COMMUNITY
LEGAL CENTRES
TASMANIA

10 May 2019

Department of Justice
Strategic Legislation and Policy
GPO Box 825
Hobart TAS 7001

via email: haveyoursay@justice.tas.gov.au

To Emma Gunn,
Re: *Magistrates Court (Criminal and General Division) Bill 2019*

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment on the *Magistrates Court (Criminal and General Division) Bill 2019* ('the Bill').

CLC Tas is the peak body representing the interests of nine community legal centres (CLCs) located throughout Tasmania. We are a member-based, independent, not-for-profit and incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

We are supportive of the Bill and of the consultative process adopted by the Government over a number of years. We are particularly pleased that the Bill contains a comprehensive framework for the disclosure of prosecution evidence in summary offences that will ensure a defendant receives full disclosure of the case against them at the earliest opportunity.

Witness not answering (clause 26)
Clause 26 of the Bill allows the court to imprison a witness who without reasonable excuse refuses to answer questions. In most cases, clause 26 will apply in circumstances in which a witness refuses to attend court voluntarily and is complying only because they have received a witness attendance notice or arrest warrant. We are concerned that clause 26 may have unintended consequences. For example, a family violence victim who refuses to give evidence may be imprisoned for up to a week. As the clause reads, the family violence victim may then be brought back before the court, refuse to answer questions and again be sentenced to seven days imprisonment.

Whilst we agree that there should be powers requiring witnesses to attend court, we strongly believe that no witness should be forced to give evidence. Practically,

unfavourable witnesses are already dealt with in section 38 of the *Evidence Act 2001* (Tas) and therefore, in our opinion, clause 26 should be removed from the Bill.

Adjournment of Proceedings (clause 31)

Clause 31 provides the court with the power to adjourn proceedings "if the court considers it in the interests of justice to do so". But, the clause does not expressly provide that an accused is entitled to an adjournment on their first appearance. This is inconsistent with section 74A(1)(b) of the *Justices Act 1959* (Tas) which expressly provides:

> (1) When a person charged with a simple offence to which he or she has not entered a plea in writing authorized by rules of court first appears before justices, the justices shall, if that person is not represented by counsel–
>
> > (b) inform the person that he or she is entitled to have the proceedings in respect of the charge adjourned in order to consider a course of action or to obtain legal advice in relation to the charge.

We strongly believe that clause 31 should be amended to expressly provide that an accused is entitled to an adjournment on their first appearance.

Pre-hearing disclosure of prosecution case (clauses 64-78)

The disclosure of prosecution evidence in a timely manner is important for many reasons including reducing delays and inefficiencies. Anecdotally, we are aware of a number of cases where the accused has had access to either no or insufficient evidence to confidently enter a plea, particularly in circumstances in which elements of the crime include a mental element or a legal defence is available.

Unsurprisingly, the failure to provide disclosure in a timely manner has led to a significant backlog with a 2016 KPMG report finding that Tasmania has the second highest case backlog for criminal matters greater than 12 months at 11.8 per cent and the lowest clearance rate for criminal matters at 94 per cent.[1]

The failure of the *Justices Act 1959* (Tas) to prescribe timeframes for the provision of disclosure means that defence counsel is regularly unable to provide good advice in a timely manner. In some cases, counsel may only have the complaint and the 'Facts for the Prosecutor' for multiple court appearances.

We are strongly supportive of the Bill and its requirement that the preliminary brief for summary offences must be provided at least 21 days before the return day specified in the court attendance notice.[2] The Bill also provides that in relation to summary offences, the summary offence brief ('full brief') must be provided not later than 28 days before the case management hearing or, if a case management hearing is not being held, the hearing of the charge.[3]

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[1] KPMG, *Review of the Magistrates Court of Tasmania* (Department of Justice, 2017) at 17.

[2] Clause 64(1)(b).

[3] Clause 66(2).

In our opinion, the timeframes set out in the Bill will lead to decreased delay and greater court efficiencies with earlier resolution of criminal hearings facilitated, including defence counsel being in a better position to advise their clients and engage in plea negotiation.

We strongly believe that the Bill could be strengthened by expressly providing that prosecution disclosure is provided at no cost. Whilst clause 52(2) of the Bill states that the charge sheet is provided "free of charge" there is no express waiver for disclosure. Given that a charge of $53.90 may be applied for disclosure of each offence, it can be costly to receive disclosure in full. We therefore recommend that the Bill expressly provide that both the preliminary brief and the summary offence brief are provided at no cost to the accused.

We also believe that the requirement in clause 75 that a prosecutor is not required to provide either a preliminary or full brief if it has already been provided to the defendant is unnecessarily harsh. If the disclosure provisions of this Bill are passed without amendment, some defendants will receive disclosure before they have sought legal representation. In our experience, some defendants may lose the documents, or the documents are not received or are destroyed or there may be some other reason why they are no longer in possession of the documents. Ideally, we believe the prosecution should be required to have a copy of the disclosure documents on file so that they can be easily provided to the defendant's legal representative. Alternatively, clause 75 should allow the defendant or their legal representative to make an application for disclosure.

Finally, efficiencies in the provision of disclosure will only be met if adequate resourcing is assured. The need for additional resources was highlighted in a recent Sentencing Advisory Council report in which it was observed:[4]

> Additional funding for Tasmania Police, Legal Aid and the Office of the Director of Public Prosecutions will be necessary to support changing practices in relation to disclosure and the early attention to matters by prosecution and defence.

Alibi evidence if elected summary offence (clause 106)

Clause 106 allows the accused to adduce evidence in support an alibi or call a witness to give evidence in support of an alibi provided written notice has been provided to the prosecution within the prescribed period. The clause defines 'prescribed period' as 7 days. In our opinion, 7 days is too narrow a timeframe as an accused may have practical difficulties getting an appointment with legal counsel to draft the written notice. We believe that the prescribed period for the serving of a written notice outlining the alibi should be extended to at least 14 days.

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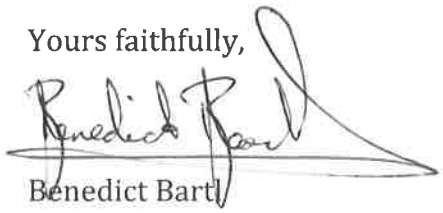
[4] Sentencing Advisory Council, *Statutory Sentencing Reductions for Pleas of Guilty* (Final Report No. 10 (October 2018) at vii.

If you have any queries or we can be of any further assistance, please do not hesitate to contact us.

Yours faithfully,



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