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Committal Proceedings Reforms: The Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2010 (Qld)

*The **Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2010 (Qld)**, introduced on 13 April 2010, contains the first stage of reforms to respond to the December 2008* 'Review of the Civil And Criminal Justice System in Queensland' *(**Moynihan Report**). The Moynihan Report examined and reported on the workings of, and made recommendations for possible improvements to, Queensland's civil and criminal justice system with a view to a more effective use of public resources.*

*This Research Brief focuses on the proposed amendments to **Part 5** of the* **Justices Act 1886** ***(Qld)*** *to implement certain recommendations of the Moynihan Report to reform Queensland's **committal process**. The Bill seeks to restrict the defendant's right to call and cross-examine prosecution witnesses so a witness's written statement will constitute his or her evidence unless the prosecution consents to the calling of the witness or the magistrate is satisfied there are substantial reasons in the interests of justice for the defence to cross-examine the witness. It also enables the use of a 'registry' committal process where a defendant is legally represented and on bail and no prosecution witnesses are to be called or cross-examined; and seeks to align the process of ex officio indictments with the process for registry committals.*

Nicolee Dixon

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General Distribution Research Team
Research and Information Service

Ms Karen Sampford, Team Leader	(07) 3406 7116
Mrs Nicolee Dixon, Senior Parliamentary Research Officer	(07) 3406 7409
Mrs Renee Gastaldon, Parliamentary Research Officer	(07) 3406 7241
Ms Mary Westcott, Parliamentary Research Officer	(07) 3406 7372
Ms Kelli Longworth, Parliamentary Research Officer	(07) 3406 7468

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Inquiries should be addressed to:
Team Leader, General Distribution Research Team
Research and Information Service
Queensland Parliamentary Library
Parliament House
George Street, Brisbane QLD 4000
Ms Karen Sampford. (Tel: 07 3406 7116)
Email: Karen.Sampford@parliament.qld.gov.au

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EXECUTIVE SUMMARY

The Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2010 (Qld) (the Bill) contains the first stage of reforms to respond to the December 2008 *Review of the civil and criminal justice system in Queensland* (Moynihan Report). The Moynihan Report examined and reported on the workings of, and made recommendations for possible improvements to, the civil and criminal justice system with a view to a more effective use of public resources.

This Research Brief focuses on the proposed amendments to **Part 5** of the ***Justices Act 1886*** **(Qld)** to implement certain recommendations of the Moynihan Report to reform Queensland's **committal process**.

On 8 August 2008, the then Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, the Hon Kerry Shine MP, called for a review of the civil and criminal justice system in Queensland. The Terms of Reference sought review and report on areas including:

- the range of indictable offences heard summarily by magistrates;
- possible reforms to committal proceedings (the topic of this Research Brief);
- sentencing discounts for early pleas of guilty;
- case conferencing; and
- monetary limits for the civil jurisdiction of the District and Magistrates Courts.

The Moynihan Report was delivered in December 2008. In July 2009, the Government provided its response to the Report recommendations: *Queensland Government's Response to the Review of the Civil and Criminal Justice System in Queensland*. The Preface indicated the Government's support of the general findings and themes in the Moynihan Report and proposed to implement reforms responding to those recommendations in a staged process. As noted in **section 2** of this Research Brief, the first stage incorporates amendments to various pieces of legislation proposed by the new Bill, including amendments to reform and streamline the committals process. The second stage will comprise a new Criminal Justice Procedure Act and accompanying rules and forms and was initiated by the release of a Discussion Paper on the same day as the Bill was introduced (13 April 2010).

A short **overview** of the Moynihan Report is provided in **section 3** of the Research Brief, including the Report's observation that, while there have been a number of piecemeal reforms and amendments to criminal procedure laws, there has been no single comprehensive review.

Section 4 then turns to the focus of this Brief, the **committal proceedings process**, which was covered in **Chapter 9** of the Moynihan Report. The examination in this Brief begins with a short **history** of the development of committal proceedings in the United Kingdom to indicate how the current process is a product of its evolution. The discussion then moves to the **purpose** of committal proceedings (as originally intended) – to protect a defendant from being committed for trial on

evidence that does not meet the required evidentiary threshold and to allow a defendant to know the case against him or her.

Section 5 discusses the **committal process in Queensland** as it currently operates under **Part 5** of the ***Justices Act 1886*** **(Qld)**. In particular, it examines the types of committals that can occur – a full committal where witnesses can be examined, cross-examined and re-examined on their written statements; a 'full hand up' committal where a legally represented defendant agrees to all the written statements of the prosecution witnesses being handed up to the magistrate without those witnesses being required to attend for cross-examination; or a combination of the two types. The Moynihan Report commented that Queensland is one of the few Australian jurisdictions to retain the full committal concept whereby the defence has unfettered right to call and cross-examine prosecution witnesses without providing reason or justification.

The Moynihan Report's observations on the **effectiveness of the committals process** in Queensland are considered in **section 6** of this Brief. Among the problems noted in the Report were the delays, waste of resources and inconvenience caused when the defence agrees to a hand up of prosecution witnesses' statements only at the last minute and arising from the practice of calling witnesses, no matter how inconsequential their evidence.

Section 7 considers the Moynihan Report recommendations for **reforms** to committal proceedings, some of which were adopted in **Part 11** of the **Bill** which seeks to amend Part 5 of the *Justices Act 1886* (Qld). These proposed amendments include:

- **restrictions on the calling and examination of witnesses** so that written prosecution witness statements can be tendered as evidence without the witness having to give oral evidence unless the prosecution agrees or the magistrate is satisfied that there are substantial reasons why, in the interests of justice, a witness should attend and give oral evidence;
- a process for a direct administrative or **'registry' committals** as the default position where a full hand up of witnesses' statements is agreed to, the defendant is legally represented and is on bail;
- aligning the mechanism for transfer of **ex officio indictments** with that for registry committals;
- more **magistracy supervision** of committal proceedings.

The Moynihan Report envisaged that reforms to the committal process would be underpinned by improved compliance with disclosure obligations. While not forming part of the Moynihan Report's chapter on committal proceedings (Chapter 9), this Brief also considers the Report's recommendations regarding **disclosure obligations** (in Chapter 5), as they relate to the proposed committal amendments, sought to be implemented by the Bill.

Section 8 provides a brief summary of the Moynihan Report **recommendations** on the committal process that were **not supported** by the Queensland Government, including the recommendation for a stronger committal test.

Finally, **section 9** very briefly outlines reforms in some other Australian jurisdictions, with particular focus on **Western Australia** and **Tasmania** where committals have more or less been abolished.

Section 10 concludes with an outline of **other amendments** proposed by the Bill.

1 INTRODUCTION

On 13 April 2010, the Attorney-General and Minister for Industrial Relations, the Hon Cameron Dick MP, introduced the Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2010 (Qld) (the Bill) into the Queensland Parliament. The Bill contains the first stage of reforms to respond to the December 2008 *Review of the civil and criminal justice system in Queensland* (Moynihan Report). The Moynihan Report examined and reported on the workings of, and made recommendations for possible improvements to, the civil and criminal justice system with a view to a more effective use of public resources.

This Research Brief focuses on the proposed amendments to **Part 5** of the ***Justices Act 1886*** **(Qld)** to implement certain recommendations of the Moynihan Report to reform Queensland's **committal process**. The Bill seeks to restrict the defendant's right to call and cross-examine prosecution witnesses so a witness's written statement will constitute his or her evidence unless the prosecution consents to the calling of the witness or the magistrate is satisfied there are substantial reasons in the interests of justice for the defence to cross-examine the witness. It also enables the use of a 'registry' committal process where a defendant is legally represented and on bail and no prosecution witnesses are to be called or cross-examined; and seeks to align the process of ex officio indictments presented by the Attorney-General or the Director of Public Prosecutions with the process for registry committals.

The second stage of reforms in response to the Moynihan Report will involve an overhaul and consolidation of criminal justice procedure legislation into a new and modernised Criminal Justice Procedure Act. This next stage has been initiated through the release of the Criminal Justice Procedure in Queensland – Discussion Paper on 13 April 2010. The Government will consider the implementation of outstanding recommendations in the Moynihan Report after the impact of the initial stages has been evaluated.[1]

2 BACKGROUND

On 8 August 2008, the then Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, the Hon Kerry Shine MP, called for

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[1] Hon CR Dick MP, Attorney-General and Minister for Industrial Relations, Second Reading Speech, Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2010 (Qld), *Queensland Parliamentary Debates*, 13 April 2010, pp 1253-1256, p 1256.

a review of the civil and criminal justice system in Queensland.[2] Contributions from interested parties were also invited. The Terms of Reference said:[3]

> *In recognition of the increasing volume and complexity of demands on the State's civil court system and increases in the time and resources consumed by the litigation process, it is timely to examine whether the current jurisdictional limits of Queensland's courts are appropriate.*
>
> *In recognition of the desirability of early identification and encouragement of pleas of guilty in the District and Supreme Courts and the potential for a greater number of less serious indictable offences to be finalised in the Magistrates Court, it is timely to review the criminal jurisdiction, including the jurisdictional limits of Queensland's courts, and to consider new models for progressing criminal matters.*

The Attorney-General asked the Hon Martin Moynihan AO QC[4] to undertake the review and to report on areas including:

- the range of indictable offences heard summarily by magistrates;
- possible reforms to committal proceedings;
- sentencing discounts for early pleas of guilty;
- case conferencing; and
- monetary limits for the civil jurisdiction of the District and Magistrates Courts.

As noted by the Moynihan Report (pp 17-18), most of the above reference terms are interrelated and integral to the criminal justice process, and are difficult to consider separately. Nevertheless, while the Hon Martin Moynihan's 60 review recommendations in his December 2008 report, *Review of the civil and criminal justice system in Queensland* (Moynihan Report), cover each of the Terms of Reference, the focus of this Research Brief is on the second of these – **reforms to the committal proceedings process**. Other review recommendations sought to be implemented by the Bill, such as increased magistracy supervision and enhancements to disclosure obligations on the prosecution, will be discussed to the extent they impact upon the proposed new committals process.

In July 2009, the Government delivered the *Queensland Government's Response to the Review of the Civil and Criminal Justice System in Queensland* (Government

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2 Department of Justice and Attorney-General (DJAG), Community Consultation, 'Review of the civil and criminal justice system in Queensland'. This announcement followed upon a forum, attended by a number of agencies, launched on 28 July 2008. Speaking notes of the Hon Martin Moynihan AO QC at the launch are available.

3 Hon Martin Moynihan AO QC, *Review of the civil and criminal justice system in Queensland* (Moynihan Report), December 2008, Appendix 1.

4 The Hon Martin Moynihan AO QC is the former Senior Judge Administrator of the Supreme Court of Queensland and is currently the Chair of the Crime and Misconduct Commission.

Response) to the Moynihan Report recommendations. The Preface indicated the Government's support of the general findings and themes in the Moynihan Report in line with the Government's stated ongoing priority of improving and maintaining public confidence in the justice system. The Government proposes to implement reforms in response to the Report in a staged, structured and prioritised way, as was recommended by the Moynihan Report (pp 87-88).

The first stage seeks to make legislative changes to disclosure obligations, civil monetary limits, summary disposition of indictable offences, and sentencing discounts for early guilty pleas (covered by Chapters 5, 7, 8 and 10 of the Moynihan Report), and amendments to implement a number of recommendations to streamline the committals process (the focus of Chapter 9 of the Moynihan Report and of this Research Brief). The second stage of reforms will comprise the development of a Criminal Justice Procedure Act and accompanying rules and forms to consolidate, modernise and streamline criminal justice procedure legislation.[5]

On 24 November 2009, the Queensland Attorney-General released a draft Consultation Bill and draft Explanatory Notes. When introducing the Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2010 (Qld) (the Bill), the Attorney-General said that the Bill introduced into Parliament incorporated outcomes from consultation on the draft Bill.[6] Further, it was noted that although the Government had proposed amendments regarding early guilty pleas to implement other Moynihan Report recommendations, the recent decision to establish a Sentencing Advisory Council for Queensland meant that further advice about this proposal should be sought from the Council.[7]

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5 Queensland Government, *Queensland Government's Response to the Review of the Civil and Criminal Justice System in Queensland* (Government Response), July 2009, Preface.

6 For instance, provisions to expand the Magistrates Court's jurisdiction to summarily deal with a broader range of indictable offences are more limited than the original proposal but if the reforms appear successful, consideration will be given to increasing the summary jurisdiction further. The Bill seeks more limited amendments to the *Drugs Misuse Act 1986* than suggested by the Moynihan Report but the Attorney-General said if those reforms prove effective, further expansion to production and supply offences, as recommended by Mr Moynihan, would be considered: see Hon CR Dick MP, Second Reading Speech, pp 1254, 1255.

7 Hon CR Dick MP, Second Reading Speech, p 1255.

3 REPORT ON THE REVIEW OF THE CIVIL AND CRIMINAL JUSTICE SYSTEM IN QUEENSLAND

The Hon Martin Moynihan AO QC, delivered his report, *Review of the civil and criminal justice system in Queensland* (Moynihan Report) in December 2008.[8] The comprehensive review addressed in detail, and made recommendations concerning, the matters covered by the Review's Terms of Reference.

The Moynihan Report (pp 19-20) comments that the Review was constrained by a number of considerations, particularly the lack of reliable and comprehensive data, for example, about a person's progress through the criminal justice system.

The Moynihan Report (pp 44-46) observed that, while there have been significant reforms to substantive and procedural criminal laws over the last century in Queensland, there has not been a single, comprehensive review of the effectiveness of the criminal justice processes or of the impact of technology on those processes. Reforms have tended to be piecemeal and ad hoc, demonstrated by the fact that there have been over 100 amendments to both the *Justices Act 1886* (Qld) and the *Criminal Code Act 1899* (Qld) since they were passed.

The Report did not focus directly on substantive aspects of criminal offences but on the processing of persons charged with committing those offences through the criminal justice system and the impacts of those processes on victims of crime, witnesses and others.[9]

3.1 THE CRIMINAL JUSTICE SYSTEM

In the earlier parts of the Moynihan Report, His Honour makes some observations about the Rule of Law – of which the criminal justice system is an essential component – and the notions of equal justice, impartiality, fairness, expedition, minimal delay and minimal use of public resources that are the touchstones of such a system.[10] Simply put, the 'Rule of Law', as described by AV Dicey,[11] embraces

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8 The Review received formal submissions on each of the terms of reference from certain individuals and agencies including Chief Judge Marshall Irwin of the Queensland Magistrates Court; The Public Advocate; the Commonwealth Director of Public Prosecutions (Qld); Bar Association Queensland; Queensland Law Society; Legal Aid Queensland; Office of the Director of Public Prosecutions (Qld); and Queensland Corrective Services. The Review team also held a number of informal 'forums' and it consulted broadly. Draft recommendations were sent to the agencies concerned to invite response.

9 Moynihan Report, p 58.

10 Moynihan Report, Chapters 1 and 2.

11 AV Dicey, 'The Rule of Law', Part II in *Introduction to the Study of the Law of the Constitution*, 8th ed., Macmillan and Co. Limited, London, 1931, at pp 183, 189, 191.

three concepts: that no person is punishable except for a distinct breach of the law established in the ordinary legal manner before the courts of the realm; that all persons are equal before the ordinary law of the realm; and that the constitution is based on judicial decisions on the rights of persons.

The Moynihan Report observed that, while the criminal justice system is geared towards the likely outcome being a trial of an offender, around 90% of cases are resolved without a trial. The identification of matters (often 'run of the mill' cases) capable of early resolution to reduce the need and expense of a trial was seen by the Report as a feature of an effective criminal justice system. While just a small percentage of matters go to trial, it appears that 30% of cases absorb up to 70% of all resources (pp 58-59, 79). It was recommended (pp 81-82) that courts consider adopting Practice Directions to promote a policy of court events being used to progress cases to resolution. Such events should be based on information already acquired rather than being used to obtain new information to be acted on at the next event. It was also recommended that hearings should proceed on allocated dates for the estimated time; there be fewer pre-trial court appearances; and there be a better use of electronic communications.

4 HISTORY AND PURPOSE OF COMMITTAL PROCEEDINGS

Chapter 9 of the Moynihan Report covers the Review's consideration of, and recommendations for reforming, committal proceedings in Queensland. The Report noted that the issue had been a major focus of attention for the Review, being the subject of the *Reform of the Committal Proceedings Process Discussion Paper*, produced at an early point of the Review process to stimulate debate and discussion. The Moynihan Report (p 161) commented that the topic gave rise to more written submissions than any others considered by the Review. Before examining the changes to the committal process sought to be effected by the Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2010 (Qld) based on the recommendation of the Moynihan Report, an overview of the current position is provided below.

4.1 BRIEF HISTORY OF COMMITTAL PROCEEDINGS

The committal procedure process applies only to indictable offences – which are, somewhat circuitously – those offences that the legislation states are 'indictable offences'. Essentially, indictable offences are serious offences tried on indictment

by a judge and jury, or by a judge only in the Supreme Court or District Court. Some indictable offences can be dealt with summarily by a magistrate. However, all criminal matters begin in the Magistrates Court and the committal is a process by which an indictable offence is transferred to the Supreme Court or District Court for trial or sentence. In some jurisdictions, committal proceedings are known as preliminary examinations or preliminary hearings.

The committal system has evolved over many hundreds of years and has been adapted to fit particular local contexts.[12] The committal process operating in Australia emerged from the United Kingdom's *Indictable Offences Act 1848* which, itself, originated from the Grand Jury System.

Grand Juries were made up of citizens who gathered together to make determinations on a range of matters of public interest, such as criminal matters arising out of complaints from private citizens (there being no organised police force to arrest offenders until 1829). A Grand Jury would consider if there was sufficient evidence to justify a trial and whether the 'offending' behaviour amounted to an offence. The aim was to ensure that an accused would not face trial on insufficient evidence or on the basis of a frivolous prosecution. Eventually, the role of the Grand Jury in determining sufficiency of evidence to stand trial was taken over by justices (who originally acted in apprehending and arresting suspected offenders).[13] During the mid 16th Century, legislation was passed empowering justices to act upon information and to examine the accused and the witnesses against him or her. The proceedings occurred in secret with the main objective being to determine if there was evidence to present to a Grand Jury. Such function was regarded as an administrative/inquisitorial function as it was the Grand Jury, not the justices, who determined whether the accused should stand trial.

By the mid 19th Century, an organised police force had been established in England and the role of the justices changed. With the passage of the *Indictable Offences Act 1848* (UK) witnesses appearing before the justices could be examined in the presence of the accused and cross-examined by the accused or by his or her counsel. Depositions of the evidence were reduced to writing and signed by the justices and the accused. The accused was no longer required to undergo examination but was asked if he or she wished to make a statement. Under the *Indictable Offences Act*, if '*in the opinion of the justices such evidence is sufficient to put the accused party upon his trial for an indictable offence, or if the evidence given raise(s) a strong or probable presumption of the guilt of such accused party, then such*

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12 The historical summary here is sourced from the Moynihan Report, p 163, and from *Grassby v R* (1989) 168 CLR 1; [1989] HCA 45 paras 10ff, per Dawson J.

13 Moynihan Report, p 163.

justice or justices shall, by his or their warrant, commit him to the common gaol or house of correction … or admit him to bail ...'.

As noted by Dawson J in *Grassby v R*, even under the *Indictable Offences Act*, the function of the justices was not to determine whether the accused should stand trial. It was the Grand Jury who still decided this. However, when the justices were determining whether the accused should be sent to prison or granted bail while awaiting trial or should be discharged, the justices were, in effect, deciding if there was a sufficient case against the accused. This was, in practice, the same decision required to be made by the Grand Jury. The Grand Jury's role soon became a mere formality until its abolition in the UK in 1933. The role of the justices has been taken over by magistrates. In Australian jurisdictions, it does not appear that the Grand Jury concept was ever actually adopted. A magistrate in conducting committal proceedings is exercising the powers of a justice of the peace. The powers of a magistrate are administrative, not judicial – to determine whether the accused shall be discharged, or committed to prison or given bail to await trial. A consequence of its history is that a committal proceeding is an administrative, not judicial, function.[14]

4.2 THE PURPOSE OF COMMITTAL PROCEEDINGS

As the Moynihan Report (p 162) observed, much has been written on the various functions served by the committal process. There have also been dicta in various judgements about the essential purposes such proceedings play in the system of criminal justice. For instance, in the High Court case of *Barton v R*[15] Gibbs and Mason JJ said:[16]

> *It is now accepted in England and Australia that committal proceedings are an important element in our system of criminal justice. They constitute such an important element in the protection of the accused that a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair. For us to say, as has been suggested, that the courts are concerned only with the conduct of the trial itself, considered quite independently of the committal proceedings, would be to turn our backs on the development of the criminal process and to ignore the function of the preliminary examination and its relationship to the trial.*

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14 *Grassby v R*, paras 10ff.

15 (1980) 147 CLR 75, [1980] HCA 48, para 43, per Gibbs & Mason JJ (with whose judgment Aickin J agreed). On the other hand, Stephen J and Wilson J appeared to consider that a committal was not essential to a fair trial.

16 See also, *Grassby v R* [1989] HCA 45 para 15.

Nevertheless, the Moynihan Report (p 162) sought to encapsulate the principal purposes as being to ensure that the accused knows the case against him or her (also dealt with in the consideration of disclosure in Chapter 5 of the Report); and that the trial in the Supreme Court or District Court is justified through the case meeting the requisite evidentiary threshold.[17] The committal process is also regarded as meeting the principles of fairness, efficiency and access to justice by enabling access to a pre-trial court in which to conduct an independent examination of the case against an accused.[18]

5 FEATURES OF THE CURRENT COMMITTAL PROCESS IN QUEENSLAND

Part 5 of the ***Justices Act 1886* (Qld)** (mainly Divisions 5-9)[19] covers the committal proceedings process for indictable offences in Queensland. The committal can take a number of forms:[20]

- a full committal where witnesses are examined, cross-examined and re-examined on their evidence to ensure there is sufficient evidence to commit the defendant for trial;
- a 'full hand up' or 'paper' committal where the defendant (if legally represented) agrees to all evidence of the prosecution witnesses being handed up to the magistrate in written statements without those witnesses being called for cross-examination and the defendant is automatically committed for trial; or
- a combination of both where some statements are handed up but some or all witnesses might be examined, cross-examined and re-examined.

Prosecutions of State offences are undertaken by the Queensland Police Service (QPS) and the Office of the Director of Public Prosecutions (ODPP), with the majority – around 75% – of committals being conducted by the QPS. The ODPP

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17 Other additional purposes served by committals noted by the Moynihan Report (p 162) include providing the opportunity for the parties to test and refute evidence, the chance to filter out weak cases, to identify early pleas, and to clarify and refine issues and charges before the trial. It also enables independent review by the committing magistrate.

18 Queensland Law Society (QLS), Submission on the Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2009, 31 January 2010, p 7.

19 Section 113A of the *Justices Act 1886* (Qld) applies to committals where the defendant is a corporation.

20 See Moynihan Report, p 167.

does not tend to become involved until after the defendant has been committed to the Supreme or District Court for trial or sentence.[21]

Before the committal proceeding, the QPS collects written statements of witnesses and prepares a 'brief of evidence'. This contains the form prepared by the arresting police officer setting out the charges and the facts alleged to have occurred, witness statements, confessional material (if any), and other relevant material. A copy is provided to the defendant or his or her lawyer. The defendant (or lawyer) will inform the prosecution about which witnesses the defence requires to be present to give oral evidence or to be cross-examined on their statements. The defence might also agree to a 'full hand up' committal on the written statements only.[22]

The following brief outline of the committals process is drawn from ss 103, 104-113 of the *Justices Act 1886* and the Moynihan Report (pp 168-170).[23]

5.1 FULL COMMITTAL HEARING FOR EXAMINATION OF WITNESSES

The process for a full committal where the defence does not consent to a 'full hand up' of witness statements is set out in s 104 of the *Justices Act 1886*.

The examination of witnesses must be conducted in the defendant's presence, if the defendant's presence is required, and of his or her lawyer (if any).[24] The charges against the defendant are read out and the prosecution presents its evidence via tendering written witness statements or by the witnesses giving oral evidence.

When all the prosecution evidence has been adduced and the magistrate is of the opinion that the evidence is insufficient to commit the defendant for trial, the magistrate shall order the defendant to be discharged (if in custody). As noted by the Moynihan Report (p 170), a discharge is not the same thing as an acquittal. An ex officio indictment can be presented by the Attorney-General or the ODPP, or the police might well initiate the same charges down the track. The latter might occur

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21 Moynihan Report, pp 167-168. The QPS can ask the ODPP to conduct more complex or sensitive committals.

22 Moynihan Report, p 168.

23 The process following private complaint is not considered here (see Part 5, Div 4 of the *Justices Act 1886* (Qld)).

24 Where a defendant is appearing together with other defendants, a defendant or his or her lawyer can apply for the defendant to be excused from attendance during the taking of prosecution evidence: s 104A(1). The magistrate may excuse attendance after having regard to matters in s 104A(2).

if new evidence comes to light. Alternatively, different charges might be laid in relation to the same incident.

However, if the magistrate is of the opinion that the evidence is sufficient to put the defendant upon trial (in other words, commit the defendant for trial), the magistrate advises the defendant that he or she can answer the charge, but is not obliged to do so, and may call witnesses.[25] If the defendant answers the charge, it is reduced to writing and, if the defendant is committed to stand trial, is transmitted with other depositions to the Supreme or District Court.

If, upon consideration of all the evidence adduced by the examination of witnesses, including any answer by the defendant (as per the previous paragraph), the magistrate is of the opinion that the evidence is insufficient to commit the defendant for trial for any indictable offence, the defendant is discharged (if in custody). However, if the magistrate believes that the evidence is sufficient to commit the defendant for trial, the defendant is committed to stand trial. In the meantime, the defendant is placed in custody or granted bail (s 108(1)).

If the defendant pleads guilty after being addressed by the magistrate, the defendant is committed for sentence before a court of competent jurisdiction (s 113).[26]

Although the Review was not able to ascertain the average number of witnesses needed for cross-examination; or whether the defence or prosecution required witnesses to give evidence; or the average length of committal hearings, the Report (pp 174-175) said that the data observed by the Review indicated that full committals, where many or all witnesses have to attend to give oral evidence and be available for cross-examination, are rare and tend to occur only in more serious matters, such as rape.

5.2 HAND UP COMMITTAL

Section 110A of the *Justices Act 1886* deals with the use of tendered written witness statements in lieu of oral testimony in the committal proceeding – the 'paper' or 'hand up' committal. This can be a 'partial hand up' or a 'full hand up', as noted earlier. The Moynihan Report (p 175) said that the majority of contested committals are partial hand ups in which there is consent for evidence to be given in written statements and only a small proportion of witnesses are cross-examined.

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25 The magistrate can also commit the defendant on different charges from those presented if the magistrate considers that there is a prima facie case for the laying of those charges. See also, Moynihan Report, p 169.

26 See s 113(4) regarding the circumstances where the defendant can be tried at another location.

The committing magistrate may admit as evidence signed and sworn written statements of witnesses tendered by the prosecution or the defence without the need for those witnesses to appear and give oral evidence, provided the defendant has legal representation. However, the prosecution and the defence must agree to the admission of each written statement; a copy must be available to other parties (containing information about any exhibits referred to in the statement), and the other party or parties must not object to such admission.[27] The written statements are deemed to be evidence of the witnesses as if they were oral evidence.

Where *all* the evidence (without reference to other exhibit evidence) consists of written statements and the defendant's lawyer *consents* to the defendant being committed for trial (or, if relevant, for sentence) without consideration of the contents of the written statements, the magistrate shall, without deciding if the evidence is sufficient to commit the defendant for trial, formally charge the defendant and commit the defendant for trial (or for sentence).

The Moynihan Report (p 169) made the point that while s 104(2) requires the magistrate to consider whether the evidence is sufficient to commit the defendant for trial in a committal hearing, the magistrate is not required to make such assessment in the case of a full hand up committal. Committal is on the basis of the written statements under s 110A. The Report (p 168) commented that consent to a full hand up is effectively an acceptance that the defendant has a case to answer.

The Moynihan Report (pp 168-169) pointed out that, where the defence *does not consent* to a full hand up committal (on the basis solely of written statements), the matter proceeds as a full committal hearing. The magistrate, after hearing any submissions made by the prosecution and the defence, determines whether the evidence is sufficient to commit the defendant for trial.

Where *some* of the evidence consists of written statements and *some* is given orally by witnesses, the magistrate will consider the evidence and determine if it is sufficient to commit the defendant for trial. The committal provisions apply as if an oral examination of witnesses at a full committal hearing was taking place.

Even if a written witness statement is admissible, whether it has been admitted or not and whether the defence has consented to committal for trial or sentence, the magistrate can, nevertheless, require that witness to appear to give evidence. The committal hearing provisions apply and the magistrate determines, on the basis of all the oral and written evidence, whether or not to commit the defendant.

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[27] A written statement may be admitted as evidence where the prosecution and the defence agree that the person making it shall be present in order to be cross-examined by the other party or parties, as required. The magistrate must then consider both the witness's written and oral evidence.

6 EFFECTIVENESS OF THE COMMITTALS PROCESS

The lack of valid and reliable information and data was regarded by the Moynihan Report (pp 170-171) as particularly problematic in terms of attempting to analyse the effectiveness of the committal process (e.g. how many full hand up committals; how long committals took on average, how many witnesses are called). Regional and local variations in practices and culture also made it difficult to draw inferences that were applicable to every location. Stored data on committals maintained on separate systems by the QPS, the Courts, the ODPP and Legal Aid Queensland tended to focus on the needs of the particular agency concerned rather than on providing an overview of how effective committals were. Thus, any recommendations for reform could not be as 'evidence based' as would have been desired. Nevertheless, the Report stated that there is general agreement among users of the court system that there needs to be improvement in the committal process. It was also noted that although much of the information is based on anecdotal evidence, there is a considerable amount of concurrence.[28]

With the above points in mind, the Moynihan Report stated that it was possible to draw various inferences from the information collected by the Review.

6.1 DELAYS IN AGREEMENT TO FULL HAND UP COMMITTALS

The Moynihan Report (pp 172-173) found (based on anecdotal evidence and a review of files) that a significant proportion of committals are by way full hand up. For example, the Brisbane Magistrates Court files indicated that an estimated 70% of committals were done this way.

As flagged above, many matters set down for a full committal hearing, where the defendant's lawyer requires the attendance of witnesses for cross-examination, end up as being a full hand up committal. Court staff in the Brisbane Magistrates Court estimate that around 25%-40% of matters set down for a full hearing finish up being full hand ups – often on the day of the committal hearing. The Moynihan Report (pp 173, 182) expressed particular concern about the 'disproportionate number of matters' in which there was agreement to a full hand up 'at the last minute'. The Review believed that this created discontent and inconvenience to

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[28] The Moynihan Report (p 171) said that it had considered information collected from the Courts, QPS, LAQ and the ODPP, interviews with court staff and users of the system, direct observations of the processes. In addition, Future Courts (a program established to create a modern, innovative and effective courts system for Queensland) and the Review also conducted a survey of a small sample of files of the Brisbane Magistrates Court and a more extensive review of 68 closed ODPP files for matters committed for trial and listed for April, May and June 2008.

witnesses who are summoned but, after turning up on the appointed day, find they are not required. Some of those are expert witnesses, such as doctors, who may be asked to give evidence in many matters. It was also seen as a waste of court, prosecution and police time and resources.

An example was given (p 182) of a matter where the defence required the attendance of numerous witnesses, including a surgeon who had delayed his operations on the designated day. On the morning at court he was informed that he was not needed. The only issue of contention was whether the prosecution would be seeking a prison term for the defendant yet the ODPP said that it had never sought a custodial sentence and it had never been asked about this until the morning of the committal. The Report considered that such events lead to much frustration, loss of confidence in the justice system, and costs to all involved.

The Report (p 173) noted that a commonly cited explanation of the late agreement to a hand up is that defence lawyers were often ill-prepared, and this could be due to LAQ funding policy,[29] or the tactics engaged in by some law firms to stall negotiations unless all witnesses are made available.[30]

6.2 CALLING OF WITNESSES AT COMMITTAL

The unfettered right of the defence to require prosecution witnesses to attend the committal for possible cross-examination, no matter how trivial the evidence they have to offer, without the need to provide justification was seen to create delays and inefficiencies within the justice system without any real purpose being served (Moynihan Report (p 182)). However, it was also important to ensure that cross-examination at committal hearings still occurs where it is justified and serves the purpose of the committal but not where witnesses are called and cross-examined as part of a 'fishing exercise' to work out a defence strategy.

The Report (p 166) observed that cross-examination can become directed at 'pinning down' witnesses – a purpose different from the historical function of the committal.

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[29] Which the Moynihan Report (pp 73-75) considered might be geared towards funding cases at a later stage rather than to achieve earlier resolution.

[30] The Moynihan Report (p 174) noted that court management and listing difficulties have been accentuated by practices such as those mentioned above, particularly if matters are set down for multiple committal mentions.

6.3 Effect of Contested Committal on Outcome

The Moynihan Report (pp 175-176) commented that lack of effective data meant it was not possible to determine the correlation between a contested committal and the outcome. For instance, there is little information about the number of cases in which cross-examination resulted in charges being dropped at trial, or a verdict, or the defendant not being committed at all. However, there is some information from a small case sample, ODPP data, and information provided by court staff that in around 11%-16% of cases some charges are dismissed, discharged, or withdrawn at committal but it is rare that all charges are dismissed.

6.4 Court Events or Mentions

Prior to committal, there can be a number of mentions.[31] However, the Magistrates Court information system does not record the number of mentions per matter or as an average. A survey of ODPP files and estimates made by court staff indicate that the average number of mentions per matter is 5.6. The Moynihan Report (p 177) commented that some of the many court events do not seem to progress the matter and some matters involved relatively small charges, such as minor assaults. Further, it was noted, unnecessary court events waste public resources and contribute to court delays (the available information suggesting that it is anything from four months to over seven months between arrest and committal).

6.5 Is Outcome Dependent on Prosecuting Agency?

The Moynihan Report (p 177) inferred, from a review of ODPP file data, that the prosecuting agency at committal might impact upon the conduct and outcome of matters. It was found that matters run by the QPS were, on average, more likely to go to trial rather than a guilty plea, tended to involve a longer delay, and more often involved a change of charges from committal.

7 PROPOSED REFORMS TO THE COMMITTALS PROCESS

The Moynihan Report (p 181) considered that, in view of the available information, submissions and opinions of persons consulted, and the experiences of other

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[31] Which Mr Moynihan prefers to call 'court events': Moynihan Report, p 176.

jurisdictions,[32] it was clear that the committal process required reform. The Report observed that the current system did not make effective use of public resources and that there needed to be a '*more focussed, streamlined, effective committal process*'. However, the essential purposes to be served by the process needed to be the focus. The Report (p 183) reiterated that the principal purposes of committals were to ensure that the defendant knows the case against him or her; and that a committal of the matter for trial is justified – in other words, that the evidentiary threshold has been met.

Thus, the Report argued (p 166), there is need of clarification of purpose and adjustment to align the committal process with the achievement of an early resolution and to do so consistently with principles of fairness and access to justice.

The Moynihan Report (pp 181-182) said that proper use of a committal with well briefed lawyers can help to clarify issues, refine the charges, enhance negotiations about pleas, and identify weak cases that need to be dropped. It can also allow a defendant to know the case to answer and the magistrate to determine if there is, indeed, a prima facie case. The Report (p 169) commented that there are many reasons why a defendant may cross-examine witnesses but it will be mainly to determine the approach to defence at the trial once the evidence has been tested, and prosecution weaknesses exposed, at the committal. On the other hand, the prosecution may also see the committal process as a chance to examine a prosecution witness to ascertain if he or she is a hostile witness or is likely to survive a cross-examination.

However, it was believed that unfettered access to the courts without justified need had to stop due to the delays and inefficiencies created for little resulting purpose. The Review was especially concerned about the large number of matters where there is agreement to a full hand up only at the last minute, wasting time and resources of witnesses and the courts.

It was proposed (p 184) that:

- instead of there automatically being a committal hearing unless the defence consents to a hand up of witness statements, an administrative (full hand up) committal be the default position and that a hearing with examination and cross-examination of witnesses only be conducted where justified; and
- in the absence of agreement, prosecution witnesses only be called by the ODPP or by an order of the magistrate.

The new system is proposed to be founded on timely and compliant disclosure (discussed in Chapter 5 of the Moynihan Report).

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[32] Committal processes in other Australian jurisdictions are considered later in this Research Brief.

The above proposal and detailed recommendations of the Moynihan Report (pp 209-214) for the suggested new committal process form the background to the consideration of **Part 11** of the Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2010 (Qld) (the Bill) which proposes to amend **Part 5** of the *Justices Act 1886* to implement the new reforms. The *Queensland Government's Response to the Review of the Civil and Criminal Justice System in Queensland* (Government Response), published in July 2009, dealt with the committals recommendations on pp 12-13.

The proposed amendments sought to be effected by the Bill will be examined under headings that relate to the main points of the Moynihan Report recommendations.

7.1 RESTRICTIONS ON THE CALLING AND EXAMINATION OF WITNESSES

At present, the defence can require every prosecution witness to be called for possible cross-examination without providing any justification and no matter how trivial the witness's evidence may be. This, according to the Moynihan Report (p 191), can lead to carelessness by some defence lawyers who just ask for all witnesses to be available then, later, agree to a hand up. It was proposed (p 192) that an unrestricted right to call and cross-examine all witnesses should no longer occur. However, if prosecution evidence raised justifiable concerns and related to a critical issue, it is reasonable for cross-examination to occur. It was observed that there were limitations on the right to call and cross-examine prosecution witnesses in all other Australian jurisdictions, apart from the Northern Territory (which will legislate during 2010 to impose restrictions).

7.1.1 Moynihan Report Recommendations

Accordingly, the Moynihan Report recommended that (pp 192-195) if the defence wishes to cross-examine a witness, unless the prosecution consents, it must seek leave of a magistrate justifying why it is necessary and stating the scope of questioning proposed. It was also considered that better quality statements and recording of statements[33] would reduce the need for oral witness testimony.

The New South Wales *Criminal Procedure Act 1986* was seen (pp 193-194) as providing a model as it has been seen as working satisfactorily for over 20 years and has been tested by the courts. Section 74 states that prosecution evidence must be provided in written statements (apart from the exceptions in s 77). Section 91 sets out the circumstances in which the magistrate may direct the attendance at the committal proceedings of a prosecution witness. If the prosecution does not

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[33] The recommended mechanisms for which were discussed in Ch 4 of the Moynihan Report.

consent, the direction can be given only if the magistrate is satisfied that there are substantial reasons why, in the interests of justice, the witness should attend to give oral evidence.[34]

7.1.2 Submissions

A number of submissions, including those from the Queensland Law Society (QLS), Legal Aid Queensland (LAQ), and the Bar Association favoured retention of the current unrestricted rights to call and cross-examine witnesses.

The QLS Submission argued that just because reforms and restrictions have been implemented in other jurisdictions does not provide justification for making reforms in Queensland, particularly as the Moynihan Report had not produced any evidence based information about whether reforms in those jurisdictions have resulted in an improvement in pre-trial and trial outcomes.[35] It was also argued that most legal practitioners in Queensland use the committal proceedings properly with due regard to the need to save time and resources and with a focus on the true issues.[36] Despite the QLS' view of Queensland's criminal practitioners, the Hon Justice John Byrne, Senior Judge Administrator of the Supreme Court of Queensland recently said that it, nevertheless, appears that Mr Moynihan took a different view of the way in which committals generally function in Queensland.[37]

The QLS Submission (pp 9-10) also noted that recent DPP Annual Reports indicate that over 40% of cases in which the ODPP was involved were disposed of summarily or the charges were withdrawn. It was argued that those statistics suggest that cross-examination of witnesses at committal acts as a filter for expeditious and cost effective disposition of matters in the lower court or efficient resolution in a superior court by way of a plea or shorter trial. The QLS also said that its members have found that in the majority of committals where cross-

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[34] See also, s 93 of the NSW *Criminal Procedure Act 1986* – magistrate not to allow cross-examination on different issues unless there are substantial reasons why, in the interests of justice, this should be allowed.

[35] See also, Joel Gibson, 'Taxpayers foot bill as 30% of court cases dropped', *Sydney Morning Herald Online*, 10 May 2010.

[36] Queensland Law Society (QLS), 'Submission on the Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2009', 31 January 2010, p 9. This submission relates to the draft consultation Bill released in November 2009.

[37] Hon Justice John Byrne, Senior Judge Administrator of the Supreme Court of Queensland, 'Moynihan Review', Notes of a paper presented to the Queensland Law Society's 48th Annual Symposium, Brisbane, 26 March 2010, p 4.

examination occurs, one or more witnesses alter their account, will offer new evidence that has not been given to the police, or will depart from evidence provided in their statements. If this were to happen at trial, the jury may have to be discharged and a retrial ordered which increases costs and creates inefficiencies (p 10). Thus, the QLS argued, cross-examination at committal allows for key evidence to be tested prior to the trial which case conferencing cannot necessarily do.

The Legal Aid Queensland (LAQ) Submission[38] noted that another important aspect of the committal proceeding was that it 'brings home' to a defendant the reality of his or her position because of the need to appear at a proceeding where evidence is called and a magistrate makes a determination about the case. A committal was regarded as more effective than other court events, such as mentions, in underlining to the defendant the need to make decisions. Sometimes the evidence and the cross-examination at the committal may steer the defendant towards a guilty plea if, for instance, the defendant has resisted doing so because of a belief that a key prosecution witness may be unreliable or hostile. The cross-examination of that witness at the committal may indicate that there is little prospect of the defendant being able to defend the charges.

Thus, the LAQ submitted (p 24), that without the step of the committal proceedings and the opportunity to see witnesses give evidence and be cross-examined, some defendants may elect to defend a trial to have their 'day in court'. To reinforce this point, reference was made to a comment by the Hon Judge Dick at the committals discussion forum (to launch the Moynihan Review) that she had perceived a significant number of early guilty pleas after the defendant had heard pre-recordings of the evidence of affected child witnesses (whose evidence is restricted under the *Evidence Act 1977* (Qld) and who do not have to give evidence at committals). It appeared that the pleas arose in circumstances suggesting that the plea decision was influenced by the nature of the child witnesses' oral evidence under cross-examination. It was argued (p 25) that it can be important for a defendant to see what a key prosecution witness will say on oath under cross-examination rather than what the witness said in private in a police statement or interview.

The LAQ Submission (p 26) argued that it was more cost effective to have such a pre-trial procedure in the committal proceeding to achieve the above results than to do so at trial. It was also its perception that trials in Queensland courts were more expeditious than in some other states.

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[38] Legal Aid Queensland (LAQ), Submission to the review of the civil and criminal justice system in Queensland, September 2008, p 24.

While the LAQ Submission (p 33) agreed that unproductive cross-examination did occur at times in some committals, the fault was not only that of the defendant's lawyers. Disengagement by magistrates and the prosecution also contributed, it was suggested. The LAQ argued that magistrates should more actively intervene to restrict improper cross-examination that is unproductive, bullying or otherwise inappropriate.[39]

On the other hand, as noted in the Moynihan Report (pp 194-195), the Commonwealth ODPP had submitted that the NSW *Criminal Procedure Act 1986* had the advantage of requiring the defence to have to actually consider which witnesses it needed to call for cross-examination and to be able to justify that need.[40]

7.1.3 Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2010 (Qld)

The Bill adopts the above Moynihan Report recommendations, including basing the new provisions restricting cross-examination on the *Criminal Procedure Act 1986* (NSW). The Explanatory Notes (pp 6-7) reproduce Appendix 13 of the Moynihan Report setting out the principles that apply to 's 91 applications' and the meaning of 'substantial reasons in the interests of justice' provided by Whealy J in *Sim v Magistrate Corbett & Anor*.[41]

Committal Hearing to Examine Witnesses

While the Moynihan Report and the Government Response supported making administrative committals the default position, it was recognised that, in some situations, there were substantial reasons, in the interests of justice, for a magistrate to allow witnesses to be called and cross-examined.

As discussed earlier, when a committal hearing is held before a magistrate and the evidence of the prosecution has been adduced, the magistrate considers the evidence to determine if it is sufficient to commit the defendant for trial for any indictable offence. If the magistrate considers that the prosecution's evidence is sufficient to commit the defendant, **s 104(2)(b)** of the *Justices Act 1886* (Qld)

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[39] The LAQ Submission, p 33, noted that the Bar Association's committals paper (at pp 14-15) also set out steps for addressing abuse of the committal proceeding.

[40] Moynihan Report (pp 194-195) quoting the Commonwealth ODPP Submission to the Review of the Civil and Criminal Justice System in Queensland (submission unavailable online).

[41] [2006] NSWSC 665, para [20].

currently provides that the magistrate shall advise the defendant that he or she can answer the charge but that he or she is not obliged to do so. The magistrate must tell the defendant that he or she may give evidence on oath and call witnesses. **Clause 86** of the Bill seeks to clarify that the reference to the defendant calling witnesses means 'witnesses for the defence'.

If the defendant wants to offer evidence, the magistrate shall hear and receive all such admissible evidence tending to show whether or not the defendant is guilty of the offence charged (s 104(4)).[42]

As noted earlier, s 108 provides that if the magistrate is of the opinion that the evidence is sufficient to commit the defendant for trial on an indictable offence, the magistrate shall do so.[43] The defendant is held in custody or released on bail until the trial. If the evidence is not sufficient to commit the defendant for trial, the defendant is discharged. If the defendant pleads guilty, the defendant is committed for sentence before a court of competent jurisdiction (s 113).

Full and Partial Hand Up Committal

Section 110A of the *Justices Act* is proposed to be amended by **cl 87**. Section 110A sets out the process for hand up committals either as a full hand up of written statements or a combination of written statements and oral testimony. The amended **s 110A** aims to provide for the admission of written witness statements at the committal proceeding.

Statements Tendered by the Defence

If a written statement of a defence witness is tendered, the magistrate may, subject to other provisions in s 110A being satisfied, admit the statement as evidence without the witness appearing to give oral evidence (**proposed new s 110A(2)**).

Under the **proposed new s 110A(6B)**, the statement must not be admitted as evidence unless the prosecution agrees to the admission and no other party objects. **Section 110(8)** is also sought to be amended to provide that a statement tendered by the defence may be admitted subject to agreement between the parties that the

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42 If the defendant is committed to stand trial, anything the defendant may say in answer is reduced to writing transmitted with depositions of witnesses pursuant to s 126 (**s 104(3)**). Where the defendant is committed for trial, the magistrate must warn the defendant that he or she may not be permitted to give evidence at that trial of an alibi or call witnesses supporting an alibi unless the defendant gives written notice about such to the crown solicitor within the prescribed time (**s 104(5)**). See also **s 105** about statements made by the defendant and signed by the magistrate being given in evidence at any later trial.

43 See also s 108(2) regarding circumstances for the defendant being tried at another location.

witness providing the statement will be available to be cross-examined by the other party or parties if required.

Even if a written statement is admissible as part of the defence case and whether or not it has been admitted by the magistrate, the magistrate may still require the witness to attend to give oral evidence (**s 110A(9)** as amended by cl 87). If so, the magistrate must consider the witness's oral and written evidence even if the defence has consented to a committal for trial or sentence (as occurs on a full hand up). In these circumstances, the committal is conducted as if it were a hearing.

Statements Tendered by the Prosecution

Under **proposed new s 110A(3)**, if a written prosecution witness statement is tendered, the magistrate must, subject to other provisions in s 110A being satisfied, admit the statement as evidence; and must not require the prosecution witness to appear to give evidence unless the magistrate has directed, under the new s 83A(5AA), that the prosecution must call the witness to give oral evidence or be available for cross-examination. [44]

However, the prosecution witness statement will not be admitted if the defendant is not legally represented, unless the magistrate is satisfied that the defendant understands the nature and consequence of the proceedings; that the defendant is aware of his or her entitlement to have a lawyer and to apply for legal assistance; and that the defendant has been made aware of his or her right to apply for a s 83A(5AA) direction that the witness attend to give oral evidence (**new s 110A(4))**.

Currently, if the defendant is unrepresented, he or she cannot be committed by way of full hand up of written statements and it is always necessary for witnesses to give oral evidence and be present for cross-examination. The problem, however, is that it is very likely an unrepresented defendant will be unable to undertake any effective cross-examination of the witness (Moynihan Report p 199). The Moynihan Report (pp 199-200) considered that changes were needed to enable the committal of unrepresented defendants on the basis of written statements provided the magistrate was satisfied of the conditions outlined in the previous paragraph.[45] The proposed s 110A(4) adopts that recommendation.

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[44] Although, as pointed out in the *Explanatory Notes* (p 37) the prosecution can call its own prosecution witnesses without a s 83A(5AA) direction being required.

[45] This was also supported by the LAQ Submission (p 39).

Direction to Prosecution Witness to Give Oral Evidence

Section 83A of the *Justices Act 1886* enables a direction hearing to be convened and held on the magistrate's own initiative or on application by a party to the proceeding. The **proposed new s 83A(5AA)** provides that a magistrate can give a direction at a direction hearing requiring the prosecution to call the maker of a written statement tendered or sought to be tendered under s 110A(3) to appear to give oral evidence or to be available for cross-examination. However, the new subsection is subject to the proposed new s 110B requirements and does not apply to statements of an affected child witness under the *Evidence Act 1977* (Qld), nor to enable a cross-examination that is not otherwise permitted (e.g. cross-examination of protected witnesses).[46]

The **proposed new s 110B** (see **cl 88**) seeks to ensure that a magistrate cannot give a s 83A(5AA) direction to direct the attendance of the maker of a written statement unless satisfied that there are *substantial reasons why, in the interests of justice, the maker should attend to give oral evidence or be made available for cross-examination on the written statement*.[47]

Guidelines to the interpretation of '*substantial reasons why, in the interests of justice, a witness should attend to give oral evidence*' are provided by Whealy J in *Sim v Magistrate Corbett & Anor* (in the context of such requirement in s 91 of the NSW *Criminal Procedure Act 1986*) and referred to in the Explanatory Notes to the Bill (pp 6-7).[48] In brief, the guidelines indicate that:

- each case will depend on its own facts and circumstances and the issues likely to arise at trial. It is not possible to define what might, in a particular case, constitute substantial reasons. The reasons advanced must have substance in the context of the committal proceedings;
- the categories of 'substantial reasons' are not closed and flexibility of approach is required. It may be a situation where the defence believes that:[49]
  - cross-examination may result in the discharge of the defendant because the evidence does not justify committal;

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46 See also, **proposed new s 83A(9)** to be inserted by **cl 78**.

47 The magistrate must give reasons for his or her decision about a s 83A(5AA) application (**new s 110B(6)**). The direction by the magistrate can be withdrawn on the application of the prosecution if the defendant or his or her lawyer does not appear at the direction hearing (**new s 110B(8)**).

48 See also, Appendix 13 of the Moynihan Report and Explanatory Notes to the Bill (pp 6-7).

49 The bulleted points draw from the Moynihan Report (p 193) and *Sim v Magistrate Corbett & Anor* para [20], points 6 &7.

- cross-examining a certain witness may expose a weakness in the prosecution case giving rise to a 'no case' submission;
- cross-examination is likely to substantially undermine the credit of an important witness;
- cross-examination is necessary to avoid the defendant being taken by surprise at trial;
- the attendance of a witness will enable cross-examination in respect of a matter which itself might give rise to a discretion or determination to reject evidence at trial.

An application for a direction under **proposed new s 83A(5AA)** can only be made if specified conditions in **proposed new s 110B(3)** – effectively requiring the parties to communicate to see if agreement can be reached on this issue – are satisfied. These are:

- the defence has advised the prosecution in writing (or by electronic form of communication) of the witness it wishes to call, the general relevant issues for doing so (e.g. regarding identification evidence), the reasons relied on to justify this, and a nominated time (see s 110B(4)) for the prosecution to respond; and
- the prosecution does or does not respond within the nominated time; and
- the defendant's communication and the prosecution's response (if received) has been filed with the application. The prosecution's response may state if the prosecution agrees to the witness being called and any conditions it attaches to such agreement (see Explanatory Notes, p 38).

The **proposed new s 110C** provides that where a witness attends the committal hearing because of a s 83A(5AA) direction, the magistrate must not allow the person to be cross-examined about an issue that is not relevant to the reasons given by the magistrate for needing the witness to attend. However, cross-examination on such an issue may be allowed if the magistrate is satisfied there are substantial reasons why, in the interests of justice, the cross-examination should be allowed. The prosecution will then be able to re-examine the witnesses.[50] This proposed provision is very similar to s 93 of the NSW *Criminal Procedure Act 1986*.

If the prosecution and the defence agree that a prosecution witness will be available for cross-examination, a s 83A(5AA) direction is not required (**new s 110A(5)**). The DPP might be inclined to issue guidelines about such agreements.

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[50] The **new s 110C(4)** provides that the limitations on cross-examination in s 110C are additional to, and do not affect, other laws limiting cross-examination. The notes give such examples as provisions in the *Evidence Act 1977* (Qld) which enable disallowance of improper questions, certain questions going to credit, and provisions for the cross-examination of protected witnesses and child witnesses.

If a witness is cross-examined because of a s 110A(5) agreement or a s 83A(5AA) direction, the magistrate must consider both the witness's written statement and the witness's oral evidence (**proposed new s 110A(6)**). **Section 110A(7)** will continue to state that where there is this mixture of oral and written evidence, the magistrate must consider all the prosecution evidence to determine if it is sufficient to commit the defendant to trial for an indictable offence.

Admission of Written Statements

A written statement tendered by either party must not be admitted as evidence unless a copy has been made available, by or on behalf of the party proposing to tender it, to the other party or parties. The tendering party must advise that the copy was being made available with the intention that the statement be admitted at the committal.[51]

A written statement tendered by the defence or the prosecution admitted under the new s 110A(2) or (3) has the same effect as evidence given or a statement made under s 104 upon an examination of a witness; and is admissible to the same extent as it would be if the contents had been given as oral evidence by the person who made the written statement (**proposed new s 110A(6A)**).

Full Hand Up Committal

The 'full hand up' committal situation is provided for in the **proposed new s 110A(6D)-(6F)**. This is where all the evidence before the magistrate (whether for the prosecution or the defence), without reference to exhibits, comprises written statements and the defendant's lawyer *consents* to the defendant being committed for trial or sentence (as is relevant) without consideration of the contents of the written statements.

In this situation, the magistrate must, without deciding under s 104(2) whether the evidence is sufficient to commit the defendant for trial for an indictable offence (but subject otherwise to s 104), formally charge the defendant and order him or her to be committed for trial or sentence (as is relevant).

The magistrate can commit the defendant even if, before the defendant's lawyer consented to the defendant being committed without considering the contents of

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[51] The statement must be signed and contain the relevant declaration under the *Oaths Act 1867* (Qld) or specified acknowledgment (**proposed new s 110A(6C(c)**). If the statement refers to any other document as an exhibit, a copy of that must also be given to the other party or the other party must be given the information necessary to allow the party to inspect the document (**amended s 110A(14)**). See also, **s 110A(15)**.

the statements, one or more unsuccessful applications were made for a s 83A(5AA) direction to require a person to attend and give oral evidence.

However, where all the evidence consists of written statements and the defendant's lawyer *does not consent* to the defendant being committed for trial or for sentence *or* the *defendant is not legally represented*, the magistrate, after hearing any submissions made by the prosecution and the defence, then decides whether the evidence is sufficient to commit the defendant for trial. The committal process provisions then apply as if an ordinary oral examination of witnesses was taking place (**amended s 110A(10)**). The above provisions in the **new s 110A(4)** about admitting prosecution witnesses statements where a defendant is not legally represented would appear to also apply here. These enable the magistrate to admit the statement(s) if the defendant has been made aware of the nature of the proceedings and the consequences for him or her; that he or she can seek legal representation and legal assistance; that he or she can apply to cross-examine witnesses in limited circumstances (with an explanation of the effect of s 83A(5AA)).

7.2 REGISTRY COMMITTALS

Under the Bill, it is proposed that there will be a direct administrative (or registry) committal unless it is otherwise agreed or ordered that witnesses are to be called.

7.2.1 Moynihan Report Recommendations

The Moynihan Report (pp 169, 196-197) noted that, in the case of full hand up committals, where the defendant has consented to being committed, the magistrate does not have to consider whether there is sufficient evidence to commit the defendant for trial. It is as if the defence accepts that the committal is justified. Thus, the process involved is actually an administrative ('rubber stamp') one rather than judicial. Yet, the processing takes up court time and resources when it could be done by the registry and carried out electronically.

The LAQ Submission (pp 36-37) supported the concept of registry committals to facilitate the expeditious transfer of matters to the higher courts and to replace full hand up committals and ex officio indictments where the defendant is legally represented, the defence determines a prima facie case exists and examination of witnesses is unnecessary.

7.2.2 Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2010 (Qld)

Clause 89 of the Bill seeks to insert a **new Part 5**, **Division 7A** to provide for registry committals by the Magistrates Court Clerk where a full hand up of witnesses' statements is agreed to.

The **proposed new s 114** provides that the Clerk may order a defendant to be committed, tried or sentenced for an indictable offence if:

- the indictable offence is not to be heard and decided summarily;
- the defendant is not in custody or in breach of any bail conditions;
- the defendant is represented by a lawyer;
- all evidence for the prosecution (including of any affected child under Part 2, Div 4A of the *Evidence Act 1977*) is intended to be given as written statements;
- the written statements have been filed by the prosecution and copies given to the defence (unless the defendant's lawyer has included in the s 114(1)(f) notice (mentioned in the next bullet point) a statement consenting to statements not being filed and given);
- the defendant's lawyer has given notice to the Clerk (by a specified date), and served a copy on the prosecution, stating that the defendant does not intend to give evidence or call witnesses; acknowledging that the functions of the Clerk for a registry committal do not include considering/deciding whether the evidence is sufficient to commit the defendant for trial; and stating whether the defendant wishes to be committed for trial or for sentence.[52]

The Clerk's order, above, has the same effect as if it were an order of a magistrate.

The **proposed new s 115** makes it clear that the functions of the Clerk for a registry committal do not include considering or deciding whether the evidence is sufficient to commit the defendant for trial for the indictable offence.[53]

The defendant and any other parties do not need to attend the registry committal. The registry committal is conducted by the Clerk on the basis of the charges as agreed to by the prosecution and the defence and the Clerk has the same power as a magistrate has to amend or withdraw charges to ensure the defendant is committed

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[52] If the defendant's lawyer gives a notice stating that the defendant wishes to be committed for sentence, the lawyer must also file a written statement signed by the defendant stating matters specified in **new s 114(2)**, including that the defendant pleads guilty to the offence.

[53] The Clerk, upon committing the defendant, must give notice warning the defendant, as is required of a magistrate under s 104(5), that alibi evidence may not be permitted at the trial unless specified notice is given to the prosecution (see **new s 115(2)**,**(3)**).

on the agreed charges rather than charges on which the defendant may have been initially brought before the Court.[54]

The functions of the Clerk for a registry committal do not, however, include remanding the defendant in custody or any bail function. As the Note to the new s 115(10) points out, the new **s 34BA** of the ***Bail Act 1980*** (sought to be included by **cl 7** of the Bill) provides for the automatic continuation of the defendant's bail when a defendant is committed for trial or sentence. This reflects the views of the Moynihan Report (see e.g. pp 198, 206).[55]

7.3 EX OFFICIO INDICTMENTS

The Attorney-General (or the ODPP) essentially has the discretionary power to present an indictment in the Supreme or District Court without a committal. Even if the magistrate does not commit the defendant and the defendant is discharged, the Attorney-General (and the ODPP) is not bound by this determination.[56] As noted in the Moynihan Report (p 205), an ex officio indictment is a bill of indictment for an offence in respect of which there has been no committal for trial. The power for presenting an ex officio indictment is now found in s 561 of the Criminal Code.

The Moynihan Report (p 205) also observed that the ODPP usually, in practice, chooses to proceed by way of a full hand up committal rather than by way of ex officio indictment because it is a faster way of getting the matter up to the higher court. The LAQ Submission (p 31) supported this observation. The result is much the same because in both situations, the matter goes up to the higher court without any testing of the evidence and examination of witnesses in the Magistrates Court. The LAQ said that the delay in processing ex officio matters impacts adversely on magistrates courts because the charges are not removed from the Magistrates Court jurisdiction until resolved in the higher court. Meanwhile, the matter takes up time

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[54] See also, **new s 115(7)-(9)** regarding circumstances where the defendant is committed for trial or sentence at a court at another place (discussed earlier in this Research Brief).

[55] The **proposed new s 116** will provide that this administrative/registry committals process takes the place of the normal procedures that would otherwise apply under Part 5, Divisions 5-7 of the *Justices Act 1886*. Sections 110A(12)-(15), regarding the effect of admitted written witness statements etc. when the matter goes to trial, also have effect for a registry committal to the greatest practicable extent: **new s 116(2)**. See also, **proposed new s 117**, and **proposed new s 130** (see **cl 90**) regarding actions taken by the Attorney-General or crown prosecutor in relation to documents etc. sent to them after committal.

[56] See *Grassby v R* [1989] HCA 45, paras 16, 17, per Dawson J.

for all involved to appear at mentions of the matter because of it still being listed in the Magistrates Court.

7.3.1 Moynihan Report Recommendations

The Moynihan Report (pp 205-206) recommended that any administrative mechanism used for full hand ups also be available to transmit ex officio matters to the Supreme or District Court. This seemed preferable to the current situation where a matter that is on an ex officio indictment continues to be listed in the Magistrates Court and undergoes repeated mentions until the higher court finally deals with it. Each callover requires the attendance of the parties' lawyers and use of court time. It was also proposed that the mechanism for transferring an ex officio matter should be aligned with that for transferring matters to the higher court where there is no committal hearing (i.e. full hand ups).

7.3.2 Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2010 (Qld)

Under the **proposed new s 23EB** (sought to be inserted into Part 3, Div 2A of the *Justices Act 1886* by **cl 73** of the Bill) a Magistrates Court is able to refer to the Clerk of the Magistrates Court a charge for an indictable offence only if the defendant is legally represented, is not in custody, and is not in breach of any bail conditions.

A charge may be referred to the Clerk if the prosecution and the defence advise that they are in agreement that an ex officio indictment is to be presented under s 561 of the Criminal Code. Once the charge is referred, the Clerk has to keep the charge under review and refer it back to the Court if the Clerk considers this should be done to ensure the hearing of the charge is not delayed unnecessarily, or if either party asks for that to be done.

Once the ex officio indictment has been disposed of by the Supreme or District Court, the registrar of the Supreme or District Court must, within one calendar month, advise the Clerk of the Magistrates Court of this.

The Moynihan Report (p 206) noted that bail issues in this context needed to be addressed and this could be by continuing the defendant's bail status until the indictment is presented. Similarly to the situation with registry committals (as discussed above) **cl 7** of the Bill seeks to amend the *Bail Act 1980* (Qld) to insert a **new s 34BB** so that where the Clerk is managing a matter proceeding by way of ex officio indictment, the defendant's bail requirements are continued, subject to certain changes.

7.4 MAGISTRACY SUPERVISION

7.4.1 Moynihan Report Recommendations

At pp 210-211, the Moynihan Report proposed that the magistracy be given overall responsibility for supervising committals and summary matters without the need for the application of a party, provided that the exercise of the magistrate's own initiative is accompanied by the parties being given the chance to make submissions on the proposed intervention. The magistrate should, it was believed, be able to give directions, direct parties to confer about issues, set timetables and have a number of powers relating to the parties' disclosure obligations and noncompliance therewith.

7.4.2 Civil and Criminal Jurisdiction Reform and Modernisation Amendment Bill 2010 (Qld)

The Bill (in **cl 85**) proposes to insert a **new s 103B** into the *Justices Act 1886* which gives magistrates an overall supervisory responsibility for a committal proceeding which will include setting timetables for the proceeding to the extent not otherwise provided for under an Act or practice direction. This does not, however, affect the powers of the magistrate to act in relation to the examination of witnesses, or any other power to control a proceeding or give a direction about a disclosure obligation (see below), or the operation of the registry committals provisions, or the magistrate's duty to comply with the Chief Magistrate's directions or requirements.

In recommending against magistrates having more specific power to control proceedings, especially regarding the cross-examination of witnesses, the Moynihan Report (pp 211-212) observed that a number of Acts currently gave adequate powers to all courts to control their proceedings. For instance, s 21 of the *Evidence Act 1927* (Qld) gives the court discretion to stop certain cross-examination that is not relevant or to disallow a question that it considers to be improper, misleading, confusing, annoying, harassing, intimidating, offensive or repetitive. That Act also enabled the court to disallow a question going to a witness's credit or to tell the witness that the question need not be answered if the court considers an admission of the question's truth would not materially impair confidence in the reliability of the evidence given by the witness.

7.5 DISCLOSURE OBLIGATIONS

The Bill includes a number of amendments to the *Justices Act 1886* and the Criminal Code to adopt a number of the Moynihan Report Chapter 5 recommendations regarding disclosure obligations and the court's power to deal with noncompliance with such obligations. The Moynihan Report (p 192) noted that the new committal process would be founded on compliance with disclosure obligations which may also reduce the need for committals. As noted by the Report, timely disclosure minimises delay and supports the effective use of resources through fostering early guilty pleas and the narrowing of various issues.

The **Criminal Code** currently imposes an ongoing obligation on the **prosecution** to disclose evidence it intends to rely upon as well as things in its possession which could help the case for the defendant (s 590AB). Chapter 62, Chapter Division 3, Chapter Subdivision C then goes on to impose various other disclosure requirements in relation to 'a relevant proceeding' (defined in s 590AD to include a committal proceeding).[57] However, the Moynihan Report, in Chapter 5, expressed some concerns about the lack of clarity and coherency in the provisions, which the proposed amendments seek to improve.[58]

Some examples of current disclosure obligations under the Criminal Code are that the prosecution must give to the defence copies of each of the things listed in s 590AH (sought to be amended by **cl 28** of the Bill). These include a copy of the bench charge sheet, complaint or indictment containing the charge; the defendant's criminal history; any statement of the defendant; proposed prosecution witness statements; notice about affected child witnesses; reports or test results; a written notice describing any original evidence to be relied upon etc. A timeframe for disclosure is provided in s 590I which has been amended (by **cl 79**) to clarify the specific date for compliance and the Bill inserts a new s 706 to enable the prosecution to agree to an earlier disclosure.[59] Under s 590AJ of the Criminal Code, the prosecution must, on request, give the defence the things listed therein and the obligation to disclose is ongoing so if the thing was not in the prosecution's possession when asked for by the defence, it must be disclosed when it comes into the possession of the prosecution (s 590AL). Chapter 62, Chapter Division 3,

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57 The Criminal Code prosecution disclosure obligations provisions apply to committals under the *Justices Act 1886* (Qld).

58 See Government Response, p 5, which expressed support for the need for improvements. It did not, however (p 6), support some recommendations regarding certification by arresting police officers.

59 For a committal proceeding, the court can set a date to commence the hearing of evidence even if, having regard to s 110A of the *Justices Act 1886* (discussed earlier regarding hand up committals), there will or may be no witnesses to be called to give oral evidence.

Chapter Subdivision D imposes some limitations on the disclosure obligations and the way in which things are disclosed.[60]

The disclosure obligations imposed on the **defendant** are fairly limited and are set out in Chapter 23, Chapter Division 4.

7.5.1 Disclosure Obligation Directions

The Bill (**cl 35**) seeks to insert new disclosure obligation directions provisions as a **new Chapter 62, Chapter Division 4A** of the Criminal Code. The new chapter division seeks to make specific provision for the Court to issue pre-trial directions about compliance with the abovementioned disclosure obligations on the prosecution and the defence. The **new s 590AAA** (sought to be inserted into Chapter 62, Chapter Division 2 by **cl 25**) proposes to give the Court new powers in relation to noncompliance with the Court's direction about disclosure. These new disclosure direction provisions in the Criminal Code are similar to those sought to be incorporated by the Bill into the *Justices Act 1886* in relation to committals and will, thus, be discussed in that context in the next paragraph.

Section 83A of the *Justices Act 1886* currently allows a magistrate to direct the parties (on his or her own initiative) or on application by a party, to attend a direction hearing. At the direction hearing, the magistrate may give a direction about any aspect of the conduct of the proceeding, including about prosecution disclosure under Chapter 62, Chapter Division 3 of the Criminal Code.[61]

Further, **cl 79** proposes to insert **new ss 83C-83F** into Part 4 of the *Justices Act 1886* to give the Court power to make various directions about the prosecution's

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[60] For instance, where the prosecution considers something to be: 'sensitive evidence' (e.g. obscene or indecent photographic images; photographs that would interfere with a person's privacy; child pornography (ss 590F, 590AO)); 'device statements' the prosecution seeks to tender at the committal proceeding under s 93A of the *Evidence Act 1977* (Qld) (s 590AOA). Things regarded to be contrary to the public interest need not be disclosed unless directed by the court (e.g. could prejudice the investigation of an offence) (s 590AQ). Witness contact details are not to be disclosed except in limited circumstances (s 590AP). Disclosure directions can be given by the Court, under s 590AV, regarding the foregoing limited disclosure matters.

[61] As discussed earlier, the new s 83A(5AA), inserted by **cl 78** of the Bill, will allow a magistrate to direct the prosecution to call a witness to give oral evidence or to be available for cross-examination at the committal proceeding, subject to s 110B. See also, **proposed new s 83A(9)** to be inserted by **cl 78** which allows the direction hearing for a disclosure obligation to be held on the same day as that set for the committal hearing. The *Explanatory Notes* (p 34) comment that the new s 83A(9) will enable a magistrate to list a matter for a committal hearing so that the time limit for disclosure under the Criminal Code applies but the hearing will not proceed, except in certain circumstances.

disclosure obligations. These powers do not impact on other powers of the Court.[62] The type of disclosure obligation direction that the magistrate might make could, for example, be (see **new s 83E** for other types of directions) requiring that a particular thing be disclosed; allowing the Court to inspect the thing to decide about disclosure; allowing the Court to examine the arresting officer or to require the officer to file an affidavit to decide if the prosecution has a disclosure obligation; or setting a timetable for compliance. The **new s 83F(3)** seeks to ensure that these procedures are not intended to prevent the parties from engaging in communications to attempt to resolve issues about disclosure.

7.5.2 Noncompliance with Court Direction About Disclosure Obligation

The **new s 83B** (sought to be inserted by **cl 79**) allows the Court to deal with noncompliance with a direction given by the Court regarding the prosecution's disclosure obligations.[63] If a person fails to comply with the Court's disclosure direction, the Court may order that person to file an affidavit or give evidence explaining and justifying the noncompliance. If the Court is not satisfied there is satisfactory explanation and justification, the Court may adjourn the proceeding to enable the person to obey the direction and give the defence the chance to consider the evidence disclosed under the direction. The Court can, if it considers that the noncompliance was unjustified, unreasonable or deliberate, also award just and reasonable costs against the noncompliant person.[64]

8 COMMITTAL RECOMMENDATIONS NOT SUPPORTED BY THE QUEENSLAND GOVERNMENT

8.1 STRENGTHENED COMMITTAL TEST

The Moynihan Report recommended that there be a new stronger committals test. At pp 206-210, the Moynihan Report explained that the committals test is applied

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62 The procedures applying in relation to seeking a disclosure obligation direction at a s 83A direction hearing will be set out in the *Criminal Practice Rules 1999*, Chapter 9A: **new s 83F**.

63 The Explanatory Notes (p 35) observe that the new s 83B will not apply to the defence as its disclosure obligations under Ch 62, Chapter Div 4 of the Criminal Code do not apply to Magistrates Court proceedings.

64 A person is not excused from filing an affidavit or giving evidence on the grounds of self-incrimination but the affidavit or evidence cannot be used in any criminal or contempt proceedings, subject to limited exceptions.

by a magistrate to determine, pursuant to the *Justices Act 1886*, whether '*the evidence is sufficient to put the defendant on trial*'(s 104). There appears to be significant authority indicating that this requires the magistrate to decide if the prosecution has adduced sufficient evidence to put the defendant on trial – not that the magistrate is personally persuaded of guilt but to determine whether any reasonable jury, properly instructed, could return a verdict of guilty. In other words, is there a prima facie case against the defendant?[65]

At p 209 and in Table 9(e), the Moynihan Report compared committals tests applied by magistrates in other jurisdictions and observed that most applied a higher threshold for committal than in Queensland. For instance, the NSW *Criminal Procedure Act 1986* (s 64) requires the magistrate to consider all the evidence and determine whether or not '*there is a reasonable prospect that a reasonable jury, properly instructed, would convict the defendant of an indictable offence*'.

It was recommended (pp 209-210) that a more stringent committals test – that applied in NSW – be adopted in Queensland. It was argued that the NSW test is of long standing, has been the subject of judicial consideration, and appears to be working satisfactorily. This reflected considerations including that a strengthened test would dispose of more cases at an early stage. It also had the support of the QLS, LAQ, and Boe Lawyers. The Report noted that the ODPP submitted that current test should remain.

However, the Government Response (p 13) noted that the recommendation for a strengthened committal test was made in the context of the introduction of case conferencing and primarily based on the justification that it would help to dispose of more cases earlier on in the process. However, the Government stated that available NSW data does not support that conclusion – and it is the test used in NSW that the Moynihan Report recommended. It was argued that a 1992 survey of NSW committals over a three month period showed that only 7.6% of cases were discharged and this rate was particularly low when compared with the number of matters discontinued by the prosecution after a defendant has been committed. Thus, the response to this recommendation for a stronger test was that it '*be considered further, along with the recommendations for case conferencing and after the impacts of the reforms to streamline the committal process have been reviewed and evaluated*'.

The QLS Submission (p 11) believed that the Government's intention to defer consideration of the adoption of the NSW committal test, in conjunction with the case conferencing recommendations, until the impacts have been evaluated was a misinterpretation of the Moynihan Report recommendation and the case conferencing concept because the Report in no way tied case conferencing to the

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[65] *Purcell v Vernados (No 2)* [1997] 1 Qd R 317 (No 190 of 1995, Ambrose J, 14 February 1996). The above comment is found at p 6 of the Transcript.

adoption of a stronger committals test. The LAQ Submission (pp 31-32) also supported a stronger test, arguing that the weaker test meant that if there is some prospect of the defendant being discharged at committal, there is little incentive for the defence to proceed by way of hand up statements rather than by full oral hearing.

8.2 CASE CONFERENCING

The Moynihan Report (pp 200, 201) noted that case conferencing provides an opportunity for an early resolution of issues (which may lead to shorter trials) or of a matter itself. Further, a number of submissions supported the introduction of compulsory case conferences (e.g. LAQ, Bar Association Queensland, and the QLS). Many matters committed for trial are resolved before trial by a guilty plea but this is often very late in the process – sometimes on the morning of trial – thereby wasting time and resources. Case conferencing seeks to facilitate early resolution at a much earlier stage.

The Report (pp 203-204) set out the proposal for case conferencing between the parties' lawyers without third party involvement, but to allow the magistrate to be involved if the circumstances justify it.[66]

The Government Response (p 113) noted the Review's caveat that adding more steps to a process should be approached cautiously without having any evidence that there will be improvements. It was said that further consideration of the recommendations for case conferencing should await the outcomes of the evaluation of the mandatory case conferencing trial in NSW. The QLS Submission (p 11) queried why it was necessary to await a review of the committals reforms before case conferencing was considered further, given the early positive results of outcomes of case conferencing in NSW.

8.3 INCREASED ROLE FOR THE ODPP IN PROSECUTIONS

The Review found that matters handled by the QPS tended to, among other things, be more likely to result in a trial and conviction rather than a guilty plea, and involve a longer delay on average. The Moynihan Report (p 177) said that whatever the reason for this, the bigger delays, more trials and changing charges supported the argument for the ODPP to prosecute more committals. The Report found that only two jurisdictions still used police prosecutors.

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[66] The Brisbane Committal Project (in Appendix 5 of the Report) was offered as an opportunity to test a case conference scheme to ascertain if it does increase the plea rate and produce earlier pleas or more accurate charging etc.

The Moynihan Report (pp 187-188) supported the views of a number of bodies, including the National Legal Aid, the Conference of Australian Directors of Public Prosecution, the Standing Committee of Attorneys-General, as well as the seminal 1989 Fitzgerald Report, that the ODPP should conduct all committal proceedings in Queensland (up from the 25% or so that it prosecutes now given that the QPS conducts the majority). It was argued (p 190) that there were benefits in separating the prosecution functions of the ODPP and the investigative functions of the QPS, and from the involvement of independent and experienced prosecutors. The various factors making this idea difficult, lengthy and costly to implement were identified, including the large and decentralised nature of the State but it was believed that there would likely be potential cost savings and other benefits in the long run (pp 190, 191).

The LAQ Submission (pp 34-36) also supported the ODPP having a greater role in the conduct of committals. It was believed that a properly resourced ODPP with experienced prosecutors able to have control of a matter from the beginning would lead to time and cost savings. The LAQ agreed with the Bar Association's views on the issue.

The Government Response (p 13) was that while an increased role for the ODPP was desirable, this needed to be undertaken progressively. The Government said it had demonstrated its commitment to expand the ODPP's prosecutorial functions, including the engagement of more prosecutors, with the allocation of more funding over the next four years.

8.4 ADVICE AND SUPPORT ROLE FOR THE ODPP

The Moynihan Report (p 215) recommended that the ODPP be given an increased role in providing advice and support to the QPS regarding investigations of serious crimes and that a protocol be developed. This recommendation was not supported by the Government. The Government Response (p 13) said that such a role could compromise the separation of investigation and prosecutorial functions.

9 REFORMS IN OTHER AUSTRALIAN JURISDICTIONS

As noted in the Review (Moynihan Report, p 166), as the last jurisdiction to introduce reforms to the committals system, there is opportunity to benefit from a consideration of the successes and failures of reforms in other places. However, the effectiveness of a reform elsewhere does not necessarily mean it will work well in a different social and legal context.

The Moynihan Report (pp 178-179), noted that the committal process has been substantially reformed and all Australian jurisdictions allow for evidence to be

provided in written witness statements. Only Queensland and the Northern Territory allow the defence unfettered right to call and cross-examine a prosecution witness. However, the Northern Territory Government has announced that, during 2010, it will implement recommendations of the NT Law Reform Commission to make hand up committals the norm and to allow the calling and cross-examination of a witness at the committal only if the prosecution consents or upon successful application to the court.[67]

It also noted that, in Western Australia, and Tasmania, committals have effectively been abolished and much emphasis has been placed on disclosure obligations of the prosecution. Under Part 3, Div 4 of the *Criminal Procedure Act 2004* (WA), if the defendant does not plead guilty to the charge, the court adjourns the charge to a committal hearing. Prior to this hearing, the prosecution has disclosure obligations under s 42 to provide the defendant with confessional material, evidentiary material (e.g. witness statements) and prescribed material. After this disclosure, the defendant may consent to an administrative committal without either side appearing. Otherwise, at the committal hearing, if the justices are satisfied there has been the required disclosure by the prosecution, the defendant is asked to enter a plea and the matter is committed to a superior court. There is no cross-examination of witnesses.

Recent amendments to the committals system in Tasmania means that, under Part VII, Divisions 2 and 3 of the *Justices Act 1959* (Tas), if the defendant has been charged with an indictable offence, the defendant's first appearance before the Court of Petty Sessions will usually end in an adjournment during which various disclosure obligations are imposed upon the prosecution so that the defence will have any prosecution witness statements and other relevant material before the next appearance. At the next appearance, if the matter is one that must be tried in the Supreme Court, the justices must commit a defendant to the Supreme Court for sentencing if the defendant pleads guilty; or for trial if the defendant pleads not guilty or if the justices believe it is appropriate to commit the matter to the Supreme Court. The defendant's first appearance in the Supreme Court will be at a directions hearing at which the judge can make a preliminary proceedings order determining which witnesses are to be called and cross-examined. These preliminary proceedings are held in the Court of Petty Sessions similarly to a committal hearing but under the supervision of the Supreme Court. Following these proceedings, the matter proceeds to trial.[68]

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67 Hon Delia Lawrie MLA, NT Minister for Justice and Attorney-General, 'New Process for Committal Hearings, *Media Release*, 11 December 2009. A draft consultation Bill was recently released inviting feedback.

68 See also, Hon S Kons MHA, Minister for Justice and Workplace Relations, Second Reading Speech, Justices Amendment Bill 2007 (Tas), House of Assembly Hansard, 4 July 2007.

The Moynihan Report (pp 180-181) noted that, in WA, while the legislation imposes more rigorous disclosure obligations and other requirements, it seemed that these were not, at the time of reporting, being properly fulfilled. Matters were being transferred to the superior court without any real resolution of pre-trial issues. Such issues had, in the past, when the traditional committals process existed, tended to be the subject of discussion and negotiation at various opportunities arising during that process. It appeared that there was now a need for more intensive juridical supervision of matters at the District Court level prior to trial.[69] However, it was also noted that these new procedures were still at an early stage and problems might be ironed out with time. On the other hand, they might be a result of 'local legal culture' (p 181).

10 OTHER AMENDMENTS PROPOSED BY THE BILL

Other 'stage one' reforms to the civil and criminal justice system sought to be effected by the Bill but not covered by this Research Brief, or merely referred to in the context of the examination of the committal process reforms, include:[70]

- providing for a broader range of indictable offences in the Criminal Code to be dealt with summarily by the Magistrates Courts including indictable offences carrying a maximum penalty of 3 years or less (or property offences where the value involved is under $30,000, subject to exceptions) unless the magistrate is unable to adequately sentence the person or is satisfied (on application of the defendant) that exceptional circumstances justify the magistrate not dealing with the matter summarily;
- amending the *Drugs Misuse Act 1986* (Qld) so that the prosecution can elect to have matters involving possession of a dangerous drug attracting a maximum penalty above 15 years imprisonment (rather than the current 15 years or less) summarily disposed of by the Magistrates Court, provided the offence does not involve a commercial purpose;
- increasing the general criminal jurisdiction of the District Court from offences with a maximum penalty of up to 14 years to those with a maximum penalty of 20 years or less (to enable a number of Commonwealth offences and drug offences to be handled in the District Court rather than the Supreme Court);

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69 The Moynihan Report, p 181, cites a personal communication with Chief Judge Toni Kennedy of the District Court of Western Australia on 26 August 2008.

70 For a comprehensive overview, please refer to the Explanatory Notes for the Bill. As noted in p 2 of the Explanatory Notes, the Bill also makes some amendments not based on the Moynihan Report but which are intended to seek increases in efficiency and consistency across the courts; facilitate payment of unclaimed money held by the Sate into a fund held by the Public Trustee; and clarify the operation of aspects of certain legislation.

- increasing the monetary limit for civil matters to $750,000 in the District Court and to $150,000 in the Magistrates Court;
- amending the *Bail Act 1980* (Qld) to allow bail applications to be made by a remote communication device to magistrates outside the relevant district as prescribed by a Chief Magistrate's practice direction in certain circumstances;
- extending the limitation period to start prosecutions for certain simple offences under the *Justices Act 1886* (Qld);
- improving the operation of and consistency between the courts (e.g. transferring the jurisdiction for workers' compensation appeals from industrial magistrates to the Queensland Industrial Relations Commission where dual appeal rights currently exist);
- amending cost scales for the Magistrates Courts to bring them into line with the Supreme and District Courts.[71]

Before turning to the Terms of Reference, the Moynihan Report made a number of comments (contained in **Chapter 4**) about the criminal justice system as an interactive and integrated whole. The Government Response (p 3) agreed with the findings in Chapter 4 and said that the first stage of the legislative reforms – the new Bill – would focus on making improvements to deliver greater efficiency in the justice system. The second stage of reforms will involve the development and the introduction of a new Civil Justice Procedure Act, uniform criminal procedure rules and forms in response to the Report recommendations that it was time, after numerous piecemeal amendments and reforms, for new criminal justice legislation and accompanying rules and forms.

Various information management issues identified in the Moynihan Report (and dealt with extensively in Chapter 6) related to the electronic acquisition, storage, transfer, lodgement, filing and access to data; electronic conferencing and hearings. In relation to these, the Government Response (p 7) stated its commitment to the examination and development of further strategies to make better use of criminal justice information. The Response noted that many of the suggested changes to provide more reliable, comprehensive and integrated electronic data were already occurring and other issues were being addressed. Initiatives aimed at better integration of reliable data across criminal justice agencies were underway.

Among the points raised in Chapter 4 was a need for criminal justices agencies whose policies, decisions and practices were interconnected and impacted upon one another to achieve more consistencies in such policies and practices; more information sharing; better cooperation, collaboration and development of protocols (see Moynihan Report (pp 46, 77-78). It was suggested that driving the

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[71] In addition, the Bill seeks to make miscellaneous amendments to other pieces of legislation.

foregoing changes should be a new Criminal Justice Practice Oversight Council charged with overseeing the coordination of criminal justice policy. [72]

The Report also commented on funding issues in relation to agencies, such as LAQ and the Aboriginal and Torres Strait Islander (ATSI) Legal Service, and the allocation of funding by agencies, suggesting that it needed to be aligned with clearly defined justice system outcomes, especially regarding early resolution (pp 73-75, 79).[73] In terms of LAQ funding, the Government Response supported a review of LAQ to identify service priorities and address ongoing funding requirements.

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[72] The Government Response (p 7) noted that the recommendation for the establishment of the Council must be considered in the context of the Government's response to the report *Brokering balance: a public interest map for Queensland Government bodies – an independent review of Queensland Government boards, committees and statutory authorities*.

[73] The Moynihan Report (pp 70-73, 79, 83) also made some observations on, and recommendations about police charging practices. See also, the Government Response, p 3.

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