MOYNIHAN[1] REVIEW[2]

The consultation draft of the legislation to implement the Moynihan Review of the State's civil and criminal justice systems gives effect to most, but not all, of the 60 recommendations.

The Queensland Law Society has made several contributions to the Moynihan Review: initially, during the Review process; and, more recently, in response to the Government's decisions. A recent example is your Society's comprehensive response to the consultation draft. This submission covers more than 60 pages. That alone indicates why in the next few minutes I cannot attempt more than a thumb-nail sketch of the changes that seem likely to result from the legislation and the impact on the work of the courts.

The Bill has not been introduced into Parliament. So there could yet be changes.

The initiatives the consultation draft bill proposes on the civil side have attracted little controversy. The most important change is to increase monetary jurisdictions: in the District Court, to $750,000; in the Magistrates Courts to $150,000; and for the Queensland Civil and Administrative Tribunal (replacing the Smalls Claims Tribunal in this respect) to $25,000.

From the perspective of practitioners, costs scales also matter. But I gather that they are not settled.

Allow me a moment to talk about what the changes will mean for my Court's disposition of its business.

On both civil and criminal sides, in the Supreme Court, there will be a small reduction in the number of cases that will be resolved by trial. Why only small?

The number of civil cases started will drop significantly. I do not expect, however, that there will be a proportionate reduction in the number of cases tried.

On the criminal side, there will be a large reduction in the number of cases started. That is because so many minor drug cases will in future be disposed of in the District and Magistrates Courts. Despite the large shift numerically, not a lot of judge time will be freed up. Few State drug cases proceed to trial now.

Nonetheless, the changes will be beneficial from the Supreme Court's perspective: in particular in enabling some civil and criminal trials to be dealt with more quickly within existing judicial resources.

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1 Hon Martin Moynihan AO, *Review of the civil and criminal justice system in Queensland*, December 2008.

2 Notes of a paper presented to the Queensland Law Society's 48th Annual Symposium, Brisbane, 26 March 2010 by the Honourable Justice John H Byrne, Senior Judge Administrator, Supreme Court of Queensland.

The major impediment to quicker trials in the Supreme Court will remain: the growing length of time that trials occupy.

A former Chief Justice, who had been a judge in the District Court and the Supreme Court for more than 3 decades, told me that he had never presided at a trial – civil or criminal – that took more than three weeks. Trials of that length are no longer unusual, in civil or crime.

Let there be no doubt about it: the easiest way to increase the rate at which cases are disposed of by trial is by reducing the length of trials.

So my Court will look to ensure that cases occupy no more trial time than is reasonably necessary for their just determination.

Crime

What of the more controversial proposals: the changes to criminal business?

Two proposals have attracted your Society's "implacable" or "strong opposition": the committals process: mainly because of restrictions on cross-examination of witnesses; and the proposals about disclosure of information gathered by the prosecution.

Disclosure

An important plank of the Moynihan recommendations was a plan to secure ample disclosure of the information the police gather.

Proper and timely disclosure is, Martin Moynihan thought, needed to minimise delay; support the effective use of public resources; foster early pleas of guilty; reduce waste of resources; and to balance an inequality of power and resources between prosecution and citizen.

The Criminal Code contains a regime for police and DPP disclosure of information bearing on a criminal proceeding, including things which would help the case of an accused. But the Moynihan Review proposed a strengthened regime - one which its author saw as complementing his idea to restrict the scope for testing evidence at a committal.

The Government's proposal involves re-drawing, with some amendment, the current disclosure regime, in response to criticisms in the Report.

The Government, however, did not accept Moynihan's recommendations for certification by an arresting officer of the sufficiency of evidence to support a charge, and certification of compliance with disclosure requirements.

The Government response concerning disclosure certification has been characterised by your Society in its recent submission as "concerning", mainly because of a perception by practitioners of recurring failures by police to comply with existing disclosure obligations.

The current inadequacy of disclosure was thought to be relevant to the importance of cross-examination of witnesses at committal.

The Government's unwillingness to adopt recommendations about disclosure and certification has fortified your Society's concern over the proposed committals process.

Committals

The Moynihan report recorded that Queensland and the Northern Territory are the only Australian jurisdictions that retain an unrestricted right to cross-examine witnesses at a committal.

Aspects of the existing committals process were regarded as being wasteful of public resources - especially because a high proportion of cases set down for committal hearings end up as full hand-ups on the day, resulting in ineffective use of Court resources and inconvenience to witnesses.

Driven by a perception that unfettered access to cross-examination at committal is inefficient and ineffective, Martin Moynihan recommended that:

(i) an administrative committal be the default position; and

(ii) cross-examination of witnesses only be undertaken where that could be specially justified.

The consultation draft of the Bill contemplates that there will not be cross-examination of a witness unless the Court is satisfied that there are substantial reasons why, in the interest of justice, the witness should attend to give oral evidence. It also provides for an application to the Court after notice to the prosecution of an intention to seek to have a witness called.

Steps must be taken before an application may be made for an order that a witness attends to give oral evidence at committal. Briefly, a notice would be served on the prosecution. It would identify the witness and give the reasons to justify calling the maker of the statement to give evidence: for example, that the defence proposes to submit that the evidence is not sufficient to put the defendant on trial, or that the defence proposes to expose a weakness in the prosecution case.

The prosecution is then allowed a reasonable period within which to respond to the notice. The response may state that the prosecution agrees to the calling of the witness.

If the Court requires attendance of the witness, reasons must be given for that decision.

The amendments also contemplate that what is now a full hand-up committal may be achieved in the Registry by the Clerk of the Court, if there is consensus that the accused person ought to be committed on the charge.

The Society's opposition to the kinds of restricted committal processes that exist elsewhere in Australia is founded on the notion that, in Queensland at any rate, the overwhelming majority of practitioners use committal proceedings properly, with due regard to saving time and resources, and with proper focus on the true issues.

Martin Moynihan apparently took a different view of the way in which committals generally function in this State.

Summary Disposition of Indictable Offences

A proposed new legislative provision prescribes that some indictable offences must be dealt with summarily in the Magistrates Court.

The most important aspect is that this would extend to any offence where the maximum penalty is imprisonment for not more than three years. The change will bring a substantial range of offences within compulsory summary jurisdiction.

Your Society has expressed strong opposition to this measure, characterising it as an indiscriminate removal of a fundamental right of an accused person to be tried by jury. The Society is concerned that many offences are comprehended by the new legislative provision in which an accused person might expect to have a better chance of acquittal before a jury.

A new provision also allows certain charges of indictable offences to be heard and decided summarily, on prosecution election. This is a change from the existing regime where some prescribed indictable offences may be dealt with summarily upon defence election.

Some of the initiatives in connection with an expanded range of summary jurisdiction do have the Society's support: for example, the idea that some drug offences which attract potentially heavy terms of imprisonment may be dealt with summarily, at the prosecution's election, provided that no commercial element is alleged.

The bulk of criminal proceedings in the Supreme Court are drug charges, many of them relatively minor, which can more sensibly be dealt with in the District Court or a Magistrates Court.

Stages

The recommendations are to be implemented in stages.

The first stage makes changes with respect to disclosure, civil monetary limits, summary disposition and sentencing discounts for early pleas of guilty, administrative committals and restricting the calling and cross-examination of witnesses.

The second stage concerns the development of uniform procedure rules and a new procedure Act.

Pleas of guilty

As everybody knows, a guilty plea is a mitigating factor; and when imposing the sentence, the Court must state in open Court that it took account of the guilty plea in determining the sentence imposed.

A more prescriptive regime is now proposed, with the Court to be required to have regard to the notion that the earlier the plea is notified, the greater the discount. No less importantly, the Court is encouraged by the proposal not only to mention in

sentencing remarks that the sentence has been reduced because of the guilty plea but also to state the sentence that would have been imposed but for the plea, identifying any reduction of the period of imprisonment resulting from a plea.

In practice, these amendments are unlikely to have much impact. Judicial officers now take the guilty plea into account as a mitigating circumstance and accord a more substantial discount when the earlier plea is made and notified.

Other Proposals

There are many other proposals in the consultation draft.

Only time will tell whether your Society's analysis of the consultation draft and comprehensive suggestions will make a difference.