

# Justice Miscellaneous (Court Backlog and Related Matters) Bill 2020

Submission to the Office of Strategic Legislation and Policy,  
Department of Justice

**2 September 2020**



## Contents

Who we are .....	4
Introduction.....	5
Criminal Code assault (s184 Criminal Code).....	5
Reforms to preliminary proceedings .....	5
Stalking and bullying, and perverting justice.....	6
Disclosure of police evidence .....	6
Supreme Court bail applications .....	7
Conclusion .....	7

## Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.<sup>1</sup>

The ALA office is located on the land of the Gadigal of the Eora Nation.

---

<sup>1</sup> [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au).

## Introduction

1. The ALA welcomes the opportunity to comment on the Justice Miscellaneous (Court Backlog and Related Matters) Bill 2020 (the Bill).
2. While the premise of the Bill, to reduce Court backlog, is welcomed, and many of the measures contained in the Bill are supported by the ALA, we are concerned that there are many instances where this Bill appears to be a poorly considered 'band-aid measure' that will not achieve its aims or unfairly deprives defendants of their rights. Examples are outlined below.

## Criminal Code assault (s184 Criminal Code)

3. The ALA is concerned about the failure to make Criminal Code assault (s184 Criminal Code) an indictable offence that can be tried summarily. We note that in every other jurisdiction in Australia assault charges, including where injuries are serious, can be heard in the magistrates court.<sup>2</sup>
4. The experience of our members is that this crime overwhelmingly attracts a non-custodial sentence, and where custodial sentences are imposed they are generally for a duration of less than three years (which is within the new sentencing threshold granted to magistrates hearing and sentencing persons for indictable crimes under this Bill).

## Reforms to preliminary proceedings

5. The reforms to preliminary proceedings – insofar as they include complainants in aggravated assault, wounding and grievous bodily harm, and unlawful acts intended to cause actual bodily harm within the definition of 'affected person' – are problematic.. This is because an 'affected person' can only be cross-examined in exceptional circumstances.
6. The first observation we make is that it is legitimate to define an "affected person" as the alleged victim in sexual assault and sexual abuse cases. In such cases it is proper that "exceptional circumstances" be shown. However the definition of "affected person" in section 61 (2) includes witnesses in cases where a defendant is charged with non-sexual assaults, murder, and other offences.

---

<sup>2</sup> See, for example, Criminal Code (Qld) s552A

7. While we understand the need to ensure that preliminary proceedings are used for a legitimate forensic purpose and that witnesses are not subjected to the ordeal of giving evidence more than is necessary to ensure fairness in the proceedings, in our submission the proposed section 62 (2) (b) which requires the showing of “exceptional circumstances” is too high a bar and will result in added cost and inefficiency to the justice system as a result.
8. We say this for the reasons set out below.
9. Frequently, cases involving the non-sexual crimes listed in the proposed definition of “affected person” can involve issues of identification or self-defence. Permitting cross-examination of these complainants is essential to ensuring fairness in the trial process as it allows defence lawyers to test the strength of any proposed defence and to make judgments about the strength of the Crown case, including on issues of reliability and credibility. In turn, weak defence cases are prevented from proceeding to trial and adding to the growing criminal trial backlog.
10. The result of such a broad category of “affected persons” is that there will be delays in trials because the defence will rightly not wish to be taken by surprise, or be at the distinct forensic disadvantage of having to cross examine a witness at the trial for the first time. Accordingly, applications will be made, and the Court will grant such applications, to examine a witness before the trial – the so called Basha inquiry. In other words, the witness will still have to give evidence twice.

## **Stalking and bullying, and perverting justice**

11. Stalking and bullying, and perverting justice should not be a matter of election for both parties, but rather the sole election of the defendant. By requiring input from a prosecutor, this will again result in the overwhelming majority of stalking and bullying, and perverting justice matters being committed to the Supreme Court.

## **Disclosure of police evidence**

12. The Bill does not address the ongoing systemic problems associated with the disclosure of evidence by Tasmania Police, which is the *primary* cause of delay in the Supreme Court. Consequently, the Magistrates Court will become congested with cases that cannot proceed to preliminary proceedings in a timely manner due to insufficient disclosure. The Bill also fails to address the problem of defendants being committed for trial without complete disclosure. In effect, the disclosure problem that has congested the Supreme Court will proceed unabated.

## Supreme Court bail applications

13. With respect to the changes to the Supreme Court hearing bail applications following a refusal to grant bail by a magistrate are concerned, the ALA submits that the imposition of a 21-day limitation period on the filing of applications would unfairly bar defendants from appealing against a refusal to grant bail after that period passes. Specifically, we note that the legislation is silent on the power of a judge to hear the application if it is filed later than 21 days. The ALA submits that this provision should be amended to permit a judge to hear a late application if leave is granted. This would ensure that meritorious albeit late applications for bail could still be heard.

## Conclusion

14. The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide these comments on the Justice Miscellaneous (Court Backlog and Related Matters) Bill 2020.

15. In our view, to ensure that the Supreme Court backlog is overcome the Parliament must amend the Bill to address the problems identified above.



**Sebastian Buscemi**  
**Tasmanian President and State Director**  
**Australian Lawyers Alliance**