

17 June 2022

Mr Michael Shanahan AM
Criminal Procedure Review – Magistrates Courts
GPO Box 149
Brisbane
QLD 4001

Via email: Criminal-Procedure-R@justice.qld.gov.au

Dear Mr Shanahan,

Re: Criminal Procedure Review, Magistrates Courts – Consultation Paper

Thank you for the opportunity to provide feedback on the Criminal Procedure Review Consultation Paper (consultation paper). This work represents an important opportunity for the Queensland government to develop contemporary and effective criminal procedure laws for the Magistrates Court, considering the developments in society, technology and the human rights of all people in Queensland since the *Justices Act 1886* was enacted.

As the Public Advocate for Queensland, I undertake systemic advocacy to promote and protect the rights and interests of Queensland adults with impaired decision-making capacity.¹

There are a range of conditions that may affect a person's decision-making ability. These include intellectual disability, acquired brain injury, mental illness, neurological disorders (such as dementia) or problematic alcohol and drug use. While not all people with these conditions will experience impaired decision-making ability, it is likely that many may, at some point in their lives. For some, impaired decision-making ability may be episodic or temporary, requiring intensive supports at specific times in their lives, while others may require lifelong support with decision-making and communicating choices and decisions.

It is a well-known problem that people with impaired decision-making ability are overrepresented in the criminal justice system.² There are a number of human rights obligations in relation to people with disability that must be taken into consideration when creating a new set of criminal procedures. For example, the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD)³ has a number of articles aiming to ensure effective access to the justice system for persons with disabilities on an equal basis with others. Chief among these is Article 13 which requires the 'effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.'⁴

This is further reinforced through Queensland's *Human Rights Act 2019*, which states that a person charged with a criminal offence is entitled to criminal proceedings without discrimination, and among other rights, 'to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication the person speaks or understands'.⁴

¹ *Guardianship and Administration Act 2000* (Qld) s 209.

² Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Issues Paper Criminal Justice System* (January 2020).

³ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

⁴ *Human Rights Act 2019* (Qld) s 32(2)(a).

Given these developments, it is vital that contemporary and effective criminal procedure laws reflect these fundamental rights that belong to everyone who comes before the criminal justice system.

This submission will be structured around some of the questions as found in the consultation paper and the issues relevant to my role as the Public Advocate.

Consultation question 3: How could criminal procedures in the Magistrates Courts better accommodate the needs of different people? What is needed to allow for better understanding, connection and participation? This might include (but is not limited to) First Nations people, people from culturally and linguistically diverse backgrounds, women, people with disability, victims of crime and the general community.

I recommend that the new legislation enliven the right of people to have reasonable accommodations made when dealing with the justice system. This includes reflecting the obligation under Article 13 of the CRPD and the need to accommodate any difficulties in communication or understanding as required under the *Human Rights Act*, as mentioned above. The new legislation should require the court to seek appropriate support for a person with disability (such as impaired decision-making ability) to understand what is happening if this is needed.

A specific provision to allow such accommodations should be in the new legislation to guarantee that the rights of people with disability are upheld.

Such accommodation could be achieved through various means such as the person's support providers, personal network, individual advocates who specialise in working with people with disability, and other accommodations in terms of extra time being given by the courts to not only arrange for such support to be found, but also to allow enough time for the person to be properly informed of what is happening. The court should also enquire, when appropriate, to determine whether the person has a substitute decision-maker (such as a guardian or an attorney under an enduring power of attorney) who should be involved in supporting the person, or if a guardianship appointment through the Queensland Civil and Administrative Tribunal might be necessary.

Consultation question 4: Should the new legislation include guiding principles? If so, what should the main themes of those principles be?

The new legislation should include guiding principles as they can assist the court in interpreting the legislation and in conducting proceedings in a more consistent, rights-based way.

These guiding principles should include many of the concepts discussed above including the requirement of reasonable accommodation for people with impaired decision-making ability. Some of the principles in the new legislation could take guidance from those found in the *Guardianship and Administration Act*,⁵ and acknowledge that all people have the same human rights and fundamental freedoms, regardless of their decision-making ability. Further, it should be noted that such rights and freedoms include the concepts of non-discrimination and the ability to have full and effective participation in court processes. The principles should include the need for reasonable accommodations to be made when appropriate to allow all participants in the criminal justice procedure (defendants, victims, and witnesses) to be afforded the same opportunity to participate on an equal basis as everyone else.

⁵ *Guardianship and Administration Act 2000* (Qld) s 11B.

Consultation question 29: Should the new legislation about criminal procedure in the Magistrates Courts include 'in-court diversion'?

New legislation should include provisions regarding in-court diversion, and it should be mandatory for the court to consider all in-court diversion options before proceeding with a matter. This could include, for example, considering whether proceedings under the *Mental Health Act 2016* might be appropriate, or, when pleas of guilty are entered, an obligation could exist on the court to consider diversion to the Queensland Drug and Alcohol Court or the Murri Court.

The court should note before proceeding at each major stage that it has considered the various diversionary options available. The consultation paper discusses a number of potential in-court diversions that may be implemented in the future, such as deferred prosecution agreements, the Victorian Criminal Justice Diversion Programs, and cautions. These should all be trialed and explored as they may be more appropriate for people with impaired decision-making ability, with such diversions assisting the person to potentially access further supports to address offending behaviour.

Consultation question 31: Should the new legislation about criminal procedure in the Magistrates Court have specific objects or principles about 'in-court diversion'? If yes, what should they be?

The principles of the new legislation as discussed above should include the requirement that the court must consider all possible diversions, including in-court diversions, where appropriate so that matters can be dealt with in the most fair and equitable manner, considering the circumstances of the people involved in the proceedings.

Thank you again for the opportunity to provide feedback on the Criminal Procedure Review Magistrates Courts Consultation Paper.

I look forward to hearing about any further opportunities to be involved in further consultation as the review progresses.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'John Chesterman', with a long horizontal flourish extending to the right.

John Chesterman (Dr)
Public Advocate