



17 November 2009

M6, 68.7
RM;rp

The Honourable M J Atkinson MP
Attorney-General
DX 336
ADELAIDE SA

Dear Mr Attorney

Magistrates Court (Special Justices) Amendment Bill 2009

I refer to a letter from your Chief of Staff, Mr Peter Louca, of 6 October 2009 inviting the Society to comment on the above Bill. The Bill has been considered by the Society's Council.

The Society supports, as a matter of principle, lessening the burden on the magistracy by expanding the jurisdiction of special justices. To that end, we support the Bill save and except for one aspect of it.

The Bill seeks to expand the jurisdiction of the Petty Sessions Division to include offences with a maximum penalty of imprisonment, although sentences of imprisonment may not be imposed: cl 5(1) (proposed s9A(b)(ii)) and cl 5(3) (proposed s9A(2)).

It is these last mentioned offences that we consider should not be dealt with by special justices.

Overview

Justices are not qualified or experienced to act as judicial officers. The proposed amendments will involve justices exercising judicial discretions. The fact that this already occurs to a minor extent is not a reason to expand it.

Special Justices to Determine the Limits of Jurisdiction

One of the concerns with justices adjudicating upon matters that may attract imprisonment, in the context of not having the power to imprison, is that the justices are, for the first time in the Petty Session Division, required to determine the limits of their jurisdiction.

Previously, those limits were determined for them by Parliament (ie, justices were only permitted to sentence for offences where a fine, and licence disqualification, was the maximum penalty).

With the increased jurisdiction, the justices must now determine whether imprisonment is a sentencing option before sentencing. We believe they, as lay people, should not be called upon to exercise a judicial discretion of such magnitude. Whether a sentence of imprisonment is justified or required in a given case is a serious decision involving a consideration of a multitude of complex matters that should be reserved for judicial officers.

Anomaly / Fragmentation: Liability vs Sentence

In addition, the proposed section allowing justices to hear offences attracting imprisonment creates a major anomaly and the real potential for the fragmentation of matters within the criminal justice system.

The anomaly is with the justices being invested with jurisdiction to determine liability on a matter which is too serious for the justices to sentence on (ie, on those matters worthy of imprisonment). This situation does not occur at any other level of the criminal justice system.

We consider it to be of fundamental importance that an accused's liability for an offence worthy of imprisonment should only be determined by a judicial officer (ie, one having the jurisdiction to sentence him/her to imprisonment). By determining liability when imprisonment should or might be imposed, the justices will necessarily (and inappropriately) be adjudicating upon serious matters.

If, after determining guilt, the justice considers that imprisonment is or might be appropriate, the matter should then be referred to a magistrate. This fragmentation of the process between liability and sentence is highly undesirable and unique. There are many reasons why the officer sentencing an offender should be the one who determines his/her guilt.

Little or No Efficiency Saving?

This provision may not achieve the efficiency savings it is hoped to. Indeed, the appeals, referrals and consequential delays may outweigh any savings.

Consent of Both Parties Not the Answer

We do not believe the consent of both parties to the justices' jurisdiction (ie, that a sentence of imprisonment is not appropriate) will overcome the concerns. Essentially, this is because the judicial discretion on the issue of imprisonment should not be left with the parties. Indeed, it is a fundamental principal of sentencing that the judicial officer's sentencing discretion is not fettered by the agreed attitude of both parties.

Licence Disqualification

Licence disqualification is a significant penalty in that it greatly impacts on an individual's independence (and can significantly affect one's livelihood). Granted that justices currently have the power to disqualify, we are concerned that the Bill increases the seriousness of the licence disqualification offences that may be dealt with by justices by including those with imprisonment (albeit limited to a \$2,500 fine). For the reasons outlined, we question the appropriateness of justices dealing with such matters.

Recommendation

Our recommendation, therefore, is that the Bill be amended to limit the jurisdiction of offences to those not including imprisonment as a penalty.

If that amendment is made, we consider that the Bill still goes some way towards enlarging the jurisdiction of the justices and, thereby, alleviating the burden on the magistracy.

Acknowledgment

We have considered the Bill in the knowledge that justices can, in limited circumstances, determine matters involving imprisonment - where there are no magistrates available to constitute a court: s7A(2)(b) *Magistrates Court Act 1991*. In such instances, the same limitation of not being able to sentence to imprisonment applies to justices.

We maintain our views, notwithstanding the existing position, because the Bill seeks to enlarge the jurisdiction of the Petty Sessions Division exercisable solely by justices to include serious matters. That is a far different, and more concerning situation, than the present which only provides for a fall-back position in the event a magistrate is not available. In practice, it is likely that a justice would do no more than the minimum required until a magistrate becomes available (ie, the justice would not determine the matter).

There are two other matters upon which we would like to comment / make a suggestion.

Amendment by Regulation

The first concerns clause 5(3) (proposed s9A(2)(b)). A "*prescribed offence*" means, *inter alia*, "*an offence that is prescribed by the regulations...*". The effect of this is that the jurisdiction of the Petty Sessions Division will be able to be expanded by regulation.

We consider that the criminal jurisdiction of the Petty Sessions Division is not one which should be capable of expansion by regulation. The appropriate safeguards of legislative amendment should apply to it.

Adjournment / Interlocutory Matters

Secondly, we believe that consideration could be given to reducing the workload of magistrates by enabling justices to deal with some adjournments and interlocutory processes.

Please do not hesitate to contact me, should you have any query in relation to this submission.

Yours sincerely



Richard Mellows
PRESIDENT