

Magistrates Court (Criminal and General Division) Bill 2019

Submission to the Tasmania Department of Justice

9 May 2019

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Magistrates Court (Criminal and General) Division Bill 2019

1. The ALA welcomes the opportunity to provide input to the Tasmanian Department of Justice on the *Magistrates Court (Criminal and General) Division Bill 2019*.
2. The Tasmanian Committee of the ALA has carefully considered the *Magistrates Court (Criminal and General) Division Bill 2019*.
3. The view of the ALA is that the *Justices Act 1959*, which the Bill is intended to replace, is aged, poorly drafted and fails to define adequately the processes of the court. Notwithstanding that a significant body of jurisprudence has developed in respect of it, the *Justices Act 1959* is over due for replacement.
4. The *Magistrates Court (Criminal and General) Division Bill 2019* is, in general terms, an improvement upon the *Justices Act 1959*.
5. There is, however, one respect in which the Bill in its current form represents a retrograde step, and that is in respect of *Part 6 Division 2 – Pre-Hearing Disclosure of Prosecution Case*.
6. The disclosure regime contemplated under the new Act is, in very simple terms, as follows:
 - (1) A defendant will at an early stage receive a 'preliminary brief', said to comprise the charge sheet, summary of the material facts, record of prior convictions, copy of the record of interview, statement advising how the defendant can view an audio-visual copy of the record of interview, and anything else that the regulations may provide in respect of summary offences;
 - (2) Upon entry of a plea of not guilty to a summary offence, the defendant is also to be provided with a 'summary offence brief' consisting of a number of other things, notably 'a copy of all relevant statements made by each person that the prosecutor, at the time of disclosure, intends to call as a witness';
 - (3) Prior to a second appearance on an indictable matter, the defendant is to be provided with an indictable offence brief, consisting of, among other things, a copy of 'the relevant statements made by each person to a police officer or other person investigating the relevant offence'.

7. The consequences of failing to comply with the new statutory disclosure regime are an adjournment of the hearing, with the defendant able to require witnesses to be recalled to cross-examine about the evidence or matter disclosed during the adjournment, and to adduce evidence in rebuttal.
8. This disclosure system essentially does no more than replicate the system already in place with respect to summary offences.
9. Presently, defendants receive disclosure commonly referred to as 'basic disclosure', which is in substance not at all different from the 'preliminary brief' described in the Bill. Defendants then must plead not guilty before receiving what is currently referred to as 'full disclosure'.
10. 'Full disclosure' is coordinate to the proposed concept of 'summary offence brief', save that 'full disclosure' is intended to contain all of the witness statements that are on the prosecution file. A 'summary offence brief' is, by contrast, said to be limited to the witness statements of those witnesses whom prosecution intends to call. Thus, any witnesses whom a prosecutor does not intend to call, but who might conceivably be called by defence, would not, under the new statutory disclosure regime, be disclosed to a defendant.
11. The first criticism to be made is therefore that of ossification. The current disclosure regime exists at the level of a policy of Tasmania Police. It is manifestly inadequate, infamously causative of delays, and clearly contradicts very clear statements of principle expressed by the High Court of Australia. Yet, as a policy, it is capable of easy internal modification and betterment, should the will to do so ever arise within Tasmania Police.
12. To incorporate a disclosure regime that is identical to the current policy of Tasmania Police with all its flaws into a statute would be to ossify the disclosure regime, rendering it less able to be improved internally; and would endorse the notable inadequacies of the present system with the imprimatur of the Parliament.
13. The second criticism is as relevant to the current policy of Tasmania Police as it is to the Bill: there is absolutely no reason in principle why a defendant should not know the evidence against him or her before entry of a plea.
14. That a defendant does not know the evidence against him or her is not only bad in principle, but it gives rise to the delays that presently vex the Magistrates Court of Tasmania. Members of the Committee of the Australian Lawyers Alliance who have practised in interstate

jurisdictions, particularly Victoria, are very familiar with the experience of showing to a defendant a comprehensive brief of evidence before entry of a plea, at a very early stage. In those cases defendants are often confronted by overwhelming evidence, and enter pleas of guilty at a very early stage.

15. The third criticism lies in the differentiation of the contents of the 'summary offence brief' from the 'indictable offence brief'. There is absolutely no reason for omitting a witness's statement from disclosure to a defendant charged with a summary offence, merely because the prosecutor has no intention of calling the witness. Such statements may assist a defendant in exposing a clear defence to a charge, and the acknowledged need of disclosure in respect of indictable matters is as apparent in the Magistrates Court of Tasmania. The differentiation is therefore illogical.

Conclusion

16. The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide input to the Tasmanian Department of Justice on the *Magistrates Court (Criminal and General) Division Bill 2019*.
17. In conclusion, while the Bill is generally speaking a significant improvement upon the *Justices Act 1959*, the Australian Lawyers Alliance has several concerns regarding the Bill's provisions, as detailed above, and therefore urges the parliament to refuse to pass the Bill in its current form.



Fabiano Cangelosi

Tasmanian President and State Director
Australian Lawyers Alliance