



# **Submission**

**CIVIL AND CRIMINAL JURISDICTION REFORM AND MODERNISATION AMENDMENT BILL 2009**

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## EXECUTIVE SUMMARY

The Queensland Law Society welcomes the opportunity to comment on the consultation draft of the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2009* (the "Draft Bill").

The Society participated extensively in the Moynihan Review, providing a number of detailed submissions that considered various facets of the Review, participating in round table discussions and, ultimately, providing detailed submissions to Mr Moynihan AO QC regarding the discussion paper entitled, *Reform of the Committal Proceedings Process* (the "Moynihan Report").

The Moynihan Report was published in December 2008 and made publicly available for comment, along with the Government's response to the Report, in July 2009.

The Society is disappointed that despite numerous requests to be provided with a copy of the Moynihan Report between December 2008 and July 2009, the Society did not receive it until its public release in July 2009; yet other key stakeholders, which we are advised included the Queensland Police Service ("QPS"), received the Report and were consulted prior to that date.

It is our opinion that the Government's response to the Moynihan Report and the Draft Bill itself are a product of selective and narrow consultation and we have little confidence that, in its current form, the result will be an efficient, cost-effective and fair civil and criminal justice system for the benefit of all Queenslanders.

Through out this process the legal profession has only advocated for the system's single largest group of "consumers": the non-governmental litigants and victims. The profession's advocacy on this issue has not been driven by self-interest; we anticipate that the introduction of these reforms will have not have a detrimental impact on the livelihoods of lawyers. The Society is simply concerned that reforms should not prefer the convenience of the Government and its officers to the plight of consumers in the system.

Fundamentally the Society expects that the proposed reforms will have vastly greater resource and cost implications than anticipated by the Government. In our view these reforms will in no way achieve cost neutrality.

The criminal law reforms will place significant pressure on the resources of the Magistrates Court, legal aid service providers and the police prosecution systems. It is particularly concerning that the Government does not appear to acknowledge this and has not provided any indication that additional funding will accompany the commencement of the legislation. The Society sincerely hopes that such funding is forthcoming and that the reforms in no way act to diminish the capacity for accused persons to access justice.

The Society commends the Government's decision to widen the jurisdiction of the Magistrates Court. The earlier deposition of appropriate cases in the Magistrates Court will no doubt achieve the better resource efficiency and cost savings that are sought. However, the Society is strongly opposed to the indiscriminate removal of the fundamental and historical right of an accused to elect to be tried by a jury of his peers. Reformation of the criminal justice system should restate and reaffirm fundamental rights, not remove them.

In our opinion the resource efficiencies sought can be achieved by simply increasing the jurisdiction of the Magistrates Court as proposed. There is no need to do away with the right to trial by jury for a large portion of offences. Upon the widening of the summary jurisdiction we anticipate that many more accused will choose to plead guilty in the Magistrates Court rather than face the cost and delay of being sentenced in the District Court. Retaining the defence right of election while encouraging the election of matters in the lower courts by providing sentencing incentives such as sentencing discounts for early guilty pleas, will ensure the early resolution of matters without the need to impinge upon an accused's right to a fair trial.

The Moynihan Report states that following are the eight key features of the streamlined criminal justice process:<sup>1</sup>

1. Prosecution and defence will be obliged to canvass issues bearing on whether there is to be a plea of guilty, for example, clarification of charges, the sentence sought and they will need to work towards narrowing of the issues;
2. The Magistracy will have responsibility for supervising the process and for intervening when justified. This may happen on the Magistrate's own initiative or on the application of a party. The Magistrate will have power to:
  - Give directions;
  - Enforce directions;
  - Direct parties to confer and report;
  - Set timetables; and
  - Deal with non-compliance.
3. Protocols should be developed by the Magistrates Court, DPP and other players to work out the machinery for various processes including:
  - Separate court management of summary offences and indictable offences; and
  - QPS lodgement of the 'brief of evidence' and disclosure certificate.
4. It should be mandatory that evidence of witnesses be given in statement form subject to specified exceptions;
5. A mandatory case conference will be held and reported on, initially only for matters under the Brisbane Committals Protocol;
6. Witnesses can be called by the prosecution, by consent or by order of a magistrate who is satisfied that it is justified and sets the parameters for the cross-examination;
7. There will be a new committal test; and
8. There will be a direct administrative committal unless it is agreed or ordered witnesses can be called.

These key features were recommended as a cohesive, interconnected system designed to interact together to facilitate the earlier resolution of criminal matters and achieve a more effective use of public resources across the justice system.

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<sup>1</sup> Moynihan Report, Page 186

It is incredibly disappointing that the Government has been selective in its implementation of the recommendations. Only 5 of the 8 key recommendations proposed in the Report were adopted. The Government's outright rejection, without substantive justification, of Mr Moynihan's recommendation to require an arresting officer to swear a certificate as to their compliance with the disclosure obligations is concerning; as is the dismissal of his recommendations regarding the introduction of a strengthened committals test and case conferencing until analysis of the adopted reforms is completed in the future.

Against the backdrop of a widely acknowledged police culture adverse to complying with disclosure obligations, the Society notes that it is patently unfair for the Government to institute a committal's regime that restricts the right of the defence to cross examine an arresting officer regarding their compliance with disclosure requirements, while at the same time ignoring Mr Moynihan's recommendation to require an arresting officer to make sworn certification as to such compliance. Such an approach is a complete degradation of the disclosure regime proposed in the Moynihan Report, particularly in light of the decision to effectively abolish the right to subpoena the police to provide specific information.

It is evident through out the Report that Mr Moynihan struggled to comprehensively evaluate the current system given a significant lack of quality and reliable statistical information. This is a major failure of the report and its recommendations; particularly considering the Government's acknowledgement that "reliable, up to date, accurate and accessible data is the life blood of an effective criminal justice system... it allows decision makers to make evidence abased decisions, challenges entrenched beliefs and perceptions and provides a foundation for funding".<sup>2</sup>

We note that the Government's Response to the Moynihan Report alludes to the establishment of a Criminal Justice Procedures Coordination Council to oversee and coordinate the implementation of the recommendations regarding information management. The Society commends this proposal and seeks advice as to when this Council will be convened. Administrative arrangements are already being made in relation to a number of reforms outlined in the Report and it would seem prudent that the Council be operational as soon as possible in order to monitor these reforms and ensure an integrated and coordinated approach is taken to the process.

Finally, the Society has raised concern about the decision to retain the disparate District and Supreme Court cost scales and opines that it will do little more than make litigation cheaper for unsuccessful litigants subject to adverse costs orders. The Society recommends that further consideration is given to these matters, including a commitment to revisit the costs scales in 12 months time to ensure they adequately reflect the work being undertaken.

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<sup>2</sup> Government Response to the Moynihan Report, Page 9

**QUEENSLAND LAW SOCIETY SUBMISSION:  
CIVIL AND CRIMINAL JURISDICTION REFORM AND MODERNISATION AMENDMENT BILL 2009**

The Queensland Law Society thanks you for the opportunity to provide our comments on the consultation draft of the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2009* (the “Draft Bill”).

As you are no doubt aware, the Society participated extensively in the Moynihan Review, providing a number of detailed submissions that considered various facets of the Review, participating in round table discussions and, ultimately, providing detailed submissions to Mr Moynihan AO QC regarding the discussion paper entitled, *Reform of the Committal Proceedings Process*.

Since receiving the Moynihan Report and the Government Response to that report in July 2009, the Society has also made a number of submissions in conjunction with the Bar Association of Queensland as to overarching policy concerns regarding a variety of the proposed reforms. On occasion, the Society has also had the opportunity to meet with the Attorney and members of his Office and Department to further discuss its concerns.

This submission once again reiterates the Society’s strong opposition to many of the fundamental policy reforms proposed in the Draft Bill, but also highlights some of the more technical issues that we recommend be addressed prior to the legislation’s assent.

## **CRIMINAL JURISDICTION REFORMS**

### **Committals**

It is the Society’s firm belief that a robust committals process in Queensland is an essential and effective tool in streamlining the prosecution of indictable offences and an enormous benefit in the saving of public resources.

While the Society acknowledges that there are significant and proper changes that can be made to the administrative processes around committals in order to make them more efficient, it is our opinion that such changes can be made without unduly limiting the fundamental right of an accused person to test the prosecution evidence against them at committal.

### **The benefits of a properly conducted committal hearing**

In an adversarial criminal justice system, the principles of fairness, efficiency and access to justice require the existence and ability to access a pre trial court in which to conduct an independent examination of the case against the accused. A committal hearing is the ideal forum for such an examination to occur.

The Moynihan Report itself acknowledges the various functions that committal proceedings perform and the substantial benefits that they bring to the pre-trial process.<sup>3</sup> The Report also highlights the fact that

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<sup>3</sup> Moynihan Report, Page 162

numerous Courts have acknowledged the fundamental contribution a properly conducted committal hearing plays in ensuring procedural fairness for an accused.<sup>4</sup> For example, in Barron -v- Attorney-General (NSW) (1987) 10 NSWLR 215, Mahoney JA, wrote at 221:

*“It is not the function of committal proceedings merely to provide the occasion of a chance blunder, or provoking one. But the abuse of committal proceedings should not obscure their use. An accused person will often be at a disadvantage against the powers of the State to assemble evidence and to expend resources for the purpose. The accused would ordinarily not have access to Crown witnesses. Committal proceedings will often be the only opportunity which the accused has to investigate the motives of the Crown witnesses and the basis on which they say what they do. In the case of witnesses tendered as experts, the full revelation of what they say may be able to be investigated and contrary evidence prepared only if they can be examined on committal. In many cases, of which these are examples, the legitimate function of committal proceedings will be to explore possibilities.”*

In the interests of brevity, the following, while not meant to be an academic analysis, summaries the substantial benefits a properly conducted committal hearing can achieve:

- An early acquaintance with the true extent of the evidence held by the prosecution. Such an understanding is important as:
  - It allows the accused to fully assess the weight and nature of the evidence that could be produced at trial and to make a considered decision as to the appropriate plea to be entered when arraigned;
  - Cross examination of crown witnesses can be undertaken at an early stage in order to test the cogency of their evidence and to obtain particulars of the allegations;
  - The defendant can assess what evidence in reply should be marshaled for trial;
  - Submissions can be prepared more effectively as to the evidentiary issues at trial, and to support pre trial hearings;
  - The trial listing process is better informed, particularly as to the likely duration of the trial and as to the issues in contention at the trial;
  - If a defendant pleads guilty, the sentencing judge can read the depositions obtained at the committal and be fully apprised of the nature of the case;
  - The Office of the Director of Public Prosecutions (“DPP”) can fully assess the prosecution case and exercise their prosecutorial discretion as to whether the matter should properly be brought to trial, notwithstanding that there may be a prima facie case; and
  - It assists in the determination of relevant public policy considerations such as those set forth in the Prosecution Guidelines of the DPP, for example, the existence of any mitigating or aggravating circumstances, the attitude of the alleged victim, the likely length and expense of a trial etc.
- The requirements surrounding a committal hearing can permit early negotiations and facilitate disclosure;

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<sup>4</sup> Moynihan Report , Page 165, citing *Barton v R* [1980 ] HC

- An independent review of the prosecution protects against misconceived, over-zealous or even malicious prosecutions, something which is both in the interests of the community and the defendant; and
- If a matter does not proceed to trial, a determination at the committal stage provides complainants and defendants with the benefit of a public judicial examination of the evidence and published reasons for the matter not proceeding, ultimately instilling public confidence in the transparency of the legal system.

Further, the Society contends that there are significant economic benefits in retaining an unfettered committals process.

The Moynihan Report stated that “there are undoubted effects and costs to the system from unnecessary, inappropriate and wasteful use of the committal: court costs, delay and excessive ‘churning’ through unproductive court events”<sup>5</sup>. However, it is the Society’s opinion that the proposed restrictions have the potential to have serious negative financial implications if misdirected matters are required to be dealt with in the more expensive jurisdiction of the superior courts. Quite simply, trials are exponentially more costly than committal proceedings.

### **Cross examination of witnesses at committal**

Over the last 15 years committals processes, and particularly the right to cross examine witnesses at committal, have undergone substantial reform in most Australian jurisdictions. New South Wales, Victoria and South Australia have all imposed limits on the circumstances in which an accused may cross-examine witnesses, Western Australia and Tasmania have effectively abolished committals, and the Australian Capital Territory has recently adopted the New South Wales and Victorian models. Queensland and the Northern Territory are accordingly the only Australian jurisdictions that have retained an unrestricted right of an accused to cross-examine prosecution witnesses.<sup>6</sup>

However, the mere fact that reforms and restrictions have been put in place in other jurisdictions by no means serves as a sound justification for making reforms in Queensland. It is concerning that the proposed reforms are being considered in light of the experiences in other jurisdictions despite the fact that the Moynihan Report failed to produce any evidence based information as to whether such reforms have resulted in an improvement in criminal pre trial and trial outcomes in those states. The problems that have plagued the committals process in New South Wales are not apparent in Queensland where the overwhelming majority of legal practitioners use committal proceedings properly, with due deference for the saving of time and resources, and with proper focus on the true issues. It is vital that the reforms are made in the context of the Queensland justice system and that reforms are not made simply for the sake of reform.

While the Society acknowledges that a complete dismissal of charges does not happen often, the majority of barristers or solicitors practicing criminal law have, on numerous occasions, experienced charges being dismissed at committal with no further ex-officio indictment being presented by the Crown afterwards. The DPP Annual Report also clearly supports this proposition. The 2007-2008 report indicates that approximately 44% of cases handled by the DPP were disposed of summarily or the charges were withdrawn. The reports for 2006 – 2007 indicate a similar percentage (43%). These statistics suggest that the cross examination of witnesses at committal acts as a considerable exercise in filtering matters for expeditious (and cost-effective) disposition in the lower court or efficient resolution in

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<sup>5</sup> Moynihan Report, Page 4

<sup>6</sup> Moynihan Report, Page 165

a superior court by way of a plea, or shorter trial.

It is the experience of the Society's members that in the majority of committals where cross examination occurs, one or more witnesses will alter their account, will offer new evidence that has not been told to the police, or will depart from the evidence given in their statement. If such evidence is given at trial, in many cases the jury will be need to be discharged and a retrial ordered, substantially increasing costs and inefficiencies in the superior courts.

If the reforms ultimately seek to promote the early resolution of appropriate matters one would assume that determining the issues in dispute as soon as practicable, and preferably before trial, would be paramount. While properly conducted case conferencing will provide the opportunity for discussion and negotiation between the prosecution and defence, it will not allow for key evidence to be tested prior to trial. Restricting the right to cross examine witnesses at committal will only serve to increase the risk of miscarriages of justice occurring and will result in significantly more pre-trial hearings and applications to the superior courts in order to determine issues that could have been able to be resolved as a result of cross examination at committal.

As an aside, the Society would also like to take this opportunity to note that, in our opinion, the principal focus of cross examining witnesses at committal is not to "pin" witnesses down, as suggested in the Moynihan Report:<sup>7</sup>

*"Now, cross-examination of witnesses on their written statements is directed at laying the ground work for trial, in particular by exposing inconsistencies in testimony. In other words cross-examination is directed at 'pinning' down the witness, a purpose which is quite different from the historical purposes of the Committal".*

"Pinning down a witness" is only incidental to ensuring that relevant evidence that bears on the credibility of important witnesses is in fact put before the court; a fundamental purpose of the pre-trial process.

Example:

A member of the Society's Criminal Law Section recently conducted a committal in a suburban Court where the identity of the person responsible for breaking into and trashing an apartment was central to the Prosecution case. The apartment owner, in a statement taken by the police, identified or supposedly identified the defendant from CCTV footage of the incident.

Cross-examination of the Principal Investigating Officer at committal later revealed that on initially being questioned the apartment owner told police that he had no idea who was responsible for the break in and subsequent significant wilful damage of the apartment. Cross-examination also revealed that the apartment owner told police this *after* he had viewed the CCTV footage, despite later claiming in his statement to be able to identify the defendant from the footage.

The Arresting Officer failed to reveal in his statement, or in any other material in the Prosecution brief, that the apartment owner told police that he was unable to identify the defendant; a statement fundamental to the defence case.

<sup>7</sup> Moynihan Report, Page 166

While the Society acknowledges that the DPP Consent to Cross Examination Guidelines have not yet been finalised, the Society is nonetheless concerned that in order to obtain consent defendants will inevitably be required to provide large parts of their cross examination and case plan to the prosecution when making an application. It is our opinion that any requirement to disclose large portions of the defence case or strategy prior to committal offends the fundamental presumption of innocence and is likely to result in frequent applications to the court to determine whether consent should properly be provided.

### Committals test

Another key element of the Moynihan recommendations is the adoption of the New South Wales test applied by a Magistrate in deciding to commit an accused to trial, that is, the Magistrate must consider all the evidence and determine whether or not *there is a reasonable prospect* that a reasonable jury, properly instructed, would convict the accused person of an indictable offence.<sup>8</sup>

The Society is supportive of recommendation to introduce the New South Wales strengthened committals test.

In rejecting this recommendation (to adopt the New South Wales committal test), the Government Response notes that “the recommendation for a strengthened committal test was made in the context of the introduction of case conferencing”<sup>9</sup> and accordingly the adoption of the test will be considered *in conjunction* with the recommendations for case conferencing “after the impacts of the reforms to streamline the committal process have been reviewed and evaluated”.<sup>10</sup>

It is the Society’s opinion that this is a misinterpretation of the Moynihan recommendation and the case conferencing concept.

Recommendation 49 of the Moynihan Report suggests that a pilot case conference be established in conjunction with the Brisbane Committals Project, however the Report in no way ties the concept of case conferencing to the adoption of a new committals test.

Case conferencing was a specific term of reference provided to Mr Moynihan and the Report explicitly notes that the purpose of a case conference is to facilitate resolution at a much earlier stage by directing resources to preparation at the front end of the system in order to ensure accuracy of charges, early refinement of issues and effective plea discussions.<sup>11</sup>

In any event, the Society queries why it is necessary to wait until a review of the committals reforms is conducted before consideration can be given to adopting the case conferencing recommendation. While the case conference concept is still under formal review in New South Wales by the Bureau of Criminal Statistics, early results show that out of 195 matters which went to a case conference a full two-thirds of committals either had the charges withdrawn or downgraded to charges that were fully and finally disposed of in the Magistrates Court.<sup>12</sup> Such data is incredibly positive and would suggest the project will be an overwhelming success.

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<sup>8</sup> Moynihan Report, Pages 218-219

<sup>9</sup> Queensland Government response to Moynihan Report, July 2009, Page 13

<sup>10</sup> Queensland Government response to Moynihan Report, July 2009, Page 13

<sup>11</sup> Moynihan Report, Pages 200 and 201

<sup>12</sup> Moynihan Report, Page 202

## Impetus for reform

The Society is concerned that such far reaching reforms are being made to discrete public policy issues without sufficient empirical data to justify the proposed changes. We also point out that this is a concern shared by Mr Moynihan himself, who acknowledges in his Report that: <sup>13</sup>

*“it is difficult to comprehensively evaluate the effectiveness of the current committal system because of the lack of valid and reliable information ... Throughout this Report I have referred to the endemic problem of the lack of quality, reliable information. Nowhere is this more evident than in relation to the conduct of committal proceedings”.*

The Moynihan Report acknowledges that in conducting the review of the committals process the following information was not able to be ascertained: <sup>14</sup>

- The average number of witnesses required for cross-examination;
- Whether the defence or prosecution more readily require witnesses to give evidence;
- The average duration of a committal hearing;
- The proportion of cases in which cross examination of witnesses result in charges being withdrawn at trial; and
- The proportion of matters in which a Magistrate dismisses all or some charges at committal.

In the Society’s opinion such data is fundamental to any decision as to how to rightly reform the committals process and the Society queries why such statistical information could not be obtained or made available? The development of good public policy is rooted in fact and proper legal and practical analysis. In our view, the lack of such data should give the Government reason to reflect on need for a properly funded body whose charter it is to collect crime statistics.

## Recommendation

Given the Society’s implacable opposition to the proposed reforms of the committals process we are somewhat reluctant to offer any advice as to how to improve provisions that we consider contain fundamental policy flaws. Nonetheless, if the Government is determined to proceed with such reforms the Society makes the following comments.

It is recommended that the observations dealing with committals as contained on pages 3-5 of the Explanatory Notes, particularly the eight criteria drawn from the judgment of Whealy J in *Sim* [2006] NSWSC 665, be specifically retained in the final Explanatory Notes so as to leave it beyond doubt in the subsequent interpretation of the new committals regime by Queensland Courts that the Justice Whealy criteria are central to the interpretation of the new committals regime in Queensland.

We also suggest that the Justice Whealy criteria be incorporated into any DPP Guidelines developed as to the provision of consent to cross examine witnesses at committal.

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<sup>13</sup> See Moynihan Report page 170-171

<sup>14</sup> See Moynihan Report page 174-175

## Bail Act Changes

### **Section 15B - Application for Bail Outside District or Division**

The Society notes that the proposed amendment to section 15B of the *Bail Act 1980* was not the subject of a recommendation in the Moynihan Report.

Section 15B of the *Bail Act* deals with the procedure to be adopted in rural or remote areas of Queensland where a police officer has refused watchhouse bail after a person has been arrested but when it is not practical to bring the accused before a Court to apply for bail because of the person's remote location.

The current law, as outlined in section 15A of the *Bail Act*, is that in the above scenario the arrested person may apply to a Magistrate for bail by telephone or radio, but the application may *only* be made if the Court Registry where the Magistrate usually constitutes the Court is actually open for business.

The Explanatory Notes to the Draft Bill observe that the new proposed section 15B to the *Bail Act* will allow a Magistrate outside a relevant Court District to grant bail by remote communication device. This amendment will provide additional flexibility for the Chief Magistrate to manage the consideration of urgent bail applications by the Court over public holidays, vacation periods and on other occasions (for example where a resident Magistrate is ill).<sup>15</sup> The Society commends this proposal.

The Explanatory Notes go on to observe that applications for bail in this manner will still only be available if:<sup>16</sup>

- A police officer has refused to grant bail;
- A Magistrates Court has the authority to grant bail; and
- Having regard to all the circumstances the person may not reasonably or practicably be brought personally before a Court to apply for bail.

The Explanatory Notes further emphasise that the Magistrate may decide an application only if the Magistrate is satisfied that:<sup>17</sup>

- *It was necessary to make the application;* and
- The way the application that was made was appropriate.

The Society has concerns in relation to the qualification that the Magistrate may decide the application only if the Magistrate is "satisfied it was necessary to make the application". It is accepted that this phrase currently exists in Section 15A, but it is the Society's view that putting such a restriction on the Magistrate as to whether the application can be heard unnecessarily limits the right of an accused watchhouse domiciled person to make a bail application.

If a person is denied bail by the watchhouse keeper it follows so far as that persons legal rights are concerned that it is necessary to make an application to a Magistrate. Accordingly, the Society submits that the phrase "necessary to make the application" be deleted from the current section 15A of the *Bail Act* and also be removed from the proposed section 15B.

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<sup>15</sup> See page 10 Consultation Draft Explanatory Notes

<sup>16</sup> See Ibid page 10

<sup>17</sup> See Ibid page 10

In the Brisbane City Magistrates Court, Court 1 sits every Saturday and on all public holidays. Therefore, in respect of long weekends, if a person is arrested and refused watchhouse bail after Saturday morning Court, that person is kept in custody until Monday morning when a bail application can then be made to the Court.

In Brisbane the ability of a person to make a bail application on the Monday morning of a public holiday is not subject to the restriction that the Magistrate is first required to determine whether it is necessary for a person to make a bail application before such an application can be heard. In the interests of consistency, such a restriction should not apply to people who are detained at a watchhouse outside of Brisbane.

It is our opinion that such an amendment will ensure that the number of matters which need to go to the Supreme Court in these circumstances is reduced.

### **Further reformation of watchhouse bail**

It is the experience of criminal defence lawyers that watchhouse bail is relatively frequently refused by Watchhouse Keepers, both in Brisbane City Watchhouse and elsewhere, on rather arbitrary and/or capricious grounds.

For example, we are advised by a number of practitioners that it is common place for Watchhouse Keepers to refuse overnight bail and to cause persons arrested on long weekends to remain in custody for two nights in circumstances where it is obvious that a Court will grant the arrested person bail.

#### Example:

A member of the Society's Criminal Law Section was recently involved in a case where four adults (two couples), with no previous criminal history, were recently arrested in respect of a fraud matter which had been under investigation for almost two years.

After considerable delay being brought before the Court 1 Magistrate, one couple were granted bail with the only relevant conditions being a residence condition and a surrender of passport within 24 hours condition. Due to the time of the day the Magistrate was understandably not prepared to wait for the other couple to be processed by the watchhouse.

Despite the fact that the factual and background information of the two unbailed accused was identical to the two that had been bailed by the Magistrate, the Watchhouse Keeper refused to grant bail on the basis of the seriousness of the fraud.

This had the effect that the two accused had to remain in the watchhouse overnight and have their three dependent children cared for by a relative.

A complaint was made to the CMC regarding the Watchhouse Keeper's arbitrary decision to refuse bail. The complaint was however rejected on the basis that it did not constitute official misconduct, effectively meaning that the Watchhouse Keeper's actions in unjustifiably refusing bail were not subjected to any form of review or accountability process.

Accordingly, the Society kindly recommends that the following amendments be made to the *Bail Act*:

- to compel a Watchhouse Keeper to provide detailed reasons when refusing watchhouse bail, as opposed to the pro forma type reasons that are currently provided;
- to make it clear to Watchhouse Keepers that they are acting in a quasi-judicial capacity in making a decision as to watchhouse bail;
- to allow an appeal to be made by telephone to the on duty Magistrate against a refusal by the Watchhouse Keeper to grant bail; and
- to make it a disciplinable offence for a Watchhouse Keeper to arbitrarily or capriciously refuse bail.

Further, the Society notes that it has been advised that the Queensland Police Service (“QPS”) have developed an informal policy for Watchhouse Keepers to follow, in effect establishing pro forma factual scenarios when bail should be refused. The Society asks that any such policy be made publicly available so as to ensure that any fettering of the individual discretion of Watchhouse Keepers can be addressed if necessary.

### **Summary Disposition of Indictable Offences**

#### **Section 552A – Charges of Indictable Offences that Must be Heard and Decided Summarily**

Clause 9 of the Draft Bill entirely reconstitutes the existing section 552A of the *Criminal Code*.

The proposed section 552A provides that the following offences *must* be fully and finally dealt with in the Magistrates Court:

- Any offence where the maximum penalty is not more than three years imprisonment (**Appendix A**). For example, sedition, electoral offences, official secrets offences and offences relating to the procurement of abortions; and
- Any offence relating to property and contracts that is not a serious offence i.e. this typically includes offences with a prescribed value under \$30,000. For example, theft, fraud, forgery, wilful damage and burglary.

This means that for all offences listed in Appendix A and Appendix B, an accused person will no longer have the ability to elect to have a Trial by Jury. We note that the proposed reform encompasses a significant number and variety of offences, many of which has historically been heard as Jury Trials due to the public interest in the nature of the offence.

In this regard the Society draws the Government’s attention to the fact that the jurisdictional change will result in sections 98E, 98F and 98G of the *Criminal Code* (see Appendix A) being required to be heard and decided summarily. We note that the Government explicitly removed these offences from the *Electoral Act* and inserted them into the *Criminal Code* after the CMC Shepherdson Inquiry due to the serious nature of the offences. The Society queries whether it is the Government’s intention that these matters now be dealt with in the Magistrates Court.

In any event the Society is supportive of extensively increasing the range of matters that *can* be dealt with summarily and commends the decision to permit non-serious drug related matters currently required to be dealt with in the Supreme Court to be heard in the Magistrates Court. Upon the widening of the summary jurisdiction we anticipate that many more accused will choose to plead guilty in the Magistrates Court rather than face the cost and delay of being sentenced in the District Court. The earlier disposition of *appropriate* cases in the Magistrates Court will no doubt better achieve resource efficiency and cost savings will thereby flow.

However, the Society is strongly opposed to the indiscriminate removal of the fundamental right of an accused to elect to be tried by a jury of his peers. It is our opinion that any reform of the criminal justice system should restate and reaffirm fundamental rights, not remove them.

### **Removal of the Right to Elect Trial by Jury**

The Moynihan Report observes that: <sup>18</sup>

*“...there is a lack of reliable data to indicate how many matters that could be dealt with by the Magistrates Court are currently being dealt with in the District and Supreme Courts. In the absence of the availability of figures but relying on such data as is, and on anecdotal evidence, it would appear that something in the region of half to three quarters of the matters presently heard in the District and Supreme Court could be dealt with in the Magistrates Court”.*

If correct, this reform represents a substantial reduction in the centuries old right to elect Trial by Jury.

Not only is the removal of this right for individuals charged with certain categories of offences deeply concerning, but the lack of sound evidence based justification for such a reform is equally troubling.

At no time does the Moynihan Report directly suggest that citizens are currently abusing their right to elect Trial by Jury by having minor matters inappropriately heard in the District Court. If such abuse is not occurring, the Society queries the need for such a substantial reform.

As to the justification for the reform, the Moynihan Report argues that Queensland has more matters dealt with on indictment in the District Court than any other Australian jurisdiction and suggests that this “is a direct consequence of the classification of offences.” <sup>19</sup>

We note that the assertion that the number of matters heard on indictment “is a direct consequence of the classification of offences” is stated without any evidentiary or statistical data.

In the Society’s opinion, if the number of non-serious drug matters currently dealt with in the Supreme Court were removed for disposition in the Magistrates Court, as many Defendant’s would elect given the opportunity, the disparity between Queensland and the other states in respect of the number of matters finalised in the superior courts would be considerably less.

Accordingly, based on the content of the Moynihan Report it would appear that the only impetus for the removal of the right of election is economic. A justification which the Society firmly believes is insufficient to justify the curtailment of the fundamental right to Trial by Jury.

In this regard, the Moynihan Report quotes District Court Chief Judge Wolfe as stating that: <sup>20</sup>

*“because of the number of offences that a defendant can elect for Trial by Jury, many of those charged with offences capable of determination in the Magistrates Court are not sentenced there, so that the effect of an efficient running of the District Court is being hampered by the number of less serious matters coming before it for sentence”.*

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<sup>18</sup> Moynihan Report, Page 145

<sup>19</sup> Moynihan Report, Page 133

<sup>20</sup> Moynihan Report, Page 144

In the experience of the Society's criminal law practitioners, it is a very rare defendant who will elect to spend money on a District Court trial for a minor matter, particularly if the sentence outcome would be non-custodial, nor are legal aid grants usually forthcoming for such an enterprise.

Further, the Society asserts that while some matters heard in the District Court may appear "less serious" on their face, it does not necessarily mean that they are being unjustifiably brought before the superior courts. The personal implications of conviction for even a minor offence may be serious for some alleged offenders and in such a case it is understandable if the accused were to elect Trial by Jury upon being advised that they have a greater chance of acquittal before a jury, particularly if they are facing a custodial sentence. For example, a relatively minor traffic matter may see a professional truck driver lose their livelihood upon conviction.

The Moynihan Report itself suggests that the reason more matters are filed on indictment than in the Magistrates Court is due to the higher rates of acquittal and a perception of more lenient sentencing practices in the District and Supreme Courts. The Report notes that "according to the Legal Aid Queensland submission, there is a 50% chance of acquittal in the District or Supreme Court but only a single figure rate in the Magistrates Court".<sup>21</sup> In commenting upon this disparity in acquittal rates the Report notes that "the reasons for this are unclear. There are probably a number of them including that the cases in the Magistrates Court are simpler and the evidence more clear cut".<sup>22</sup>

Once again, we note that these comments are mere speculation. No empirical data is presented to support the arguments made.

In any event, regardless of the reasons for the higher acquittal rate in the superior courts, in the Society's opinion there are a number of offences covered in section 552A in which an accused would rightfully expect to have a better chance of acquittal before a jury than in the Magistrates Court, and in such cases there is no reason why they should not have the ability to exercise their right of election.

Given that the Moynihan Report comments that "...when proceedings reach the District Court, around 90% of Defendants plead guilty",<sup>23</sup> in our view retaining the defence right to elect Trial by Jury will not carry any particularly significant consequences for the ongoing resources of the District Court.

The Society urges the Government to reconsider the proposed reform of section 552A.

### ***Impact on the Magistrates Court and Associated Entities***

As suggested earlier, the Moynihan Report itself estimates that "...something in the region of half to three quarters of the matters presently heard in the District and Supreme Court could be dealt with in the Magistrates Court".<sup>24</sup> Regardless of how prosecutors and magistrates exercise their respective discretions about elections, this will result in a substantial increase in the workload of the Magistrates Court.

The Society is concerned that the proposed reforms will obviously have major impacts on the Magistrates Court, Legal Aid Queensland and the Police prosecution systems yet there has been no indication that additional funding will accompany the commencement of the legislation.

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<sup>21</sup> Moynihan Report, Page 139

<sup>22</sup> Moynihan Report, Page 154

<sup>23</sup> Moynihan Report, Page 144

<sup>24</sup> Moynihan Report, Page 145

### *Magistrates Courts*

The Magistrates Courts already have a significant workload, particularly in the major centres. The introduction of this legislation will see a substantial increase in the workload of Magistrates, both in terms of the number of matters heard and the complexity of matters that will now be capable of disposition in the summary jurisdiction. While the Society acknowledges that the expected reduction in committal numbers may act to ease the burden slightly, given the comparatively high number of full hand-up committals that currently occur one would not expect this reduction will in any way off-set the other workload impacts.

Further, we understand that at present, approximately 99% of summary matters are resolved by way of a plea of guilty. Any reduction in this trend will accordingly have a huge impact on the court e.g. a 1% reduction in the plea rate would double the existing trial work of the court and clearly place the system under pressure which it could not sustain without increased resources.

Additionally, we note that as a result of the reforms more matters will be dealt with at a local level in regions, rather than going on indictment to a circuit court in the District Court. The economies and efficiencies achieved through those circuits may not be replicated in the future.

### *Prosecution Services*

The Society recommends that the DPP be given the authority (statutory or otherwise) to take over the prosecution of any matter from the Police Prosecution Corps in regional Queensland where the possibility of summary disposal exists but there has been inadequate disclosure. It is our opinion that this may assist the disposition of matters in that centre's Magistrates Court by officers of the DPP and defence lawyers already at the centre on a superior court circuit.

Ideally, as outlined in the Society's previous submissions to Mr Moynihan, the DPP should be funded with a view to being responsible for the summary disposition of indictable offences statewide. We note the Moynihan Report's limited recommendations in this regard. Nonetheless, it is the Society's opinion that if matters are to be disposed of summarily in a circuit town this could be achieved by the DPP sending a less experienced officer on circuit with an experienced Prosecutor who ultimately is responsible for supervising the summary disposition of indictable offences in the local Magistrates Court. We do however note that this would necessitate the involvement of the local profession and, where necessary, funding for counsel in legally aided matters. It would also require the cooperation of the Magistrates Court.

### *Legal Aid*

It is vital that the proposed jurisdictional reforms in no way diminish the capacity for accused persons to access justice.

Currently legal assistance in summary matters is provided through the duty lawyer scheme (open to all but limited in the assistance that can be provided) and through grants of aid for summary pleas and trials. These grants are already subject to extensive "merit" testing given the demand for assistance and Legal Aid Queensland's limited resources. The grants themselves are for amounts that both the Bar and the Society have long regarded as manifestly inadequate to cover anything approaching fair or proper remuneration for the work involved in these cases. Rarely are grants of aid for counsel made in Magistrates Courts matters.<sup>25</sup>

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<sup>25</sup> The standard grants clauses are as follows:

We note that in the superior courts, at present such legal aid merit testing does not apply for trials or sentence, and ordinarily will include a grant of aid for counsel.

The Moynihan Report noted that:<sup>26</sup>

*“The potential expense involved in mounting a defence makes accessibility to Legal Aid funding a vital issue for a summary trial. It is understandable that defendants elect to have their matter dealt with in the District or Supreme Courts if there is no funding available for the matter to be dealt with summarily. While the number of summary matters that received Legal Aid funding to plead guilty has steadily increased over the last few years, there has been little change to the numbers of summary trials that are funded by Legal Aid.”*

Indeed, in addressing the risks associated with jurisdictional change, Mr Moynihan specifically warned that “current legal aid funding arrangements may mean that a defendant will have trouble obtaining funding for summary trial.”<sup>27</sup> To address this issue he further recommended that Legal Aid Queensland be appropriately funded to deal with summary matters.<sup>28</sup> We commend that recommendation to you.

It is imperative that the proposed reforms be accompanied by sufficient legal aid funding, and a fee structure, to enable defendants to access legal representation in a way that will promote the attainment of the goals of increased system efficiency and identification and early resolution of appropriate cases. There must be a significant investment in the provision of legal assistance at an early stage of proceedings in order to deliver the benefits sought by the reforms. Aid for counsel should be available in suitable matters and grants should be structured in such a way that lawyers are properly compensated for preparing matters at an early stage, including pursuing relevant disclosure issues and negotiating with the prosecution in order to resolve cases or to refine issues that will be alive at committal or in the superior courts.

A significant investment in the front end of the criminal justice system and legal aid funding will enable savings of public money across the whole spectrum as it presently stands. The cost of criminal proceedings increases significantly when matters are only resolved by late pleas of guilty, usually on or close to the morning of trial, and often because experienced counsel from both sides has not been previously retained, or alternatively there is late disclosure by the Police/Prosecution of evidence of some sort that changes the whole complexion of the case. Stringent disclosure provisions accompanied by adequate Legal Aid funding in both summary and indictable matters will achieve systemic reform with the result that only definite trials will be listed for hearing in the superior courts.

Additionally, the proposed reforms will impact on the duty lawyer system; there will be increased defendant numbers and more complexity in many cases. It is likely there will be more sitting days in various courts, where the Magistrate will want a duty lawyer service to be provided. At present some remote courts have no service, and in others Legal Aid Queensland, in order to deliver a duty lawyer service, places reliance on co-operative arrangements with the Aboriginal and Torres Strait Islander

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Plea of Guilty in the Magistrates Court – solicitor – maximum of \$591 (aid is only granted for pleas that meet the funding guidelines and where it is unreasonable to expect a duty lawyer to conduct the plea, due to complexity, likelihood of imprisonment, disability of the defendant etc)

Summary trial (including all preparation and first day of trial)– solicitor only - \$1091. Solicitor with counsel - \$1070 for the solicitor, \$890 for counsel; although, as noted, grants for counsel in summary matters are very rare.

<sup>26</sup> Moynihan Report, Page 140

<sup>27</sup> Moynihan Report, Page 153

<sup>28</sup> Moynihan Report, Page 153

Legal Service and other providers. Jurisdictional reform dictates that the Government adequately resources an effective and properly supported duty lawyer scheme in all Magistrates Courts throughout Queensland.

Finally, we note that much of the current casework undertaken by the ATSILS, while funded by the Commonwealth, is in relation to State summary matters. There is potential for significantly increased demand on ATSILS services and a corresponding need for increased resources as a result of the proposed reforms. Failure to meet this need will only entrench Indigenous disadvantage and exacerbate the rising and disturbing rate of Indigenous over-representation in the criminal justice system.

### **Drug Related Matters**

#### *Clause 55 – Insertion of new Section 14 into the Drugs Misuse Act*

Clause 55 proposes to insert a new section 14 into the *Drugs Misuse Act*, effectively permitting charges for an offence against sections 6 (supply dangerous drugs), 8 (produce dangerous drugs), 9 (possess dangerous drugs) or 10B (possession of a prohibited combination of items) where an offender is liable to imprisonment for more than 15 years to be dealt with summarily, at the election of the prosecution, provided the prosecution is not alleging any commercial element.

The Society is supportive of this proposal. As noted in the Moynihan Report, a disproportionate allocation of time and resources in the superior courts are invested in drug cases that are primarily to do with personal use and involve no indicia of commerciality.<sup>29</sup>

We note that the provision requires the DPP to issue guidelines for deciding whether to take proceedings summarily under section 14. The Society kindly requests to be involved in the development of such guidelines and envisages that the Bar Association of Queensland and a number of other interested stakeholders would also like to participate in a public consultation on such a document.

Further, the Society also recommends that the DPP Guidelines come into effect by way of regulation so as to allow Parliament the opportunity to debate the contents of the document. In our opinion it would be inappropriate for such guidelines to be applied without parliamentary oversight.

#### *Clause 56 – Amendment of Section 127 of the Drugs Misuse Act*

The Explanatory Notes indicate that the prohibition against costs orders for proceedings under the *Drugs Misuse Act* is to be amended to allow for limited costs sanctions for failing to comply with a direction as to disclosure.

While the Society supports this amendment, it is also recommends that the Government give consideration to the abolition of section 127 of the *Drugs Misuse Act*.

Section 127 provides that no costs shall be awarded with respect to any proceedings arising out of a charge of having committed an offence defined in the *Drugs Misuse Act*.

In our opinion it is anomalous and unfair to require an accused who is successful in the Magistrates Court on drug charges to obtain a costs order when the Queensland *Justices Act* states that for all other offences where an accused is successful in a summary hearing in the Magistrates Court costs can be awarded.

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<sup>29</sup> Moynihan Report, Page 147

We note that an award of costs in this regard is not handed down as a punishment for police misconduct (even if such a finding is made by a Magistrate) but rather to ensure that a successful accused is not punished by winning their case but losing by virtue of being substantially out of pocket because of the legal costs incurred.

With the increased jurisdiction of the Magistrates Court to hear such drug matters it would seem timely that the total prohibition against any costs orders being made in favour of a defendant as contained in section 127 of the *Drugs Misuse Act* be abolished.

### **Section 552B – Changes of Indictable Offences that Must be Heard and Decided Summarily on Prosecution Election**

The Society does not support the proposal that for those offences where an election as to jurisdiction is retained, the jurisdiction should now be at the election of the prosecution. Such a proposal directly impinges on the right to Trial by Jury.

The Moynihan Report notes that “there is no clear rationale as to why certain offences attract a prosecution election and others a defence election”<sup>30</sup> and goes on to recommend that, in the interests of having “a coherent system with clarity and certainty for all involved”,<sup>31</sup> the election lie with the prosecution.

It is deeply concerning that no further justification beyond “clarity and certainty” is provided in either the Moynihan Report or the Explanatory Notes as to why the prosecution should be given the right of election in respect of certain offences.

The Society is not aware of any inherent or systemic trend of defence lawyers currently electing to take matters on indictment where summary disposition would have been more appropriate, and nor does the Moynihan Report refer to such a problem. The cost of funding private representation, together with the expected sentencing benefits of an early plea, promote the election of appropriate matters being dealt with in the lower courts where possible. Similar observations can be made in regard to legally aided matters.

In any event, it is our opinion that having the prosecution exercise the election will not result in “certainty”. Providing the prosecution with the right of election over the defence will not guarantee that the election will be properly and sensibly exercised, nor will promote better or more efficient outcomes for the criminal justice system. In fact it is the Society’s expectation that there will be significant inconsistency across regions as to how election decisions are made.

For your information, the Society is anecdotally aware of a number of instances where prosecutors have elected to have a matter heard in the District Court that could more appropriately have been dealt with in the Magistrates Court simply to allow an application for criminal compensation to be made.

In this regard the Society seeks clarification about whether there is potential for the prosecution to misuse their election in respect of charges for attempts to commit a relevant offence. For example, an offence under the *Criminal Code* with a maximum penalty of 5 years imprisonment will attract the prosecution right of election under section 552B. However, a mere *attempt* to commit such an offence will only attract half the maximum penalty for the offence, being 2.5 years imprisonment. In such cases, the proposed

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<sup>30</sup> Moynihan Report, Page 142

<sup>31</sup> Moynihan Report, Page 143

provisions would appear to give the prosecution a right of election despite the fact the matter should rightfully fall under section 552A and be dealt with summarily.

Finally, the Society wishes to note that it is particularly concerning that, given the current Legal Aid funding guidelines for indictable and summary matters, the prosecution election will carry not only the decision as to jurisdiction, but may also have consequences as to whether or not an accused person can access legal representation, and particularly counsel, to defend a charge.

### **Recommendation**

In our view, the most appropriate method of encouraging the election of matters in the lower courts is to provide sentencing incentives. Stringent disclosure and sentencing discounts for early guilty pleas will ensure the early resolution of matters without the need to impinge upon the rights of an accused to a fair trial.

However, if the Government is to proceed with the proposed section 552B the Society recommends that guidelines be produced as to how the election decision should be made in regard to specific charges. In our opinion, particular guidelines relating to specific offences, as opposed to guidelines of a general nature that merely give directions such as to proceed on indictment where the interests of justice require, will result in the election being exercised more consistently across regions.

### **Section 552D – When the Magistrates Court Must Abstain from Jurisdiction**

The current section 552D provides that a Magistrates Court must abstain from dealing with a matter summarily if satisfied, at any stage, and after hearing any submissions by the prosecution and defence, that because of the nature or seriousness of the offence or any other relevant consideration, the defendant, if convicted, may not be adequately punished on summary conviction.

The Moynihan Report recommends that the Magistrate's discretion provided by section 552D continue to apply<sup>32</sup> and that defendants charged with matters that may be dealt with summarily retain the ability to have a matter taken before a jury if, on an application to a Magistrate, the Magistrate is satisfied by the defendant that there are exceptional circumstances that justify the matter being committed to the District or Supreme Court.<sup>33</sup> We note that the Report does not attempt to examine what may constitute exceptional circumstances.

In any event, the Draft Bill inserts the following provision into the existing section 552D:

*“A Magistrates Court must also abstain from dealing summarily with a charge under Section 552A or 552B if satisfied, on an application made by the defence that, because of exceptional circumstances applying in relation to the charge, the charge should not be heard and decided summarily”.*

The Draft Bill also provides the following as an example of “exceptional circumstances”:

*“Exceptional circumstances could include that factual circumstances will cause the proceedings for the charge to be especially complex, or will involve the giving of a significant amount of expert technical evidence”.*

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<sup>32</sup> Moynihan Report, Page 139

<sup>33</sup> Moynihan Report, Page 142

In principle, it is the Society's view that it is inappropriate that the defence is required to establish "exceptional circumstances" before a Magistrate must abstain from dealing summarily with a charge of an indictable offence. Magistrates are trained judicial officers and should be entitled to abstain from dealing summarily with a charge simply because they believe it is 'more appropriate' to be decided in a superior court. Fettering the discretion of Magistrates in this way appears overly restrictive and unnecessary.

Further, the Society questions the nature of the explanation used in the Draft Bill to define exceptional circumstances. The example has the effect of suggesting that a submission to have a matter removed from the Magistrates Court to Trial by Jury will be need to argue that an untrained juror is more capable than a trained Magistrate of understanding and dealing with an "especially complex charge" or "a significant amount of expert technical evidence". If this is not the intention of the example the Society suggests that the term "exceptional circumstances" be reconsidered and/or the example amended.

In any event, we have considered whether the "exceptional circumstances" requirement in section 552D can be explained by the use of more or other examples. In our view, the test is high. Authorities dealing with the expression in the context, for example, of bail and appeals make this clear. Our concern about the test as prescribed is that it does not allow for cases that, objectively, are appropriate for trial by judge and jury to be dealt with in that manner. Cases where there is an argument that the interests of justice require the matter to go to the higher court may be generally, but possibly not always, exceptional circumstances cases. A case that involves an important point of law is not necessarily an exceptional circumstance case. A case involving, say, a politician or member of the judiciary, whether merely because of that fact or because of that fact and the nature of the charge, cannot readily be described as an exceptional circumstance case. Otherwise the identity of the defendant and the defendant's profile in the community would, on that argument, be the significant determinant of whether that person gets tried by a judge and jury. This is an undesirable result from the standpoint of public confidence in the justice system. A case of 'general importance' would not always be and most likely would only infrequently be an exceptional circumstance case without other supporting factors.

The example given in the draft does not cover circumstances of 'interests of justice', 'general importance', 'public interest', 'important question of law' or 'complexity of the trial having regard to the issues, the nature of the evidence, the facilities available to conduct the trial and other factors'. We say that these matters should, at the least, find their way into the examples to explain what matters constitute exceptional circumstances in this context; more appropriately (for reasons of clarity) they should be substituted for the proposed test as the factors that govern the exercise of the discretion.

The present example in the draft leaves open the possibility of a two tiered justice system. In a regional area, the Magistrates Court might not have the facilities to accommodate a case that could be heard in Brisbane. The mere fact that it is located in a regional area could result in the discretion being exercised in that case whereas the discretion would not be exercised in Brisbane. It is also a concern that the example invites decisions based on perceptions of adequacy of resourcing rather than the inherent features of the case.

It is worth drawing attention to but one type of case where, on the tests we have suggested, there would be good reason to have the matter heard by judge and jury but which would almost certainly fail the exceptional circumstances test. In fact, there is a danger if that test is successfully used in this type of case, there may be strident public and political criticism of the judiciary for creating imbalance in the justice system based on race. These are the cases where native title arguments have been used to defend prosecutions. Many of these deal with fauna prosecutions [for example, *Walden v Hensler* (1987) 163 CLR 561 (hunting turkeys in breach of fauna legislation); *Yanner v Eaton* (1999) 201 CLR 351 (crocodiles and fauna legislation); *Stevenson v Yasso* [2006] QCA 40 (fishing and fisheries legislation)]. They assist the argument we make.

The facts from one case from the Northern Territory do very much highlight the problems we identify. Director of Public Prosecutions Reference No. 1 of 1999 [2000] NTCA 310 concerned an aboriginal elder who assaulted a photographer and damaged a camera and film because the photographer had photographed clan land and children of the clan. This was done, according to the defence of the case, in the course of enforcing Aboriginal law. In appropriate circumstances this type of case should be dealt with by a judge and jury. The difficulties we see are that the facts do not readily satisfy the exceptional circumstances test and, further, the way that some may depict such decision in the public domain may cause unfair and unnecessary criticism of the judicial officer. These problems could be avoided by framing the test in a way that anticipates there will be a variety of circumstances where it is appropriate to consider a trial by judge and jury.

### *Section 552G*

In the Society's view section 552G also fails to serve as adequate mechanisms to assist an accused in obtaining a jury trial.

The Moynihan Report and the Explanatory Notes refer to an amendment to section 552G which currently provides that where a decision as to jurisdiction based on the value of property is to be made, so far as a matter being heard in the Magistrates Court or being sent to the District Court, the value of the property or the value of damage to the property is to be decided by the Magistrates Court.

It is noted that the amendment to section 552G acts to provide that "it is for the Magistrates Court to decide a matter for the purposes of determining jurisdiction ... and that this decision may be on the basis of submissions made by the parties, given there may be occasions where the relevant circumstances or criteria for determining summary jurisdiction for an indictable offence may not be obvious on the face of the charge itself".

In our opinion, this is a mechanical amendment that does not in any way assist in enhancing an accused person's right to argue for Trial by Jury.

### *Section 552J*

The Moynihan Report also argues that section 552J, which deals with Appeals against a decision to decide charges summarily, represents some sort of protection for an accused person who may be denied the right to a Jury Trial in a given case.

It is the experience of the Society's Criminal Law Section members that Section 552J is rarely used and, in a practical sense does therefore not act as a suitable mechanism by which an accused can argue for a jury trial. It is rarely in a defendant's interests to argue on appeal that a Magistrate erred in hearing a matter as the accused's offence warranted a greater penalty. Further, if such an appeal was heard, the Appellate Court would be faced with the unattractive prospect of remitting the case for a committal hearing, effectively requiring the witnesses to give evidence twice more.

## **Recommendation**

It is the Society's opinion that Magistrates should be in a position to properly supervise cases. To do so, it is our view that section 552D should be extended so as not to limit the role of a Magistrate in determining what matters should be dealt with in the superior courts. Under section 552D, where the seriousness of

the matter, the interests of justice or other circumstances warrant such a course, Magistrates should have the power to send a matter to a superior court despite an election being made by either the prosecution or defence.

## **Disclosure**

The Society is deeply concerned that the disclosure regime as outlined in the Draft Bill does not address the problems or meet the expanded test of disclosure demanded of the prosecution that was recommended throughout the Moynihan Report. The Society is also of the opinion that the proposed disclosure regime represents a fundamental shift in policy that is not only inconsistent with the recommendations in the Moynihan Report but with the overall objective of the legislation to promote the earlier determination of issues in dispute and the early resolution of matters.

It would be an incredible shame to go through the process of reforming the disclosure regime without achieving the procedural and resource efficiencies envisaged in the Moynihan Report.

## **The Moynihan Recommendations**

The Moynihan Report makes the following overarching comments of importance concerning disclosure:

- Proper and timely disclosure is the lynchpin of our criminal justice system. It provides the accused with knowledge of the case the prosecution proposes to make against them and so is the foundation of a fair trial.<sup>34</sup>
- Proper and timely disclosure provides the basis for a Magistrates determination of whether to commit a matter for Trial.<sup>35</sup>
- Proper and timely disclosure serves to balance the inequality of power and resources between the Executive Government and an accused.<sup>36</sup>
- A criminal case is not an equal contest. The Prosecution has the power and the resources of the State behind it pitted against an individual who does not. Disclosure obligations are not, and should not, be reciprocal.<sup>37</sup>

The Moynihan Report also makes the following criticisms of the subjective element in the current test for disclosure used by the prosecution:<sup>38</sup>

*All these provisions (dealing with disclosure)... introduce a subjective element in the prosecution's decision making. These decisions are made in the context of the prosecution case and they provide a basis for discounting the defence case. The various tests such as "what would tend to help the case of the accused" or would be "reasonably considered as adverse" or would be "reliable evidence to cause a jury to reasonably doubt the guilt of the accused" throughout the legislation do not provide clear guidance as to all that must be disclosed.<sup>39</sup>*

Further, the Report goes on to note that it is police culture which hinders the disclosure regime from working properly:<sup>40</sup>

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<sup>34</sup> Moynihan Report, Page 85

<sup>35</sup> Moynihan Report, Page 85

<sup>36</sup> Moynihan Report, Page 86

<sup>37</sup> Moynihan Report, Page 90

<sup>38</sup> Moynihan Report, Page 92

<sup>39</sup> Moynihan Report, Page 92

<sup>40</sup> Moynihan Report, Page 93

*“...there is a pervasive police culture that ‘it’s not our job to help the defence’ and ‘the defence is not under any reciprocal obligation so why should we have to disclose’. That there is such a culture cannot be lightly dismissed giving the frequency with which the perception was raised...”*

Example:

A member of the Society’s Criminal Law Section was recently engaged in a part heard committal in a Brisbane suburban court where the first hearing date was in December 2009.

The prosecution, in response to a defence disclosure request, stated in Court that the Police did not have to comply with the disclosure provisions and that if the defence wanted the information sought (the details of the number of current criminal charges the complainant was facing) the defence should seek that information by way of a *Freedom of Information Act* request.

In this regard, **Appendix 2** also details a number of examples, provided by the Society’s members, illustrating various police failures to comply with disclosure obligations and consequently the important nature of the right to cross examine witnesses at committal. It is our belief that these examples were a powerful influence on the disclosure recommendations made in the Moynihan Report.

Tellingly, the Moynihan Report goes on to state that it is time to ‘give teeth’ to the disclosure provisions of the legislation.<sup>41</sup>

We note that the Society was pleased to be offered the opportunity to provide Mr Moynihan with a submission regarding the disclosure proposals at an early stage of the Review process. It is however somewhat disappointing that despite an invitation by Mr Moynihan to QPS to participate in consultation regarding the draft proposals, the QPS failed to take the opportunity to provide preliminary comments:<sup>42</sup>

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

It is unfortunate that Mr Moynihan did not have the benefit of the QPS’s views, particularly in regard to the proposals for sworn certification of disclosure, when his report was finalised and delivered to the State Government in December 2008.

Furthermore, the Society is somewhat frustrated that despite numerous requests to be provided with a copy of the Moynihan Report between December 2008 and July 2009 so as to be in a position to offer additional considered comments, the Society did not receive the Report until its public release in July 2009 while other entities, which we are advised included the QPS, received the Report and were consulted with prior to that date. A fact that we note is particularly disappointing against the background of the QPS failing to respond to a specific invitation by Mr Moynihan to provide its comments regarding the certification proposal.

<sup>41</sup> Moynihan Report, Page 93

<sup>42</sup> Moynihan Report, Page 94

In the spirit of open government the Society takes this opportunity to kindly request that the submissions made by the QPS regarding the Moynihan Report be made publicly available.

### The Government's Response

The Queensland Government's response to the Moynihan Report was issued in July 2009. While the response agreed that improvements need to be made to the disclosure regime, the following comments were also noted:

*"The Queensland Police Service is committed to reviewing its internal training, processes and policies with a view to making changes to address the issues identified in the review and in view of disclosure.*

*The Government does not support recommendation 15 (Arresting Officer certification)... and recommendation 22 (certification of compliance for each stage of disclosure) in relation to compliance with disclosure requirements.*

*The proposal for certification... is considered unnecessary. The decision to institute proceedings by an Arresting Officer takes effect as of the laying of a charge. This of itself represents the express written belief by the officer that there is sufficient evidence to support the charge.*

*Certification also adds an unnecessary layer of bureaucracy and has significant cost implications"<sup>43</sup>.*

Recommendation 15 of the Moynihan Report proposes that before a brief to prosecute is filed in the Magistrates Court the arresting officer must be satisfied there is sufficient evidence to support the charges *and* that the statutory disclosure provisions have been complied with. The arresting officer must swear a certificate that he or she is satisfied that those two requirements have been complied with and lodge the certificate with the brief of evidence in the Magistrates Court.<sup>44</sup>

Recommendation 22 of the Moynihan Report recommends that a certification of compliance be provided for each stage of the disclosure process so as to ensure that the disclosure obligation requirements continue to be met as a matter progresses.<sup>45</sup>

The Society does not support the Government's rejection of recommendations 15 and 22 and is deeply concerned that such proposals were not adopted because "certification adds an unnecessary layer of bureaucracy and has significant cost implications" and, in any event, "the institution of proceedings by an arresting officer represents the written belief by the officer that there is evidence to support the charge".

In the Society's opinion this is an extraordinarily misguided response to one of the core recommendations of the disclosure regime recommended by Mr Moynihan.

Firstly, the Society queries how requiring an arresting officer to take the small additional step of swearing a certification to the effect that his/her disclosure obligations have been complied with will add an unnecessary additional layer of bureaucracy which will have *significant* cost implications.<sup>46</sup> The *Bail Act*

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<sup>43</sup> Queensland Government Response to the Moynihan Review, July 2009, Page 6

<sup>44</sup> Moynihan Report, Page 100

<sup>45</sup> Moynihan Report, Page 100

<sup>46</sup> Queensland Government response to Moynihan Report, July 2009, Page 6

currently requires officers to swear an Objection to Bail Affidavit under oath. Recommendation 15 effectively proposes the same sworn process applying to an arresting officer in relation to disclosure compliance.

Secondly, the Society points out that the fact that an officer makes an arrest or institutes proceedings is not of itself a declaration by the officer that the institution of proceedings equals a sufficiency of evidence to “support the charge” (if this phrase is taken to mean a sufficiency of evidence to gain a conviction).

It is well known that the standard of belief that an arresting officer requires to lay a charge is considerably less than the standard needed to obtain a committal for trial and, further, falls considerably short of the standard the prosecution need to obtain a conviction, namely proof beyond reasonable doubt.

For the Government’s response to suggest that the laying of a charge somehow equates to the Moynihan proposal of ongoing sworn certification is, in our opinion, patently flawed.

It is the Society’s position that the criticisms made by Mr Moynihan regarding a pervasive police culture against complying with disclosure obligations should not be lightly dismissed. In saying this, we do not seek to denigrate the vast number of dedicated and responsible police officers who provide an invaluable service to the people of this State. The simple reality however is that a significant number of investigating police are reluctant to disclose all relevant matters, particularly matters that will assist an accused person in his/her defence.

It is also pertinent to point out that while the Society is unaware of a police officer ever being internally disciplined by the QPS for failure to comply with disclosure obligation or of any prosecutions being taken against an officer under the *Criminal Code*, the Moynihan Report notes that current police conduct regarding disclosure may well constitute a breach of section 204 of the *Criminal Code* (Disobedience to Statute Law).

Against this background, the Society queries the Government’s motivation for dismissing this core recommendation on the notion that the QPS will simply “review its internal training procedures to improve disclosure”.

Rejecting sworn certification by officers will only allow evidence to be kept from the defence, be it wilfully or negligently, and unless that evidence fortuitously comes to light, the fact that such evidence exists and has not been disclosed by the prosecution will continue to result in serious miscarriages of justice. A clear example of the potential for injustice can be seen in the recent case of *Mallard*, in which the High Court of Australia noted that failure by the prosecution to disclose highly relevant evidence to the defence about the nature of the murder weapon resulted in Mr Mallard being wrongfully imprisoned for a number of years on a conviction of murder that was later set aside.<sup>47</sup> We provide also further recent examples at

### **Appendix 3.**

#### **Recommendation**

In our opinion the Government’s selective implementation of the Moynihan recommendations represents a significant degradation of the improved disclosure regime; a regime which the Moynihan Report emphasises is vital a part of streamlining the committals process. It would seem patently unfair to institute a committal’s regime restricting the right of the defence to cross examine an arresting officer as to the extent of his/her compliance with disclosure obligations, while at the same time removing the significant

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<sup>47</sup> *Mallard* [2005] HCA 68

safeguard recommended for the defence in an arresting officer being required to make sworn certification as to compliance with disclosure both at the time of delivery of the brief and at other relevant stages in the process.

If the Government proceeds with its decision to selectively implement recommendations, as an alternative to certification, the Society recommends that provision be made for the defence to request an arresting officer produce an affidavit as to compliance with the disclosure obligations and, further, that upon request the defence have a right to cross examine that arresting officer upon the contents of the affidavit. In our opinion, such a requirement will offer some measure of protection to the defence, while at the same time increasing the number of hand up committals and reducing the length of committal hearings.

## Disclosure and the Criminal Practice Rules

### **Clause 14 – Non Compliance with a Particular Direction**

Clause 14 of the Draft Bill introduces a new section 590AAA, where there is currently a section 590AA-AW.

The proposed section 590AAA provides that if a party fails to comply with a disclosure direction given under the new section 590AA(2)(ba), the court may require the directed party to file an Affidavit or give evidence in court explaining the failure to comply. If the court is not satisfied that the Affidavit or evidence satisfactorily explains and justifies the non compliance, the court may adjourn proceedings to allow enough time, if necessary, for the party in breach to obey the requirement and to allow for the disclosed evidence to be considered. The court may also make an order that the directed party pay incidental costs where the adjournment has resulted from unjustified, unreasonable or deliberate non compliance and the court is satisfied that it is proper that a costs order be made and that the costs applied for are just and reasonable.<sup>48</sup>

In this regard it should be noted that the Moynihan Report, under the heading '*Failure to comply with disclosure requirements*', notes as follows:

- Failure to comply with the requirements of the law for disclosure can give rise to grave injustice. For example, the case of *Mallard [2005 High Court]* outlined earlier. We note that there is also a plethora of other cases in the law reports which are supportive of this proposition.<sup>49</sup>
- There has been a substantial body of information, submissions, consultation and roundtable discussions throughout the Review that found concern that disclosure obligations are not being met... there have been, for example, accounts of experienced high ranking detectives directing a lower rank and inexperienced police prosecutor as to what disclosure to make rather than the prosecutor making an independent assessment.<sup>50</sup>
- It is recommend that if a Magistrate does not consider that a prosecution Affidavit satisfactorily explains and justifies the failure to make proper disclosure, the QPS should be liable to pay an amount to the defendant reflecting the cost the defence incurred as a consequence of the failure.<sup>51</sup>

Clause 14 effectively extends this costs liability to the defence as well as the prosecution.

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<sup>48</sup> Explanatory Notes to the Consultation Draft Bill, Page 12

<sup>49</sup> Moynihan Report, Page 95

<sup>50</sup> Moynihan Report, Page 96

<sup>51</sup> Moynihan Report, Page 101

Currently, the only circumstances under the *Criminal Code* and the associated *Criminal Practice Rules* that permit costs to be ordered against an accused or an accused's lawyer are found in Chapter 8 of the *Criminal Practice Rules* in relation to Subpoenas.

Rule 34 headed '*Applying for Costs*' provides that if a Subpoena is set aside or narrowed, the person who was served with the Subpoena may apply for an Order that all or part of that person's costs incurred in applying to have the Subpoena set aside be paid by the party who served the Subpoena or if the court finds the conduct of the party's lawyer in serving the Subpoena was oppressive, vexatious or an abuse of process, the party's lawyer.

In this regard, the Society wishes to note that it is concerning that the Explanatory Notes do not make any reference to the fact that clause 14 introduces a costs consequence to the defence if they do not comply with a directions to provide details to the prosecution of alibi evidence, expert evidence or representation evidence of someone who is unavailable.

### **Clause 15 – Disclosure Obligation**

The Moynihan Report makes the following observations at to the current test applied to the prosecution's disclosure obligations:

- There are examples of a more coherent, consistent and objective approach to the disclosure test than that reflected in the current Queensland legislation. In *McLikenny v R* 1991 Cr App Rep 287 at 312 Lloyd CJ spoke in terms of 'making available all materials which may prove helpful to the Defence'.<sup>52</sup>
- The *Criminal Disclosure Act 2008 (NZ)* provides for disclosure in terms of relevance and defines relevant as... in relation to information or an exhibit, means information or an exhibit, as the case may be, that tends to support or rebut, or has a material bearing on, the case against the defendant.<sup>53</sup>

Clause 15 amends section 590AB in order to clarify the prosecution's ongoing disclosure obligation in order to ensure its consistency with recommendation 12 of the Moynihan Report.

Recommendation 12 provides that the statutory provisions for disclosure should be redrawn so as to make them simpler, more coherent and consistent. In particular, but not exhaustively:<sup>54</sup>

- There must be disclosure of the evidence relied on by the prosecution; and
- There must also be disclosure of all information or material known to, or in the possession of the prosecution, bearing on the case which is capable of rebutting the prosecution case or advancing the defence case (or a similar provision meeting the concerns expressed in this chapter).

The actual amendment to section 590AB reads:

*"(that the prosecution is to disclose) all information, including knowledge, or material in the possession of the prosecution, capable of rebutting the prosecution case or advancing the defence case"*.

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<sup>52</sup> Moynihan Report, Page 97

<sup>53</sup> Moynihan Report, Page 98

<sup>54</sup> Moynihan Report, Page 99

The words “capable of rebutting the prosecution case or advancing the defence case” are effectively copied from recommendation 12 of the Moynihan Report.

The Society is concerned that the phraseology adopted effectively narrows the disclosure obligation of the prosecution rather than widens it, as was the apparent intention of Mr Moynihan.

In explanation we draw your attention to the annotations at Volume 1 of Carters Criminal Law of Queensland at 4468 to 4469 where, in *Rollason* [2008] QCA 065, the Court ruled that section 590AB(2) provides for mandatory disclosure of any material that “would tend to help the case for the accused person”. Accordingly, clause 15 effectively replaces the phrase “would tend to help the case for the accused person” in the current section 590AB, with the phrase “all information...capable of rebutting the prosecution case or advancing the defence case.”

In this regard, the Society notes the concern expressed by the Court of Appeal in *Rollason*:<sup>55</sup>

*“We think that section 590AB(2) speaks broadly of “things in the possession of the prosecution...that would tend to help the case for the accused person”, rather than more narrowly and technically “of things that would tend, either to disprove the prosecution case or to establish a defence.”*

The Society shares the Court of Appeal’s concern and is worried that the new phraseology in section 590AB(2)(b) is particularly similar to what the Court of Appeal described in *Rollason* as the rather more “narrow and technically phrased concept” to “disprove the prosecution case or to establish a defence”.

We note that the case of *Rollason* was not referred to in the Moynihan Report.

### **Clause 17 – Definitions**

The Explanatory Notes suggest that Clause 17 is designed to amend the definitions used in Chapter 62, Division 3, effectively extending the prosecution disclosure obligations to Summary Trials. This intention is also outlined in a document published by the Attorney-General’s Department and provided to the Society on 26 December 2009 entitled ‘*Reforms in response to the Report*’.

The Society is of the opinion that, in their current form, the definitions do not achieve their purpose.

Under the existing section 590AD the term “*prescribed Summary Trial*” is said to mean a Summary Trial of an offence prescribed under a regulation for this definition.<sup>56</sup>

It is the Society’s understanding that there has been a variety of Magistrates rulings stating that the disclosure regime does not apply to Summary Trials generally as a regulation has not been so prescribed.

On its face, the new definition of prescribed Summary Trial proposed in clause 17 appears to relate to a charge for an indictable offence that must be heard summarily and a charge for an offence prescribed under a regulation.

<sup>55</sup> Volume 1 Carters, Page 4468 to 4469

<sup>56</sup> Volume 1 Carters, Page 4466

It is the Society's opinion that this definition is problematic in that if a specific, purely summary offence is not "prescribed under a regulation" it appears that it will not fall within the definition of a prescribed Summary Trial and the disclosure provisions will therefore not apply.

In the interests of clarity, the Society recommends an amendment be made to the *Criminal Code*, the *Summary Offences Act* and all other legislation under which Summary Trials are conducted, detailing that the disclosure provisions relate to *all* Summary Trials held in the Magistrates Court, not just indictable offences heard summarily.

### **Clause 18 – Compulsory Disclosure**

The Explanatory Notes state that the amendment of section 590AH is designed to make the section clearer and to ensure consistency with the general disclosure obligation outlined in section 590AH(2). Clause 18 replaces the existing section 590AH(2).

Clause 18(3) provides that the new section 590AH(2) does not require the prosecution to disclose anything if disclosure would not fall within the disclosure obligation as described in the proposed section 590AB(2) i.e. if the "thing" is not capable of rebutting the prosecuting case or advancing the defence case the prosecution is not required to disclose it.

In the Society's opinion the proposed amendment restricts the scope of the prosecution disclosure required and runs contrary to the intention of the reforms and the efficiencies they seek to achieve. The amendment has the potential to result in material being withheld by the Police or prosecution on the basis that, in their view, it will not rebut the prosecution case or advance the defence case. Such actions will only serve to promote applications for disclosure directions.

#### Example:

A member of the Society's Criminal Law Section is aware of a recent matter where it was established at committal that an Arresting Officer had failed to disclose that forensic testing of the crime scene had found the DNA of someone other than the accused.

The Arresting Officer attempted to justify the failure to meet his disclosure obligations on the basis that this information did not have to be disclosed, in his view, as it did not assist his case (i.e. the prosecution case alleging the accused was the offender).

### **Clause 20 – Disclosure that Must be made on Request**

The effect of clause 20 is to completely replace section 590AJ(2).

The Moynihan Report, under the heading '*Test Disparities*', refers to difficulties caused by the disparate and potentially subjective nature of the tests imposed by the legislation and particularly refers to the existing section 590AJ:

*Subsection (2)(c) is drafted in terms 'may reasonably be considered to be adverse to the reliability or credibility of a prosecution witness' while subsection (2)(d) states 'may tend to raise an issue about the competence of a proposed witness'<sup>57</sup>.*

After considering this and other tests the prosecution is required to apply in relation to disclosure the Moynihan Report makes the following observations:<sup>58</sup>

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

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

While the Moynihan Report notes that the current legislation does not provide clarity as what must be disclosed,<sup>59</sup> it nonetheless fails to recommend factors to be inserted into the legislation in order to provide clearer guidance.

Ultimately, the effect of amendments proposed in clause 20 is to restrict the amount of material that must be disclosed by the prosecution. In which case, even though the Moynihan Report was critical of the example of the Investigating Officer who did not disclose key information because he thought no-one would believe it,<sup>60</sup> the amended section 590AJ may actually perpetuate this sort of prosecution behaviour.

#### *Section 590AJ(2)(c)*

Section 590AJ(2)(c) currently reads:

*A copy and notice of anything in the possession of the prosecution that may reasonably be considered to be adverse to the reliability or credibility of a proposed witness for the prosecution.*

The proposed section 590AJ(2)(c) contracts the test to be applied by deleting the phrase "that may reasonably considered". This amendment effectively allows the prosecution to argue that they are only required to disclose material in their possession that *is* adverse to the reliability and credibility of a proposed witness. It would also appear that no obligation exists upon the prosecution to provide the

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<sup>57</sup> Moynihan Report, Page 92

<sup>58</sup> Moynihan Report, Page 92

<sup>59</sup> Moynihan Report, Page 92

<sup>60</sup> Moynihan Report, Page 42

defence with an explanation as to why certain material is not considered adverse to a proposed witness and is accordingly non-disclosable.

It is unfortunate that the Explanatory Notes do not draw attention to this amendment.

In any event, the Society recommends that the phrase currently used in section 590AJ(2)(c), “may reasonably be considered to be adverse to the reliability or credibility of the proposed witness”, remain the test to be applied.

#### *Section 590AJ(2)(d)*

Under the existing section 590AJ(2)(d) it is noted that the prosecution must, on request, give the accused:

*Notice of anything in the possession of the prosecution that may tend to raise an issue about the competence of a proposed witness for the prosecution to give evidence in the proceeding.*

The amending section 590AJ(2)(d) restricts this test in favour of the prosecution to read:

*Notice of anything in the possession of the prosecution that raises an issue about the competence of a proposed witness for the prosecution to give evidence in the proceeding.*

Once again we note that there appears to be no justification arising from the Moynihan Report for the removal of the phrase “may *tend to raise an issue*” about the competence of a proposed witness in sub-paragraph (d).

#### *Section 590AJ(2)(e)*

The Society also queries why the phraseology of the proposed section 590AJ(2)(e) has been changed from the current reading, being “a copy of any statement of any person relevant to the proceeding and in the possession of the prosecution, but on which the prosecution does not intend to rely on”, to “a copy of any statement of a person and in possession of the prosecution that is relevant to the proceeding, but on which the prosecution does not intend to rely”.

The Society would appreciate clarification in this regard.

#### *Section 590AJ(2A)*

Similarly, the Society queries the impetus for the amendment made in the proposed section 590AJ(2A). Sub paragraph (2A) provides that sub-section (2) does not require the prosecution to disclose anything if disclosure would not fall within the disclosure obligation as described in section 590AB(2).

The Society would once again appreciate advice as to the justification for this restriction.

#### *Section 590AJ(2B)*

Section 590AJ(2B) provides that a document requested under sub section (2)(c), (d) or (e) does not include a copy of a statement mentioned in section 590AH(2)(d)(i).

Section 590AH(2)(d)(i) provides, in amended form, that the prosecution must give the accused a copy of each statement provided by a witness for the prosecution or if there is no statement, the name of each witness.

As above, the Society seeks clarification as to the justification for this amendment.

### **Clause 22 – Ongoing Obligation to Disclose**

While the Explanatory Notes suggest that the replacement of the phrase “exculpatory thing” with the phrase “exculpatory evidence” in section 590AL(2) and (3) is merely designed to ensure consistency with other terms used in Chapter Division 3, the Society is concerned that the amendment narrows the meaning of the term.

In the view of experienced criminal law practitioners, the amended definition has the potential to result in arguments being made by the Police or Prosecutors that certain things were not disclosed as they were not considered “evidence”, as in their view the things were inadmissible, irrelevant etc. To avoid confusion the Society suggests the phrase be further defined.

### **Clause 27 – Disclosure Obligation Directions**

The Explanatory Notes highlights that Division 4A of the Draft Bill contains the proposed new sections 590D, 590E, 590F and 590G. It is also outlines that Division 4A is to make specific provision for the issue of directions as to compliance with the disclosure obligations in Chapter 62 Division 3 (Disclosure by the Prosecution) and Chapter 62 Division 4 (Disclosure by an Accused Person).

The Explanatory Notes also provide that the new chapter division will not affect any other powers of the Court or a party in relation to a failure to comply with a disclosure obligation. Further it is not intended to affect any power of the Chief Justice or Chief Judge to issue general practice directions as to disclosure.

Section 590F outlines the types of directions that may be made about compliance with a disclosure obligation. This includes, for example, whether or not specific material or information is subject to a disclosure obligation.<sup>61</sup>

Relevantly section 590F(1)(d) provides that a disclosure obligation direction may permit the Court to *examine the prosecution or arresting officer*.

The word “examine” does not appear to be defined but would seem to envisage allowing the Court to require a Prosecutor to enter the witness box and be questioned. The Society would appreciate clarification as to whether this is the intention of the section.

If indeed this is the intention, the Society suggests that a right for the defence to cross examine the Prosecutor or Arresting Officer in this regard should be included within the provision.

### **Clause 29 – Development of Administrative Arrangements**

The Explanatory Notes observe that clause 29 is intended to encourage and give statutory recognition to any collaboration that may be undertaken between criminal justice agencies, the Courts and stakeholders to develop arrangements for compatible business and operating processes and procedures to facilitate the efficient and timely resolution of criminal proceedings.

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<sup>61</sup> Explanatory Notes to the Consultation Draft Bill, Page 14

The definition of a “relevant agency” includes the President of the Queensland Law Society and the President of the Bar Association of Queensland.

We note that while the section gives statutory recognition to any collaboration between stakeholders in the criminal justice system, it does not appear to do anything other than recognise the desirability of such collaboration.

In any event, the Society gives its full commitment to cooperative participation in any arrangements that might be implemented and notes that it is already attending and extensively contributing to planning meetings with the Chief Magistrate regarding the administrative implementation of the Moynihan reforms.

### **Clause 33 – Subpoenas**

Clause 33 of the Draft Bill clarifies that rule 29 of the *Criminal Practice Rules* will now not permit an accused to require, by Subpoena, a Prosecutor to attend a Court to produce a document or thing that must otherwise be disclosed under the Prosecution’s disclosure obligations under the *Criminal Code*.<sup>62</sup>

This was not a recommendation made in the Moynihan Report and is a wholly unwelcome and, in the Society’s opinion, fundamentally misguided change.

It is deeply concerning that the abolition of the right of an accused to require the police to provide information by subpoena was not raised at all in the Moynihan Report, the Government’s Response or in the Explanatory Notes to the Draft Bill.

Under the current subpoena process, particularly in committal proceedings heard in the Magistrates Court, if a subpoena is issued to a Principal Investigating Police Officer, the officer can be required to answer questions under oath as to the extent of compliance in respect of the subpoena which has been issued.

If, as the case seems to be, the role of the subpoena is to be significantly reduced, if not abolished, there appears to be no mechanism by which questioning under oath to ensure full compliance with subpoenaed material can now occur.

However, in this regard the Society notes that it would appreciate clarification as to whether the term “prosecutor” is intended to include the Commission of the QPS.

In any event, having regard to the observations made in the Moynihan Report about the current police culture issues surrounding non compliance with the existing *Criminal Code* disclosure provisions, the fact that a Principal Investigating Officer cannot be cross-examined under the new disclosure obligation direction scheme is a matter of major concern.

In the absence of being satisfied that clause 33 will not restrict an accused person’s right to access the full range of information which might otherwise be open to subpoena, the Society strongly advocates that clause 33 be removed from the Draft Bill.

Further, the Society seeks clarification as to whether it is the intention of the provision is to also restrict the ability of the defence to subpoena materials to bail hearings, whether in the Magistrates Court or the Supreme Court, committal hearings and summary trials. At first sight the proposed sub-section only

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<sup>62</sup> Explanatory Notes to the Consultation Draft Bill, Page 15

appears to apply to the District and Supreme Courts, however the accompanying Note seems to indicate the provision may have wider applicability.

### **Clause 35 – Disclosure Obligation Directions**

Clause 35 introduces the following new rules, rule 43A (Purpose and scope of Chapter 9A), rule 43B (Definitions for Chapter 9A), rule 43C (Procedure applying before filing of Application for Disclosure Obligation Direction), rule 43D (Filing of Application for Disclosure Obligation Direction) and rule 43E (Disposal of Application for Disclosure Obligation Direction).

#### *Rule 43C*

The Explanatory Notes outline that the new rule 43C sets out the procedure applying before a party can file an Application for a Disclosure Obligation Direction. This procedure is aimed at facilitating the early resolution of issues between parties and the marring of issues requiring determination without the need for intervention by the Court.<sup>63</sup>

Effectively, rule 43C provides that the defence must advise the prosecution what it should have done in relation to disclosure and prosecution must then respond within a particular time period.

The Society notes that such a procedure is close to unworkable given the proposed restrictions on the right to cross examine witnesses at committal, the only mechanism whereby the defence is able to establish what witnesses, documents and evidence must be obtained from the prosecution and examined. While the defence will obviously be aware of certain documents they require the prosecution to disclose, in many cases they will not be aware of what they don't know and accordingly will not in a position to advise the prosecution of what documents they require.

#### *Rules 43D*

Rule 43D provides that an Applicant may file an Application for a Disclosure Obligation Direction if either the defence receives an unsatisfactory response from the prosecution or a response is not received within the dictated timeframe.

Rule 43D also provides that in filing an Application for a Disclosure Obligation Direction the defence must file copies of all correspondence between the defence and prosecution. Relevantly rule 43B(3) provides that unless the Court otherwise directs, the only material before the Court in relation to an Application for a Disclosure Obligation Direction must be the Application and the appropriate correspondence.

Rule 43D(3) therefore appears to envisage that unless the Court otherwise directs, an Outline of Argument is not permitted to be part of the Applicant's material in an Application for a Disclosure Obligation Direction.

In the Society's opinion, such a restriction appears to be unnecessary and in many respects counter-productive. Producing an Outline of Argument can effectively distil and otherwise pull together relevant issues that have been ventilated in correspondence between the defence and prosecution before the filing of an Application for a Disclosure Obligation Direction.

#### *Rule 43E*

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<sup>63</sup> Explanatory Notes to the Consultation Draft Bill, Page 15

The Explanatory Notes outline that the new rule 43E allows the Court to dispose of an Application for a Disclosure Obligation Direction without oral submissions, unless a party has indicated that it wishes to have a Hearing *and* the Court decides that this is appropriate.<sup>64</sup>

Removing the right of either party to orally argue their case in such an application is a radical departure from the existing practice in relation to subpoenas.

Presently, if a subpoenaed party considers that a subpoena is oppressive, too wide or seeks irrelevant material to be produced a subpoenaed party has a right to argue those issues before a Court. Similarly, if a person issuing a subpoena is concerned that all relevant subpoenaed material has not been provided that party has a right to outline their assertions in oral submissions to the Court.

The Society objects to the restriction of the right to be heard in oral submissions. Both the Applicant and the Respondent should retain an absolute right to be heard and rule 43E should accordingly be amended to represent this right.

### **Clause 40 and 41 – Amendment of Director of Public Prosecutions Act 1984**

Clause 41 amends section 24C of the *Director of Public Prosecutions Act* so as to ensure that the obligation of police officers to the Director are consistent with the prosecution's disclosure obligations to an accused person under the *Criminal Code*.<sup>65</sup>

The Society submits that the new section 24C further dilutes the duty of investigating police officers to fully disclose relevant matters to the DPP.

The existing section 24C(2) provides that police officers investigating alleged offences have a duty to disclose to the Director all relevant information, documents or other things obtained during the investigation that *might tend to help* the case for the prosecution or the case for the accused person.

Clause 41 removes the words "might tend to help the case ... for the accused person" and replaces them with an obligation to disclose all relevant information or documents "that the Director is or may be required to disclose to the accused person to comply with the Director's disclosure obligations to the accused person under the Criminal Code, chapter 62, chapter division 3".

The Society notes that the language used in the amendment is particularly cumbersome and suggests that it is unrealistic to expect an investigating officer to interpret the meaning of the words. Given the current pervasive police culture of non compliance with the disclosure regime,<sup>66</sup> one would think that a specific reference as to what is required to be disclosed would be more beneficial than a generic reference to legislation.

Accordingly, the Society recommends that the current wording of section 24C(2) be retained, namely that police officers have a duty to disclose to the Director all relevant information which might tend to help the case for the prosecution or the case for the accused person.

### **Clause 65 – Prosecution Disclosure**

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<sup>64</sup> Explanatory Notes to the Consultation Draft Bill, Page 16

<sup>65</sup> Explanatory Notes, Page 16

<sup>66</sup> Moynihan Report, Page 93

As outlined in the Explanatory Notes, the prosecution disclosure provisions set out in the *Criminal Code*, Chapter 62, Division 3 only apply to a relevant proceeding as defined in section 590AD.

Within Section 590AD the definition of a prescribed summary trial (for the purpose of prosecution disclosure) means a summary trial of an offence prescribed under a regulation.

As outlined earlier in our submission, it is the Society's position that the disclosure laws should apply to all summary trials, particularly having regard to the fact that there have been no such prescriptions made under the definition.

#### **Clause 67 – Production of Documents before Justices**

Clause 67 of the Draft Bill clarifies the proposition that section 83 of the *Justices Act* does not permit a prosecutor or complainant who is a police officer to be summonsed to produce a document or thing that must otherwise be disclosed under the prosecution's disclosure obligations under chapter division 3 of the *Criminal Code*.

The Society is fundamentally opposed to this amendment for the reasons outlined above in relation to the effective abolition of subpoenas in a variety of circumstances.

#### **Clause 74 – Tendered Statements in Lieu of Oral Testimony**

The proposed section 110A(9A) *requires* statements tendered in lieu of oral testimony in committal proceedings to be admitted as evidence, rather than *permitting* the statement to be admitted, as is currently the case.

The Society points out that such a requirement is likely to be problem where a witness statement contains significant hearsay or other inadmissible material, as is very commonly the case. Such material should not be before a magistrate, particularly where the defence wishes to argue the insufficiency of evidence, or for other reasons wishes to prevent inadmissible or prejudicial material coming before a Magistrate. That objectionable material, if admitted at committal, then flows through to the superior court as part of the depositions, and becomes available to the relevant judge, causing similar issues to arise in that jurisdiction. The Society is concerned that section 110A no longer contains a mechanism to take such circumstances into consideration.

Further, the Society is of the opinion that the "substantial reasons" test outlined in section 110A(9D) further unduly restricts the right of the defence to cross examine witnesses at committal.

The Society is aware that the "substantial reasons" test adopted from the New South Wales legislation has lead to a situation in that State where cross examination of witnesses at committal is now an extremely rare occurrence; the Society sincerely hopes that the Queensland committals regime will not mirror the New South Wales experience. In this regard the Society proposes that if the government is determined to impose conditions upon cross-examination at committal, a less restrictive threshold test of "sufficient reasons" be included in section 110A(9D) in replacement of the "substantial reasons" element of the test.

## **CIVIL JURISDICTION REFORMS**

### **Costs Scales**

As detailed in a number of the Society's past submissions, the Society's Litigation Rules Section is deeply concerned that inadequate cost scales are resulting in poor cost recovery. The Consultation Draft does little to address these concerns.

The Society does not support the decision to retain the disparate District and Supreme Court cost scales in order "to reflect the hierarchy of the courts". The notion that the work required to be completed by practitioners on matters heard in the District Court requires any less analysis or legal work than matters heard in the Supreme Court is patently flawed. It is the Society's opinion that maintaining an irrational difference in the costs scales simply because historically the scales were set that way is not a sufficient justification for the disparity.

The Society takes this opportunity to once again strongly recommend that clause 113 of the Draft Bill be amended so as to set the cost scales at the following levels:

1. The current Magistrates Court Scales be maintained for matters to \$50,000;
2. For matters between \$50,000 and \$150,000 the current District Court Scale be applied in the Magistrates Court; and
3. For matters in the Supreme and District Court, the Supreme Court Scale be applied in both jurisdictions.

In their current form, the proposed reforms do little more than make litigation cheaper for unsuccessful litigants subject to adverse costs orders. The amount of legal work required to be undertaken in matters will not change as a result of the jurisdictional changes and the legal fees charged by practitioners will not reflect the court scales. Ultimately, the proposed reforms will simply penalise successful litigants by permitting unsuccessful litigants to pay 20% less costs than they would otherwise have paid.

We also note that the proposed cost scale revision will result in substantial anomalies:

- (a) it is inconsistent that the legislation's proscriptive nature will result in matters of the same value being heard in different jurisdictions simply depending on the chronological time at which the litigation was commenced; and
- (b) it is illogical that a matter worth \$500,000 commenced before the jurisdictional change and a similar matter commenced after the jurisdictional change, where the judgements were both handed down in 12 months time, will be assessed using different costs scales.

The Society wishes to stress the importance of ensuring that the public has sufficient warning as to the jurisdictional changes and the consequential treatment of costs. It would be unfortunate if consumers were to suffer financially if they were not given adequate opportunity to start proceedings prior to the commencement date of the proposed legislation or if views or decisions already made in relation to pursuing legislation were distorted due to changes in the cost scales.

We note that if the Society's recommendations as to the reform of the scales are not adopted, we would appreciate your advice as to whether the Government intends to commit to reviewing the cost scales in the civil jurisdiction in a year so as to ensure that they realistically reflect the work undertaken.

### **Central Registry**

As outlined in previous submissions, the Society is concerned that the amendments proposed to rules 33 and 34 of the *Uniform Civil Procedure Rules* in clause 107 of the Draft Bill may negatively affect litigants defending matters filed in the Magistrates Court.

If Magistrates Court matters are permitted to be filed in a central registry outside of the district in which the defendant or respondent lives, regional defendants will be required to incur the increased costs of engaging solicitors in the location of the central registry or regional practitioners will be required to engage town agents to appear on their behalf. It would be unfortunate if the additional cost or inconvenience dissuaded litigants from raising a legitimate defence in debt recovery matters heard in the Magistrates Court.

While clause 107 of the Draft Bill also applies to District Court matters, we note that our concerns are less likely to be problematic in such matters given the larger jurisdiction.

## APPENDIX

### Appendix 1

#### Offences for which a Trial by Jury will no longer be permitted upon amendment of section 552A

The following offences carry imprisonment for not more than three years:

- **SECTION 1(2) - UNLAWFUL DRILLING** – any person who, at any meeting or assembly held in contravention of the directions under a regulation, is trained or skilled in the use of arms or the practice of Military exercises, movements or evolutions, or who is present at any such a meeting or assembly for being so trained, is guilty of a misdemeanour and is liable to imprisonment for two years.
- **SECTION 52 - SEDITION** – any person who conspires with any person to carry into execution a seditious enterprise or advisedly publishes any seditious words or writing is guilty of a misdemeanour and is liable to imprisonment for three years.
- **SECTION 54 - INTERFERENCE WITH GOVERNMENT OR MINISTERS** – any person who does any act with the intention to interfere with the free exercise of the duties of the Governor's Office or does any act with the intention to interfere with the free exercise by a member of the Executive Council of the duties or authority of the Member's Office as a member of the Executive Council or as a Minister of State is guilty of a misdemeanour and liable to imprisonment for three years.
- **SECTION 55 - INTERFERENCE WITH THE LEGISLATURE** – any person who, by force or fraud, intentionally interferes or attempts to interfere with the free exercise by the Legislative Assembly of its authority, or with the free exercise by any Member of the Legislative Assembly of the Member's duties or authority of such Member, or as a Member of a Committee of the Legislative Assembly is guilty of a misdemeanour and is liable to imprisonment for three years.
- **SECTION 56A - DISTURBANCE IN HOUSE PARLIAMENT NOT SITTING** – any person creating or joining in any disturbance in Parliament House or within the precincts there of during anytime other than an actual sitting of Parliament House or at the office or residents of the Governor or of any Member of the Legislative Assembly or of the Executive Council shall be guilty of an offence and liable to imprisonment for two years.
- **SECTION 56B - GOING ARMED TO PARLIAMENT HOUSE** – any person who without lawful excuse for being armed and is found in Parliament House or in any of the grounds thereof or in any building in or upon such grounds is guilty of an offence and is liable on Summary Conviction to a term of imprisonment not exceeding two years where armed is defined, among other things, as possessing any dangerous or offensive weapon or instrument.
- **SECTION 61 - RIOT** – If 12 or more persons who are present together (assemble persons) use or threaten to use unlawful violence to a person or property for a common purpose and the conduct of them taken together would cause a person in the vicinity to reasonably fear for the persons safety each of the assembled persons commits the crime of taking part in a riot and if the Defendant does not cause grievous bodily harm or is not armed is liable to imprisonment for three years where it is immaterial whether there is or is likely to be a person in the vicinity who holds the fear mentioned.
- **SECTION 69 - GOING ARMED SO AS TO CAUSE FEAR** – any person who goes armed in public without lawful occasion in such a manner as to cause fear to any person who is guilty of a misdemeanour and is liable to imprisonment for two years where the word armed has been held to mean possessing an object which is capable of causing terror.
- **SECTION 70 - FORCIBLE ENTRY** – any person who, in a manner likely to cause, or cause reasonable fear of, unlawful violence to a person or to property, enters on land which is the actual

and peaceable possession of another commits a misdemeanour and is liable for imprisonment for two years.

- **SECTION 71 – FORCIBLE DETAINER** - Any person who, being in actual possession of land without colour of right, holds possession of it, in a manner likely to cause, or cause reasonable fear of, unlawful violence to a person or to property, against a person entitled by law to the possession of the land commits a misdemeanour and is liable for 2 years imprisonment.
- **SECTION 72 - AFFRAY** – any person who takes part in a fight in a public place or takes part in a fight of such a nature as to alarm the public in any other place to which the public have access commits a misdemeanour is liable for one year imprisonment.
- **SECTION 74 - PRIZE FIGHT** – any person who fights in a prize fight, or subscribes to or promotes a prize fight, is guilty of a misdemeanour is liable to imprisonment for one year.
- **SECTION 75 – THREATENING VIOLENCE** - Any person who with intent to intimidate or annoy any person, by words or conduct threatens to enter or damage a dwelling or other premises or with intent to alarm any person, discharges loaded firearms or does any other act that is likely to cause any person in the vicinity to fear bodily harm to any person or damage to property commits a crime and is liable for 2 years imprisonment.
- **SECTION 78 - INTERFERING WITH CAPITAL LIBERTY** – any person who by violence, or by threats or by intimidation of any kind, hinders or interferes with the free exercise of any political right by another person is guilty of a misdemeanour and is liable to imprisonment for two years and if the offender is a public officer and commits the offence in an abuse of the offender’s authority as such officer, the offender is liable to imprisonment for three years.
- **SECTION 85 - DISCLOSURE OF OFFICIAL SECRETS** – a person who is or has been employed as a public officer who unlawfully publishes or communicates any information that comes or came to his or her knowledge or any document that comes or came in to his or her possession, by virtue of the person’s office and it is or was his or her duty to keep secret, commits a misdemeanour and is liable to two years imprisonment.
- **SECTION 88 - EXTORTION BY PUBLIC OFFICERS** – any person who, being employed in the Public Service, takes or accepts from any person, for the performance of the person’s duty as such officer, any reward beyond the person’s proper pay and emoluments, or any promise of such reward is guilty of a misdemeanour, and is liable to imprisonment for three years.
- **SECTION 89 - PUBLIC OFFICERS INTERESTED IN CONTRACTS** – any person who, being employed in the Public Service, knowingly acquires or holds, directly or indirectly, otherwise than as a member of registered joint stock company consisting of more than 20 persons, a private interest in any contract or agreement which is made of the account of the Public Service with respect to any matter concerning the Department of the service in which the person is employed, is guilty of a misdemeanour and is liable to imprisonment for three years.
- **SECTION 90 - OFFICERS CHARGED WITH ADMINISTRATION OF PROPERTY OF A SPECIAL CHARACTER OR WITH SPECIAL DUTIES** – any person who being employed in the Public Service, and being charged by virtue of the person’s employment with any judicial or administrative duties respecting property of a special character, or respecting the carrying on of any manufacture, trade or business, of a special character, and having acquired or holding, directly or indirectly, a private interest in any such property, manufacture, trade or business, discharges any such duties with respect to the property, manufacture, trade, or business, in which the person has such interest, or with respect to the conduct of any person in relation thereto, is guilty of a misdemeanour and is liable to imprisonment to one year.
- **SECTION 91 - FALSE CLAIMS BY OFFICIALS** – any person who being employed in the Public Service in such a capacity as to require the person or to enable the person to furnish returns or statements touching any remuneration payable or claimed to be payable to himself, herself or to any other person or touching any other matter required by law to be certified for the purpose of any payment of money or delivery of goods to be made to any person, makes a return or statement

- **SECTION 92 - ABUSE OF OFFICE** – any person who, being employed in the Public Service, does or directs to be done, in abuse of the authority of the person’s office, any arbitrary act prejudicial to the rights of another is guilty of a misdemeanour and is liable to imprisonment for two years. If the act is done or directed to be done for the purpose of gain, the person is liable to imprisonment for three years.
- **SECTION 93 - CORRUPTION OF SURVEYOR AND VALUATOR** – any person who, being duly appointed under any statute to be a Valuator for determining the compensation to be paid to any person for land compulsorily taken from the person under the authority of a statute, or for injury done to any land under the authority of the statute acts as a Valuator while the person has, to the person’s knowledge, an interest in the land in question or executes unfaithfully, dishonestly or with partiality, the duty of making a valuation of the land or the extent of the injury, is guilty of a misdemeanour and is liable to imprisonment for three years.
- **SECTION 94 - FALSE CERTIFICATES BY PUBLIC OFFICERS** - any person who, being authorised or required by law to give any certificate touching any matter by virtue where of the rights of any person may be prejudicially affected, gives a certificate which is, to the person’s knowledge, false in any material particular is guilty of a misdemeanour and is liable to imprisonment for three years.
- **SECTION 95 - ADMINISTRATING EXTRAJUDICIAL OATHS** - any person who administers an oath, or takes a solemn declaration or affirmation or affidavit, touching any matter with respect to which the person has not by law any authority to do so, is guilty of a misdemeanour and is liable to imprisonment for one year.
- **SECTION 96 - FALSE ASSUMPTION OF AUTHORITY** – any person who not being a Justice assumes to act as a Justice or without authority assumes to act as a person having authority by law to administer an oath or take a solemn declaration or affirmation or affidavit or represents himself to be a person authorised by Law to sign a document testifying to the contents of any register or record kept by lawful authority is guilty of a misdemeanour and is liable to imprisonment for three years.
- **SECTION 97 - IMPERSONATING PUBLIC OFFICERS** – any person who impersonates a Public Officer on an occasion when the Officer is required or authorised to do an act or attend in a place by virtue of the Officer’s office or falsely represents himself or herself to be a Public Officer, and assumes to do an act or to attend in a place to do an act by virtue of being that Officer commits a misdemeanour and is liable for three years imprisonment.
- **SECTION 98E - INFLUENCE AND VOTING** – a person who improperly influences the vote of a person at an election or referendum is guilty of a crime and is liable for two years imprisonment.
- **SECTION 98F - PROVIDING MONEY FOR ILLEGAL PAYMENTS** - any person who provides money for a payment that is contrary to law relating to elections or replacing any money that has been spent in making a payment that is contrary to law relating to elections is guilty of a crime and is liable to two years imprisonment.
- **SECTION 98G - VOTING IF NOT ENTITLED** – any person who, at an election or referendum, votes the name of another person, including a dead or fictitious person or votes more than once or casts a vote that a person knows he is not entitled to cast or procures someone to vote who, to the procuring person’s knowledge, is not entitled to vote is guilty of a crime and is liable to three years imprisonment.
- **SECTION 99 - VOTING IF NOT ENTITLED** – the person who votes at an election in the name of another person, including a dead or fictitious person commits a misdemeanour and is liable to two years imprisonment.
- **SECTION 100 - HINDERING OR INTERFERING WITH VOTING CONDUCT** - a person who, in order to hinder or interfere with another person’s voting conduct, acts fraudulently or uses or

threatens to use force against any person or causes or threatens to cause a detriment to any person commits a misdemeanour is liable to one year imprisonment.

- **SECTION 101 - BRIBERY** - a person who asks for or receives or offers or agrees to ask for or receive a benefit whether for the person or another person on the understanding that the person's election conduct will be influenced or affected commits a misdemeanour and is liable to one year imprisonment.
- **SECTION 102 - PUBLISHING FALSE INFORMATION ABOUT A CANDIDATE** - a person who, before or during an election, in order to affect the election result, knowingly publishes false information about a candidate's personal character or conduct or whether a candidate has withdrawn from the election commits a misdemeanour and is liable to one year imprisonment.
- **SECTION 103 - PROVIDING MONEY FOR ILLEGAL PAYMENTS** - a person who knowingly provides money for voting or allied purposes contrary to offences outlined in the *Criminal Code* commits an offence - 10 penalty units.
- **SECTION 104 - ELECTION NOTICES TO CONTAIN PARTICULAR MATTERS** - a person who, before an election, prints or publishes, or permits another person to print or publish an election notice for the election that does not state the name and address for the person who authorised the notice commits an offence - 3 penalty units.
- **SECTION 108 - INTERFERING AT ELECTIONS** - a person who wilfully interrupts, or obstructs or disturbs a proceeding at an election commits a misdemeanour and is liable to three years imprisonment.
- **SECTION 109 - ELECTORS ATTEMPTING TO VIOLATE SECRECY OF BALLOT** - any person who, having received a ballot paper from the presiding officer at an election wilfully makes on the ballot paper any mark or writing not expressly authorised by law or wilfully fails to fold up the ballot paper in such a manner as to conceal how the person has voted or wilfully fails to deposit the ballot paper in the ballot box in the presence of the presiding officer commits a misdemeanour and is liable to three years imprisonment.
- **SECTION 111 - PRESIDING OFFICER HELPING AN ELECTOR WITH A DISABILITY** - if a presiding officer at an election agrees to help an elector who is blind or otherwise unable to vote without help, by marking the elector's ballot paper for the elector and the presiding officer wilfully fails to mark the ballot paper in the way requested by the elector commits a misdemeanour and is liable to three years imprisonment.
- **SECTION 113 - INTERFERING WITH SECRECY AT ELECTIONS** - a person who unfolds a ballot paper that has been marked and folded by an elector at the election commits a misdemeanour. An officer who ascertains or discovers how an elector has voted commits a misdemeanour and an officer who discloses any information about how an elector has voted at the election commits a misdemeanour and is liable to two years imprisonment.
- **SECTION 114 - BREAKING THE SEAL OF A PARCEL AT ELECTIONS** - a person who wilfully opens or breaks the seal of a parcel sealed under the *Authorising Act* for an election commits a misdemeanour and is liable to two years imprisonment.
- **SECTION 118 - BARGAINING FOR OFFICES IN PUBLIC SERVICE** - any person who corruptly asks for, receives or obtains or agrees or attempts to receive or obtain any property or benefit of any kind for himself on account of anything already done or to be afterwards done with regard to the appointment of any person to any office or employment in the Public Service is guilty of a misdemeanour is liable for three years imprisonment.
- **SECTION 128 - DECEIVING WITNESSES** - any person who practises any fraud or deceit, or knowingly makes or exhibits any false statement, representation, token, or writing, to any person called or to be called as a witness in any judicial proceeding, with intent to affect the testimony of such person as a witness, is guilty of a misdemeanour and is liable to imprisonment for three years.
- **SECTION 130 - PREVENTING WITNESSES FROM ATTENDING** - any person who wilfully prevents or attempts to prevent any person who has been duly summoned to attend as a witness

before any Court or Tribunal from attending as a witness or from producing anything in evidence pursuant to the subpoena or summons commits a misdemeanour and is liable to three years imprisonment.

- **SECTION 133 - COMPOUNDING AN INDICTABLE OFFENCE** - any person who asks for any benefit of any kind for himself, herself or any other person upon any understanding that the person will compound or conceal an Indictable offence, or will abstain from, discontinue, or delay a prosecution for an Indictable offence, or withhold any evidence thereof is guilty of an Indictable offence and is liable to three years imprisonment.
- **SECTION 136 - JUSTICES EXERCISING JURISDICTION IN A MATTER OF PERSONAL INTEREST** - a person who, being a Justice, wilfully and perversely exercises jurisdiction in a matter in which the Justice has a personal interest commits a misdemeanour and is liable to three years imprisonment.
- **SECTION 137 - DELAY TO TAKE PERSON ARRESTED BEFORE MAGISTRATE** - any person who, having arrested another upon a charge of an offence, wilfully and without lawful excuse delays to take the person before a Justice to be dealt with according to law is guilty of a misdemeanour and is liable to imprisonment for two years.
- **SECTION 139 - INSERTING ADVERTISEMENT WITHOUT AUTHORITY OF COURT** - any person who, without authority, or knowing the advertisement to be false in any material particular, inserts or causes to be inserted in the Gazette or in any newspaper an advertisement purporting to be published under the authority of any Court or Tribunal is guilty of a misdemeanour and is liable to imprisonment for two years.
- **SECTION 144 - HARBOURING ESCAPED PRISONERS** - a person who harbours, maintains or employs another person knowing that the other person has escaped from lawful custody is guilty of a crime and is liable for imprisonment for two years.
- **SECTION 147 - REMOVING PROPERTY UNDER LAWFUL SEIZURE** - any person who, when any property has been attached or taken under the process or authority of any Court of Justice, knowingly, and with intent to hinder or defeat the attachment, or process, receives, removes, retains, conceals, or disposes of, such property is guilty of a misdemeanour and liable to imprisonment for three years.
- **SECTION 148 - OBSTRUCTING OFFICERS OF COURTS OF JUSTICE** - any person who wilfully obstructs or resists any person lawfully charged with the execution of an Order or Warrant of any Court of Justice commits a misdemeanour and is liable for two years imprisonment.
- **SECTION 194 - FALSE DECLARATIONS** - a person who makes a declaration that the person knows is false in the material particular, whether or not the person is permitted or required by law to make the declaration, before a person authorised by law to take or receive declaration, commits a misdemeanour is liable for three years imprisonment.
- **SECTION 199 - RESISTING PUBLIC OFFICERS** - any person who in any manner obstructs or resists any public officer while engaged in the discharge or attempted discharge of the duties of his or her office under any Statute, or obstructs or resists any person while engaged in the discharge or attempted discharge of any duty imposed on the person by any Statute, is guilty of a misdemeanour and is liable to imprisonment for three years.
- **SECTION 200 - REFUSAL BY PUBLIC OFFICER TO PERFORM DUTY** - any person who, being employed in the Public Service, or as an officer of any Court or Tribunal, perversely and without lawful excuse permits or refuses to do any act which it is his or her duty to do by virtue of his or her employment is guilty of a misdemeanour and is liable to imprisonment for two years.
- **SECTION 204 - DISOBEDIENCE TO STATUTE LAW** - any person who without lawful excuse, the proof of which lies on the person, does any act which a person is, by the provisions of any Public Statute in force in Queensland, forbidden to do, or omits to do any act which the person is, by the provisions of any such Statute, required to do, is guilty of a misdemeanour, unless some mode of proceeding against the person for such disobedience is expressly provided by Statute, and is

intended to be exclusive of all other punishments. Such a person is liable for imprisonment for one year.

- **SECTION 205 - DISOBEDIENCE TO LAWFUL ORDER ISSUED BY STATUTORY AUTHORITY** - any person who without lawful excuse, the proof of which lies on the person, disobeys any lawful order issued by any Court of Justice, or by any person authorised by any Public Statute in force in Queensland to make the order, is guilty of a misdemeanour, unless some mode of proceeding against the person for such disobedience is expressly provided by Statute, and is intended to be exclusive of all other punishment is liable to one year imprisonment.
- **SECTION 206 - OFFERING VIOLENCE TO OFFICIATING MINISTERS OF RELIGION** - any person who by threats or force prevents or attempts to prevent any Minister of Religion from lawfully officiating in any place of religious worship or obstructs any Minister of Religion whilst so officiating or assaults any Minister of Religion is guilty of a misdemeanour and liable to imprisonment for two years.
- **SECTION 207 - DISTURBING RELIGIOUS WORSHIP** - any person who wilfully and without lawful justification or excuse, the proof lies on the person, disquiets or disturbs any meeting of persons lawfully assembled for religious worship, or assaults any person officiating at any such meeting or any of the persons there assembled is guilty of an offence and is liable to imprisonment for two months.
- **SECTION 226 - SUPPLYING DRUGS OR INSTRUMENTS TO PROCURE ABORTION** - any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, is guilty of a misdemeanour and is liable to imprisonment for three years
- **SECTION 227 - INDECENT ACTS** - any person who wilfully and without lawful excuse does any indecent act in any place to which the public are permitted to have access or wilfully does an indecent act in any place with intent to insult or offend any person is guilty of a misdemeanour and liable to imprisonment for two years.
- **SECTION 227A - OBSERVATIONS OR RECORDINGS IN BREACH OF PRIVACY** - a person who observes or visually records another person in circumstances where a reasonable adult would expect to be afforded privacy without the person's consent and when the other person is in a private place or is engaging in a private act and the observation or visual recording is made for the purpose of observing or visually recording a private act commits a misdemeanour and is liable for imprisonment for two years *and* the person who observes or visually records another person's genital or anal region in circumstances where a reasonable adult would expect to be afforded privacy in relation to that region without the other person's consent and then the observation or visual recording is made for the purpose of observing or visually recording the other person's genital or anal region is liable for two years imprisonment.
- **SECTION 227B - DISTRIBUTING PROHIBITED VISUAL RECORDINGS** - a person who distributes a prohibited visual recording of another person having reason to believe it to be a prohibited visual recording, without the other person's consent commits a misdemeanour and is liable for two years imprisonment.
- **SECTION 228 - OBSCENE PUBLICATIONS AND EXHIBITIONS** - a person who knowingly, and without lawful justification or excuse distributes or exposes for sale any obscene book or other written matter whether on payment of a charge for admission or not or publicly exhibits any indecent show or performance is guilty of a misdemeanour and is liable for two years imprisonment
- **SECTION 229H - KNOWINGLY PARTICIPATING IN PROVISION OF PROSTITUTION** - a person who knowingly participates, directly or indirectly in the provision of prostitution by another person commits a crime and for a first offence is liable for imprisonment for three years.
- **SECTION 229I - PERSONS FOUND IN PLACES REASONABLY SUSPECTED OF BEING USED FOR PROSTITUTION** - a person who, without reasonable excuse, is found in or leaving after having been in, a place suspected on reasonable grounds of being used for the purpose of

prostitution by two or more prostitutes commits a crime, for a first offence, is liable for imprisonment for three years.

- **SECTION 229K - HAVING AN INTEREST IN PREMISES USED FOR PROSTITUTION** - a person who knowingly allows premises to be used for the purposes of prostitution by two or more prostitutes commits a crime and for a first offence is liable for imprisonment for three years.
- **SECTION 230 - COMMON NUISANCES** - any person who without lawful justification or excuse, the proof of which lies on the person, does any act, or omits to do any act with respect to any property under the person's control, by which act or omission danger is caused to life, safety or health of the public is guilty of a misdemeanour and liable to imprisonment for two years.
- **SECTION 232 - OPERATING A PLACE FOR UNLAWFUL GAMES** - a person who operates a place for the purpose of conducting an unlawful game or playing an unlawful game commits a misdemeanour and is liable for three years imprisonment.
- **SECTION 233 - POSSESSION OF THING USED TO PLAY AN UNLAWFUL GAME** - a person who possesses gaming equipment that has been used, or is intended to be used, for playing an unlawful game commits an offence - 200 penalty units.
- **SECTION 234 - CONDUCTING OR PLAYING UNLAWFUL GAMES** - a person who conducts an unlawful game commits an offence - 200 penalty units.
- **SECTION 236 - MISCONDUCT WITH REGARD TO CORPSES** - any person, who without lawful justification or excuse, the proof of which lies on the person, improperly or indecently interferes with or offers any indignity to any dead human body whether buried or not is guilty of a misdemeanour and is liable to imprisonment for two years.
- **SECTION 238 - CONTAMINATION OF GOODS** - any person who interferes with goods or makes it appear that goods have been contaminated or interfered with, commits a misdemeanour and is liable to three years imprisonment.
- **SECTION 240 - DEALING IN CONTAMINATED GOODS** - a person who knowingly sells for human consumption or has in the person's possession with intent to sell any article that the person knows to be contaminated or otherwise unfit as goods for human consumption is guilty of a misdemeanour and is liable for three years imprisonment.
- **SECTION 324 - FAILURE TO SUPPLY NECESSARIES** - any person who, being charged with a duty of providing for another the necessaries of life, without lawful excuse fails to do so, whereby the life of that other person is or is likely to be endangered or the other person's health is or is likely to be permanently injured, is guilty of a misdemeanour and is liable to imprisonment for three years.
- **SECTION 327 - SETTING MAN TRAPS** - any person who sets a man trap or other engine calculated to destroy human life or to inflict grievous bodily harm is guilty of a misdemeanour and is liable to imprisonment for three years.
- **SECTION 328 - NEGLIGENT ACTS CAUSING HARM** - any person who unlawfully does any act, or omits to do any act which it is the person's duty to do, by which act or omission bodily harm is actually caused to any person, is guilty of a misdemeanour and liable to imprisonment for two years.
- **SECTION 328A - DANGEROUS OPERATION OF A VEHICLE** - a person who operates, or in any way interferes with the operation of, a vehicle dangerously in any place commits a misdemeanour and is liable to three years imprisonment.
- **SECTION 329 - ENDANGERING SAFETY OF PERSONS TRAVELLING BY RAILWAY** - any person who by any unlawful act, or by any omission to do any act which it is the person's duty to do, causes the safety of any person travelling by any railway to be endangered, is guilty of a misdemeanour and liable to imprisonment for two years.
- **SECTION 333 - EVADING LAWS AS TO EQUIPMENT OF SHIPS** - any person who, being a person having actual control over a vessel on board of which any article has been placed with the person's knowledge or consent in order to the obtaining of permission or authority to leave a port,

removes or allows the removal of such article from the vessel after such permission or authority has been obtained is guilty of a misdemeanour and is liable to imprisonment for three years.

- **SECTION 334 - LANDING EXPLOSIVES** - any person who being charged by law with any duty respecting the landing or delivery of any explosive substance or of any acid, or other thing of a dangerous or destructive nature, from any vessel, fails to perform that duty is guilty of a misdemeanour and liable to imprisonment for three years.
- **SECTION 335 - COMMON ASSAULT**- any person who unlawfully assaults another is guilty of a misdemeanour and liable, if no greater punishment is provided, to imprisonment for three years.
- **SECTION 356 - FALSE CERTIFICATES BY OFFICERS CHARGED WITH DUTIES RELATING TO LIBERTY** - any person who being required by law to give any certificate touching any matter by virtue thereof the liberty of any person may be affected, gives a certificate which, in any material particular, is to the person's knowledge false is guilty of a misdemeanour and liable to imprisonment for three years.
- **SECTION 357 - CONCEALMENT OF MATTERS AFFECTING LIBERTY** - any person who being required by law to keep any record touching any matter relating to any person in confinement, refuses or neglects to keep such record, or makes in such record an entry which, in any material particular, is to the person's knowledge false is guilty of a misdemeanour and liable to punishment for three years.
- **SECTION 358 - UNLAWFUL CUSTODY OF PATIENT UNDER *MENTAL HEALTH ACT 2000*** - any person who detains or assumes the custody of an involuntary patient under the *Mental Health Act 2000* contrary to the provisions of the laws relating to such persons is guilty of a misdemeanour and liable to imprisonment for two years.
- **SECTION 361 - UNLAWFUL CELEBRATION OF MARRIAGE** - any person who celebrates, or attempts to celebrate the marriage of a person who is under the age of 18 years, and is not a widower or widow, without the written consent of some person authorised by law to give such consent, or with a written consent which, to the person's knowledge, is not given by a person authorised by law to give it, is liable to imprisonment for three years.
- **SECTION 362 - UNQUALIFIED PERSONS PROCURING REGISTRATION AS PERSONS QUALIFIED TO CELEBRATE MARRIAGES** – A person found guilty of such an offence is liable for imprisonment for two years.
- **SECTION 365 - CRIMINAL DEFAMATION** - any person who, without lawful excuse, publishes matter defamatory of another living person knowing the matter to be false or without having regard to whether the matter is true or false and intending to cause serious harm to the relevant person or any other person or without having regard to whether the serious harm to the relevant person or other person is caused is guilty of a misdemeanour is liable to three years imprisonment.
- **SECTION 399 - FRAUDULENT CONCEALMENT OF PARTICULAR DOCUMENTS** - a person who, with intent to defraud, conceals the whole or part of a register or record kept by lawful authority commits a crime and if the offence is committed in relation to a document recording title to property is liable to three years imprisonment.
- **SECTION 408D - OBTAINING OR DEALING WITH IDENTIFICATION INFORMATION** - a person who obtains or deals with another entity's identification information for the purpose of committing or facilitating the commission of an indictable offence commits a misdemeanour and is liable to three years imprisonment.
- **SECTION 413 - ASSAULT WITH INTENT TO STEAL** - any person who assaults any person with intent to steal anything is guilty of a crime and is liable to punishment for three years.
- **SECTION 414 - DEMANDING PROPERTY WITH MENACE WITH INTENT TO STEAL** - any person who, with intent to steal anything, demands it from any person with threats of any injury or detriment of any kind to be caused to the other person, either by the offender or by any other person, if the demand is not complied with, is guilty of a crime, and is liable to imprisonment for three years.

- **SECTION 425 - POSSESSION OF THINGS USED IN CONNECTION WITH AN UNLAWFUL ENTRY**- any person who is found being armed with any dangerous or offensive weapon or a noxious substance and being so armed with intent to break or enter a dwelling or premises, and to commit an indictable offence therein is guilty of a crime and liable to imprisonment for three years.
- **SECTION 427A - OBTAINING PROPERTY BY PASSING VALUELESS CHEQUES** - any person obtains from any other person any chattel, money etc by passing a cheque that is not paid on presentation for payment is guilty of a misdemeanour and liable to imprisonment for two years.
- **SECTION 431 - FALSE ACCOUNTING BY PUBLIC OFFICER** - any person who, being an officer charged with the receipt, custody or management of any part of the public revenue or property, knowingly furnishes any false statement or return of any money or property received by the person and trusted to the person's care, or of any balance of money or property in the person's possession or under the person's control is guilty of a misdemeanour and liable to imprisonment for two years.
- **SECTION 470A - UNLAWFUL DEPOSITION OF EXPLOSIVE OR NOXIOUS SUBSTANCES** - any person who wilfully and unlawfully throws, leaves down, or otherwise deposits any explosive or noxious substance in any place whatsoever under such circumstances that it may cause injury to any person or damage to the property of any person, is guilty of a misdemeanour and liable to imprisonment for two years.
- **SECTION 477 - OBSTRUCTING RAILWAYS** - any person who, by any unlawful act, or by any intentional omission to do any act which it is the person's duty to do, causes any engine or vehicle in use upon a railway to be obstructed in its passage on the railway, is guilty of a misdemeanour, and is liable to imprisonment for two years.
- **SECTION 488 - FORGING AND UTTERING** - a person who, with intent to defraud forges a document or utters a forged document commits a crime (and in certain circumstances) the maximum imprisonment is three years.
- **SECTION 501 - FALSE STATEMENTS FOR THE PURPOSE OF REGISTERS OF BIRTHS, DEATHS AND MARRIAGES** - any person who knowingly and with intent to procure the same to be inserted in a register of births, deaths, or marriages, makes any false statement touching any matter required by law to be registered in any such register, is guilty of a misdemeanour and liable to imprisonment for three years;
- **SECTION 502 - PROCURING OR CLAIMING UNAUTHORISED STATUS** - any person who by any false representation procures any authority authorised by any Statute to issue certificates testifying that the holders thereof are entitled to any right or privilege, or to enjoy any rank or status, to issue to himself, herself or any other person any such certificate is guilty of a misdemeanour and is liable to imprisonment for three years.
- **SECTION 514 - PERSONATION IN GENERAL** - any person who, with intent to defraud any person, falsely represents himself or herself to be some other person, living or dead, real or fictitious, is guilty of an offence which, unless otherwise stated, is a misdemeanour, and the person is liable to imprisonment for three years.
- **SECTION 533 - MIXING UNCERTIFIED WITH CERTIFIED ARTICLES** - when a mark has been attached to any article, or a certificate has been given with respect to any article, under the authority of any Statute, for the purpose of denoting the quality of the article, or the fact that it has been examined or approved by or under the authority of some public body, any person who mixes with the articles so marked or certified any other article which has been so examined or approved is guilty of a misdemeanour and liable to imprisonment for three years.
- **SECTION 542 - CONSPIRACY TO COMMIT OTHER OFFENCES** - any person who conspired with another to commit an offence which is not a crime, or to do any act in any part of the world which if done in Queensland would be an offence but not a crime, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a misdemeanour and is liable to imprisonment for three years.

- **SECTION 543 - OTHER CONSPIRACIES** - any person who conspires with another to effect any of the following purposes, that is to say to prevent the enforcement of any Statute Law, to cause an injury to the person or reputation of a person, to injure any person in the person's trade or profession is guilty of a misdemeanour and is liable to imprisonment for three years.

## APPENDIX

### Appendix 2

#### **Case examples provided by Queensland Law Society members illustrating various failures by the Police to comply with disclosure obligations and the consequent benefits of the right to cross examine witnesses at committal**

##### **Case 1 – Drug Trafficking Matter**

I have been in [a regional court] for the past few days for a committal proceeding set down for three days. I took considerable effort to ensure that full disclosure was made. This included (in addition to normal procedure) a directions hearing where the Court was advised by the prosecution that all material had been provided. After the directions hearing I requested that the oral advice given in court about disclosure be followed up with written confirmation from Police that I had all the material. On the first day of the committal, during cross-examination of the arresting officer, it became clear that in fact I did not have all the material. Some additional statements had not been disclosed including from some important witnesses. This radically altered the approach that had to be taken to the case.

I accept (not without some reservations) the explanation given that the non-disclosure was the result of error on the part of police prosecutions. Nevertheless, this example is important because, were it not for the committal process, the mistake would have continued to impact a great deal further down the line. I would have been proceeding on the basis that there was less evidence against the client than there in fact was. The final result is a saving to the justice system because a more realistic picture of the Crown case emerged.

One witness did not come up to proof in the committal shortening the period of trafficking. At the end of the committal I ended up negotiating an agreed set of facts for one of the clients and a summary disposition of alternate charges for the other client.

This example highlights a number of matters. There are no formal sanctions that can be made against police in the event of failing to comply with disclosure. This may be an appropriate approach, as here human error played a role. Most importantly, it was the hearing which corrected the mistake. Cross-examination gave me a true picture of the case. This resulted in timely pleas of guilty and savings to the system.

##### **Case 2 – CEM Matter**

I represented a client originally charged with having possession of 14100 images on a computer said to constitute child exploitation material. There were 8 charges that spanned over 7 hard drives taken by Argos. After obtaining the expert report that utilised the iGrade system developed by Argos, I formed concerns about how the analysis had been conducted. The report did not address duplicate files across the seven hard drives, nor did it address whether any of the files could be categorized as “Carved” (meaning either undeleted files, thumbnail images of existing files or files saved by the computer automatically rather than by the defendant) After some cross-examination of the expert, who could not answer my specific questions about these matters, directions were obtained from the Magistrate that the exhibits be re-tested. Although the arresting officer claimed that disclosure obligations had been

complied with, after cross-examination I discovered that there was a tape of when police had first spoken to my client.

When the matter returned to court, police withdrew 4 charges and are now alleging 845 images.

Without the committal process there would have been a potential injustice. Although it was clear to me that my client had some images, I had instructions that there were not as many as alleged. The differences between these numbers will make a significant difference at sentence which will not be a contested sentence.

### **Case 3 – Dangerous Operation of a Motor Vehicle**

The client was driving a prime mover along a road into a bend. Parked over the white boundary line along the bend protruding dangerously on to the road was an unmarked Police car. In front of the Police car was a small van that had been intercepted by the Police.

The client instructed that the bend was such that the unmarked police vehicle was obscured until the last second. This meant that as he took the turn the driver did not have time to stop. The client, with the police vehicle suddenly in front of him, had no choice but to swerve into the oncoming lane to avoid a collision. The client was travelling under the speed limit. A multi-vehicle accident with a roll-over resulted with significant damage to three trucks and their loads and injury to the drivers.

Another driver, [W], travelling in the same direction moments earlier had sounded his horn to get the Police car to move off the road.

There were numerous witnesses to the accident, including the drivers of the various vehicles and passengers.

The Police obtained statements from the occupants of the two oncoming vehicles. However, they did not obtain a statement from W. We were aware, through out investigations prior to committal, that W had contacted the police to provide a statement about the dangerous location of the police vehicle after he became aware of the collision. It emerged from cross-examination that a statement was not obtained from W because of specific instructions given by the superior officer to the investigating officer that W was "not a relevant witness". Further the superior officer admitted in cross-examination that he and the investigating officer had discussed the investigating officer's evidence before the superior gave his evidence.

During preparation, we obtained signed statements from the occupants of the other vehicles (not provided in the brief) and which were provided to the relevant CTP insurer's investigator. These raised the inference that the witnesses were provided with Police statements to sign, but refused to sign them as they were not correct. The witnesses confirmed this in cross-examination.

We also obtained three versions of the police traffic incident report which did not mention the unmarked Police car at all until a third version of the report. Two earlier versions of the report also did not refer to the Police vehicle. The Police gave an unconvincing explanation during the cross-examination to the effect that they had not collected all the relevant information to include the Police car as a relevant vehicle in the two earlier versions. It became clear that it was only due to correspondence from us that the Police vehicle was entered on to the Police report on the third version.

The Police officer in the parked vehicle gave a version about the position of his vehicle during cross-examination which was completely inconsistent with the versions of our client, and of W and the occupants of the other vehicles gotten in cross-examination.

The weight of the evidence at the committal pointed to the Police vehicle being parked over the line and our client coming around the bend and having no choice but to swerve to avoid a collision with the police vehicle.

It was extremely important to have the committal. The client, of limited education, had given a poor record of interview.

Police records obtained during the committal demonstrated that the accident experts were sent back out to the accident scene to re-check their measurements and make further findings after it was clear to the police that the charge would be defended. It emerged in evidence that there was a request by the superior officer that the experts attended the scene again to "negative the defence" - rather than to find out what actually happened.

The Magistrate found that a jury properly instructed could not find our client guilty of the charge.

#### **Case 4 - Acts of indecent dealing with a minor (14 yrs).**

The client had befriended a boy who spent considerable time hanging around at the local shopping complex and streets. The client was new to the country, spoke poor English and was looking to make friends. The client gave the boy a lift on some occasions at the request of the boy to houses where friends of the boy lived. The client also chatted with the boy in the supermarket car park etc. Our client instructed that he first met the boy when he ran out of petrol and knocked on the boy's door of the boy's home to ask for assistance. The boy gave him some petrol in a jerry can. The friendship started from there. The boy alleged that on several occasions our client touched his arm and leg inappropriately, made sexual advances and showed him sex toys and pornographic DVD covers. Our client admitted that when our client was getting a funnel out of his boot to put the petrol from the jerry can into his tank, the boy saw three porn DVD covers and one sex toy in the boot. When the child asked to see them, our client instructs that he refused. The child alleged to the police that our client had "rows and rows" of porn DVDs and numerous sex toys in his car boot. Our client denied ever making any inappropriate comments or making sexual advances towards the boy. The client and the boy argued after the boy made demands on the client for money.

We cross-examined the Police and the boy's mother at committal. It was clear from cross-examining the Police that the boy was well known as a trouble maker in the area and had been involved in theft and violent offences. It became clear that the Police had simply taken the boy at his word on all of the allegations and particularized the charges accordingly. (It emerged from the committal that there were 3 DVDs and 1 sex toy.) It became clear from cross-examining the mother that the boy was a trouble maker, had been involved in drugs, violence and theft - he had even stolen from her. It also emerged that he had made a blackmail attempt with another man but nothing ever came of it. Details regarding counseling with a government agency and disciplinary action by schools were given in evidence by the mother.

As a result of the committal we subpoenaed records from the Government agency and Education Queensland. Large bundles of documents were received which showed a lengthy history of drug taking, debts to drug dealers, violence, property damage, theft and blackmail.

It also emerged that the interpreter used during the record of interview had frequently and seriously incorrectly translated both questions to the client and answers from the client. An alternative interpreter was engaged to transcribe the ROI and this formed the basis of a 590AA application.

After considering both the evidence from the committal and the deficiencies in the ROI, the DPP withdrew the case before the 590AA was heard and before the pre-recording.

### **Case 5 - Dangerous operation causing GBH**

C was a BCC bus driver. He was travelling along North Quay when he ran through the lights at the intersection with Ann St and slammed into a car turning from Ann St on to the freeway. The driver was a grandmother who sustained severe injuries. She survived after emergency surgery.

It was alleged that C was travelling about 60-70kmh along North Quay. This was based on evidence from an expert. The expert was cross-examined and conceded that our client could have been travelling closer to 40-50kmh after his calculations and methodology were tested. Evidence also emerged that it was easy for a person driving in C's elevated position to mistake the next set of lights as applying to the intersection where the collision occurred.

These issues, especially the speed of the vehicle, were extremely important when the guilty plea was entered in the District Court. We were successful in avoiding an actual term of imprisonment. The client received a wholly suspended sentence based on facts which emerged from the committal and without a contested plea.

### **Case 6 – Carnal knowledge of 2 minors (aged 13 and 15)**

The client was a "Goth" aged 19 who met the 2 girls, aged 13 and 15 (friends) at a shopping centre, went to the home of one of the girls and then had intercourse with both.

It was discovered during cross-examination at the committal that:

- (a) The Police informally questioned the 13 year old at her home before taking a section 93A statement.
- (b) The Police interviewed the client before taking s.93A statements from the children, the interview being based on a complaint from the mothers of the girls and without full information from the 2 girls.
- (c) The Police then framed questions and directed the interviews of the children based on the information they had already obtained from our client.
- (d) There was extensive collusion regarding facts between the two children and one of the mothers both prior to and after giving their signed statements to Police. This was only able to be extracted as a result of the cross-examination at the committal.
- (e) The Police amended a witness statement to remove details regarding a "wire" that a witness was wearing when she was speaking to our client and this again only emerged as a result of the committal.

The evidence at the committal demonstrated that the investigation was seriously flawed. The evidence of one of the mothers was also demonstrated at committal to be seriously deficient. The result of the committal was that the client had prospects of defending both charges on the basis of his apprehension of the age of the 2 girls due to the circumstances of the invitation he received, the discussions with the girls and the consensual nature of the activity. The significant problems with the Police witnesses and the police investigation were extremely helpful to mounting a defence.

As a result of the committal, the DPP reviewed the case and offered to resolve the matter on the basis of a plea in relation to the 13 year old only. The DPP also advised they would submit that probation was the appropriate sentence outcome.

The client instructed to accept the plea, thereby avoiding the need for a trial, the embarrassment to the families of the 2 girls and the prolongation of proceedings.

### **Case 7 – Cattle stealing – disclosure issues**

A committee member of the Criminal Law Committee of the QLS has recently been involved in a committal hearing in a Queensland country area which factually demonstrates the necessity for full wide ranging cross examination at committal of the type currently permitted but which is likely to be either not permitted or severely restricted in any reworked committal model.

X was charged with stealing 100 cattle on the basis of recent possession of cattle that had been objectively stolen.

There was no evidence that X knew that the cattle were on his property.

When the police turned up, X put a lot of effort into assisting the police with what had gone on in circumstances where the police notes as to the detail and extent of X's assistance was only skimpily recorded and the extent of that assistance had to be cross examined out of various police witnesses at the committal hearing.

Police did not disclose a significant body of material claiming that they did not see it to be relevant. However, as a result of a series of subpoenas issuing, a body of circumstantial evidence emerged which suggested that the manager of X's neighbouring property (the owners were absentee landlords) may have been responsible for placing the relevant stolen cattle on X's as the absentee landlords had come to the property at short notice to do a muster prior to selling the property. Evidence emerged only as a result of cross-examination at committal that the manager of the neighbouring property may have had the stolen cattle on his property and that he then quickly removed them onto a distant part of X's property when the absentee landlord returned to conduct a muster because the manager (the circumstantial evidence according to the defence so showed) did not want to get caught in possession of the stolen cattle when the absentee landlords did their muster.

Further cross-examination at committal indicated that police had conducted a number of very lengthy interviews with the manager which were very relevant to this alternative explanation as to how the stolen cattle were found on X's property. Police sat on this material and had not disclosed it.

Further, statements taken by the investigating officers from civilian witnesses were very skimpy on detail and failed to reveal a number of relevant facts which emerged when those witnesses were cross examined at committal.

By way of example, some cattle experts who had been spoken to by police revealed in cross examination facts which were not in their statements namely that it is known that when cattle are shifted from one place to another, for a period of days after they are moved into a large paddock they tend to congregate or herd up against the boundary fence of the paddock to which they have been removed closest to the area from which they had come.

The relevant police helicopter mustering evidence failed to disclose this fact and it was only through cross examination of relevant witnesses that this fact emerged.

X was committed for trial after a lengthy committal hearing but having regard to the new evidence that was elicited as a result of cross examination the DPP indicated to the stock squad that unless they could gather evidence which neutralised the exculpatory evidence elicited at the committal in favour of X an indictment would not be presented.

Recently the DPP advised that an indictment would not be presented as a result of the evidence elicited by cross examination at the committal which had not been neutralised by police as a result of the post committal investigation.

### **Case 8 - Indecent dealing**

Client was charged with five (5) offences of having unlawfully and indecently dealt with an intellectually impaired person. The impaired persons were dementia patients at a Buderim nursing home. These persons did not make the complaint to police and when one was spoken to by police she made no complaint. The tape of this interview was produced. The charges were based on the observations and opinions of two (2) enrolled nurses. In summary it was alleged by these two nurses that 'the client' who was also an EN would rub the patient's vagina and breasts inappropriately when washing, would kiss the patients on the lips, would shake their nipples and would speak to them in an overtly sexual manner.

Prior to the committal I was provided with approximately seven statements, two of which were from police. The other statements were from employees of the nursing home most of which provided an outline of appropriate policy and procedure in relation to the washing and handling of patients.

Whilst cross-examining the AO I asked him about the absence of a statement. He referred to a folder of documents. I observed him look through a vast amount of material in this folder and asked him whether that material related to this matter. Eventually and reluctantly, he admitted that he had a folder which contained 39 "field statements" of other employees all stating in effect that our client handled the patients in an exemplary manner. There was also further material not disclosed.

The matter was committed for trial however the Crown did not proceed. This was due to the committal having been conducted

### **Case 9 - Sexual assault**

My client was charged with 2 x sexual assaults, 2 complainants. During cross-examination of the first complainant it was revealed that this was all to do with getting compensation. Costs savings were significant as the complainants were Japanese nationals and were flown in from Japan. If the matter proceeded to trial, the State would have once again been required to fund them flying from Japan etc. At the end of the committal it was apparent that we had a client who should not have been charged.

**Case 10 - Stealing, wilful damage.**

The complainant's original statement once cross-examined was different to the oral evidence. The concession was made by the prosecution witness in cross-examination that she had given the property to the client as a gift. This matter was committed to the District Court but no true bill was entered.

**Case 11 - Attempted robbery with violence**

The client went to remedy a situation with the prosecution witness who had sold him a faulty car part. He went to the witness' house and demanded he give him the money back for the car part. He was trying to take him down the road to the ATM etc to get the money back. Cross examination of the complainant was useful in that evidence of the culpable witness' behavior in this matter was confirmed. The client pleaded guilty as result of the committal. The matter was never set for trial and the client was able to enter a plea on the true facts. Client received probation.

In respect to the benefit of an early plea, the prosecution on sentence conceded that, although the matter proceeded to committal hearing, the committal had a purpose. This aspect was noted by Her Honour Judge O'Sullivan who agreed that the 'witness' behavior in this matter was aggravating. These comments would assist the defendant should a criminal compensation application ever be made and this was also noted by Her Honour.

**Case 12 - Indecent dealing**

Client was Vietnamese. The committal was at Caboolture. One of the witness statements contained a paragraph which at face value could have been considered to be an admission. The effect of it was that the client made an apology to the grandfather of the complainant. At committal and on cross examination this was examined, and put in context. At the trial, the prosecution wanted to lead this as an admission but was objected to by the defence. His Honour Judge Nase noted the cross-examination on this issue at committal and found that it was explained at the committal and agreed with the defence that it should not be allowed in. Verdict of NOT GUILTY.

If there was no committal, a pre-trial application would have been required.

**Case 13 - GBH**

As the result of a recent committal I conducted, a charge of AOBH was preferred instead of GBH. This was because of the cross examination of the medical officer whose evidence as a result supported the client's position and in getting the GBH discontinued. There is, of course, a huge difference between the penalty for GBH compared to AOBH.

**Case 14 - Source of witness statement**

At a recent committal I conducted, it emerged under cross-examination that a witness statement was effectively a statement prepared by the AO loosely based on what the witness told the police. The

witness stated under oath (in reference to the statement): "I did not say that". The witness also said: "That's what the police wrote". The matter was committed and an indictment is pending.

### **Case 15 - Failure to comply with Disclosure Requirements - historical sex complaints**

As part of the brief of evidence we were provided with a disorganised bundle of photocopied documents, purportedly comprising the records of a government department with respect to contact with the principal Crown witness. Due to our inability to read parts of the copied material provided, and to identify particulars such as the date or author of relevant documents, we called for the original files. On the first day of the committal hearing it was indicated by the Crown that neither the police nor the Crown had possession of the original material and that the Crown did not intend to rely on the files (despite the files expressly being produced by a Crown witness).

The issue was raised before the presiding Magistrate, and the matter stood down for enquiries to be made as to the location of the original files. At one point it was indicated by the Crown that the material may have been tendered in other proceedings involving the same complainant and another accused, and at another point it was indicated that the material may still be with the government department in Western Australia (and that the government department may object to release of the material). Ultimately, after considerable and heated argument on (and off) the record, the Crown gave an undertaking to the Court to obtain the original files as soon as possible, and failing that to obtain a certified copy of the files.

The original files were (miraculously) produced on the second day of committal hearing. Provision of the original material revealed that we had been provided with only selected pages of the relevant files. The evidence of the arresting officer was as follows:-

1. that she had received the full files from Western Australia, and selected and provided to the Crown only the "relevant" parts of the files;
2. that she had done this of her own volition, without advice to do so from QPS Legal Services;
3. that she had not advised the Crown of having undertaken the process of selectively disclosing the contents of the relevant files;
4. that she believed the selective disclosure of this material was acceptable and common practice.

### **Case 16 - Sexual Offences**

I had a client who was charged with a number of sexual offences against two persons. There was a further witness who was called to give evidence of similar offending by the accused against her on an earlier date (she had not wished to make any complaint). During cross-examination of this witness at committal it became apparent that the alleged offending against her was of such a dissimilar nature that it could not be admitted at trial as similar fact evidence. If there had been no opportunity to cross-examine her prior to the trial then inadmissible evidence would have been placed before the jury and a mistrial may have resulted.

### **Case 17 - Serious assault and prostitution**

I had a client who was charged with Serious Assault and Participating in the Provision of Prostitution by another. Half way through the committal hearing it became apparent that the police case was collapsing in relation to the prostitution charge. The arresting officer then proceeded to produce a document that had been seized from our client and subsequently translated into English. This document was said by the police to support the allegation of carrying on the business of prostitution. The behaviour of the police in this instance was in complete contravention of the disclosure provisions in the Criminal Code. But for the committal hearing this evidence would not have been provided to defence probably until the case collapsed at trial. The defence would then have been ambushed by these documents.

### **Case 18 – Wilful damage**

This case was elected as a summary trial although it could have been conducted as a committal hearing. It does demonstrate the problems with police disclosure.

The client was a 17 year old who had been at a party involving a considerable number of youths most of whom had been drinking. A taxi driver arrived over an hour after the booked time causing the youth and his companions to miss the last public transport from the intended destination of the cab ride. To get home it was going to cost considerably more. The youth argued with the cab driver that he and his friends should be taken to their homes for the same cost as the cab fare to the bus station. An angry exchange ensued. The youth threw the end of a hot dog roll into the cab which hit the cab driver. The police charged him with common assault. The cab then departed. The youth chased the cab. He admitted in a record of interview that he was tapping on the back window of the maxi-taxi to try to get it to stop as he and his friends needed to get home. In the record of interview he said expectedly and to his shock the window shattered. He also said in the record of interview that he had no intention to break the window and didn't expect that the window would break.

Full disclosure was not given before the trial and the level of disclosure was extremely poor. The police witness statements were very sketchy. The police notebook had to be requested prior to the trial.

The statement from the cab driver was short and was to the effect that there was an incident with the youth; the hot dog roll was thrown; that the youth ran behind the cab; the window shattered; the cab momentarily stopped; and the cab driver saw the youth in his rear view mirror directly at the back of the cab. No other witnesses were interviewed. There was a note in the police notebook that the driver found a bottle in the cab after he went to the service station following departing the scene.

The police case was particularised on the basis that the youth had broken the window with his fist and that he had done so deliberately in a fit of anger at the driver.

During the evidence of the investigating police officer, a bottle was produced, said to be the bottle found in the vehicle. The bottle was not notified as an exhibit. The police prosecutor was then asked to confirm particulars of the case and the police prosecutor said that the case was that the client had thrown the bottle through the window. This completely changed the nature of the defence and the case that had to be run. The defence up to that point had been that it was not wilful and the damage was accidental.

Through cross-examination of the only eye witness (the cab driver), it was established that there were numerous youths in the vicinity, that bottles were being thrown by those youths (not the client) and that this activity was taking place in a position behind the cab. Further, it emerged in cross-examination that the witness could not identify that the bottle he had at one stage seen the youth with was the same type of bottle as found in the cab. Further, evidence elicited through cross-examination established that

immediately prior to the client chasing the cab, the client was at the cab driver's window and didn't have the bottle in his hand.

The client was acquitted.

If the matter had been run as a committal and the client had been committed, it is certain that the DPP would not have run it to trial. Without a committal, a costly trial would have been the only option if an election for trial by jury had been made. The experience here was that a summary trial seemed to be encouragement for the police to avoid the disclosure requirements as far as possible.

## APPENDIX

### Appendix 3

The following are recent examples of insufficient Police/prosecution disclosure resulting in serious miscarriages of justice.

#### Crime & Misconduct Commission's "Dangerous Liaisons" Report

Chapter 9 of the Report details the failure of the Police to disclose relevant material in relation to a murder investigation known as Operation Delta Fawn, resulting in the CMC referring a brief of evidence to the DPP.

Ultimately two police officers and another person (Henderson) were each charged with attempting to pervert the course of justice. While the charge against Henderson was dismissed after committal proceedings, both officers have been committed to stand trial. The CMC said the following about the failure of those officers to make proper disclosure of material, in accordance with the prosecutorial disclosure obligations in s 590AB of the Criminal Code:

*"In simple terms, because Henderson was to be used as a witness in the prosecution of the accused, it was important that the accused's legal representatives were provided with a full account of Henderson's circumstances, including evidence as to the basis upon which he had been tasked with (or had volunteered for) engaging with him.*

*Detectives DS and ON had a clear legal obligation to advise the prosecution of the circumstances in which the accused's alleged confession was obtained...*

*If the police officers were to rely upon evidence from Henderson, his background and his motivation to assist law enforcement were clearly issues central to his credibility as a witness. Full disclosure should have been made of the fact that Henderson had previously been used by law enforcement agencies as an informant.*

*This was particularly important in this prosecution, because Henderson's claim that the accused had confessed to him in prison was central to the prosecution case — without the evidence, the prosecution case would be based solely upon the uncorroborated evidence of a co-offender who has provided different accounts of the crime.*

*Instead of complying with their obligations to make full disclosure, there is evidence suggesting that Detectives DS and ON, both experienced police officers, set about disguising the true nature of Henderson's role. In this regard, the evidence points to their failing to make disclosure of Henderson's background in assisting law enforcement, and downplaying and denying the circumstances in which Henderson had been 'tasked' to speak with the accused (at pp.106-107)".*

**R v HUA [2009] QCA 165**

A defendant was convicted of seven acts of sexual activity with a 14 year old girl.

The Prosecution failed to disclose to the defence a letter from the complainant's doctor and victim impact statement which raised an alternate view of events to that put at trial. The Court said at 42 "The loss of this opportunity because of the failure of the prosecution to perform its obligations of disclosure goes to the root of the fairness of the trial."

**R v WAB & SBN [2009] QCA 144**

A matter relating to several sexual offences against a girl.

At a very late stage at trial the prosecution introduced computer evidence against the accused from a computer expert which was not disclosed to the defence, nor mentioned in the prosecutor's opening statements and introduced after the complainant had been cross-examined. On appeal Justice Wilson considered the fact of the non-disclosure so material that a miscarriage of justice had occurred and that convictions should be set aside.