant circumstance’. This aligns the approach taken with schedule 1.

### Clause 3 - Indictable offences that must be decided summarily

Legislative history: sections 552BA and 552BB Criminal Code.

This clause links to schedule 1 and provides that where an offence is listed in that schedule and the relevant circumstances test is satisfied, the charge must be dealt with summarily.

As with sections 552BA and 552BB of the Criminal Code, this remains subject to:

- the overriding power of the court to decide to abstain from dealing with the charge on the ground that the court could not adequately punish upon summary conviction (see clause 9 below)
- a decision by the court following an application by the defendant that summary disposition is not appropriate given the case’s exceptional circumstances (see clause 10 below).

### Clause 4 - Indictable offences must be decided summarily on prosecution election

Legislative history: section 552A Criminal Code.

This clause links to schedule 2. Where an offence is listed in that schedule and the relevant circumstances test is satisfied and the prosecution elects to have the charge heard by the Magistrates Court, the charge must be dealt with summarily.

The summary disposition of the charge remains subject to the overriding power of the court to abstain from dealing with the charge if the court considers that it cannot adequately punish the defendant upon conviction (see clause 9 below).

### Clause 5 - Schedule 2 offences – procedure for making of prosecution’s election

Legislative history: new; drawn from section 552I Criminal Code.

The Criminal Code is presently silent as to the process for election by the prosecution. The draft Bill includes a process for election, adopted from section 552I of the Code,

which sets out the process for the defendant's election (and which is carried over in clause 7).

If the prosecution does not elect to have the charge decided summarily, the proceeding will be adjourned to the committal stream.

#### Clause 6 - Indictable offences that must be decided summarily if defendant does not elect a jury trial

Legislative history: section 552B Criminal Code.

This clause links to schedule 3 and provides that where an offence is listed in that schedule and the relevant circumstances test is satisfied and the defendant does not elect to be tried by a jury, then the charge must be dealt with summarily.

As with section 552B of the Criminal Code, this remains subject to the overriding power of the magistrate to abstain from dealing with the charge if the court considers it cannot adequately punish the defendant (see clause 9 below).

#### Clause 7 – Schedule 3 offences – procedure for making of defendant's election

Legislative history: section 552I Criminal Code.

This clause provides the process for the defendant's election and carries over the effect of section 552I of the Criminal Code.

If the defendant elects to go to a jury trial, the proceeding will be adjourned to the committal stream.

#### Clause 8 – Another Act may provide for indictable offence to be decided summarily

Legislative history: new

There are many indictable offences on the statute book outside the Criminal Code that may be summarily determined. While this chapter of the Bill is drafted only in relation to Code offences, a goal of the Bill is to clearly set out the process by which any indictable offence comes within the summary jurisdiction. Consideration is being given to applying the summary disposition provisions of the Bill to all offences in the statute book.

There are generally four types of provisions in other legislation that permit indictable offences to be disposed of summarily. These are:

- Mandatory, subject to magistrate's discretion, for example:
  - section 69 *Public Interest Disclosure Act 2010*  
(similar to section 552BA and 552D Criminal Code)
- Prosecution election, subject to magistrate's discretion, for example:

- section 52A *Child Protection (Offender Reporting) Act 2004* (similar to section 552A and 552D(1) Criminal Code)
- Defence election, subject to magistrate’s discretion, for example:
  - section 128 *Prostitution Act 1999* (similar to section 552B and 552D(1) Criminal Code)
- Prosecution election, subject to defendant’s consent and magistrate’s discretion (this is the standard provision in Acts other than the Criminal Code), for example:
  - section 165 *Nature Conservation Act 1992*
  - section 208 *Lotteries Act 1997*
  - section 242 *Local Government Act 2009*
  - section 63ZM *Health Services Act 1991*
  - section 192F *Gene Technology Act 2001*
  - section 233 *Financial Intermediaries Act 1996*

The first three types of disposition align with the Criminal Code offences as set out in clauses 3, 4 and 6 of the Bill and the relevant offences listed in schedules 1, 2 and 3.

The fourth type of provision (the standard non-Criminal Code provision), could be also included in the Bill. If it is not appropriate for an offence to be included in the schedules, this clause will provide that the legislation creating the offence will continue to provide for its disposition.

The indictable offences themselves would remain in the statute within which they are presently situated. A provision would be inserted stating their disposition, where permitted summarily, is governed by the relevant provisions of the Criminal Justice Procedure Act. Provisions in the Bill relating to limitation periods, maximum penalty and constitution of the Court for summary hearings of indictable offences would apply to the disposition of these non-Criminal Code indictable offences unless the Act establishing the offence provides otherwise.

#### **Question 12:**

**Should the Bill incorporate all other provisions on the statute book which provide for the summary disposition of indictable offences as they are procedural in nature, or should those provisions remain within their regulatory framework?**

Clause 9 - When court must abstain from summary jurisdiction – inadequate punishment

Legislative history: sections 552D(1) and 552I(7) Criminal Code.

This clause maintains the current circumstances in which a court must abstain from dealing with an indictable offence mentioned in schedules 1, 2 or 3, namely where the defendant if convicted may not be adequately punished by the court, owing to the

limitations on punishment set by clause 11 below (a continuation of section 552H of the Criminal Code).

The court may make the decision to abstain at any time and after hearing any submissions by the prosecution or the defendant.

In relation to schedule 3 offences, the clause continues the restriction imposed by section 552I(7)(a) Criminal Code on the court's consideration of a defendant's criminal history, unless it is admissible in evidence, before the defendant pleads guilty or before the court finds guilt. The current section clearly allows consideration of history where it is an element of the offence charged. It is also assumed that this restriction does not prevent consideration of criminal history on bail applications. However, this is not clear.

This appears to restate the common law principle that the court should not be informed of the defendant's criminal record, bad character or antecedents prior to determining guilt or conviction. (The case law appears to use both terms interchangeably.)

### **Question 13:**

**Is it necessary for the provision to contain this restriction, given the common law principle?**

If the offence before the court is a schedule 3 offence, the court may not consider the defendant's criminal history in deciding whether it can adequately punish the defendant on conviction (section 552I(7)(b)). This restriction addresses 'the dilemma' (as described by Dixon CJ in *Hall v Braybrook* (1956) 95 CLR 620) confronted by magistrates trying to decide whether an adequate punishment can be imposed in ignorance of a defendant's criminal history by clarifying that the criminal history cannot be taken into account.

The requirement to not have regard to the defendant's criminal history in deciding whether the defendant can be adequately punished on summary conviction overrides the majority decision in *Hall v Braybrook* that the relevant summary disposition provision enabling the court to consider 'any circumstances' in determining whether it could adequately punish was sufficiently broad to enable consideration of the criminal history.

This restriction does not apply to prosecution election offences (schedule 2) or where an offence must be determined summarily (schedule 1). Presumably, it was not applied to the prosecution election because the prosecution would not elect a summary trial when the defendant's criminal history is such that the prosecution is of the view that the defendant could not be adequately punished summarily. *Hall v Braybrook* would apply in these cases, unless it is distinguishable on the basis that section 552D(1) refers to 'any other relevant consideration' as opposed to 'any circumstances'.

A line of English and Australian case law (see *Keily v Henderson* [1989] 19 NSWLR 139) is authority for the proposition that as the common law requires that the court not

consider the defendant's criminal history until after a decision of guilt/conviction, the court may decide that it cannot adequately punish after a deciding guilt and order that the defendant be committed for sentence in the higher court. Section 552I(7)(b) would also appear to prevent this course of action.

The standard non-Criminal Code provision mentioned above under clause 8 provides:

Proceedings for indictable offences

- (1) A proceeding for an indictable offence against this Act may be taken, at the election of the prosecution—
  - (a) by way of summary proceeding under the *Justices Act 1886*; or
  - (b) on indictment.
- (2) A magistrate must not hear an indictable offence summarily if—
  - (a) the defendant asks at the start of the hearing that the charge be prosecuted on indictment; or
  - (b) the magistrate considers the charge should be prosecuted on indictment.
- (3) If subsection (2) applies—
  - (a) the magistrate must proceed by way of an examination of witnesses for an indictable offence; and
  - (b) a plea of the person charged at the start of the proceeding must be disregarded; and**
  - (c) evidence brought in the proceeding before the magistrate decided to act under subsection (2) is taken to be evidence in the proceeding for the committal of the person for trial or sentence;** and
  - (d) before committing the person for trial or sentence, the magistrate must make a statement to the person as required by the *Justices Act 1886*, section 104(2)(b).

This provision appears to enable the magistrate to make the decision to abstain in (2)(b) at any time during the proceeding up until conviction. Any plea is disregarded and any evidence brought in the proceeding is deemed to be evidence for the committal of the defendant for trial or sentence.

Other Australian jurisdictions have resolved the 'dilemma' in different ways. Section 29(2)(b) of the *Criminal Procedure Act 2009* (Vic) explicitly authorises the consideration of the defendant's criminal record. Section 5(9) of the Criminal Code (WA) explicitly enables the court to commit the defendant for sentence after summary conviction. Section 72B(2) of the *Justices Act 1959* (Tas) sets out the procedure should, during the hearing of a charge, the justice decide the charge should be dealt with by the Supreme Court. If the justice has not convicted the defendant, he or she must either abandon the hearing and proceed as a committal or complete the hearing and convict or discharge the defendant. If the defendant is convicted, the justice must commit him or her to the Supreme Court for sentence. If the justice decides to abstain from jurisdiction after conviction, the justice must commit the defendant to the Supreme Court for sentence.

The Bill should contain a consistent approach to the use of criminal history in making a decision about whether the defendant can be adequately punished on summary conviction.

**Question 14:**

**Should the Bill enable the court to consider the defendant's criminal history when deciding whether the defendant could be adequately punished on summary conviction?**

**OR**

**Should the prohibition on having regard to the defendant's criminal history for determining whether the defendant could be adequately punished on summary conviction apply to all offences that must be dealt with summarily rather than only those where the defendant does not elect a jury trial?**

**OR**

**Should the Bill explicitly state the power of the court to abstain upon consideration of the defendant's criminal history after the defendant has pleaded guilty or after a finding of guilt and prior to sentencing, upon which the court would commit the defendant for trial or sentence?**

**OR**

**Should the Bill enable the court to commit the defendant for sentence after conviction, if the court considers at that point that it cannot adequately punish the defendant?**

**Is there another more preferable approach?**

Clause 10 - When court must abstain from summary jurisdiction – exceptional circumstances

Legislative history: section 552D(2) Criminal Code.

This clause continues the requirement upon the court to abstain from dealing with an indictable offence that is otherwise required to be decided summarily (schedule 1 offence), where the court is satisfied that the charge should not be determined summarily because of exceptional circumstances.

An application to abstain from exercising jurisdiction must be made by the defendant.

The Bill carries over the examples of exceptional circumstances currently listed in the Code. These are:

- There is sufficient connection between the offence the subject of the charge, and other offences allegedly committed by the defendant and to be tried on indictment, to allow all the offences to be tried together.
- There is an important issue of law involved.
- An issue of general community importance or public interest is involved, or the holding of a trial by jury is justified in order to establish contemporary community standards.

Consultation has suggested that the first ‘exceptional circumstance’ is not exceptional and that, routinely, there are connections that are sufficient to warrant a schedule 1 charge being heard together with an indictable charge proceeding on indictment. It has also been suggested that the court should be able to make the determination of its own initiative and that the prosecution should be permitted to make application to the court to abstain.

#### **Question 15:**

**Should the court be required to abstain from exercising jurisdiction for an offence that should be otherwise determined summarily if there is a sufficient connection between it and an offence proceeding on indictment?**

**If so, should the court have the power to make the determination on its own initiative or on an application by either party?**

Clause 11 - Maximum penalty for chapter 4 indictable offence decided summarily

Legislative history: section 552H Criminal Code.

This clause re-enacts the effect of section 552H of the Criminal Code which sets the maximum penalty to which a defendant summarily convicted of an indictable offence may be sentenced in the Magistrates Court.

The maximum period of imprisonment has remained the same, namely 3 years. Results of consultation demonstrated support for an increase in the maximum fine which may be imposed. Where convicted by a magistrates court, the fine has been increased from 100 penalty units to 500 penalty units.

Clause 12 - Constitution of Magistrates Court

Legislative history: 552C(1), (2) Criminal Code.

This provision re-enacts the effect of section 552C(1) and (2) of the Criminal Code to state how a Magistrates Court must be constituted in order to determine an indictable offence summarily.

The court must be constituted by a magistrate or two justices of the peace (magistrates court). However, limits apply to the jurisdiction of the court if constituted by justices of the peace. The current provisions for appointment of these justices of the peace in

section 552C will be included in the *Justices of the Peace and Commissioners for Declarations Act 1991*.

## Schedule 1 – Mandatory summary disposition

This schedule of offences relates to clause 3 and includes the offences that must be decided summarily if the relevant circumstances test is met.

As the Bill proposes to set out what can be decided summarily in the positive, the schedule is a reversal of the table following section 552BB of the Criminal Code.

As an example, a subset of the offence in section 408A (of unlawful use of a vehicle, aircraft or vessel to facilitate the commission of an indictable offence) (sub-section (1A)) is currently excluded from the definition of a relevant offence which must be decided summarily. It is listed in a table of offences which excludes it from summary disposition if the indictable offence facilitated is one that must be heard on indictment.

The reversal of this exclusion sees that an offence against s408A(1A) must be decided summarily if the defendant used or intended to use the vehicle, aircraft or vessel for the purpose of committing an indictable offence (summary jurisdiction) (the Bill's terminology for indictable offences which are capable of summary disposition). Hence, if the purpose was to commit an indictable offence that must be decided by the Magistrates Court or could be if so elected, an offence against section 408A(1A) must be heard summarily.

It should be noted that schedule 1 (mandatory summary disposition) now also includes an offence that is currently listed as a defendant election offence. This is not a removal of a defence election. An offence involving an offence of a sexual nature without a circumstance of aggravation where the victim was 14 years of age or older and for which the penalty is more than 3 years is expressed to be a defendant election offence where the defendant pleads guilty. However, a defendant could not plead guilty and elect to go to a jury trial. In practice, an offence of this type is decided summarily (see for example, *White v Barbler & Galovic* CM No.12/2010). It has accordingly been placed in schedule 1.

## Schedule 2 – prosecution election

Schedule 2 follows the same method as schedule 1. The offences that must be decided summarily if the prosecution so elects are included in the schedule.

## Schedule 3 – defendant election

Schedule 3 follows the same method as schedule 1. The offences that must be decided summarily if the defendant does not elect to be tried by a jury are included in the schedule.

Some changes have been made to the offences listed in this schedule to reflect case law and more accurately state the way the offences are treated.

Item 3 of schedule 3 have been clarified to refer to sections 339(1) and (3) Criminal Code. This clarification reflects the position of the Supreme Court (*Fullard v Vera & Byway* [2007] QSC 050).

Further, there is a history of some doubt as to whether the words ‘an offence involving an assault’ at the opening of section 552B(1)(c) - now item 4 in schedule 3 - effectively mean that an assault must be an element of the relevant offence. Because of the coverage of section 552A(1)(b) - now item 5 in schedule 2 - this interpretation would make section 552B(1)(c) otiose, as apparently there is no offence in the Criminal Code that attracts more than 5 years but not more than 7 years imprisonment, if the approach is taken that assault must be an element of the offence.

If the approach was taken that an assault need not be an element of the offence this would give some application to the provision. Potential examples from the Criminal Code of its application, depending upon the facts of the charge, are:

- administering poisons with intent to harm (section 322)
- wounding (section 323)
- endangering life of children by exposure (section 326)
- kidnapping (section 354)
- kidnapping for ransom (section 354A)
- child-stealing (section 363)
- abduction of a child under 16 (section 363A)
- cruelty to children under 16 (section 364).

**Question 16:**

**What is the better approach to the possible overlap of the disposition of offences involving an assault?**

**Would it be helpful to list out the offences to which the provision could apply?**

# Appendix B

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**Criminal Justice Procedure Bill 2012—extract**

**Part 1 Preliminary**

- 1 When *relevant circumstance test* is satisfied for chapter 4 indictable offence**
- (1) For part 2, the *relevant circumstance test* is satisfied for a charge of a chapter 4 indictable offence if—
- (a) no relevant circumstance is listed in column 4 of schedule 1, 2 or 3 for the alleged offence; or
  - (b) if 1 or more relevant circumstances are listed in column 4 of schedule 1, 2 or 3 for the alleged offence—at least 1 relevant circumstance applies in relation to the alleged offence.
- (2) Column 3 of schedule 1, 2 or 3 gives the headings of sections mentioned in column 2 of the schedule and is for information only.
- 2 Value of property or damage to property**
- For part 2, the value of property, or damage to property, is the value decided by the court.

## **Part 2                      Summary disposition of    indictable offences**

### **3                      Indictable offences that must be decided summarily**

- (1) A charge of an indictable offence listed in schedule 1, column 2 must be decided summarily if the relevant circumstance test is satisfied for the charge of the offence.
- (2) An alleged offence that is mentioned in subsection (1) is a *schedule 1 offence*.
- (3) Subsection (1) is subject to sections 9 and 10.

### **4                      Indictable offences that must be decided summarily on    prosecution election**

- (1) This section applies to a charge of an indictable offence listed in schedule 2, column 2 if the relevant circumstance test is satisfied for the charge of the offence.
- (2) An alleged offence mentioned in subsection (1) is a *schedule 2 offence*.
- (3) The charge must be decided summarily if the prosecution elects, under section 5, that the charge will be decided summarily.
- (4) Subsection (3) is subject to section 9.

### **5                      Schedule 2 offences—procedure for making of    prosecution’s election**

- (1) If a defendant is charged with a schedule 2 offence, at the start of the proceeding the court must ask the prosecution whether the prosecution wants the charge to be decided summarily.
- (2) If the prosecution wants the charge to be decided summarily, the court must ask the defendant to plead to the charge as required under [the general provisions for asking the defendant to plead in a summary proceeding].

- 
- (3) If the prosecution does not want the charge to be decided summarily, the proceeding must be dealt with as a committal proceeding.

**6 Indictable offences that must be decided summarily if defendant does not elect a jury trial**

- (1) This section applies to charge of an indictable offence listed in schedule 3, column 2 if the relevant circumstance test is satisfied for the charge of the offence.
- (2) An alleged offence mentioned in subsection (1) is a *schedule 3 offence*.
- (3) The charge must be decided summarily unless the defendant elects, under section 7, for the charge to be tried by a jury.
- (4) Subsection (3) is subject to section 9.

**7 Schedule 3 offences—procedure for making of defendant's election**

- (1) This section applies to a charge of a schedule 3 offence.
- (2) If the defendant is not legally represented, before the defendant is asked to plead the court must—
  - (a) state the substance of the charge to the defendant; and
  - (b) explain to the defendant that he or she is entitled to be tried by a jury and is not obliged to make any defence; and
  - (c) ask the defendant whether he or she wants the charge to be tried by a jury.
- (3) If the defendant is legally represented, before the defendant is asked to plead the court must ask the defendant whether he or she wants the charge to be tried by a jury.
- (4) If the defendant wants the charge to be tried by a jury, the proceeding must be dealt with as a committal proceeding.

- (5) If the defendant does not want the charge to be tried by a jury, the court must ask the defendant to plead to the charge as required under [the general provisions for asking the defendant to plead in a summary proceeding].

**8 Another Act may provide for indictable offence to be decided summarily**

- (1) Another Act may provide for a charge of an indictable offence, other than an indictable offence against the Criminal Code, to be decided summarily.
- (2) The charge must be decided in accordance with any provision under that Act about when and how the charge is to be decided by the court.

**9 When court must abstain from summary jurisdiction—inadequate punishment**

- (1) The court must abstain from deciding summarily a charge of a chapter 4 indictable offence if the court is satisfied, at any stage and after hearing any submissions made by the parties, that because of the nature or seriousness of the offence or any other relevant consideration the defendant may not be adequately punished on summary conviction.
- (2) For a charge of a schedule 3 offence, unless the defendant's criminal history is admissible in evidence on the hearing of the charge, the court must not have regard to the defendant's criminal history—
  - (a) before receiving a plea of guilty or making a decision of guilt; or
  - (b) for deciding whether the defendant may be adequately punished on summary conviction.
- (3) If the court abstains from deciding a charge summarily under this section, the proceeding for the charge must proceed by way of a committal proceeding.

**10 When court must abstain from summary jurisdiction—exceptional circumstances**

- (1) The court must abstain from deciding summarily a charge of a schedule 1 offence if the court is satisfied, on an application made by the defendant, that because of exceptional circumstances the charge should not be decided summarily.

*Examples of exceptional circumstances—*

- 1 There is sufficient connection between the offence the subject of the charge, and other offences allegedly committed by the defendant and to be tried on indictment, to allow all the offences to be tried together.
  - 2 There is an important issue of law involved.
  - 3 An issue of general community importance or public interest is involved, or the holding of a trial by jury is justified in order to establish contemporary community standards.
- (2) If the court abstains from deciding a charge summarily under this section, the proceeding for the charge must proceed by way of a committal proceeding.

**11 Maximum penalty for chapter 4 indictable offence on summary conviction**

- (1) The maximum penalty that may be imposed on a summary conviction of a chapter 4 indictable offence is—
- (a) if the court is constituted by a magistrate, other than a magistrate performing functions as a drug court magistrate under the *Drug Court Act 2000*—500 penalty units or 3 years imprisonment; or
  - (b) if the court is constituted by a magistrate performing functions as a drug court magistrate under the *Drug Court Act 2000*—
    - (i) if the consent mentioned in section 20(2) of that Act has been obtained—500 penalty units or 4 years imprisonment; or
    - (ii) otherwise—500 penalty units or 3 years imprisonment; or

[s 12]

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- (c) if the court is constituted by justices under section 12(1)(b)—100 penalty units or 6 months imprisonment.
- (2) Despite subsection (1), the defendant can not be punished more than if the charge of the offence had been decided on indictment.

**12 Constitution of court**

- (1) For deciding a charge of an indictable offence summarily, the court must be constituted by—
  - (a) a magistrate; or
  - (b) 2 justices of the peace (magistrates court) appointed under the *Justices of the Peace and Commissioners for Declarations Act 1991*.
- (2) For subsection (1)(b), the jurisdiction of the justices is limited to an offence—
  - (a) to which the defendant pleads guilty; and
  - (b) that the justices consider they may adequately punish by imposing a penalty under section 11; and
  - (c) for an offence involving property—involving property, or property damage or destruction, of a value not more than \$2500.

**Schedule 1      Indictable offences decided summarily**

section 3

**Criminal Code**

Column 1	Column 2	Column 3	Column 4
Item	Offence	Provision heading	Relevant circumstance
1	an offence against any provision		the maximum term of imprisonment for which the defendant is liable is not more than 3 years
2	an offence of a sexual nature		(a) the offence is without a circumstance of aggravation; and (b) the complainant was 14 years of age or over at the time of the alleged offence; and (c) the defendant pleads guilty

Schedule 1

Column 1	Column 2	Column 3	Column 4
Item	Offence	Provision heading	Relevant circumstance
3	an offence against s 398	Punishment of stealing	<p>1 the value of the thing stolen, or the detriment caused, is less than the prescribed value</p> <p>2 the value of the thing stolen, or the detriment caused, is equal to or more than the prescribed value but the defendant pleads guilty</p> <p>3 punishment in special cases, clause 14 applies to the alleged offence and the defendant intended the firearm to be used by anyone to commit an indictable offence that is, or would be if the charge were laid, an indictable offence (summary jurisdiction)</p>
4	an offence against s 399	Fraudulent concealment of particular documents	<p>1 the value of the yield to the defendant, or the detriment caused, because of the concealment is less than the prescribed value</p> <p>2 the defendant pleads guilty</p>
5	an offence against s 403	Severing with intent to steal	<p>1 the value of the thing made moveable is less than the prescribed value</p> <p>2 the defendant pleads guilty</p>
6	an offence against s 406	Bringing stolen goods into Queensland	<p>1 the value of the property is less than the prescribed value</p> <p>2 the defendant pleads guilty</p>

Column 1	Column 2	Column 3	Column 4
Item	Offence	Provision heading	Relevant circumstance
7	an offence against s 408A(1)	Unlawful use or possession of motor vehicles, aircraft or vessels	1 the value of the motor vehicle, aircraft or vessel is less than the prescribed value 2 the defendant pleads guilty
8	an offence against s 408A(1A)	Unlawful use or possession of motor vehicles, aircraft or vessels	the defendant used or intended to use the motor vehicle, aircraft or vessel for the purpose of facilitating an indictable offence (summary jurisdiction)
9	an offence against s 408A(1B)	Unlawful use or possession of motor vehicles, aircraft or vessels	1 the value of the destruction, damage, interference or detriment caused, or the value of the thing removed, (regardless of the value of the motor vehicle, aircraft or vessel involved) is less than the prescribed value 2 the defendant pleads guilty
10	an offence against s 408C	Fraud	1 the value of the property, the yield to the defendant or the detriment caused is less than the prescribed value 2 the defendant pleads guilty
11	an offence against s 408E(2)	Computer hacking and misuse	
12	an offence against s 408E(3)	Computer hacking and misuse	1 the value of the detriment or damage caused, or benefit obtained, is less than the prescribed value 2 the defendant pleads guilty

Schedule 1

Column 1	Column 2	Column 3	Column 4
Item	Offence	Provision heading	Relevant circumstance
13	an offence against s 419(1), (2), (3)(a) or (b)(iii)	Burglary	
14	an offence against s 419(3)(b)(iv)	Burglary	1 the value of any damage caused to property is less than the prescribed value 2 the defendant pleads guilty
15	an offence against s 419(4)	Burglary	(a) the defendant is alleged to have entered or been in the dwelling of another and committed an indictable offence in the dwelling that is, or would be if the charge were laid, an indictable offence (summary jurisdiction); and (b) if the defendant damages, or threatens to damage, any property—the value of any damage caused to property is less than the prescribed value or the defendant pleads guilty
16	an offence against s 421(1)	Entering or being in premises and committing indictable offences	
17	an offence against s 421(2)	Entering or being in premises and committing indictable offences	the defendant is alleged to have entered or been in premises and committed an indictable offence in the premises that is, or would be if the charge were laid, an indictable offence (summary jurisdiction)

Column 1	Column 2	Column 3	Column 4
Item	Offence	Provision heading	Relevant circumstance
18	an offence against s 421(3)	Entering or being in premises and committing indictable offences	the defendant is alleged to have gained entry to premises by a break and committed an indictable offence in the premises that is, or would be if the charge were laid, an indictable offence (summary jurisdiction) and either—  (a) the value of any damage caused by the break is less than the prescribed value; or  (b) the value of any damage caused by the break is equal to or more than the prescribed value and the defendant pleads guilty
19	an offence against s 425(2)	Possession of things used in connection with unlawful entry	
20	an offence against s 427(1), (2)(a) or (b)(iii)	Unlawful entry of vehicle for committing indictable offence	
21	an offence against s 427(2)(b)(iv)	Unlawful entry of vehicle for committing indictable offence	1 the value of any damage caused to property is less than the prescribed value 2 the defendant pleads guilty
22	an offence against s 430	Fraudulent falsification of records	1 the value of the yield to the defendant because of the act or omission mentioned in s 430(a), (b), (c), (d) or (e), or the value of the detriment caused by that act or omission, is less than the prescribed value 2 the defendant pleads guilty

Schedule 1

Column 1	Column 2	Column 3	Column 4
Item	Offence	Provision heading	Relevant circumstance
23	an offence against s 433	Receiving tainted property	1 the value of the tainted property is less than the prescribed value 2 the defendant pleads guilty
24	an offence against s 435	Taking reward for recovery of property obtained by way of indictable offences	1 the value of the benefit mentioned in s 435(b) is less than the prescribed value 2 the defendant pleads guilty
25	an offence against ch 44	Offences analogous to stealing relating to animals	1 the value of the animal the subject of the offence is less than the prescribed value 2 the defendant pleads guilty
26	an offence against s 468(2)	Injuring animals	1 the value of the animal the subject of the offence is less than the prescribed value 2 the defendant pleads guilty
27	an offence against s 469	Wilful damage	1 the defendant is liable to punishment under punishment in special cases, clause 3 (Wills and registers), 4 (Wrecks), 8 (Deeds and records), 9 (Graffiti), 10 (Educational institutions) or 11 (Cemeteries etc.) 2 none of the punishment in special cases applies
28	an offence against s 471	Damaging mines	1 the value of the damage or interference caused is less than the prescribed value 2 the defendant pleads guilty

Column 1	Column 2	Column 3	Column 4
Item	Offence	Provision heading	Relevant circumstance
29	an offence against s 472	Interfering with marine signals	1 the value of any damage or detriment directly attributable to the commission of the offence, including, for example, economic loss arising from disruption to shipping, is less than the prescribed value 2 the defendant pleads guilty
30	an offence against s 473	Interfering with navigation works	1 the value of any damage or detriment directly attributable to the commission of the offence, including, for example, economic loss arising from disruption to shipping, is less than the prescribed value 2 the defendant pleads guilty
31	an offence against s 474	Communicating infectious diseases to animals	1 the value of the animal or animals the subject of the offence is less than the prescribed value 2 the defendant pleads guilty
32	an offence against s 475	Travelling with infected animals	
33	an offence against s 478	Sending letters threatening to burn or destroy	

Schedule 1

Column 1	Column 2	Column 3	Column 4
Item	Offence	Provision heading	Relevant circumstance
34	an offence against s 488	Forgery and uttering	paragraph (a) or (b) of the penalty applies and either— (a) the value of the yield to the defendant, or the detriment causes, involved in the forgery or uttering is less than the prescribed value; or (b) the defendant pleads guilty
35	an offence against s 498	Falsifying warrants for money payable under public authority	1 the value of the yield to the defendant, or the detriment caused, involved in the making out or delivering of the warrant is less than the prescribed value 2 the defendant pleads guilty
36	an offence against s 499	Falsification of registers	
37	an offence against s 500	Sending false certificate of marriage to registrar	
38	an offence against s 510	Instruments and materials for forgery	
39	an offence against s 514(2)	Personation in general	(a) the value of the property mentioned in that section is less than the prescribed value; and (b) the defendant pleads guilty
40	an offence against s 515	Falsely acknowledging deeds, recognisances etc.	
41	counselling or procuring the commission of an offence mentioned in any of items 3 to 40		

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<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>	<b>Column 4</b>
<b>Item</b>	<b>Offence</b>	<b>Provision heading</b>	<b>Relevant circumstance</b>
42	attempting to commit an offence mentioned in any of items 3 to 40		the maximum term of imprisonment for the offence alleged to have been attempted is not more than 3 years
43	becoming an accessory after the fact to an offence mentioned in any of items 3 to 40		the maximum term of imprisonment for the offence to which the defendant is alleged to have become an accessory after the fact is not more than 3 years

**Schedule 2 Indictable offences decided summarily on prosecution election**

section 4

**Criminal Code**

Column 1	Column 2	Column 3	Column 4
Item	Offence	Provision heading	Relevant circumstance
1	an offence against s 141	Aiding persons to escape from lawful custody	
2	an offence against s 142	Escape by persons in lawful custody	
3	an offence against s 143	Permitting escape	
4	an offence against s 340	Serious assaults	
5	any offence involving an assault		the maximum term of imprisonment for which the defendant is liable is more than 3 years but not more than 5 years and either— (a) the assault is not of a sexual nature; or (b) the assault is not accompanied by an attempt to commit a crime
6	counselling or procuring the commission of an offence mentioned in any of items 1 to 5		

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7	attempting to commit an offence mentioned in any of items 1 to 4		
8	becoming an accessory after the fact to an offence mentioned in any of items 1 to 4		

**Schedule 3 Indictable offences decided summarily if defendant does not elect jury trial**

section 6

**Criminal Code**

Column 1	Column 2	Column 3	Column 4
Item	Offence	Provision heading	Relevant circumstances
1	an offence against s 316A	Unlawful drink spiking	
2	an offence against s 328A(2)	Dangerous operation of a vehicle	
3	an offence against s 339(1) or (3)	Assaults occasioning bodily harm	
4	an offence involving an assault, other than an offence against s 339(1) or (3)		(a) the assault is without an aggravating circumstance; and (b) the assault is not of a sexual nature; and (c) the maximum term of imprisonment for which the defendant is liable is more than 3 years but not more than 7 years; and (d) the offence is not a schedule 2 offence
5	an offence against s 359E	Punishment of unlawful stalking	the maximum term of imprisonment for which the defendant is liable is not more than 5 years

6	an offence against chapter 14, chapter division 2	Corrupt and improper practices at elections—Legislative Assembly and Brisbane City Council elections and referendums	the maximum term of imprisonment for which the defendant is liable is more than 3 years
7	an offence against chapter 22A	Prostitution	the maximum term of imprisonment for which the defendant is liable is more than 3 years
8	an offence against chapter 42A	Secret commissions	
9	counselling or procuring an offence mentioned in any of items 1 to 8		
10	attempting to commit an offence mentioned in any of items 1 to 8		the maximum term of imprisonment for the offence alleged to have been attempted is more than 3 years
11	becoming an accessory after the fact to an offence mentioned in any of items 1 to 8		the maximum term of imprisonment for the offence to which the defendant is alleged to have become an accessory after the fact is more than 3 years

## Schedule 4 Dictionary

section 00

***aggravating circumstance***, for an offence, means a circumstance that renders a person liable, on conviction of the offence, to a greater penalty than that to which the person would otherwise have been liable.

***chapter 4 indictable offence*** means—

- (a) a schedule 1 offence; or
- (b) a schedule 2 offence; or
- (c) a schedule 3 offence.

***indictable offence (summary jurisdiction)*** means—

- (a) a chapter 4 indictable offence; or
- (b) any other indictable offence if another Act provides for a charge of the offence to be decided summarily.

***prescribed value***, for schedule 1, means \$30000.

***relevant circumstance test*** see section 1(1).

***schedule 1 offence*** see section 3(2).

***schedule 2 offence*** see section 4(2).

***schedule 3 offence*** see section 6(2).

***summary conviction*** means conviction by a Magistrates Court for a simple offence.