

SUMMARY PROCEDURE – DISCUSSION PAPER

Response on behalf of the Criminal Bar Association of Victoria

THE CRIMINAL BAR ASSOCIATION OF VICTORIA

The Criminal Bar Association (“CBA”) is the peak body for barristers in Victoria practising in the criminal law. Its members comprise almost one quarter of all barristers practising in Victoria and it counts almost one third of Victoria's Judiciary among its Honorary Members. The Association issues press releases, regularly meets with the judiciary and government, and is involved in the continuing legal education scheme of the Victorian Bar. The website of the CBA can be found at www.crimbarvic.org.au and is regularly updated.

OVERVIEW OF CBA RESPONSE

The discussion paper on summary procedure raises the potential for fundamental change to the manner in which summary justice is dispensed in Victoria. We do not believe that such fundamental change is necessary.

Historically the Magistrates’ Court of Victoria was the court in which misdemeanours were been dealt with expeditiously. This principle continues to lie at the heart of the summary justice. The dispensing of matters in a prompt and certain manner by the Magistrates’ Court has for more than a century properly served the Victorian community and the ends of justice.

Although in the last 50 years the jurisdiction of the Magistrates’ Court in criminal matters has extended to include an ever increasing list of indictable

offences, in the area of summary jurisdiction the fundamental philosophy which underpins the jurisdiction has essentially remained unchanged. To the extent that changes have been made, such as permitting prescribed persons to lay charges and issue a summons (s.30) the Parliament has ensured that the procedure is a simple one, which if complied with continues to promote certainty and efficiency.

A number of the proposals that are raised in the discussion paper cut across this principle. An increase in the limitation period, or the ability to lay new charges through amendment, whilst assisting informants who through neglect or incompetence fall into error, does not serve the interests of the community as a whole. On the other hand there are some proposals that foster simplicity in the prompt disposal of matters, such as the provision of written pleas by defendants. Subject to appropriate checks and balances, this is a reform that is consistent with the essential principles of summary justice.

SPECIFIC QUESTIONS

Question 1 (Granting of Leave for Private Prosecutions)

No. Private prosecutions are very rare. So rare that our many years of practice we cannot recall one. The CBA is opposed to the introduction of a requirement for leave to be granted. This places the citizen in a position of disadvantage to a police officer, who historically filed a charge not in his capacity as a police officer but as a citizen. That has been partially altered by the procedure in s.30 of the *Magistrates' Court Act 1989* ("the MCA") which creates a class of prescribed persons. However when a police officer files of a charge in the ordinary manner as described in s.26 of the MCA he

or she does so in their capacity as a citizen not as a police officer. The ordinary citizen should not become a 2nd class one.

That is so even if ultimately the charge or charges are found to be frivolous. Upon the filing of a charge an informant enlivens the courts jurisdiction and is ultimately answerable to the court in the final disposal of the matter. This may include an award of costs if the proceeding is unsuccessful.

The CBA does not support either option one or option two.

Question 2 (Nature of Proceeding for Leave)

No. In light of our response to question one, we do not support such a procedure. To the extent that we are asked to choose between (a) or (b), the granting of leave should be a matter for the court, and one which is subject to review.

Question 3 (Ex Parte)

We repeat our response to questions 1 and 2.

Question 4 (Summons Procedures)

Yes. Once it is accepted that police officers may issue a summons for the attendance of a defendant, as permitted by s.30 of the MCA, there is no reason in logic or in principle why the same function and power should not extend to other prosecuting agencies.

Question 5 (Witness Summons)

Yes. Provided the procedure is properly and adequately prescribed (such as the present requirements of s.30) there is sense in permitting prescribed persons to issue a witness summons. It is imperative that the

summons once issued is filed with the court so that any objection may be dealt with expeditiously. A consequence of this amendment is that a witness summons is no longer a command of the Court to attend at a certain time and place. Accordingly any failure to comply ought not have the same consequence as a breach of s.43.

Question 6 (Prosecuting Agencies)

Yes. See the answers above.

Question 7 (S. 30 – Charge Sheet and Issue of Summons)

No. The relaxation of the current rules for the initiation of a summary proceeding already provided by Parliament in s.30 ought not to be extended. The commencement of such a proceeding against a citizen is a serious matter and a citizen who is charged is entitled to know that fact as soon as possible. Being an adversarial process the engagement of the other party by the issuing and service of a summons is not a matter of form but an important matter of substance.

The Parliament has already granted an indulgence to the police by the introduction of s.30. Rather than that indulgence being extended the Parliament should be concerned to ensure that the present requirements are strictly adhered to. It is the failure of the police to comply with these requirements that appears to be the underlying problem. That is not a proper foundation for a further relaxation of the process.

Question 8 (Postal Service)

No. The initiation of a summary proceeding is a serious matter and requires the person charged to be promptly and properly informed of the charge or charges filed. That can only be achieved by personal service.

There will be no certainty if a summons is served by post, only unnecessary confusion and complexity when a matter is heard in the absence of a defendant who has not been given notice of the process. The problems associated with service by post will inevitably cause injustice and unnecessary expense.

Question 9 (Amendment Resulting in New Offence)

No. The filing of appropriate charges and their prompt and fair resolution is the essence of the summary process. This requires an informant to be certain about the charges before commencing the proceeding. It also enables a defendant to know at the earliest opportunity the case he or she has to meet in court. This is a fair balance between the State and the citizen.

If the limitation period of 12 months is to remain (which we endorse) then there is no justification in permitting amendments to charges that in effect create a wholly new offence. Not only will this undermine the essence of the summary process, it will permit police to become even more imprecise in the charging of citizens. Rather than relaxing the requirements for clarity and precision in the charging of citizens the Parliament should be more concerned to ensure that police get it right from the outset. The summary process should not become an opportunity for the police to develop and refine their case in running to the disadvantage of defendants.

We refer to our recommendation for statutory alternatives (in certain prescribed circumstances) as discussed in paragraph 14 herein.

Question 10 (Amendment in Certain Circumstances)

No. The rule against permitting an amendment to a charge if it results in the creation of a new offence beyond the expiration of the limitation period ought not to be amended. We repeat our answer to question 9 above.

There should be certainly and simplicity in the hearing and disposition of summary matters. There should be no exception.

Question 11 (Legislative Guidance)

Not applicable. See answers above.

Question 12 (Limitation Period)

No. The general limitation period of 12 months has operated successfully in the Magistrates' Court of Victoria for well over 100 years. There has been an extension for specific offences where Parliament thought it necessary. There is however no justification to extend the general limitation period.

As already stated the essence of the summary process is the prompt and efficient disposition of matters. Certainty in both the commencement and the completion of the process is imperative. The 12 month limit promotes efficiency in the investigation and resolution of less serious matters.

It is only in the Magistrates' Court where the limitation operates. By s.359AA (3)(G) of the *Crimes Act* 1958, the County Court and the Supreme Court can deal with summary matters on a plea at any time. This is because the hearing of summary matters in those courts is linked to the disposition of indictable offences that are already before the court. Therein

lies the important distinction between serious indictable offences, where no time limit applies and summary matters where a different balance is struck.

An extension of the time limit to 3 years will produce both uncertainty and inefficiency. This is inimical to the fair and expeditious disposition of summary justice.

Question 13 (Extension Coroner's Inquest)

No. In nearly all cases the police have laid the appropriate charges (indictable and summary) before the hearing of a coronial inquest. It is hard to conceive of any circumstance in which it is only following a coronial inquest that a summary offence for the first time emerges as being the only offence that is open on the evidence. As stated above a defendant should know at the first available opportunity what charges he or she is facing. Even more so if there is to be an inquest in which a defendant is a witness and issues of self incrimination will arise.

Question 14 (Section 26(4) MCA)

(a).No Essentially for the reasons already stated.

(b).No. Limitation periods ought not to be susceptible to waiver by a defendant, thereby exposing themselves to potential punishment. In particular an unrepresented may be at a particular disadvantage by consenting to a waiver in circumstances that are clearly adverse to his interests.

A Better Alternative

Perhaps a fairer and better way to approach the problem with summary offences (where indictable offences have already been laid and which are

to be tried summarily) is to provide legislatively for alternative verdicts in the same way as Ss. 421 - 428 of the *Crimes Act* 1958.

In this way, certain summary offences are subsumed into the indictable offence (triable summarily) so that upon the laying of the indictable offence (provided it is filed within the 12 month period) a defendant is also exposed to lesser statutory alternatives. This opens a path to settle a matter on a lesser charge (summary) even though the summary offence was not filed within the 12 month period. A Magistrate would also be able to find a defendant guilty of a lesser statutory alternative if not satisfied of the defendant's guilt on the more serious indictable offence. The presence of statutory alternatives provides certainty to both parties from the outset.

Question 15 (Children's Court – Time Limit)

(a) to (d). No. For the reasons already stated there should be no change.

Question 16 (Amendment to s.41 MCA – Imprisonment)

Yes. Imprisonment is the option of last resort. It should not be imposed without a defendant being given the opportunity to be heard in relation to matters of mitigation, of which the Court will otherwise have no knowledge. The potential for serious injustice is considerable and the mechanisms and processes of the Courts to correct an injustice is often cumbersome and difficult for a defendant, particularly if they have been incarcerated.

Question 17 (Amendment to s.41 MCA – Other Dispositions)

(a) to (d). Yes. The same considerations should apply to dispositions which have the capacity to seriously impact on the liberty of a citizen or which may place them in financial hardship which could also result in the loss of liberty.

Question 18 (Written Plea in Defendant's Absence)

Yes. Subject to our answers to questions 16 and 17, and provided that proper checks and balances are in place, a defendant ought to be permitted to enter a plea in writing and for the matter to proceed in his or her absence.

Question 19 (Mitigatory Material)

Yes. Subject to the right of the prosecutor to insist on the attendance of the author of any reference or testimonial so that the matters raised therein. It is a matter of striking a fair balance.

Question 20 (Limits on Sentence)

Yes. Limits of the type contemplated in questions 16 and 17 should apply.

Question 21 (Rehearing)

No. Once a defendant elects to enter a plea in writing and not attend court, there is no justification for a rehearing. Two bites at the cherry ought not to be permitted. A defendant still has the right to appeal *de novo* to the County Court subject to what changes might be made as a result of the current review.

Question 22 (Prior Convictions)

Yes. Subject to proper notice being given to a defendant of the prior matters that are intended to be alleged, and the defendant providing a written acknowledgement of accuracy of those prior convictions.

Question 23 (Unrepresented Defendants – Reading of Charges)

Yes. An unrepresented defendant is always at a disadvantage. It is imperative that he or she is properly informed of the charges before the court. This should be a matter of record.

Question 24 (Represented Defendants)

Yes. As a matter of practice counsel for defendants invariably inform the court of their client's plea and of their consent to the jurisdiction. This practice should be enshrined in the MCA.

Question 25 (Corporate Defendants)

The CBA supports Option Two. We believe that it is important that corporate defendants be represented at court by the appropriate officer of the company. However it not proper to compel that officer to either fund the defence for the corporation, enter a plea on behalf of the corporation or provide instructions to a legal representative on behalf of the corporation. This would undermine the right to silence which extends to corporate defendants.

The essential reason for the attendance of an officer of the defendant corporation is to ensure that the defendant is properly informed about the process and is able to participate in it.

Question 26 (Option One)

Not applicable

Question 27 (Joint Trials of Child and Adult Co-Accused)

No. The fundamental policy that underpins the *Children and Young Persons Act* is that the special needs and interests of a child take precedence over notions of court efficiency and the interests of a victim. This is a laudable principle that should continue to be embraced.

We believe that there is no pressing need for any modification to the present system, and indeed we believe that there is real danger to a child being required to have a matter heard in an adult court. If it is appropriate for a child as a single defendant to have his or her matter heard in the children's court, there can be no justification to elevate it to an adult court merely because an adult is also charged. Protection of the interests of the child (which are the communities interests) should not give way to expediency.

Question 28 (Process of Answer to 27 is Yes)

Not applicable.

Question 29 (Joint Committals)

No. We repeat our answer to question 27. Moreover by what test is one to anticipate that there may be a joint trial? Unless there is absolute certainty nothing will be gained.

Question 30 (Different Considerations)

Not applicable.

Question 31 (Which Court?)

Not applicable

Question 32 (Age of Adult Co-Accused)

No. It is the process of the adult court that causes the problem, not the age of a co-accused.

Question 33 (Application of DPP)

No . The interests of the community through the court may not always coincide with the interests of the DPP. The decision to elevate a matter to an adult court should not depend upon the view of the DPP. That does not mean that the DPP should not make such an application, however the Court should also be able to elevate a matter in an appropriate case on its own motion.

Question 34 (Remitter)

No. Once the adult court is seized of the matter it should determine the appropriate sentence. Remitter to the children's court which has not had the carriage of the matter is likely to cause injustice.

Question 35 (Remitter – Guilty Plea)

No. To the extent that this question is posited on the adoption of a rule that exposes a child a joint trial in an adult court because of the presence of an adult co-accused, we repeat our earlier answers. This should not be the basis for the removal of a child from the protections of the children's court.

To the extent that the question is posited on the present situation that permits a Magistrate to refer a matter to an adult court, the matter should remain in the adult court even if subsequently the child pleads guilty. A remitter to the Children's Court by a judge would constitute a rejection of the Magistrate's order.

Question 36 (Sentencing – *Children's Court Act*)

Yes. The child is still a child for the purposes of the *Children and Young Persons Act* and should be sentenced accordingly.

Question 37 (Contest Mention Procedure)

No. The procedure should be a matter for practice direction by the Chief Magistrate. There is a need for flexibility and prompt adaptation to changing circumstances. That cannot be achieved if the procedure is enshrined in legislation.

Question 38 (s.5 *Crimes (Criminal Trials) Act*)

Not applicable. Moreover any notion of introducing legislatively a procedure similar to the *Crimes (Criminal Trials) Act* is inconsistent with the prompt disposal of matters that is the essence of the summary process.

Question 39 (Narrowing Issues)

No. A defendant ought not to be bound by the matters raised at a contest mention. Often he is represented by a solicitor and not by the barrister who ultimately conducts the contested hearing on his or her behalf. To the extent that there is any departure, this may have a bearing on the issue of costs in the event that the defendant is acquitted.

Question 40 (Costs)

No. Specific power is not required. The awarding of costs is a matter of discretion as is the quantum any costs awarded.

If the CBA can be of any further assistance in this matter or clarification of our position on any issue is sort, please contact the writer at your earliest convenience.

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Latham Chambers