Response by Civil Liberties Australia to

Discussion Paper:
Reforms to Court Jurisdiction, Committal Processes and The Election for Judge Alone Trials

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Introduction

Civil Liberties Australia considers the due and proper administration of justice and human rights and fundamental freedoms, as two of the prime pillars underpinning civil society. Where justice is or is perceived to be denied or not available, society is in danger of failure.

While it is appropriate for all governments to reflect on the administration of justice, they must do so in a manner that does not lessen access to, and the perception of, a fair trial. Any discussion of a change to the justice system needs to encapsulate, as a first principle, that the rights of a person subject to arrest and imprisonment are not to be diminished, nor abridged. This ought to be axiomatic in jurisdictions such as the Australian Capital Territory, where there is legislation recognizing (albeit imperfectly) human rights and fundamental freedoms.

Secondly, any argument based on changes to the current processes due to inordinate time or process needs to take into consideration whether indeed it is the court processes that are at the centre of the delay or whether in fact the completeness of the investigation and prosecution processes are the major factors leading to any perceived deficiencies. The rights of a citizen defending himself or herself upon a criminal trial should not be jeopardised just to overcome the lack of preparation or the completeness, of the investigation or prosecution processes.

Similarly, the ACT Government's discussion paper has a strong leaning to language that characterises current processes as being neither efficient nor modern. Efficiency does not always lead to fair outcomes; and Justice is certainly not an exercise in cost management.

Civil Liberties Australia is also concerned that the Discussion Paper's focus is on the efficiency of the court processes and not upon the overall processes of the criminal justice system. Civil Liberties Australia notes that there is ongoing commentary on the nature and professionalism of ACT Policing and the resourcing for the Office of the Director of Public Prosecutions. Both of these organisations play a critical part in the efficiency of the overall court system. Failures by these organisations to investigate or prepare creates delays in court processes. More importantly, defendants rightly will contest matters being bought before the courts where either of these two organisations have not competently undertaken their tasks.

The Discussion Paper has not undertaken or provided any analysis of the underlying factors that create the perceived matters which the Paper purports to set out to address. Without an understanding of why defendants chose the course of action they have elected in the current process, the Discussion Paper cannot adequately address the real issues arising. If the underlying issues are not identified and addressed, the issues canvassed in this present Discussion Paper will continue and, in the years to come, this discussion will simply recur.

Civil Liberties Australia is also concerned that the Discussion Paper does not address a further critical matter – viz., why do many lawyers recommend to their clients to elect for a Supreme Court trial? Civil Liberties Australia understands from its lawyer membership that there is a lack of confidence by the legal profession in the competency of the magistracy, and a perception that they do not always act in a fair and just manner. If the legal profession perceives that a summary outcome would be likely to be similar to that of a jury, and sentencing be similar to a Supreme Court judge, there would then invariably be a higher proportion of matters dealt with summarily. Instead of introducing legislative reforms to overcome the reluctance of defendants to agree to summary jurisdiction, the Government should redress the level of competency of the magistracy, and attempt to restore confidence in it.

Civil Liberties Australia expresses surprise that the Government's Discussion Paper on this very important issue relating to the due administration of justice in the Territory has taken the form it has, and that it evinces far too great a readiness to resort to arguments of mere (asserted) expediency.

Civil Liberties Australia has canvassed members and developed its response to the Discussion Paper with contributions from members of the legal fraternity, including the Hon J.A. Miles, (former Chief Justice ACT Supreme Court). The following comments are made which may be published:

Question 1 - Should defendants be required to elect jurisdiction once the full prosecution case has been disclosed at case management hearing?

The discussion paper argues for a change based on time management criteria. As noted in the Higgins decision[1] , it would be unfair to expect a defendant to be in a position to give evidence before all the relevant matters are known. While the Discussion Paper argues for change based on the Case Management administrative processes only; what is not tested in this forum is the veracity of neither the prosecution case nor its creditability.

A change in practice could bring a response from defendants to have their 'day in court' increasing the court load schedule. Further important issues arise in this context as follows.

Defendants should <u>not</u> be *required* to elect jurisdiction at case management stage but should be given the opportunity to elect to do so. The election should not be required until the magistrate has found that a proper case for committal has been made out.

Question 2 - Should the requirement be created by legislation or by practice direction?

Practice directions which take away rights tend to be too elastic and can quite rightly give rise to challenge in the Supreme Court. Any change should be legislated and not thus "delegated".

[1] *Fares v Longmore [1998] ACTSC 133*

Question 3 - Should a defendant be able to revoke his/her election and if so in what circumstances?

Courts should have wide discretion to allow an election to be revoked in the interests of justice, particularly if an election is made by an unrepresented defendant.

Question 4 - Should the threshold for purely summary offences be increased to offences carrying a maximum of five years imprisonment?

Civil Liberties Australia is strongly opposed to changing the threshold for summary offences.

The Discussion Paper appears to argue that the determinant for whether trial a matter is held in either a Magistrates Court or the Supreme Court, should turn on court workloads and the ability of the DPP to manage the resultant workload. This is a quite inappropriate approach.

As noted earlier, the Discussion Paper does not address the reasons *why* lawyers advise their clients to elect for a Supreme Court trial. Almost invariably, it seems to be that the legal profession's confidence in an appropriate and proper magistracy outcome is lacking.

Similarly, by redefining summary offences, the right to a jury trial is thereby drastically reduced. At issue is that fundamental right. It is thus a right which should not be abridged. In *Kingswell v The Queen* (1985) 159 CLR 264, Deane J indicated the nature and importance of the guarantee of a jury trial provided the common law, as existed in England and duly received in Australia. Deane J's observations remain true and cogent today. He noted that:

> [the right to a trial by jury] reflected a deep-seated conviction of free men and women about the way in which justice should be administered in criminal cases. That conviction finds a solid basis in an understanding of the history and functioning of the common law as a bulwark against the tyranny of arbitrary punishment. In the history of this country, the transition from military panel to civilian jury for the determination of criminal guilt represented the most important step in the progress from military control to civilian self-government.

The Sixth Amendment to the United States Constitution, which guarantees all criminal defendants the right to a speedy trial before an impartial jury, was predicated on a similar basis. In *Duncan v. Louisiana*, 391, U.S. 145 (1968), at155-56, the United States Supreme Court articulated the fundamental purpose and justification for that guarantee as follows:

> ''The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate

> enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt overzealous prosecutor and against the compliant, biased, or eccentric judge. . . . [T]he jury trial provisions . . . reflect a fundamental decision about the exercise of official power--a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power . . . found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.''

In *Kingswell,* Deane J also discussed the utility and functionality of the right to a jury trial in ensuring that the public has confidence in the Justice system when he observed that:

> *Trial by jury also brings important practical benefits to the administration of criminal justice. A system of criminal law cannot be attuned to the needs of the people whom it exists to serve unless its administration, proceedings and judgments are comprehensible by both the accused and the general public and have the appearance, as well as the substance, of being impartial and just. In a legal system where the question of criminal guilt is determined by a jury of ordinary citizens, the participating lawyers are constrained to present the evidence and issues in a manner that can be understood by laymen. The result is that the accused and the public can follow and understand the proceedings. Equally important, the presence and function of a jury in a criminal trial and the well-known tendency of jurors to identify and side with a fellow-citizen who is, in their view, being denied a "fair go" tend to ensure observance of the consideration and respect to which ordinary notions of fair play entitle an accused or a witness. Few lawyers with practical experience in criminal matters would deny the importance of the institution of the jury to the maintenance of the appearance, as well as the substance, of impartial justice in criminal cases (cf. Knittel and Seiler, "The Merits of Trial by Jury", Cambridge Law Journal, vol. 30 (1972), 316 at pp.320-321).*

It is also important to note that section 80 of the *Australian Constitution* provides that:

> *The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.*

Section 4G of the *Crimes Act 1914* (Cth) provides that "Offences against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months are indictable offences , unless the contrary intention appears." This means that whenever a Commonwealth offence punishable by more than 12 months imprisonment is prosecuted in the ACT, the defendant thus has the right to elect for a jury trial in the ACT Supreme Court.

If the definition of "indictable" offence is changed to mean any offence punishable by imprisonment for more than five years, it would give rise to a duplicitous and anomalous situation, whereby a defendant in an ACT Court on trial for a Commonwealth

offence would have a higher degree of protection available through the right to a jury trial than would a defendant in an ACT Court on trial for an offence under ACT law.

The basic premiss in the Discussion Paper that underlie earlier determinations of what was an appropriate approach to the dispensation of justice were not discussed at all, nor shown to be inappropriate today. No argument for why 5 years imprisonment is an appropriate period or any other has been canvassed — why not three, four or ten years? Five years appears to be a good number without analysis! Implicit in the Discussion Paper is the Historicist notion that the times we live in demand a restriction being placed on a defendant's right to justice and that determination of incarceration of periods up to five years can be undertaken without recourse to a defendant's peers. However no evidence is advanced to support this proposition.

The "threshold" for "purely summary offences" should remain at 2 years maximum imprisonment, i.e. the defendant should have a right to trial by jury for any offence carrying a maximum of more than one year. This provision could be revisited after a comprehensive survey of what offences fall over and below this cut-off point.

Question 5 - Should the threshold for election for summary disposal for charges relating to money and property other than a motor vehicle be raised to $30,000?

This proposal is supported where a defendant consents to such an election.

Question 6 - Should theft offences involving less than $5000 and carrying a maximum of ten years imprisonment be summary offences?

This proposal could be supported where a defendant consents to proceeding in such a manner.

Question 7 - Should some indictable offences be subject to prosecution election for summary trial?

Generally, there should be no election to be exercised by the prosecution alone. Joint election may be appropriate in some cases, but subject to the discretion of the Court.

Question 8 - Should the Magistrates Court be able to impose sentences of up to 5 years imprisonment and/or fines of $10,000?

No. The Magistrate's Court should be restricted to maximum sentences of 2 years only. It is considered that the Magistrates Court have an odd tendency to impose overly long custodial sentences, when contrasted with the sentences imposed by the Supreme Court for similar offences. Also, the high success rate of appeals against severity of sentences imposed by the Magistrates Court reinforces the perception that they do tend to "over sentence". Given that there is a high rate of error with respect to even the existing jurisdiction of sentences of up to two years, there will likely be an even greater error and hence, appeal rate, if the Magistrates Court could impose sentences of up to five years.

Question 10 - Should paper, or hand-up, committals be mandatory?

Civil Liberties Australia recommends the retention of the current approach – the Crown's evidence can be given by affidavit but only if the defence agrees.

Question 11 - If paper committals are mandatory should witnesses be able to be called for cross examination at committal if the court is satisfied that there are special reasons?

Yes, but there is no need for reasons to be "special". The Discussion Paper notes that in current practice, the majority of cases are either hand-up committals or require the calling of key witnesses only. The consequences of the proposed change will have a minimal impact in court time anyway. The change appears to be one of reducing stress upon a witness at the expense of the defendant's ability to properly and appropriately test the evidence. It is precisely this sort of trade-off that is unacceptable, ill-considered and contrary to Justice.

Question 12 - When there is a witness with an identifiable legal disability such as a child, should there be a bar on all cross examination of that witness at committal?

There is no compelling reason advanced as to why the Court should not exercise its discretion in determining who, and in what circumstances, a witness should be called. A general discretion is sufficient and appropriate in the interests of Justice. If there is to be no cross-examination, it should be open to the defence to question the witness at a *Basha* inquiry.

Question 13 - Are there categories of crime where the victims should be afforded more protection, for example by the application of a more stringent test to the question of whether they should be cross examined, or where there should be a ban on cross examination at committal?

The comment at Question 12 is appropriate.

Question 15 - Should there be statutory criteria for the consideration of awards of costs in criminal proceedings?

Costs should always follow the cause.

Civil Liberties Australia agrees with the view expressed by Mason J in *Latoudis v Casey* (1990) 170 CLR 534, where he said that:

> In ordinary circumstances it would not be just or reasonable to deprive a defendant who has secured the dismissal of a criminal charge brought against him or her of an order for costs. To burden a successful defendant with the entire payment of the costs of defending the proceedings is in effect to expose the defendant to a financial burden which may be substantial, perhaps crippling, by reason of the bringing of a criminal charge which, in the event, should not have been brought. It is inequitable that the

> defendant should be expected to bear the financial burden of exculpating himself or herself, though the circumstances of a particular case may be such as to make it just and reasonable to refuse an order for costs or to make a qualified order for costs.

Similarly, it would appear that, given the Discussion Paper is strangely silent on the issue, the Government has either forgotten about (or is ignoring for the mere sake of its convenience) the reason why the common law rule that costs should generally follow the cause in the case of an acquitted defendant in a summary prosecution was formulated. That reason was put by Mason J in *Latoudis* when he held that:

> , in exercising its discretion to award or refuse costs, a court should look at the matter primarily from the perspective of the defendant. To do so conforms to fundamental principle. If one thing is clear in the realm of costs, it is that, in criminal as well as civil proceedings, costs are not awarded by way of punishment of the unsuccessful party. They are compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings: *Cilli v. Abbott*, at p 111. Most of the arguments which seek to counter an award of costs against an informant fail to recognize this principle and treat an order for costs against an informant as if it amounted to the imposition of a penalty or punishment. But these arguments only have force if costs are awarded by reason of misconduct or default on the part of the prosecutor. Once the principle is established that costs are generally awarded by way of indemnity to a successful defendant, the making of an order for costs against a prosecutor is no more a mark of disapproval of the prosecution than the dismissal of the proceedings.

Reliance on a comparison of costs awarded per head of population to other jurisdictions does <u>not</u> provide any proper or objective assessment of why costs are awarded. Similarly, the ACT is such a small jurisdiction that any statistical analysis would be inappropriate given the small statistical population size being measured – indeed, one case could be sufficient to skew any analysis of the data. Here yet again, the Discussion Paper is simply mechanistic. Civil Liberties Australia would observe that in discussion with the Attorney-General there is consensus that statistical analysis of ACT court data is misleading due to the small statistical population sizes involved.

CLA also notes that at present, defendants who are acquitted in the Supreme Court are not entitled to costs. This leads to <u>fundamentally unjust</u> outcomes with the defendant bearing costs that for many are a significant financial burden. They are often acquitted because the jury accepts, after a full interrogation of the facts, that the defendant simply did not do what was alleged. Why should that innocent defendant have to carry the burden of the cost when they have done nothing wrong? In truth, the answer is that it would be very expensive for innocent defendants to be awarded costs and it is a cost the Government wishes to avoid. Even if the prosecution has acted in good faith, the trial would nonetheless inevitably be a harrowing and overwhelming ordeal, so the State (ie the Territory) should not add insult to injury by requiring that defendant to have to bear the cost of retaining counsel in order to demonstrate the Territory's error in bringing an innocent defendant to trial.

Also, the prospect of an adverse costs order invariably weighs in the prosecution's assessment as to whether a particular matter should proceed to trial. This is a productive check and balance, as it can give the prosecution further pause for thought before pursuing an unmeritorious prosecution. Reducing the ability of costs to be awarded against the prosecution may well have the indirect consequence of causing the prosecution to have an even more cavalier approach to pursuing "borderline "or potentially unmeritorious cases.

Costs should be determined by the Court based on the matters relating to each case.

Question 16 - Are the proposed criteria appropriate?

No. Any discretion as to the award of costs should be guided by the High Court's decision in *Latoudis.* As discussed above, the fact that the prosecution was acting in good faith and with due diligence is quite beside the point. It gives no comfort to an innocent defendant who has had to incur legal costs to prove the State was in error in its allegation, to say that the prosecution acted in good faith. As a matter of principle and fundamental freedoms, if you have done nothing wrong, why should you have to pay to prove it? It is worth noting that in a civil context, it is beside the point that the unsuccessful party acted in good faith, or had a reasonable prospect of success – costs almost always follow the cause. This point was made by McHugh J in *Latoudis* when he argued that:

> *a successful defendant in summary proceedings has a reasonable expectation of obtaining an order for the payment of his or her costs because it is just and reasonable that the informant should reimburse him or her for liability for costs which have been incurred in defending the prosecution. Consequently, a magistrate ought not to exercise his or her discretion against a successful defendant on grounds unconnected with the charge or the conduct of the litigation. The fact that the informant has acted in good faith in the public interest or may have to meet the costs out of his or her own pocket is not a ground for depriving the defendant of his or her costs.*

Civil Liberties Australia is of the view that costs should only be denied to a successful criminal defendant when their conduct unnecessarily or unreasonably delayed proceedings. Even then, if the defendant was represented by a lawyer, and the delay was the fault of the lawyer and not the defendant, it would be unjust to deny the defendant his costs because of the conduct of the lawyer.

Question 17 - Should costs be subject to a scale of costs?

No – see answer to question 15.

Question 18 - Should there be restrictions on which trials can be heard by judge alone?

Civil Liberties Australia does not support a restriction on which trials can be heard by judge alone. The comments made at Question 4 relating to trial by jury, are pertinent to this question also.

Question 19 - Should access to trial by judge alone only occur if the Crown and defendant consent, or for trials where the offences are not serious crimes against the person such as murder or sexual assault, or should the question be measured against criteria, and if so, what criteria should be established?

See the answer to question 18. Proceeding to trial by Judge alone should only occur with the *consent* of the defendant.

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