MAGISTRATES COURT OF QUEENSLAND

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Criminal Law Reform – One Year on[1]

Judge Brendan Butler AM SC
Chief Magistrate

A year has passed since the commencement of the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010*. It is now possible to consider what prompted this very significant reform of the Queensland criminal law and to examine whether the reforms as implemented have lived up to those expectations.

In respect of some aspects it is probably too soon to pass judgement. We are only now reaching the end of the period during which both old and new system matters are being dealt with in parallel under different procedures. Nevertheless sufficient time has passed to allow some useful assessments to be made.

Join with me and my colleagues as we examine how the legislation has operated in practice. There will also be an opportunity to respond to your questions. Then you may judge for yourselves.

The background

Let me trace the background. In July 2008 the Attorney-General appointed the Honourable Martin Moynihan AO QC to report on the civil and criminal jurisdictions of the Queensland Courts. Mr Moynihan was asked to report with a view to making more effective use of public resources. As the former Senior Judge Administrator of the Supreme Court, Mr Moynihan brought to the role considerable experience of dealing with the existing system. He approached his task with energy and delivered a 250 page report with 60 recommendations for reform by December 2008.[2]

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[1] The speaker acknowledges the assistance provided to him when preparing this paper by Magistrate Chris Callaghan and also acknowledges having reference when preparing this paper to the useful summary in *Overview of the Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2010,* a paper by Peter Davis SC and Glen Cranny.

[2] *Review of the civil and criminal justice system in Queensland,* Hon. Martin Moynihan AO QC, December 20008.

Of the 11 chapters in the report 10 were dedicated to the criminal law. The report identified as system failures[3]:

- an archaic legislative framework
- deficiencies in data collection
- cultural differences between criminal justice agencies
- flaws in the effectiveness of disclosure by the prosecution
- a need for improvement in the committals process.

In addition to reforms addressing these issues the report recommended jurisdictional change, transparent sentencing discounts and the use of protocols between agencies.

The scene was set for some of the most far reaching change the Queensland criminal justice system had seen for generations.

In July 2009 the Queensland Government announced a staged legislative reform program based on the report recommendations. The first stage of that program was given effect with the introduction of the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill* on 13 April 2010.

It is proposed a second stage of reform will be the introduction of a new Criminal Justice Procedure Bill and development of Uniform Criminal Procedure Rules. A discussion paper was issued in April 2010 but the Bill has not as yet been introduced.

The *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* was asserted to on 13 August 2010. I will hereafter refer to it as the Modernisation Act. District and Supreme Court jurisdictional changes commenced on 1 September 2010 and the Magistrates Court changes commenced on 1 November 2010. The Act provides that the new arrangements apply only to proceedings where an originating step occurs after commencement of the legislation. The relevant originating step is arrest, making of the complaint or service of the notice to appear. It follows that for a long period the court has continued to deal with matters in accordance with the previous legislation, where the originating step in those matters occurred before the date of commencement.

The changes

An extensive reform agenda was incorporated the legislation. The major features were:

- a comprehensive restructuring of the scheme under which indictable offences may be heard summarily resulting in more matters being resolved in the Magistrates Court
- encouragement for the use of agreed protocols between criminal justice agencies and the courts
- reform of the committal process to remove cross-examination at committal as of right and to allow 'registry' committals
- reform of prosecution disclosure provisions to allow the defence to approach the court to seek compliance

Changes in jurisdiction

The most obvious reform was to the criminal jurisdiction of the Queensland courts.

[3] Ibid p.235

The *District Court of Queensland Act 1967* was amended to enlarge the jurisdiction of the District Court to include matters which carry a maximum term of 20 years imprisonment. Without descending into detail, the practical effect is that the common offences over which only the Supreme Court has jurisdiction are homicide and Schedule 1 drug offences.

Turning to the jurisdiction of the Magistrates Court, very significant change has occurred.

A category comprising indictable offences that *must* be dealt with summarily has been created for the first time. Previously indictable offences could be dealt with summarily for some offences upon election by the prosecution and in respect of other offences upon election by the defence. All indictable offences, in the absence of election, had to be committed to a higher court. Many indictable offences now fall in a category where they must be dealt with summarily, subject always to the exercise of a residual discretion held by the magistrate. It follows that the ability of a defendant to elect for committal to a higher court has been significantly limited.

In general, matters which have as their maximum penalty a sentence of imprisonment of three years or less must now be dealt with in the Magistrates Court. Examples of offences falling into this category are Going Armed so as to Cause Fear[4] and Threatening Violence[5]. Examples of other offences where the defence once had an election, but which must now be heard summarily, are Stealing and offences analogous to stealing where either the property value or yield to the defendant is less than $30,000 or the offender pleads guilty. Even some sexual offences may now be dealt with in the Magistrates Court if there is a plea of guilty.

Jurisdiction is extended to deal with certain possession offences under the *Drugs Misuse Act* attracting a maximum penalty of more than 15 years so long as the prosecution does not allege a commercial purpose.

The limitation of 3 years on the maximum penalty that may be imposed by a Magistrate has been retained.

All of these changes have resulted in a substantial increase in the criminal jurisdiction of the Magistrates Court. As observed in the Moynihan Report, most matters are resolved by a plea of guilty. Consequently, the primary outcome of this significant change in jurisdiction has been for many matters previously dealt with on sentence in the District Court to now be resolved by sentence in the Magistrates Court.

This has had a noticeable impact on our listing of matters as lengthy pleas. In Brisbane Central Magistrates Court an additional day a week has been set aside for lengthy pleas and further provision may soon be required. A similar increase is being reported from centres throughout the State. With magistrates sentencing for more serious offences and defendants facing greater consequences, legal representatives are demonstrating enhanced commitment to the presentation of pleas in mitigation before the Magistrates Court. Increasingly representatives for both the prosecution and defence are coming armed with comparable decisions to assist the magistrate.

[4] *Criminal Code* s69
[5] *Criminal Code* s75(1)

Other big picture changes

As with any significant legislative change, the enactment merely lays the foundations. The difficult task is in the implementation of those changes, particularly when so many different parties are affected.

Following consultation the Government did not take forward all of the recommendations in the report but the Act did address a number of major concerns highlighted by Mr Moynihan.
These included:

- the need to reorient criminal justice procedures away from the trial as the likely outcome to facilitate early and fair dispositions;
- the need to encourage early involvement of legal advisors on both sides;
- the use of agreements across agencies based on the model of the Brisbane Committals Project[6].

The new section 706A of the *Criminal Code* implemented the latter proposal by allowing a court head of jurisdiction to develop an arrangement with the various agencies and issue practice directions to give effect to the arrangement.

I convened a Roundtable of all relevant agencies including representatives of the Bar and Law Society, which met on many occasions to negotiate an administrative arrangement.

I am very grateful for the cooperative and productive manner in which the many parties to those meetings, each with their own particular interests, rose above those interests to allow a consensus to be reached about how to implement the new system presented to us in the legislation. In that process we together developed a response capable of giving effect to Mr Moynihan's vision of front ending the system.

Central to the development of that arrangement was the willingness of the Queensland Police Service to agree to early staged disclosure of the prosecution case and to allow police prosecutors to participate in early negotiations with legal advisors, a process referred to as "conferencing".

Mr Moynihan described proper and timely disclosure as "the lynchpin of our criminal justice process".[7] He devoted a chapter to disclosure and envisioned a coercive process to deal with any non-compliance. The Report detailed concern about non-compliance by police officers with the statutory disclosure obligations. To address this, the Modernisation Act created a procedure by which a defendant may apply for a disclosure obligation direction. If it appears the direction has not been complied with the Court may order the person with the obligation to explain or justify the non-compliance. If not satisfied the Court may adjourn the matter to enable compliance and make an award of costs in favour of the applicant.[8]

While this procedure provides some incentive for the prosecution to comply with its disclosure obligations, mandatory disclosure of the brief is only required 14 days before the date set for the commencement of hearing of evidence. Had this legislative requirement become by default the usual time for provision of the brief and the first occasion upon which the defence received meaningful detail as to the prosecution case,

[6] Ibid p.79
[7] Ibid p.85
[8] *Justice Act* ss83A-F

the objective of early disclosure and early informed negotiation would not have been achieved.

The incorporation in the administrative arrangement, with the agreement of the Queensland Police Service, of an expectation of earlier staged disclosure by the prosecution, has circumvented the inadequacy of these legislative provisions for enforcing timely disclosure.

The Police representatives at the Roundtable committed to an enhanced QP9, the document to be provided to the defence before or at the first appearance. Practice Direction No 13 of 2010, which gives effect to the administrative arrangement, allows the defence to request from the police at an early stage specific statements or exhibits comprising the substantive evidence in the matter. The Practice Direction requires provision of that material within 14 days. A full brief of evidence is only required once a matter is set for hearing.

The logic of this procedure is that early disclosure will be made of important information sufficient to enable defendants to determine whether or not to plead guilty. As the Moynihan Report identified, the majority of matters resolve into pleas of guilty. The benefit for the Police Service in the negotiated arrangement was that it could potentially save police time by avoiding the need for investigating officers to engage in the time wasting exercise of obtaining signed statements from all prosecution witnesses when in the majority of cases many of those statements will never be used for any purpose.

Being armed with relevant substantive information at an early stage allows defendants to make informed decisions about how to proceed and, if necessary, make early submissions to the Police or DPP about deficiencies in the prosecution case.

Has the process of early disclosure and conferencing been successful?

I can supply some indicative numbers from Brisbane. I hasten to explain that Brisbane is not necessarily representative of all other centres in Queensland but it does have the largest number of criminal lodgements in the State, representing 15% of the State wide criminal workload.

In Brisbane Central Magistrates Court, which also services the Roma Street Arrest Court, many matters are indicated as a plea of guilty at the initial appearance or before they are adjourned away from the Arrest Court following their second appearance. Once a guilty plea is indicated, a partial brief sufficient for the purpose of sentencing is all that is required under the Practice Direction.

Other matters are then adjourned to a Summary Callover or a Committal Callover where the progress of the matter is case managed.

After 33 weeks of data I can report the following outcomes in Brisbane. Of the new system matters case managed by callover, 1074 were disposed of through the Summary Callover and 452 through the Committal Callover. For defendants with matters before the Summary Callover:

> 649 new system matters or 60% resolved prior to a full brief of evidence being prepared. Of those 86 or 13% were withdrawn by the prosecution, the remainder were pleas of guilty.

425 or 40% were set for trial. Of those set for trial we estimate that only 1 in 4 eventually result in a hearing with the remainder a guilty plea or withdrawal on the day.

Remember that these figures do not include those matters where the defendant indicated a guilty plea in the Arrest Court. So it is apparent that considerably more than 60% are resolving at an early stage.

Indeed, early resolution of even 60% of summary matters would be heartening. Of the remaining 40% a good proportion are likely to be unrepresented defendants who are often reluctant or unable to make informed decisions until on the threshold of the hearing court.

In addition 23% of the matters before the Committal Callover, where the defendants are on charges capable of being committed to a higher court, were resolved by either a plea of guilty in the Magistrates Court or the charges being withdrawn.

These figures suggest to me that the goal of the Moynihan Report to encourage early resolution of matters is being achieved, at least in part.

To what can we attribute this?

Clearly, the change in jurisdiction requires that many matters, which previously might have gone to a higher court, will now be dealt with in the Magistrates Court. But more than that is happening. A significant proportion of matters are resolving in a timely way and an overwhelming number are resolved as pleas of guilty.

Early disclosure and the ability for parties to engage in conferencing will certainly have contributed.

The impact of the legal aid regime is harder for me to gauge. Legal Aid Queensland has assisted by making increased Duty Lawyer resources available in many centres to assist with conferencing. Nevertheless, there does seem to be less access to legal aid available to many defendants who might in the past have been processed by way of committal.

Sentencing discounts

One strategy Mr Moynihan suggested for encouraging early guilty pleas was amendment of the *Penalties and Sentences Act 1992* to encourage greater transparency in the granting of discounts for early pleas of guilty. Indeed he devoted a chapter of his report to this topic.

The Report proposed that sentencing judges and magistrates be encouraged to state the sentence that would have been imposed but for the plea of guilty.

These recommendations were not implemented in the Modernisation Act. The Government considered it would await Sentencing Advisory Council advice on this issue.

At present section 13 of the *Penalties and Sentences Act 1992* allows a court to reduce a sentence where there has been a plea of guilty. The court must state when it does so and if it elects not to reduce the sentence it must give reasons. A reduction may be made having regard to when a defendant pleads or indicates a plea of guilty.

It is probably fair to say that in the past it was often hard to identify any differentiation between early and late pleas in the sentences imposed in summary matters. However, magistrates are now keenly aware that with the increase in their summary jurisdiction the way in which they exercise this discretion is of greater significance. I anticipate that magistrates will be more vigilant than in the past about having regard, in accordance with section 13(2), to the time at which a person pleads guilty when they impose sentence.

Conferencing

Conferencing is the term chosen to describe the process of negotiation between prosecutors and defence legal representatives as provided for under Practice Direction No 9 of 2010. It is required that these negotiations occur prior to the Committal Callover or Summary Callover. The parties will usually rely on the information in the QP9 but the defence may also request that copies of specified statements or exhibits be supplied for this purpose. At the very least it is expected that the parties will discuss whether negotiations should take place.

Conferencing can highlight deficiencies in the prosecution case at an early stage and result in charges being reduced or withdrawn. Negotiations which previously would only occur on the hearing date can now occur at a much earlier point. Indeed some police prosecutors have shown a willingness when conferencing to agree to creative alternatives such as their issuing a ticket for public nuisance or giving an out of court direction to drug diversion so that the defendant avoids any criminal history entry and the matter is then withdrawn before the Court.

The experience of conferencing in Brisbane has been generally positive. Brisbane is probably representative of outcomes in larger regional courts but it is not as yet possible to gauge how outcomes are tracking throughout the State. Anecdotal information suggests that there is inconsistency across the various centres in commitment to implementing the new procedures.

Implementation of early discussion between the parties requires a significant change in culture from previous practice. Resistance has been noted from some judicial officers, some police prosecutors and some legal representatives in various locations around the State. While in other places the process appears to be operating smoothly.

The Roundtable has continued to meet to monitor these issues. The Police Service has actively promoted changed practices in its ranks and is currently reviewing implementation of the process throughout the State. That information should be available later this year for consideration by the Roundtable.

Ex officio indictments

An amendment to the *Justices Act 1886* provides for a system allowing charges adjourned in the Magistrates Court because an ex officio indictment is contemplated in a higher court, to be referred to the Clerk of the Court for supervision.

This provision now receives little use because of a decision by the Director of Public Prosecutions, Tony Moynihan SC that arose directly from a consensus reached during the Roundtable meetings. It was generally agreed among the participants at the Roundtable that the ex officio process was responsible for unnecessary delay in the progressing of matters in the criminal justice system. It was considered that ex officio disposition should be limited to exceptional matters. The Director subsequently issued a guideline to his officers to that effect.

Accordingly, only a very few matters now proceed with a view to ex officio indictment.

The committal process

The Modernisation Act has made two significant changes to the committal process.

Previously all of the evidence in the prosecution case had to be given orally in the committal proceedings if the person charged was not legally represented. Subject to safeguards for the defendant, the magistrate may now commit an unrepresented defendant on the papers.

Perhaps the most controversial component of the reforms was the removal of the ability of a defendant to cross-examine as of right at committal. This reform brought Queensland into line with all other Australian states where committal proceedings have either been effectively abolished or the right to cross-examination has been restricted.

The legislation adopted Mr Moynihan's recommendation that the defence may only call a witness to give evidence with either the consent of the prosecution or leave of the magistrate. His recommendation that the New South Wales test be adopted for the granting of leave was accepted. The magistrate must be satisfied that there are 'substantial reasons in the interests of justice' for the cross-examination to occur.

There have been surprisingly few applications. In Brisbane in a 32 week period there have been 43 applications for cross-examination, 10 consent cross-examinations and 4 applications for a disclosure hearing. Not all those applications for cross-examination were pursued to completion. I am advised that elsewhere in the State applications to cross-examine have also been few.

As you would expect, applicants have had mixed success with their arguments before the Court. Magistrates have, consistent with the intent of the legislature, given close regard to the New South Wales cases applying the test. Magistrates' decisions are posted on the Courts web site. As the experience of the profession with the new process has grown, I have found that submissions have increasingly been directed to the principles to be found in those cases. Amongst other considerations, those authorities hold that avoidance of a Basha inquiry will, without more, constitute a substantial reason in the interests of justice.[9] Applying this, magistrates are mindful of the need to avoid unnecessary pretrial hearings in the higher courts.

In my experience the application to cross-examine process can also assist in earlier resolution of a matter. In some matters the reasons of the magistrate in allowing cross-examination have resulted in the prosecution reviewing their case and discontinuing the prosecution or amending the charges with a view to a plea to a lesser offence.

It is hard to know why this option has been used sparingly by defendants. It is true that there is an alternative process now for obtaining disclosure in contrast to the past when, in my experience, many cross-examinations were about seeking undisclosed information. Perhaps some practitioners have been deterred from utilizing an unfamiliar process. Perhaps unavailability of legal aid is a factor.

My experience with the new system is that it forces both the prosecution and defence to consider the strength of the Crown case at an earlier time. On occasion the need for cross-examination may be avoided by the prosecution readily supplying requested supplementary statements. However, sometimes it is in the best interests of all to hear a

[9] *Abdel-Hady v Magistrate Freund* (2007) 177 A Crim R 517

witness cross-examined. The prosecution have an obligation not to refuse consent without justification. Where they do consent the magistrate has no discretion in the matter.

The experience in Brisbane is that most defendants on charges for indictable offences which must or may be dealt with in a higher court proceed directly to a hand up committal before the court. However, there is also scope under the Modernisation Act amendments for 'registry committals', where both parties consent, to be done on the papers by a Clerk of the Court. There would seem to be administrative advantages for solicitors in adopting this process but as yet it has not gained the support of the profession. In the 32 week reference period only 11 registry committals proceeded in Brisbane.

Of new system matters adjourned to the Brisbane Committal Callover over a 32 week period, 326 proceeded to hand up committal, 11 proceeded by way of registry committal, 23 were withdrawn by the prosecution and 92 were resolved as a plea of guilty. Of the latter a proportion pleaded after police withdrew some of the charges.
That 23% of these indictable matters were resolved without the need to be committed to a higher court is a positive outcome.

In Brisbane there has been reasonable compliance with time requirements except where forensic evidence is involved. The delay in the conduct of forensic testing continues to be a significant source of concern. However, even where there is a wait for forensic evidence to be supplied, it is possible to obtain preliminary information which may be sufficient for a defendant to make a judgement about whether to plead guilty. In an appropriate case it may be sufficient to sooner obtain a short form analysis certificate which provides identification of the drug without the need to wait on evidence of the quantity. An electronic readout of DNA results can be provided sooner without the need to await provision of the full evidentiary material.

Conclusion

Where to from here?

My preliminary assessment is that the reforms have been successful in encouraging increased resolution of matters in the Magistrates Court. This will necessarily reduce the sentencing work load in the District court but not necessarily reduce the trial work load. Furthermore, early resolution of matters before the provision of a full brief will free police time previously spent on paperwork. As investigating officers become familiar with the preparation of a fuller QP9 and early provision of complaints' statements, CCTV media and other essential evidence we can expect to see improvements in the presentation of the prosecution case. The existence of the conferencing process promotes compliance with these obligations. The results from Brisbane and some other centres suggest that these reforms are achievable.

Nevertheless, in a number of locations the courts, police and profession have been slow to adopt the reforms. The Roundtable will continue to meet and monitor progress. It is still early days. As all players gain experience with the changed practices we can expect modification of the prevailing culture.

Many in the profession are sceptical as to whether police practices are capable of change. They rightly point to poor compliance in the past with disclosure obligations and even a culture of resistance to disclosure. It is true this may take time to change.

However, I can attest to a demonstrated commitment to the reform process at the Commissioner and Deputy Commission level and there has been an active process of communicating that commitment down the line. The Police Service is currently undertaking a review of case conferencing in 14 small, medium and large centres around Queensland. The review is being oversighted by a subcommittee of the Roundtable chaired by Deputy Chief Magistrate Hine. The Roundtable will consider any recommendation to fine tune the process arising from what is learnt.

It is not my role to comment on the policy decisions that gave rise to the Modernisation Act reforms but rather to give effect to what has passed into law. I can say that the experience of the past year shows that these reforms are workable.

For all of us who have a duty to uphold the rule of law, the ultimate objective is to ensure every person charged has access to a fair trial. That involves an entitlement to know exactly what one is charged with, to have the opportunity to defend oneself, to receive disclosure of material weakening the prosecution case or strengthening yours and to have the opportunity to examine prosecution witnesses.[10]

The processes available under the amended legislation are capable of affording those rights to defendants. Whether defendants fully avail themselves of those rights may depend on the quality of the legal advice and assistance they receive. As I see it, the challenge for the profession is to adapt, and to take maximum advantage of the opportunities available under the new legislative scheme, in order to best serve the interests of their clients.

[10] *The Rule of Law*, T. Bingham, p 97