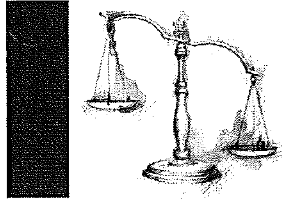


The Tasmanian Bar

5 August 2019

The Department of Justice
Office of the Secretary
Email: HaveYourSay@justice.tas.gov.au

Dear Ms Craven,

***MAGISTRATES COURT (CRIMINAL & GENERAL DIVISION) BILL* PACKAGE**

Thank you for your invitation to comment in respect of the *Magistrates Court (Criminal & General Division) Bill 2019* (the Bill). As a general proposition, the Tasmanian Bar welcomes the redrafting of legislation governing the operation of the Magistrates Court (Criminal & General Division), particularly the use of plain English and provisions dealing with early disclosure of information to defendants appearing before the Court. We wish, however, to comment in respect of the following matters.

Section 25(2)(c)(ii)

This provision that a warrant can be issued for the arrest of a witness who has not been served with a notice to attend Court. Although the Court must be satisfied that all reasonable steps have been taken to serve a witness attendance notice before issuing an arrest warrant, it is not clear that this would be confined to circumstances where, for example, a witness has actively avoided service. If that is the intent of the section, it is submitted the legislation ought make that clear. In addition, a potential unintended consequence of this provision could be that an arrest warrant may outlive the resolution of the substantive matter. A person who has done nothing except witness an offence may be the subject of an arrest warrant, arrested and taken into custody at any time in circumstances where the matter to which the notice relates is no longer on foot.

Section 56

We consider that compliance with this provision may be particularly onerous for those without fixed addresses and other means of being contacted.

Section 64(2)

This provision provides that where a defendant pleads guilty before receiving a preliminary brief they are taken to have waived the right to be provided with that information. In circumstances where a person is unrepresented, enters a plea of guilty and the matter adjourns to a later date to be dealt with, this would preclude the legal representative on a subsequent occasion from receiving information that would enable them to properly represent the person on a sentencing hearing or to provide advice as to whether the plea ought be the subject of an application to withdraw their plea. This could operate as a significant disadvantage to a person. There should be a mechanism which provides for waiver in such circumstances unless otherwise ordered by a magistrate.

Section 66 – Summary Offence Brief

It is noted that a summary offence brief is only to be provided where a plea of not guilty has been entered. There are certain circumstances where the material contained in a preliminary brief would not be sufficient to enable proper advice to be given as to plea, for example, in the case of a complex fraud matter where significant documentary evidence and surveillance footage may need to be considered. In order to obtain the relevant information, it would appear that a person would be obliged to enter a plea of not guilty as a holding plea. In circumstances where considerable mitigatory benefit may be derived from entering a plea of guilty at an early stage, a defendant who enters a holding plea in order to obtain information essential to the provision of competent advice will be deprived of that opportunity.

Section 67

This provision relates to the contents of the summary offence brief. S.67(1)(c) and (d) appears to confine disclosure to "relevant" statements of those witnesses intended to be called by prosecution and documents intended to be tendered at the hearing of the charge. This would appear to preclude the provision of:

- other witness statements made by a witness to be called at the trial where that statement is not considered "relevant";
- witness statements made by people not intended to be called as a witness; and
- documents that are not intended to be tendered by the prosecution.

This has the potential to operate to the prejudice of a defendant. The legislation does not require the disclosure of a list of other statements or documentary evidence obtained. A defendant is, for example, deprived of the ability to interrogate whether all material evidence has been disclosed, whether all material witnesses are being called by prosecution and to assess whether they ought call a witness or tender a document themselves in order to make a defence to the charge.

It is noted that s.77 provides that nothing in the division derogates from the prosecutor's duty under common law to disclose information to the defendant. Nevertheless, it is unclear how and when such disclosure will be required and what if any cost will be incurred by a defendant

seeking to obtain disclosure of potentially relevant material that a prosecutor has determined will not form the basis of their own case.

Further, we query whether it is ever not practicable for a prosecutor to copy or include documents with the summary offence brief given the advent of USB sticks and other devices.

Section 69 – Contents of Indictable Offence Brief

The contents of these briefs are confined to material that is required to be provided in a preliminary brief together with a copy of relevant statements made by each person to a police officer or other person investigating a relevant offence. "Relevant statements" as a concept is not defined. There does not appear to be a requirement that documentary evidence be provided as part of an indictable offence brief. If it is intended that the common law obligation of disclosure be complied with by prosecution, the timeframe for compliance with those obligations should also be specified in the Bill.

Section 73 – Limitation on Disclosure of Sensitive Material

The definition of "sensitive material" appears to mean that an audio-visual statement of an affected person (which may be the only form in which a statement from that witness has been obtained), may only be viewed at Prosecution offices. Given that such statements may form the evidence in chief of an affected person in certain offences, this renders the opportunity to properly assess such statements and make submissions in respect of editing or admissibility difficult. An audio copy at least ought be provided, if not a transcript. Requiring all such material to be viewed in Prosecution offices renders opportunities to properly assess and advise in respect of the material very limited.

Section 85(b) and 110(b)

The requirement that a defendant inform a prosecutor of the fact that they are unrepresented "as soon as reasonably practicable after a plea" of not guilty has been entered is one that we apprehend would be impractical.

Section 92 – Sentence Indication

The provisions in respect of victim impact statements as they relate to the sentence indication process appear to allow such statements to be provided in a broader category of cases than is provided pursuant to s.81A of the *Sentencing Act*. Such statements in the Bill are not confined to circumstances where a person has been charged with an indictable offence, or a summary offence that has resulted in death or serious injury of a person or a family violence offence, but appears to apply to offences at large. S.92 also appears to place an obligation on the Court to make inquiries of victims and notify them of the opportunity. This is not the case under the *Sentencing Act* which relies on prosecutors and victims furnishing a Court with a written statement. It is suggested that the wording of s.92 ought reflect what is currently provided for in the *Sentencing Act*.

Section 137(1)

In sub-s.(1) the final parenthesis has been omitted. We anticipate it ought fall after the word "otherwise".

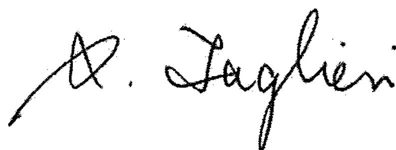
General Comments

It is noted that stalking is no longer listed as an electable criminal matter. It is the experience of our members that some stalking charges have been laid in circumstances that would not warrant a Supreme Court trial or disposition. Reliance of the remittal of the matter by the Supreme Court is a cumbersome way of dealing with such cases.

The discretion to award costs following a successful prosecution for a breach of duty that is provided under s.77 of the *Justices Act 1959* is not replicated in the new Bill. This section has routinely been used by successful non-police complainants to recover some of their costs of prosecuting offences. Examples are councils prosecuting for offences under food, environment and building legislation. Parliament has placed the prosecution of such offences with councils, and it may well be argued that is not their core function and uses ratepayers' funds, so the ability to recover costs should be maintained.

The Tasmanian Bar acknowledges the work of Kate Cuthbertson, Todd Kovacic, Jessica Sawyer and Andrew Walker in preparing this submission.

Yours faithfully,



SANDRA TAGLIERI SC
President