30th Anniversary
Reform Implementation
Report

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Table of Contents

Foreword		vii
Abbreviations and Explanations		ix
Acknowledgements		x
List of Members and Executive Officers		xi
Part I:	History of the Commission	1
	Chairmen of the Commission	4
Part II:	History of References and Legislative Reform	31
1(I)	Protection for Purchasers of Land	32
1(II)	Retention of Trust Money by Land Agents	33
1(III)	Protection for Purchasers of Home Units	34
2	Testator's Family Maintenance Act	35
3	Succession Rights of Illegitimate Children	37
4	Committal Proceedings	38
5	Interim Damages in Personal Injury Claims	40
6	Summary Trial of Indictable Offences	42
7	Disposal of Uncollected Goods	44
8(I)	Defamation: Privileged Reports	46
8(II)	Defamation	48
9	Statute Law Revision	51
10	Motor Vehicle Insurance	52
11	Liability For Stock Straying on to the Highway	54
12	Payment of Costs in Criminal Cases	55
13	Affiliation Proceedings	57
14	Disqualification for Membership of Parliament: Offices of Profit Under the Crown	58
15	Imposition of Driving Disqualifications	60
16(I)	Local Courts: Jurisdiction, Procedures and Administration	61
16(II)	Enforcement of Judgments of Local Courts	64
17	Manslaughter or Dangerous Driving Causing Death	66
18	Commercial Arbitration and Commercial Causes	67
19	Chattel Securities and the Bills of Sale Act	69
20	Evidence of Criminal Convictions in Civil Proceedings	70
21	Associations Incorporation Act 1895–1969	73
22	Innocent Misrepresentation	74
23	Legal Representation of Children	76
24	Succession Rights of Adopted Children	78
25(I)	Legal Capacity of Minors	79
25(II)	Minors' Contracts	81
26(I)	Review of Administrative Decisions: Appeals	83
26(II)	Judicial Review of Administrative Decisions	86
26(III)	New Rights of Appeal	89
27(I)	Admissibility in Evidence of Computer Records and Other Documentary Statements	90

◀ Table of Contents

27(II)	Admissibility in Evidence of Reproductions	92
28(I)	Official Attestation of Forms and Documents	93
28(II)	Formalities of Oaths, Declarations and Attestation of Documents	96
29	Special Constables	97
30	Imposition of Fines	99
31	Competence and Compellability of Spouses to Give Evidence in Criminal Proceedings	100
32	The Immunity of Suit Between Husband and Wife	102
33	Dividing Fences	103
34(I)	Distribution on Intestacy	106
34(II)	Administration Bonds and Sureties	107
34(III)	Administration of Deceased Insolvent Estates	108
34(IV)	Recognition of Interstate and Foreign Grants of Probate and Administration	109
34(V)	Trustees' Powers of Investment	112
34(VI)	Charitable Trusts	113
34(VII)	Administration of Assets of the Solvent Estates of Deceased Persons in the Payment of Debts and Legacies	114
34(VIII)	Protection and Remuneration of Trustees	116
35	Unauthorised Disposal of Goods Interstate: Right to Repossession	117
36(I)	Limitation and Notice of Actions: Latent Disease and Injury	118
36(II)	Limitation and Notice of Actions	121
37	Land Agents Act	125
38	Sale of Undivided Shares in Land	127
39	Compensation for New Street Alignments	128
40	Production of Medical and Technical Reports in Court Proceedings	129
41	Tenancy Bonds	131
42	Unrepresented Defendants	132
43	Compensation For Persons Detained in Custody	133
44	Alteration of Ground Levels	134
45	Mortgage Brokers	137
46	Criminal Injuries Compensation	138
47	Jailing of First Offenders	139
48	Appeals from Courts of Petty Sessions	140
49	Suitors' Fund Act	141
50	Appeals to the Privy Council	144
51	Unclaimed Money	145
52	Local Body Election Practices	147
53	Privilege for Journalists	149
54	Contractors' Liens	151
55(I)	Review of the Justices Act 1902: Appeals	152
55(II)	Courts of Petty Sessions: Constitution, Powers and Procedure	154
55(III)	Enforcement of Orders Under the Justices Act 1902	157
56	Strata Titles Act	159
57	Enforcement of Custody Orders	162
58	Section 2 of the Gaming Act	163
59	Audit Provisions of the Local Government Act	165

60	Alternatives to Cautions	166
61	Enforcement of Judgment Debts	167
62	Liability of Highway Authorities for Non-Feasance	168
63	Small Debts Court	170
X	Protection of Money Awarded as Damages	172
64	Bail	174
65(I)	Privacy	176
65(II)	Confidentiality of Medical Records and Medical Research	178
66	Fatal Accidents	181
67	Writs and Warrants of Execution	183
68	Illegitimacy	186
69	The Criminal Process and Persons Suffering from Mental Disorder	187
70(I)	Pre-Judgment Interest	191
70(II)	Interest on Judgments	193
71	Exemption from Jury Service	194
72	Retention of Court Records	196
73	Absconding Debtors Act 1877	197
74	Limited Partnerships	199
75	United Kingdom Statutes in Force in Western Australia	200
76(I)	Wills: Substantial Compliance	202
76(II)	Effect of Marriage or Divorce on Wills	204
77(I)	Medical Treatment for Minors	207
77(II)	Consent to Sterilisation of Minors	208
78	Joint Tenancy and Tenancy in Common	211
79	Prescribed Interests Under the Companies Code	213
80	Problem of Old Convictions	214
81	The Pawnbrokers Act 1860–1984	217
82	Financial Protection in the Building and Construction Industry	218
83	Payment of Witnesses in Civil Proceedings	220
84	Medical Treatment for the Dying	222
85	Police Act Offences	224
86	Incitement to Racial Hatred	226
87	Evidence of Children and Other Vulnerable Witnesses	229
88	Administration Act	232
89	The Sale of Goods Act 1895	234
90	Professional Privilege for Confidential Communications	236
91	Restrictive Covenants	239
92	Review of the Criminal and Civil Justice System in Western Australia	242
Part III:	Indexes	255
	Reference Subject	254
	Priority of Reform	258
	Cross-referencing	259

Foreword

On behalf of the Commission, I am delighted to introduce this report. We mean it to commemorate the Commission's history, to provide a convenient record of the Commission's work, and to focus attention on the future for law reform in our state.

Ralph Simmonds
Chairman

This report marks the 30 years since the enactment of the legislation that created the Commission. However, the report *commemorates* a longer history, one that also takes in the Law Reform Committee whose work led to that legislation. That perspective shows the extraordinary range of aspects of the legal system that first the Committee and then the Commission were asked to review. Thus, in this volume my predecessors refer to projects on strata titles, administrative law, local court process, criminal injuries compensation, the caution as a sanction in criminal law, bail, the evidence of children and other vulnerable witnesses, privilege for professional communications, limitation of actions and the state's criminal and civil justice system. As they note, there is much more to the history this volume marks than that. There have been in all 92 references that have been brought to a conclusion of some sort so far. Many of these references marked significant moments in the state's social and legal history.

The description in this volume of the work on those references shows the contribution to the literature on the law in Western Australia that the Committee and the Commission have provided. This contribution reflects the commitment to the ideal of law reform of many people. Successive members of the Committee and the Commission and their staff have included some of the most distinguished jurists in our state. But these bodies have also been able to draw on a wider community of those interested in keeping our law under review. This community includes many from the legal profession and academia who have drawn on their experience and insights both as consultants and as commentators. This community has also included a much wider section of our state's population, of people who have made submissions to the Committee and the Commission. In recent times, they include those who have participated in public meetings and other fora that the Commission has been able to organise. All of the members of this community of concern have helped the Committee and the Commission to enhance the quality of the work this report records. Beyond that assistance, this community has contributed to public ownership of law and its processes in Western Australia.

This report also *records every reference* the Committee and Commission have received that has issued in a conclusion of some sort. This record is not a bare description of the subject matter of the reference. It is an account of the genesis of the reference, the process involved in addressing it, and its upshot. Most references grew out of a significant question about the law or its administration and initiated the same sort of process. This was a process involving substantial legal research that issued in a discussion paper or papers on which submissions were received from a range of sources. Most references resulted in final reports containing a number of recommendations for legislative change that were promptly acted upon. As this report also indicates, however, particular references have initiated processes to arrive at that endpoint involving both the traditional concern for legal research of high quality and wider processes of public consultation. And whether or not action was taken to implement the recommendations in any of the final reports this report describes, the result was a significant addition to the literature on the law and legal processes in our state, to assist all concerned with their development.

This report also shows that some of the references revisited previously covered ground, most notably references in the area of administrative law and process. Some references were withdrawn when the conditions that gave rise to them had changed. Some references issued in reports indicating that no changes were needed. The constant throughout, as this report indicates, has been a concern for the development of a legal system for our state of a high standard that serves its changing needs.

Finally, this report *focuses attention* on what might be considered unfinished business in law reform. There has been a high implementation rate of the recommendations of the Committee and the Commission. But as this report notes there is a range of recommendations in final reports that remain unimplemented. Some of those recommendations are, we believe, no longer relevant. Some of them, in the light of current conditions, we consider to be matters of low priority. There remain, however, a range of recommendations that we believe would substantially enhance the quality of the legal system in our state. This report notes the unimplemented recommendations of all of these sorts, indicating our view as to the priority, if any, they should receive in the agenda for legal change in Western Australia.

It is in these ways that we mean this volume to celebrate, record and continue a history of commitment to the ideal of law reform for the benefit of all Western Australians.

Ralph Simmonds
Chairman
Law Reform Commission of Western Australia

Abbreviations and Explanations

For ease of reference the following terms have been used throughout this publication:

Chairman	refers to those, both male and female, elected to this position under the *Law Reform Commission Act 1972* (WA).
Commission	refers to the Law Reform Commission of Western Australia.
Committee	refers to the Law Reform Committee of Western Australia.
Project No	refers to the chronological project number allocated to each reference at the time it is received. The project number is the prime identifying feature of each report and is featured at the top of each page for ease of access in this publication.

Presentation of Information in this Document

This publication provides a summary of all references given to the Commission and its predecessor the Committee. Each completed reference features the following fields:

Terms of Reference	sets out the terms of the Commission's investigation.
Background of Reference	puts the reference into its historical, legal and political context.
Nature and Extent of Consultation	shows the process of consultation undertaken by the Commission in its work upon the reference.
Recommendations	lists the primary recommendations of the Commission upon the reference. Where numbered, rather than bulleted, the list is exhaustive.
Legislative or Other Action Undertaken	records the action, whether legislative or otherwise, taken by government and other relevant parties in response to the Commission's recommendations.

Those references that have outstanding recommendations for reform feature the following additional fields:

Currency of Recommendations	assesses the current relevance of recommendations in light of intervening developments.
Action Required	identifies the type of action required to effectively implement the Commission's recommendations.
Priority	offers an independent assessment of the priority status to be allocated to each reference that has outstanding recommendations.

Where a reference has been withdrawn before completion of a report or where no action was recommended by the Commission the summary report identifies this by featuring the field headings 'Reference Withdrawn' or 'No Action Recommended', respectively.

Acknowledgements

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Members

Members of the Law Reform Committee

BJ Rowland	15 Jan 1968–18 Jan 1973
EJ Edwards	15 Jan 1968–30 Nov 1968; 9 Dec 1969–18 Jan 1973
C le B Langoulant	15 Jan 1968–18 Jan 1973
IWP McCall	1 Dec 1968–8 Dec 1969

Members of the Law Reform Commission

BJ Rowland	19 Jan 1973–18 Jan 1975; Chairman 1973
EJ Edwards	19 Jan 1973–18 Jan 1974
EG Freeman	19 Jan 1973–13 Aug 1982; Chairman 1974–75; 1977–78; 1982
RW Harding	19 Jan 1974–18 Jan 1977; Chairman 1975–76
DK Malcolm	19 Jan 1975–18 Jan 1982; Chairman 1976–77; 1979–82
NH Crago	19 Jan 1977–18 Jan 1980; Chairman 1978–79
CW Ogilvie	1 Oct 1979–28 Feb 1991; Chairman 1982–83; 1987–88
HH Jackson	3 Jan 1980–18 Apr 1986; Chairman 1983–84
LL Proksch	19 Jan 1980–18 Jan 1984
DR Williams	19 Jan 1982–18 Jan 1986; Chairman 1984–85
JA Thomson	13 Aug1982–11 Aug 1986; 1 Sep 1987–31 Aug 1993; Chairman 1985–86; 1990–91
PW Johnston	19 Jan 1984–18 Jan 1988; Chairman 1986–87
RS French	19 Jan 1986–25 Nov 1986
ME Rayner	7 Jul 1986–17 May 1990; Chairman 1988–90
JR Packington	23 Sep 1986–30 Aug 1987
MC Lee	26 May 1987–12 Feb 1988
G Syrota	19 Jan 1988–18 Jan 1991
RL le Mière	16 Mar 1988–15 Mar 1992
MD Pendleton	19 Jan 1991–18 Jan 1994; Chairman 1991–1993
CJ McLure	28 Oct 1992–31 Dec 1995; Chairman 1993–94
PR Handford	7 Dec 1993–31 Dec 1995
PG Creighton	19 Jan 1994–18 Jan 1997; Chairman 1994–1996
PP Eldred	22 Nov 1994–20 Feb 1995
RE Cock	22 Oct 1996–14 Sep1999
WS Martin	22 Oct 1996–current; Chairman 1997–2001
RL Simmonds	20 Jan 1997–current; Chairman 2001-current
CF Jenkins	29 Dec1999–31 Aug 2001
ID Petersen	17 Dec–current

Executive Officers

CW Ogilvie	28 Jul 1969–31 Sep 1979
PH Clarke	1 Feb 1980–1 Jan 1983
PR Handford	16 May 1983–15 Feb 1998
MA Brewer	16 Feb 1998–28 Jan 2001
HJ Kay	29 Jan 2001–current

Part I:
History of the Commission

The Law Reform Commission of Western Australia: A Brief History

In the 1960s the need for permanent attention to issues of law reform was keenly felt throughout the Commonwealth. In the words of Mr Brand, then Premier of Western Australia, '[w]e inherited a substantial body of English law in our foundation year, 1829, and many important areas of law are inadequately covered by statute'.[1] The establishment of the English and Scottish Law Commissions in 1965 was one of the inspirations for a permanent law reform body in Western Australia.

Law Reform Committee

The first official law reform body in Western Australia, the Law Reform Committee, was established by a Cabinet decision of September 1967. After discussions with key stakeholder groups, Arthur Griffith, then Minister for Justice, and the Cabinet decided that the Committee would be constituted by three part-time members: a private practitioner; a representative of the University of Western Australia's Law School; and a representative of the Crown Law Department. The founding members were Mr Barry Rowland, a senior partner in a legal firm, Dr Eric Edwards, Reader in Law at the University of Western Australia, and Mr Clyde Langoulant, Senior Legal Assistant with the Crown Law Department. The first meeting of the Committee was held on 15 January 1968.

The Birth of the Commission

Initially, the Law Reform Committee acted as a part-time body. However, it soon became clear to the members that the Committee required permanent status if it was to effectively perform the role of continuing law reform.

In 1969, Dr Edwards, the academic member of the Committee, embarked on a study visit to the United States, Canada, the United Kingdom and India. He met with officials of a number of permanent law reform bodies in those countries to discuss and observe the daily operations of those institutions. Upon his return to Australia, Dr Edwards' first-hand observations and experiences were invaluable in aiding the Law Reform Committee to propose the establishment of a permanent law reform body in Western Australia.

On 31 October 1972 the Law Reform Committee was granted permanent status as the Law Reform Commission of Western Australia by the *Law Reform Commission Act 1972* (WA).[2] The new Commission was established as a statutory body to operate independently from the executive and legislative branches of government. The requirements for the position of the academic member of the Commission were expanded to allow for the appointment of senior legal academics from any Western Australian university. In 1978 amendment to the Act permitted the appointment of two full-time members and increased the membership of the Commission to five.

Members Past and Present

Throughout its history, the Commission has been fortunate to enjoy the contributions and services of many outstanding members. David Malcolm, now Chief Justice of Western Australia, served as a member of the Law Reform Commission from February 1975 to January 1982. Other past members include: Richard Harding, now Inspector of Custodial Services in Western Australia, who served on the Commission from January 1974 to January 1977; Robert French, now Justice of the Federal Court of Australia, who served on the Commission from January 1986 to November 1986; and Daryl Williams, now Federal Attorney-General, who served on the Commission from January 1982 to January 1986.

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1 *The West Australian*, 9 January 1968.

2 The Committee was formally reconstituted as a Commission upon proclamation of the *Law Reform Commission Act 1972* (WA) on 19 January 1973.

The Commission has also been assisted by the services of a number of prominent full-time members throughout its history, including Moira Rayner who later became Director of the Office of the Children's Rights Commissioner in London, and Hal Jackson, now a Judge of the District Court of Western Australia.

Restructure

In 1997, after consultation with the Attorney-General, the Commission radically restructured its operations and reduced its full-time staff to one—the Executive Officer—who has charge of the day-to-day business of the Commission. Through a tender process, the new structure enables the Commission to engage the services of consultants who have expertise in the area that the Commission is investigating at a given time. The Commission also engages additional temporary staff to provide research, writing, editing, and administrative services. This accordion-style structure enables the Commission to enlarge, contract or diversify its human resources pool to handle small, large or multiple projects in an efficient manner. Another benefit of the new structure is that it permits individuals who would not previously have been able to participate in the process of law reform to bring their unique and special skills to the Commission's law reform activities.

The first project to benefit from the restructure was also the largest reference ever undertaken by the Commission, Project No 92, the *Review of the Criminal and Civil Justice System in Western Australia* ("the Review"). Under its previous structure with only three full-time research staff, a reference of this size would have been impossible to complete within a limited period of time. The Review heralded a new approach to law reform methodology in this state by encouraging public participation in law reform by the staging of a series of "Have Your Say" public meetings in Perth and Western Australian regional centres. The Commission also participated in a live television conference broadcast on the Westlink Satellite Network to reach those in more remote areas of the state.

The Review was described by the Attorney-General and others as the most extensive, comprehensive and expeditious review of its kind ever completed by a law reform agency. A brief summary of the report features as the final reference of this volume and provides a fitting point from which to launch the Commission's next 30 years.

Barry Rowland was a foundation member of the Law Reform Committee of Western Australia from 1968–1972. When the Committee was reconstituted as the Law Reform Commission of Western Australia in January 1973, he was appointed a Commissioner. He was foundation Chairman of the Law Reform Committee and continued in that role with the Commission until December 1973. He resigned from the Commission in January 1975. Prior to joining the Commission Barry Rowland was in private practice as a barrister and solicitor and was appointed Queen's Counsel in 1973. In 1983 he was appointed a Justice of the Supreme Court of Western Australia and served in that capacity until his retirement from the bench in 1996. He was Chairman of the Parole Board of Western Australia from 1996–1998 and is currently Chairman of the Legal Practitioners' Disciplinary Tribunal (WA).

Barry Rowland

Describe the impact the Law Reform Commission had during the time you were in office.

The Commission was the logical successor to the Law Reform Committee which was established by the Executive Government in 1968. The members of each were given the opportunity to nominate subjects for investigation and, perhaps naturally, those subjects could be categorised as dealing with what is described as "lawyer's law". We dealt with some subjects which may have developed by way of judicial precedent but which in practice needed a more expeditious remedy. For example: purchasers of land were regarded as needing further protection; damage caused by straying stock was often without redress for those injured; and a means had to be devised for broadening the relief to those with legitimate claims who had been disinherited or left without support by a person who owed obligations. I believe the reforms we proposed impacted on resolving many practical difficulties faced by members of the public in their day-to-day activities.

What did your time at the Law Reform Commission mean to you personally? How has your experience as Chairman affected your post-Commission life and work?

I enjoyed my time on both the Committee and the Commission. It helped me develop a greater understanding of the law, its historical development and the way in which it had an impact in its social and practical application. It made me appreciate and admire the way the common law had been developed and expanded by the courts over time and how careful one had to be when introducing so called reforms, to ensure that they were confined to the matter in issue and did not cause other unwanted effects.

What do you believe was the most significant achievement of the Law Reform Commission, during your time as a Commissioner or Chairman?

I have no particular recollection of the most significant result achieved during my time as Chairman. I do recall a particular recommended reform that was not achieved: the establishment of a division of the Supreme Court to deal with administrative appeals (Project No 26). This, as I recall, had the support of the Law Society and the judges of the Supreme Court at the time. I have always thought that the proliferation of various administrative appeals bodies apparently favoured by governments should have been brought under the jurisdiction of the Supreme Court. Notwithstanding recent proposals, I adhere to my earlier views.

What inspired you to develop and pursue an interest in law reform?

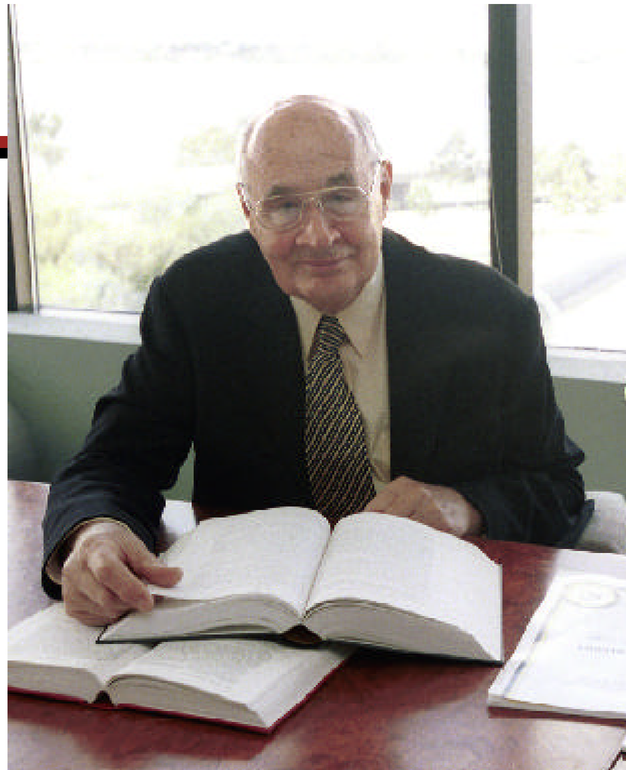
I developed an interest in law reform during my secondary education. Later, during my years in practice I developed a healthy respect for the way in which the courts usually managed to maintain contemporary standards. There were however, some matters that occasionally required statutory intervention to maintain those contemporary outcomes.

What do you believe has been the most important reference undertaken by the Law Reform Commission to date? Why?

I would not like to say.

How do you view the role of the individual or general community in law reform?

Law reform by a Commission should, I believe, play a limited role in ensuring that judge-made law keeps abreast of community developments and scientific advances that can impact upon the administration of justice. In this regard, the wider community can offer a valuable contribution to law reform. It is incumbent upon a Law Reform Commission to encourage that contribution by ensuring, amongst other things, that working papers are given as much publicity as possible.



Eric Freeman served as a part-time member of the Commission from 1973–1982. He was elected Chairman of the Commission on three separate occasions in 1974, 1977 and 1982. Prior to joining the Commission Eric Freeman practised as a barrister and solicitor in civil and criminal jurisdictions in New Zealand. He later specialised in resource law and became legal adviser to the Shell group of companies. In 1969 he was admitted as a barrister and solicitor of the Supreme Court of Western Australia and joined the Crown Law Department, subsequently becoming a Senior Assistant Crown Solicitor. Eric Freeman resigned from the Commission in 1982 to take up the position of Parliamentary Commissioner for Administrative Investigations until his retirement in 1990.

Eric Freeman

Describe the impact the Law Reform Commission had during the time you were in office.

Law reform in Australia was a growth industry in the 1970s with 11 Commissions, each differently constituted. I believe our Commission was generally well regarded by the public and was seen to be responsible and apolitical. It was however overloaded with projects and there were limitations on what three part-time members could achieve. In 1979 the addition of two full-time members helped the position. The Commission earned the respect of other agencies both in Australia and elsewhere for thoroughness and accuracy of research, and for the substantial contributions of its members at conferences and on joint projects.

What did your time at the Law Reform Commission mean to you personally? How has your experience as Chairman affected your post-Commission life and work?

It was very demanding for a part-time member, especially the homework which was neglected at one's peril since it was readily apparent if a member had not done it. The interaction with other members—all with different expertise—was a most stimulating and educational experience. So too were our visits to the Australian Law Reform Commission (ALRC) on joint references and to agency conferences. The experience gained with the Commission was helpful to me in carrying out my subsequent role as Ombudsman which also included recommending changes to the law.

What do you believe was the most significant achievement of the Law Reform Commission, during your time as a Commissioner or Chairman?

My pick would be defamation (Project No 8). This was a joint exercise with the ALRC with a view to achieving uniform defamation law throughout Australia. It was unique in that it was the first time two commissions had undertaken a joint project. Our Commission's mandate was to work with the ALRC and, when that Commission had finalised its recommendations, to submit an independent report on them. There was excellent cooperation between the commissions with the sharing of research, consideration of drafts, and formal and informal meetings with robust discussion on occasions. It was a very time consuming but stimulating project.

What inspired you to develop and pursue an interest in law reform?

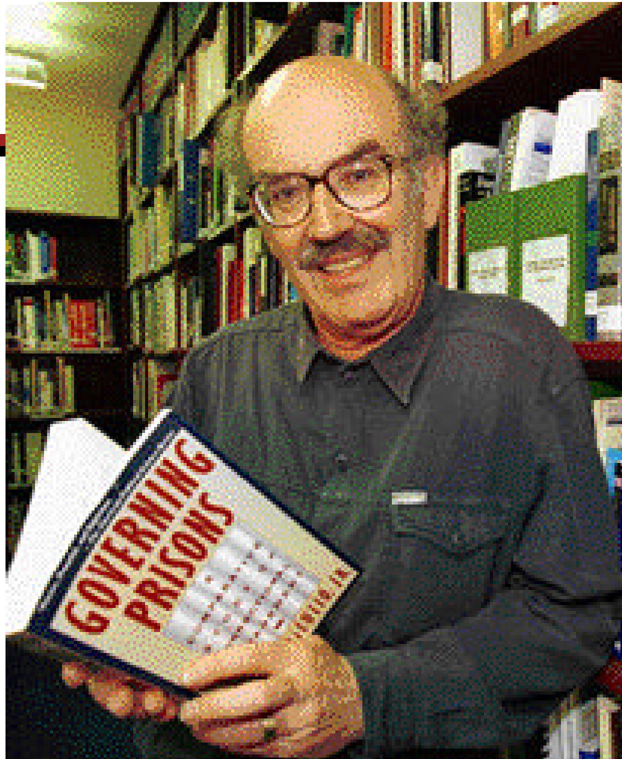
As a law student, I was influenced by perceptive lecturers who helped me to develop both an analytical and a critical approach to the law. Years later, as a part-time lecturer in commercial and company law, I endeavoured to pass on this critical approach. Students could bank on their examinations being structured towards law reform! Other exercises in law reform included being a member of the New Zealand Society of Accountants' Company Law Reform Committee, and involvement in amendments to the Petroleum legislation.

What do you believe has been the most important reference undertaken by the Law Reform Commission to date? Why?

The recent *Review of the Criminal and Civil Justice System* (Project No 92) is the largest and most wide-ranging inquiry undertaken by the Commission. What could be more important than to try to make the justice system work better? The review enabled the Commission to maximise its involvement with the public and other groups through the web-site, public meetings, and the extensive use of consultants.

How do you view the role of the individual or general community in law reform?

The law belongs to the people. It should not be a mystery to be enjoyed by lawyers behind closed doors. In my view it is vital that the community governed by the law should take part in helping to frame reforms to that law. This may be done by government giving a reference to a law reform commission, or in some other way such as inviting submissions from the public. It is essential that there be participatory law reform.



Richard Harding served as a part-time academic member of the Commission from 1974–1977. He was elected Chairman for a one-year term in 1976. Following his time with the Commission, Richard Harding served on the Board of the Australian Broadcasting Corporation and completed a five year term with the Australian Law Reform Commission. In 1984 he was appointed Director of the Australian Institute of Criminology and then foundation Director of the Crime Research Centre at the University of Western Australia. He currently holds the office of Inspector of Custodial Services in Western Australia.

Richard Harding

Describe the impact the Law Reform Commission had during the time you were in office.

The Commission transcended party politics and that was integral to its impact. During my time in office, the government did appear to take the Commission seriously and gave it some worthwhile and important references. My impression is that the Commission had a fairly strong direct impact, as well as a kind of symbolic impact in that it was representing the value that there was more to law reform than politics.

What did your time at the Law Reform Commission mean to you personally? How has your experience as Chairman affected your post-Commission life and work?

It was enormously valuable. Being on the Law Reform Commission was a wonderful legal education – I would recommend it to anybody as a way of broadening their understanding of law and indeed the world. It was also of great value to me personally, to work with people that had such different perspectives on issues. The Commission had an immensely collegial atmosphere and I drew a great deal from my colleagues and from the research and administrative staff. Subsequently, my whole career has been close to public administration of one kind or another, so the impact of my experience with the Commission has been enduring.

What do you believe was the most significant achievement of the Law Reform Commission, during your time as a Commissioner or Chairman?

I think that there was probably more attention given to criminal law and evidence matters than might have been given in the past. The reference on criminal injuries compensation (Project No 46) and the work we did on the caution as a sanction in criminal law (Project No 60) were important and timely. In a less tangible way, the affirmation of the view that goodwill can go a long way to solving problems and that you don't have to relegate everything to the bureaucratic or political arenas was a somewhat significant achievement.

What inspired you to develop and pursue an interest in law reform?

Eric Edwards, who was a colleague and great friend of mine, was one of the foundation members of the original Law Reform Committee. I think my practical interest in law reform grew during my association with him; although, as an academic I had always been interested in change.

What do you believe has been the most important reference undertaken by the Law Reform Commission to date? Why?

I'm not sure that I can comment on that because I haven't kept up with all of the Commission's work. I do think that the recent review of the justice system (Project No 92) was important but there are no doubt many smaller references that have had extremely important outcomes.

How do you view the role of the individual or general community in law reform?

Community input is enormously important. We always invited public submissions on our working papers and quite often received very valuable comments. I also spent some time on the Australian Law Reform Commission where we frequently held public hearings on the subject of our references. From that experience I can honestly say that it does affect your perspective on issues. You quite often get a feeling about the balance of a proposition from public submissions that you may not get otherwise.

David Malcolm was appointed to the Commission in 1975 and served as a part-time member for seven years. He served as Chairman of the Commission from 1976–1977 and 1979–1982. Prior to becoming a Commissioner, David Malcolm was a partner with the firm Freehill Hollingdale & Page (and its predecessor) in Perth and a barrister at the Western Australian Independent Bar. He was appointed Queen's Counsel in 1980. From 1978 to 1986, he served as Chairman of the Western Australian Town Planning Appeals Tribunal. He was appointed Chief Justice of Western Australia in 1988 and was made a Companion of the Order of Australia in 1992. As well as serving Western Australia as its Chief Justice and Lieutenant Governor, David Malcolm currently holds the offices of Chairman of the Advisory Board of the Crime Research Centre at the University of Western Australia, President of the Western Australian Branch of the International Commission of Jurists and member of the Board of Directors of the Society for the Reform of Criminal Law. In 2000 he was awarded the honour of Citizen of the Year in Western Australia in the category of the professions.

David Malcolm

Describe the impact the Law Reform Commission had during the time you were in office.

When I was first appointed, the Attorney-General was Mr T D Evans in the Tonkin Government, but there was a change of government shortly afterwards and Mr I D Medcalf QC was appointed Attorney-General. His appointment ushered in a period of greatly increased activity for the Commission. From early 1975 until my retirement early in 1982, the Commission produced no less than 28 reports on a wide range of subjects. A very significant number of these reports were implemented by legislation. In this respect, I pay tribute to the then Attorney-General, I D Medcalf QC, for his very strong support of the Commission and his efforts in securing the implementation of many of its recommendations.

What did your time at the Law Reform Commission mean to you personally? How has your experience as Chairman affected your post-Commission life and work?

For me personally it was a great learning experience and a privilege to work with people of the calibre of Richard Harding, Eric Freeman, Charles Ogilvie, Louis Proksh and Hal Jackson (now his Honour Judge HH Jackson of the District Court). My experience at the Commission has left me with a continuing desire to improve and reform the law and the procedure of the courts, to improve efficiency while maintaining the essential fairness of the system.

What do you believe was the most significant achievement of the Law Reform Commission, during your time as a Commissioner or Chairman?

In my view, the most significant achievements of the Commission during my period in office were the production of the reports, particularly those which were implemented by legislation. The Commission also achieved an enviable reputation for the quality of its research and the practicality of its recommendations.

What inspired you to develop and pursue an interest in law reform?

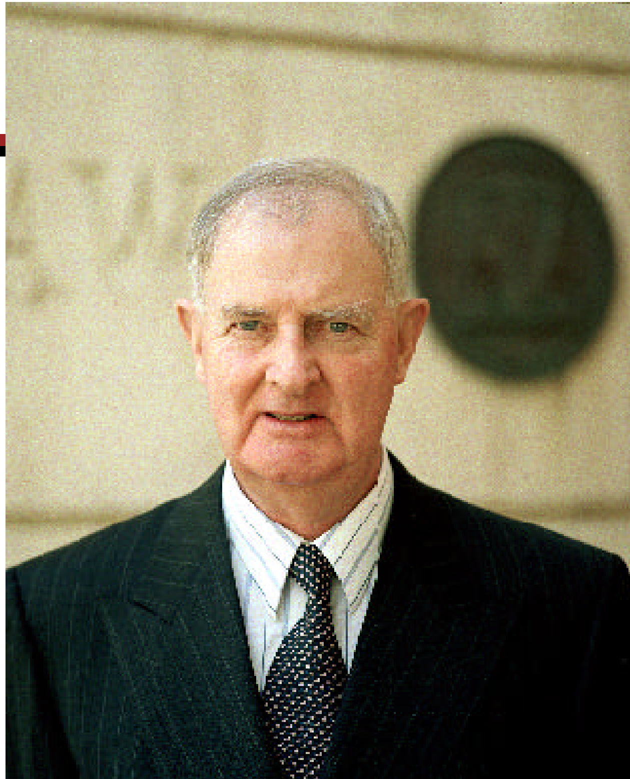
I have always had a great interest in law reform since my days at Law School. At an earlier time in 1966–1967 I had been a member of the Law Society's Law Reform Committee.

What do you believe has been the most important reference undertaken by the Law Reform Commission to date? Why?

There is no doubt that the largest reference yet received by the Commission is the reference for the *Review of the Criminal and Civil Justice System* (Project No 92). In the period from 1988–1997 both the Supreme Court Rules Committee and the Criminal Practice and Procedure Review Committee appointed by me had progressively introduced major reforms to civil and criminal procedure in Western Australia, which had been ongoing, including the introduction of many reforms to improve expedition and efficiency as well as simplify procedures. From the early 1990s both the *Rules of the Supreme Court 1971* and the *Criminal Practice Rules 1902* have been fully reviewed and amended; the latter based on recommendations made by the Hon Justice Murray assisted by his Honour Judge Healy. This has resulted in work having been commenced on many of the proposals for reform which were incorporated in the recommendations of the Commission.

How do you view the role of the individual or general community in law reform?

It is extremely important that both interested individuals and the general community are given the opportunity to participate in law reform. It is not enough merely to advertise inviting submissions. It is necessary to go further and communicate directly with individuals and organisations that may have an interest in the matter, including, in particular, community based, professional and business organisations.



Neville Crago served as a part-time academic member of the Commission from 1977–1980. He was elected Chairman for a one-year term in 1978. Neville Crago has for many years successfully combined an academic career with professional practice in the fields of equity and trusts, and wills, probate and the administration of estates of deceased persons. Between 1993 and 1997 he served several periods as an Acting Registrar of the Supreme Court of Western Australia. He has been a Visiting Professor at the University of Aix-Marseille in France, the UNIDROIT in Italy and the Institute of Advanced Legal Studies in London. He is currently Associate Professor of Law at the University of Western Australia.

Describe the impact the Law Reform Commission had during the time you were in office.

Western Australia was fortunate in having two excellent Attorneys-General during my time on the Commission – the Hon Ian Medcalf (Liberal) and the Hon Joe Berinson (Labor). Both Attorneys were interested in law reform, and both took an active interest in the work of the Commission. We were well funded, and well staffed. The references we received were generally topical, practically-relevant references. I believe the Commission did good work – as was frequently attested by the fact that many practitioners commonly used our working papers and reports as virtual textbooks on their subjects. I recall, in particular, that our report on Bail (Project No 64) was very well received, and led to the enactment of the *Bail Act 1982* (WA).

What did your time at the Law Reform Commission mean to you personally? How has your experience as Chairman affected your post-Commission life and work?

I was very fortunate to be able to work closely, and every week, with such excellent lawyers as David Malcolm QC (as the Chief Justice then was) and Eric Freeman, a leading government solicitor. We worked harmoniously as Commissioners, together with our extremely able Executive Officer, Charles Ogilvie. Discussions were rigorous, and stimulating. I learned much from this professional association.

What do you believe was the most significant achievement of the Law Reform Commission, during your time as a Commissioner or Chairman?

The work that led to the enactment of the *Bail Act 1982* (WA).

What inspired you to develop and pursue an interest in law reform?

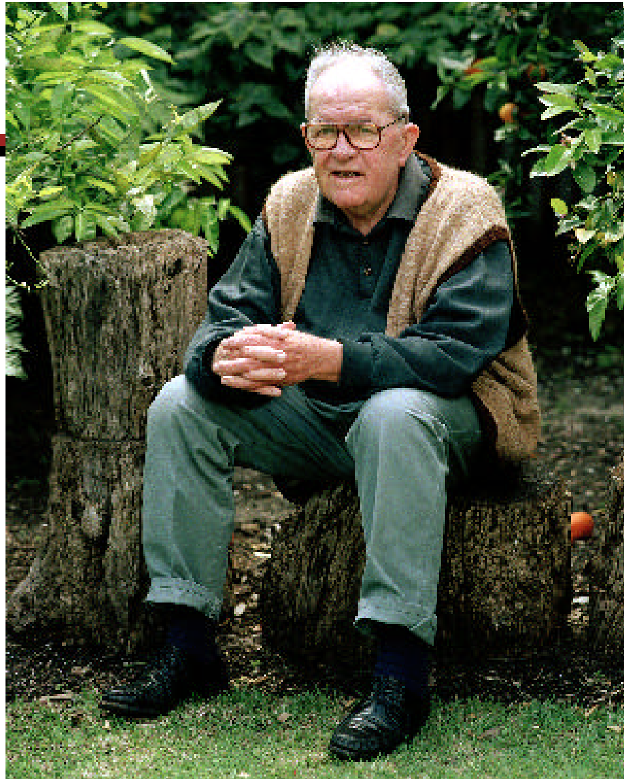
I had no special interest in law reform before joining the Commission. Upon becoming a Commissioner, one had a professional job to do and one did it with enthusiasm.

What do you believe has been the most important reference undertaken by the Law Reform Commission to date? Why?

One would not want to single out any particular project. Many projects have been important to the community, or to sections of it.

How do you view the role of the individual or general community in law reform?

One has to distinguish politically sensitive matters from 'black letter' law. Government is normally responsive to the former. Much of what is called 'law reform' is concerned with the latter. Of course, black letter law reform inevitably embodies policy matters, and individuals and community groups will have views. The Commission often goes to considerable trouble to ascertain and to consider these views. Often, of course, these inputs are merely self-interested. One would naturally take the self-interest into account in assessing them. One of the virtues of the Commission is that Commissioners normally are not partisan. Being professional lawyers they are used to considering all sides of a question. Individuals and community groups, on the other hand, usually do not do this. For this reason, I think their role in law reform is limited.



Charles Ogilvie joined the Commission (then the Law Reform Committee of Western Australia) as Executive Officer in 1969. He was recruited from the Justice Department of New Zealand where he was Senior Officer in the Advisory Division and responsible for recommending and drafting reforms to statute law. In 1979 he was appointed a full-time member and served the Commission in that capacity until his retirement in 1991. Charles Ogilvie is the longest serving Commissioner to date and held the position of Chairman of the Commission for two terms.

Charles Ogilvie

Describe the impact the Law Reform Commission had during the time you were in office.

I would say that it probably had a moderate impact, both as regards the general awareness of its publications and as regards the legislative outcome of its reports.

What did your time at the Law Reform Commission mean to you personally? How has your experience as Chairman affected your post-Commission life and work?

Being part of the legislative process always intrigued and excited me. Actually being involved, as I was, in helping to make and improve the law was a wonderful experience. This passion stayed with me the whole 22 years that I was with the Commission. Indeed, I was sorry to leave when I retired in 1991.

What do you believe was the most significant achievement of the Law Reform Commission, during your time as a Commissioner or Chairman?

It's difficult to say – whilst some projects resulted in immediate legislative reform, others, which may have been quite elaborate reports with a lot of work were seemingly ignored. Whilst it was not perhaps the most intriguing of references, the *Strata Titles Act* report (Project No 56) was, I believe, quite a significant achievement for the Commission. It was a very difficult project and resulted in important reforms.

What inspired you to develop and pursue an interest in law reform?

My superior at the Justice Department in New Zealand simply lived for law reform and working with a man like that, it was difficult not to be inspired! Although law reform was just one aspect of my work there, it was the part that I most enjoyed. So when I was offered the chance to work exclusively in law reform in Western Australia, I jumped at it.

What do you believe has been the most important reference undertaken by the Law Reform Commission to date? Why?

Well, the recent major reference *Review of the Criminal and Civil Justice System* (Project No 92) was a significant undertaking, but other smaller references also resulted in very important reforms. For instance, the work that we did on improving the status of illegitimate children was very important. At the time, illegitimate children were seen as inferior beings. I like to think that the work that the Commission did in this area ultimately served to change that perception.

How do you view the role of the individual or general community in law reform?

Law reform is not the province of experts alone. I believe that the individual and community have an absolute right to involve themselves in law reform and their input is very valuable. In fact we would plead with the public to become involved in our work! We had a large mailing list for public distribution of our working papers – the purpose of which was to stimulate and seek public comment on the particular issue. We also had a very good relationship with some journalists who would assist us by bringing our work to the attention of the public through newspaper articles.

Hal Jackson was appointed one of the first two full-time members of the Commission in 1980 and was elected Chairman for a one-year term in 1984. Prior to his appointment Hal Jackson practiced as a barrister and solicitor in Perth and was active on the Law Society Council. During his time with the Commission he also served as Vice President, and later, President of the Law Society. In 1986, he resigned from the Commission to take up a judicial appointment. From 1989–1994 he served as the inaugural President of the Children's Court of Western Australia. He currently serves as a Judge of the District Court of Western Australia.

Hal Jackson

Describe the impact the Law Reform Commission had during the time you were in office.

During my time in office the Commission's relationship with government was good. Funding and staffing was generous and consequently the Western Australian Commission was regarded fairly enviously by some of the other state commissions. In terms of the impact on the community, we were fairly active in seeking media coverage and attention for the issues the Commission was dealing with. Because we had full-time Commissioners and staff we had the time and resources to effectively raise the profile of the Commission.

What did your time at the Law Reform Commission mean to you personally? How has your experience as Chairman affected your post-Commission life and work?

My time at the Commission was reasonably lengthy, over six years' full-time, and I gained a lot from it personally. My experience as Chairman was valuable because it helped me to understand a bit about administration and the operation of government. That assisted me in my presidency of the Law Society and in other organisations that I have been associated with, such as the Youth Legal Service and the Palmerston Association, both of which I now also chair.

What do you believe was the most significant achievement of the Law Reform Commission, during your time as a Commissioner or Chairman?

I think it was that we raised the profile of law reform as a method of assisting government and of the need to continue to modernise the law. Of course not all of our recommendations were adopted.

What inspired you to develop and pursue an interest in law reform?

I guess I've always been interested in social issues and the relationship between law and social conditions. I hadn't found my time in private practice to be as stimulating as others have, so I jumped at the opportunity to work full-time in law reform and pursue my interests in that respect.

What do you believe has been the most important reference undertaken by the Law Reform Commission to date? Why?

I think in my time the *Strata Titles Act* reference (Project No 56) was quite significant – strata titles were a reasonably recent development and a lot of details needed to be ironed out. The report took some time to complete but it consolidated the fact that the Commission had a role that it could perform separately from normal departments of government that undertake the bulk of law reform activity.

How do you view the role of the individual or general community in law reform?

Well, it depends on what you mean by law reform … I think it's important that you get the general community on side in terms of what I call 'social' law reform. In contrast, in areas of black letter law reform, it's important that you consult with individuals who know what they are talking about and have given a lot of thought to the particular problem. The *Strata Titles Act* report demonstrates an interesting mix of the two – parts of the subject were very contentious and important from the community's point of view but there was also a lot of very technical land law material to address. Acknowledging the role of the community and of the experts was central to its ultimate success.

Daryl Williams was appointed a part-time professional member of the Commission in 1982 and was elected Chairman for a one-year term in 1984. Prior to his appointment, Daryl Williams worked as counsel for the Asian Development Bank and in private practice at the Independent Bar in Western Australia. He was appointed Queen's Counsel in January 1982. During his time at the Commission, he also served as President of the Law Society of Western Australia and later as President of the Law Council of Australia. He was appointed a member of the Order of Australia for services to the legal profession in 1989. In 1993 he was elected to federal Parliament and in 1996 was appointed Commonwealth Attorney-General.

Daryl Williams

Describe the impact the Law Reform Commission had during the time you were in office.

The impact of the Commission can best be judged by its success in having its recommended reforms implemented. During my time at the Commission the reports were reasonably well received by government and the Commission was actively seeking to promote implementation. This was made easier by the fact that both the Attorney-General at the time of my appointment (Ian Medcalf) and his successor (Joe Berinson) were keenly interested in law reform and generally supportive of the Commission's work and role.

What did your time at the Law Reform Commission mean to you personally? How has your experience as Chairman affected your post-Commission life and work?

As Attorney-General it has been very useful to know how a law reform commission works. From being involved in the Commission I developed an appreciation of what a law reform agency can do well and what it would not necessarily do well. Importantly, in respect of my dealings with the Australian Law Reform Commission, I had a clear idea of the timeframe that a law reform commission needs to do a thorough job.

What do you believe was the most significant achievement of the Law Reform Commission, during your time as a Commissioner or Chairman?

In general terms it would be the production of good quality, carefully considered reports. If I had to choose a report, I would probably nominate the report on the *Strata Titles Act* (Project No 56) which recommended substantial and significant reform.

What inspired you to develop and pursue an interest in law reform?

I always had an interest in law reform and followed the work of the Commission prior to being appointed. I had previously been involved in many committees that were law reform oriented, some were sub-committees of the Law Society, others of the Liberal Party. When I was a tutor at St George's College I was appointed to a committee established by the Archbishop to look at legal issues. But my interest in law reform was really generated by my study of jurisprudence, which I undertook at the University of Western Australia and later at Oxford.

What do you believe has been the most important reference undertaken by the Law Reform Commission to date? Why?

I can't really comment because I don't know the full range of references. As I mentioned, the *Strata Titles Act* report stands out from my time as a Commissioner.

How do you view the role of the individual or general community in law reform?

Well, I've seen it from the political perspective now and I think it's crucially important to involve the community in law reform. On that basis, if I was returning to on the Commission I would want to see it involved in a greater degree of public consultation than simply issuing a discussion paper and inviting submissions. You need to get out and talk to the community. One way to do that is to create a broadly based consultative forum dependent, of course, on the issue. That's what we [the federal Government] did in developing the private sector privacy legislation – we had a core consultative committee of about 20 people that came from different backgrounds, had different perspectives and met regularly to thrash out the issues. That approach was very successful.

Peter Johnston was appointed a part-time academic member of the Commission in 1984. He was elected Chairman in 1986 for a one-year term. Prior to his appointment he practiced as a solicitor in the Crown Law Department in Western Australia and the Commonwealth Attorney-General's Department in Canberra. He later practiced at the Western Australian Independent Bar where he remains in part-time practice. Peter Johnston held the position of Deputy Chairman of the Environmental Protection Authority (WA) from 1985–1990. From 1990–1993 he served as Deputy President of the Commonwealth Administrative Appeals Tribunal and in 1996 as a Hearings Commissioner of the Human Rights and Equal Opportunity Commission. Peter Johnston has successfully combined a career in public office and practice with a career in academia. In 1974 he was appointed Senior Lecturer in the School of Law at the University of Western Australia; he currently holds the appointment of Senior Fellow in the same institution.

Peter Johnston

Describe the impact the Law Reform Commission had during the time you were in office.

What became evident particularly during the four years that I was on the Commission was that the notion of what were appropriate matters for reference expanded. Previously the views about what were proper subjects for "law reform" had been restricted largely to topics that had a high "black letter" content; for example, the law of wills. These were matters primarily of concern to lawyers. In the mid 1980s issues with a higher "political" or policy component were referred to the Commission. These included rights of unborn children, dying wills and the like. These attracted wider community concern and reaction, evidenced by the differing views among medical and care providers, who sought greater certainty about their legal position, and family and community organisations.

What did your time at the Law Reform Commission mean to you personally? How has your experience as Chairman affected your post-Commission life and work?

The experience gained from participating in the process of consultation with community and professional groups demonstrated the need for policy explanation and interchange of information and opinions of those "on the coal face"; that is, those who were most immediately affected by possible changes to the law. The experience also provided a model of public consultation that I found could be adapted for use in other agencies to which I was appointed such as the Environmental Protection Authority.

What do you believe was the most significant achievement of the Law Reform Commission, during your time as a Commissioner or Chairman?

Having become Chair after three years as a member, I sought in my time to do three things:

- encourage the Commission to devote some time to develop a programme to prioritise references;
- advance certain long standing matters such as the references on the inferior court's jurisdiction under the *Justices Act* and the *Local Court Act*; and
- in order to move along some of the smaller or less urgent references that had not received much attention, but which were discrete and lent themselves to academic analysis, I proposed to the then Attorney, Mr J Berinson, (with the backing of the Commission) that a trial be conducted whereby one or two matters were put out to consultants at the University of Western Australia (UWA) to prepare draft papers for the Commission, that could form the basis of later reports. This led in due course (after I ceased to be a member) to the successful completion of references drawing on consultants from the UWA, including Messrs Crago and Proksch.

What inspired you to develop and pursue an interest in law reform?

There was no inspiration as such. The Dean of the Law School asked me, when the position of Law School member became vacant, if I was interested and I gladly accepted nomination to the Attorney-General who recommended my appointment.

What do you believe has been the most important reference undertaken by the Law Reform Commission to date? Why?

No opinion.

How do you view the role of the individual or general community in law reform?

Consultation with community and professional groups, along with individuals, is vital to ensuring full exposure of issues is achieved and the reforms proposed have a chance of *relevant* operation if put into effect. A secondary benefit is that the process ensures a degree of "ownership", and hence support, by those engaged in the consultative process.

Moira Rayner was appointed to the Commission as a full-time member in 1986. She was elected to the position of Chair in 1988 and re-elected the following year. During her term of office, Moira Rayner acted as a consultant for the Human Rights and Equal Opportunity Commission's Homeless Children Inquiry. In 1987 she received a Churchill Fellowship to study the legal representation of children, which resulted in the establishment of the first training scheme for children's lawyers in Australia. Prior to her appointment Moira Rayner worked as a solicitor in her own practice and as a barrister at the Western Australian Bar, as well as holding the position of Chairman of the Social Security Appeals Tribunal for 10 years from 1978. Following her term with the Law Reform Commission of Western Australia, she was appointed Equal Opportunity Commissioner for Victoria and later was appointed a Hearings Commissioner of the Australian Human Rights and Equal Opportunity Commission. Most recently, she has served as the foundation Director of the Office of the Children's Rights Commissioner in London.

Describe the impact the Law Reform Commission had during the time you were in office.

When I was appointed, the Commission was a low profile body that hadn't produced any reports for a while. However, soon after I became Chair, a furore erupted over the content of a discussion paper on the *Medical Treatment of Minors* (Project No 77) which was, apparently maliciously, leaked to the press prior to publication. As a result of this [ill] publicity we took on a very much higher profile both politically and publicly. Although unfortunate, it confirmed what I'd been advocating for some time: to engage in successful law reform you couldn't simply write learned papers and publish something that nobody noticed. You actually had to consult with people and involve them.

How has your experience as Chairman of the Law Reform Commission affected your post-Commission life and work?

Dramatically! The last decade of my professional career has been very much inspired by my experience with the Commission. My work there has led to some very exciting career choices that I might never have had otherwise.

What do you believe was the most significant achievement of the Law Reform Commission during your time as a Commissioner or Chairman?

The work on the *Incitement to Racial Hatred* reference (Project No 86). The degree of planning, consultation, public involvement and the high quality of the papers produced were a very significant achievement. We moved a considerable way forward in consulting with and listening to the public and I was proud of this. Even though the resulting legislation—as I understand it—has never had to be used, it was nevertheless an important statement of moral principle.

What inspired you to develop and pursue an interest in law reform?

It probably developed during my time at University. After graduating I began a Masters of Law on natural justice and courts martial because I believed that the way that draft resisters [during the Vietnam war] were being treated was unfair. The Army appeared to share this view; they wouldn't give me access to their records so I was unable to continue! When I later established my own practice, the clients I represented were often very vulnerable people and the cases often involved unfair laws or the unfair application of a law. Eventually I became tired of dealing with these systemic problems individually and began to look at how I could contribute to addressing them at a more meaningful level.

What do you believe has been the most important reference undertaken by the Law Reform Commission to date? Why?

Probably the *Evidence of Children and Other Vulnerable Witnesses* reference (Project No 87). That may reflect my own bias, but I don't think anyone appreciates how unique it is. The improvement of the judicial process for vulnerable witnesses has been implemented in Western Australia more thoroughly than anywhere else in the world. Not only did the legislation extend to protect vulnerable witnesses other than children but it also established a children's witness service which performs an extremely important role. It is a shame that Western Australia hasn't promoted this initiative more effectively.

How do you view the role of the individual or general community in law reform?

The role of the community is extremely important. Law reform is really about linking up professional and government ideas with public perception by democratic discourse. But you can't do this just by polling or placing advertisements in newspapers for public submissions. You really have to have a comprehensive plan or programme in place.

Michael Pendleton was appointed to the Commission as a part-time academic member in 1991 and served as Chairman of the Commission from late 1991 to mid 1993. Prior to his appointment, Michael Pendleton taught and practiced in the area of intellectual property law in Australia, Hong Kong and the United Kingdom. He has served as a member of the Hong Kong Law Reform Commission's Sub-Committee on Privacy and the Federal Attorney-General's Copyright Law Review Committee. He is the author of seven books on the subject of intellectual and industrial property law in China and Hong Kong and has also published extensively in other areas. He is currently Professor of Law at Murdoch University in Western Australia and Foundation Director of the Asia Pacific Intellectual Property Law Institute.

Michael Pendleton

Describe the impact the Law Reform Commission had during the time you were in office.

Implementation of the report on *Evidence of Children and Other Vulnerable Witnesses* (Project No 87) had, in my view, the greatest impact during my time with the Commission. Legislation following our report allowed for videotaping of children's evidence in order that the child witness (usually the victim) could not be intimidated by being in proximity to the accused in child sex offence trials.

What did your time at the Law Reform Commission mean to you personally? How has your experience as Chairman affected your post-Commission life and work?

My intellectual and professional life was profoundly enhanced by my time at the Commission. I was extremely fortunate to join a group of very able and socially concerned lawyers and researchers. Teaching, research and advising clients (almost exclusively in the field of intellectual property) had hitherto been my principal immersion in the law. Overall, my experience at the Commission reinforced my belief that a credible system of justice, and one which constantly seeks to renew itself, is crucial for all human societies. This was against a backdrop of ten years in Hong Kong where, in my work on mainland Chinese law, I was profoundly challenged by Chinese Confucian notions of society. In texts as old and sophisticated as the Greek from which we derive our notions of law and justice, rights and law are rejected as immoral. The coercion of law and selfishness of individualism are said to pale against self discipline and yielding to the interests of others. My time at the Commission confirmed my view that individual rights and law are essential for society though, for individuals, justice will always run a poor second to compassion, forgiveness, caring, and yes, self discipline and yielding.

What do you believe was the most significant achievement of the Law Reform Commission, during your time as a Commissioner or Chairman?

The report on *Professional Privilege for Confidential Communications* (Project No 90) was, I believe, the major achievement of the Commission during my term. This flows from the importance I place on the role of the press in a free society. Under this report (as yet unimplemented) journalists as well as a number of other professionals, might not be required to answer questions as witnesses in court in relation to their sources. A free press is truly the Fourth Estate, which like the legislative, executive and judicial arms of government extends checks and balances on the arbitrary exercise of power. This is especially important in a society such as ours which lacks entrenched individual rights. Of course, refusal to reveal sources in journalistic practice may well be because the story was contrived, but this is a lesser evil. I do hope the report will one day be implemented. Without it, our freedom is diminished.

What inspired you to develop and pursue an interest in law reform?

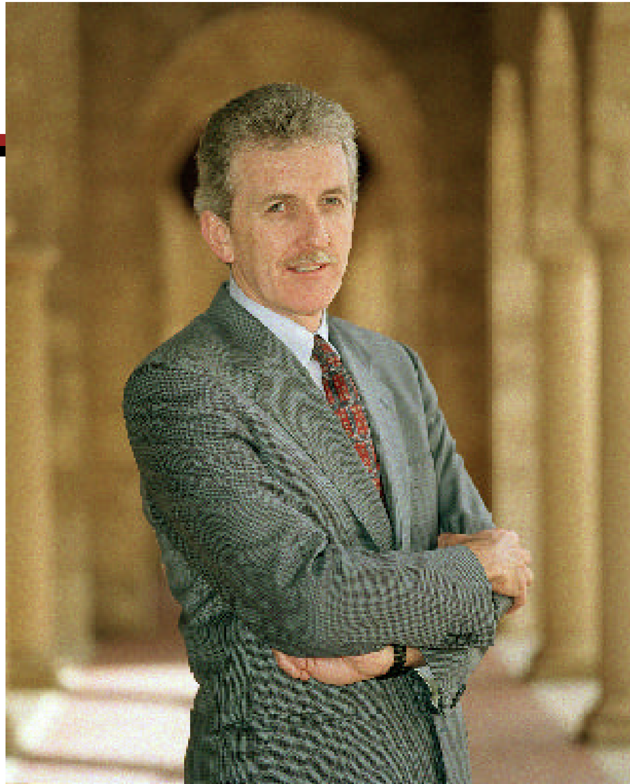
I had the privilege of teaching with two champions of law reform: Professor William Morison at the University of Sydney Law School (who pioneered NSW's privacy legislation in the 1970s) and my colleague Professor Ralph Simmonds. The enthusiasm rubbed off.

What do you believe has been the most important reference undertaken by the Law Reform Commission to date? Why?

For the reasons I have mentioned, I believe the report on *Professional Privilege for Confidential Communications* is the most important Commission reference to date.

How do you view the role of the individual or general community in law reform?

Participation by the individual and community is what makes law reform credible and legitimate. Unfortunately, there is not enough of it!



Peter Creighton served as a part-time academic member of the Commission from 1994–1997 and was elected Chairman for two consecutive terms in 1994 and 1995. He graduated from the University of Western Australia with Honours degrees in Jurisprudence and Law. After completing the Bachelor of Civil Law at Oxford University, he taught at King's College in the University of London for ten years, interrupted by a two-year period in private practice in Perth. For the past ten years, he has taught at the University of Western Australia and, for shorter periods, in Canada, Hong Kong, Malaysia and Singapore. He has published extensively in the areas of constitutional and administrative law, equity, trusts and evidence.

Peter Creighton

Describe the impact the Law Reform Commission had during the time you were in office.

As yet, there has been little in the way of legislative implementation of the reports issued by the Commission while I was a member. My term was perhaps more significant as a time in which major changes to the structure and working of the Commission were proposed, reviewed and eventually set in motion.

What did your time at the Law Reform Commission mean to you personally? How has your experience as Chairman affected your post-Commission life and work?

I particularly valued the collaborative nature of the Commission's work. Using input from a range of interested parties, members of the Commission drew on their various backgrounds and perspectives to try to fashion balanced and workable solutions. I would like to think that that approach now plays a greater part in my teaching and research.

What do you believe was the most significant achievement of the Law Reform Commission, during your time as a Commissioner or Chairman?

I think the Commission's most significant report during my term was that dealing with *Limitation and Notice of Actions* (Project No 36). It is certainly a repository of learning on that rather complex area of law. It also proposes quite bold reforms to modernise and simplify the law in Western Australia, which is currently riddled with obsolete rules and irrational distinctions.

What inspired you to develop and pursue an interest in law reform?

I recall two people in my student days who made me appreciate the work carried on by law reform agencies and the potential for law reform more generally. One was Professor Eric Edwards, the Dean of Law at UWA, and a member of the Commission in its earliest years. The other was Leonard King, who was at various times Chairman of the South Australian Law Reform Commission, Attorney-General and Chief Justice of South Australia. From them I learned that a critical evaluation of the law must be based on an accurate understanding of its content and operation. I also saw the potential to address some social problems through legislative change. Since then, all my work as an academic lawyer has in a sense been engaged in issues of law reform. The opportunity to be involved more formally in the work of the Commission seemed a natural extension of that work.

What do you believe has been the most important reference undertaken by the Law Reform Commission to date? Why?

I don't know them all well enough to answer that!

How do you view the role of the individual or general community in law reform?

Clearly, one person can make a difference. Some references to the Commission are directly attributable to the concerns raised by an individual or a community group. Similarly, submissions from individuals or interest groups can crystallise a problem that needs attention or highlight the weaknesses in a proposed reform. More generally, it is desirable that the Commission should continue to improve its consultation with the community, to better understand the community's experience of the operation of the law and to explain the Commission's proposals for reform.

Wayne Martin was appointed to the Commission as a part-time professional member in 1996. He was elected Chairman in 1997 and served in that capacity until September 2001. Wayne Martin is a member of the Western Australian Independent Bar and has served as President of the Western Australian Bar Association. He has also served as a part-time member of the Administrative Review Council and as President of the Western Australian branch of the Aviation Law Association of Australia & New Zealand. He was appointed Queen's Counsel in 1993. Wayne Martin remains with the Commission as a part-time member and is currently Senior Counsel assisting the Royal Commission into the collapse of HIH Insurance Ltd.

Wayne Martin

Describe the impact the Law Reform Commission had during the time you were in office.

I think the greatest impact that the Commission had during my time was the stimulation of public debate and awareness of the issues pertaining to the civil and criminal justice system. Also, the general acceptance of the recommendations made in our report on that subject by governments of both political persuasions was heartening, although the delays in implementation have been a little disappointing.

What did your time at the Law Reform Commission mean to you personally? How has your experience as Chairman affected your post-Commission life and work?

I think my work at the Commission has made me challenge the assumption that expert issues are best considered by experts. I have, I hope, learnt that the broader community has a great deal to offer in relation to issues which might, at first sight, be regarded as issues requiring expertise. Further, my work in relation to the reference on civil and criminal justice (Project No 92) caused me to critically analyse the utility of many of the procedural aspects of legal practice which I, and many others, have simply taken for granted.

What do you believe was the most significant achievement of the Law Reform Commission, during your time as a Commissioner or Chairman?

Publication of our *Review of the Criminal and Civil Justice System in Western Australia* (Project No 92). Also the report on *Limitation and Notice of Actions* (Project No 36(II)) was published under my hand as Chairman, although all of the work in relation to that important project was done prior to my arrival at the Commission.

What inspired you to develop and pursue an interest in law reform?

Ever since I attended law school I have been aware of the tendency of the law to be out of step with community attitudes and expectations, and of its anachronistic tendencies. Western Australia inherited a somewhat archaic legal system from our colonial masters which I believe needs regular and systematic review.

What do you believe has been the most important reference undertaken by the Law Reform Commission to date? Why?

At the risk of being accused of egocentricity, I think our report on civil and criminal justice (Project No 92) was perhaps the most wide-ranging project undertaken by the Commission, and potentially the one of greatest impact upon ordinary Western Australians. That is because of the very widespread community concern in relation to access to justice, and the community apprehension that we have a justice system which is unnecessarily complicated, expensive, slow, and out of touch with community expectations and standards.

How do you view the role of the individual or general community in law reform?

During my time on the Commission we have been at pains to attempt to achieve maximum community involvement in our projects. I believe that community awareness of a law reform issue and involvement in its consideration is in itself an important part of the law reform process, in that it helps foster some sense of community ownership of and responsibility for that process.

Part II:
History of References and Legislative Reform

1(I)

Protection for Purchasers of Land

Terms of Reference

In 1968, the Committee was asked to consider the law applicable to a defaulting purchaser under a terms contract for the sale of land and to report upon the need for reform. In the same year the reference was widened to include consideration of the *Vendor and Purchaser Act 1878* (WA), the *Sale of Land (Vendor's Obligations) Act 1940* (WA), and the *Purchasers' Protection Act 1933–1948* (WA) and to assess the viability of consolidation of these Acts into a single statute.

Background of Reference

The reference was the result of a move to clarify the obligations of, and provide some statutory guarantees for, vendors and purchasers of land. The Committee was of the opinion that aspects of the law were unjust since minor oversights by a purchaser of land might result in the vendor being able to deprive the purchaser of the benefit of the bargain, or any increase in the value of the property resulting from a rising market or improvements made by the purchaser.

Nature and Extent of Consultation

The Committee studied comparable legislation from Queensland, Victoria, New South Wales and New Zealand and received oral submissions from members of the real estate profession and officers of the Land Titles Office. The Committee further engaged in discussions with representatives of the Law Society of Western Australia and other members of the legal profession.

The Committee issued a working paper in October 1968. Responses to the working paper were received from judges, legal professionals, the Law Society of New South Wales, the Law Institute of Victoria and the Chairman of the Property and Equity Law Reform Committee of New Zealand. The Committee delivered its final report in September 1969.[1]

Recommendations

A summary of the Committee's recommendations includes:

- That legislation be enacted to ensure that in a terms contract the purchaser be given a right to notice before the vendor can act against the purchaser on his or her default.
- That the *Vendor and Purchaser Act 1878* (WA), the *Sale of Land (Vendor's Obligations) Act 1940* (WA) and the *Purchasers' Protection Act 1933–1948* (WA) be repealed and that new legislation be enacted, incorporating such provisions of these three Acts as are necessary, and containing provisions to give effect to the primary recommendation (above).

A comprehensive discussion of the Committee's recommendations may be found at pages 4–9 of the final report.

Legislative or Other Action Undertaken

The *Sale of Land Act 1970* (WA)[2] gave effect to the Committee's recommendations.

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1 The report was published under its original title: Law Reform Commission of Western Australia, *Protection to Defaulting Purchasers*, Project No 1 (1969).

2 Western Australia, *Government Gazette*, 21 January 1971, 149. See also Western Australia, *Parliamentary Debates*, Legislative Council (in committee), 12 November 1970, 2092 – 2107 (Mr IG Medcalf); Western Australia, *Parliamentary Debates*, Legislative Assembly, 18 November 1970, 2351 (Mr C Court, Minister for Industrial Development and the North West).

Retention of Trust Money by Land Agents

Terms of Reference

In March 1971 the Committee was asked to consider whether:

(a) licensed land agents should be entitled to hold in their trust accounts all money paid to them on account of a purchase of land until the availability of a title of land is assured; and

(b) that all sales of land (other than between private persons not engaged in the business of buying and selling land) must be made through a licensed land agent.

Background of Reference

The reference arose from concerns, expressed by the Real Estate Institute of Western Australia, about insufficient statutory protection of money held on trust by land agents.

The Committee issued a working paper in June 1972 which was divided into two parts: Part A[1] considered whether the sale of home units should be subject to Part III of the *Sale of Land Act 1970* (WA), or any other appropriate legislation, and Part B considered the issue of retention of trust money by land agents. Comments on the working paper were received from the Mortgage Brokers Association of WA, which expressed a desire that mortgage brokers be controlled by statute.

No Action Recommended

Given the extensive nature of potential reform to the area of law, the Committee decided that the issue would best be addressed by an extension of its concurrent reference (Project No 37) that dealt specifically with the subject of reform of the *Land Agents Act 1921* (WA) to regulate land transactions.

1 This became *Protection for Purchasers of Home Units*, Project 1(III).

Protection for Purchasers of Home Units

Terms of Reference

In 1972, the Committee was asked to consider whether the sale of home units should be subject to Part III of the *Sale of Land Act 1970* (WA) or any other appropriate legislation.

Background of Reference

The project was referred to the Committee as a result of an incident known as "the Whatley Crescent case". The incident involved a proprietary company engaged in a commercial endeavour to construct home units upon a parcel of land owned by the company but mortgaged to secure advances for the construction of the building. The company's advertising brochures invited people to purchase home units in the building; however the purchase was not offered on typical terms. By agreeing to purchase a specified home unit, the purchaser automatically applied for a group of shares in the company and agreed to be bound by its memorandum and articles of association. Some purchasers paid, to the land agent acting on behalf of the company, the full amount owing under their agreements while others only paid deposits. The land agent paid this money to the company at its request. When the company subsequently defaulted in payment of the mortgage, the mortgagee sought to invoke its right to sell the land and building, leaving purchasers inadequately protected.

Nature and Extent of Consultation

The Committee issued a working paper in June 1972 which featured discussion of the area of law in the context of the Whatley Crescent case. Comments upon the working paper were received from the Developers Institute of Australia (Western Australian Division), the Master Builders' Association of Western Australia, the Law Society of Western Australia, the Associated Banks in Western Australia and other representative and commercial bodies involved in the building trade. The Commission submitted its final report in March 1973.[1]

Recommendations

After consideration of the issues and submissions, the Commission recommended that legislation be enacted to extend the provisions of Part III of the *Sale of Land Act 1970* (WA) to strata lots.[2]

Legislative or Other Action Undertaken

The *Acts Amendment (Strata Titles) Act 1985* gave full effect to the Commission's recommendations.

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1 Law Reform Commission of Western Australia, Project No 1(III), *Protection for Purchasers of Home Units* (1973). The Committee was formally reconstituted as the Law Reform Commission of Western Australia on 19 January 1973.

2 The Commission later recommended that legislation be enacted to prohibit or restrict company and 'tenancy in common' type home unit arrangements (extended to include the sale of two or more strata lots) in its report on the *Strata Titles Act*, Project No 56 (1982).

Testator's Family Maintenance Act

Terms of Reference

In 1968, the Committee was asked to report on the desirability of amending or expanding the provisions of the *Testator's Family Maintenance Act 1939–1962*, ("the Act") so as to:

(a) extend the right of application to new categories of persons;

(b) permit applications for provision from estates in respect of which there is a total or partial intestacy;

(c) define more accurately the circumstances in which a distribution of the assets of an estate may be disturbed in order to sustain an order made under the Act;

(d) permit a variation increasing the provision made under an existing order.

Background of Reference

In 1965, the President of the Law Society of Western Australia approached the Attorney-General with a proposal that the Act be amended to extend the classes of claimants to include the mother or father of the deceased and the children of a deceased child of the deceased. The President also suggested that the scope of the Act be extended to include intestate and partially intestate estates. A concern was also raised as to what particular assets could be taken into account by a court in making an order under the Act. The matter was subsequently referred to the Committee for consideration.

In December 1968 the Committee released a working paper which summarised the law in Western Australia and other jurisdictions and contained suggestions for reform.

Nature and Extent of Consultation

The working paper was forwarded for comment to the Chief Justice, judges and registrar of the Supreme Court, the Law Society of Western Australia, the Public Trustee and law reform agencies. Comments were received from the Law Society and the Perpetual Executors Trustees and Agency Co (WA) Ltd. These responses were generally favourable to the reforms mooted in the working paper. The Committee released its final report in August 1970.[1]

Recommendations

Following extensive consideration of the law in Australia and other jurisdictions, and the responses to the working paper, the Committee recommended that the Act be repealed and a new legislative regime be established with the following features:

- The classes of possible applicants under the existing Act be widened in the new legislation to include:
  - (a) grandchildren in existence at the time of death of the deceased, including those already conceived;
  - (b) parents;
  - (c) illegitimates (ie, illegitimate children of the deceased and persons in (a) and (b) above, where the relationship is adoptive); and
  - (d) members of the household for whom the deceased had a special moral responsibility.
- The new legislation apply to intestacies.
- Courts be empowered by the new legislation to increase provision under a previous order.

1 Law Reform Committee of Western Australia, *The Protection to be Given to the Family and Dependants of a Deceased Person*, Project No 2 (1970). This report is more commonly known as the *Testator's Family Maintenance Act*.

- The absolute protection given to a distribution made prior to the determination of claims under the new legislation, for the maintenance, education and support of dependants, be restricted to payments immediately necessary for those purposes.
- The following miscellaneous provisions be included:
  (a) the new legislation apply also to estates of persons dying before commencement of the legislation, but prior distributions to be safeguarded;
  (b) the definition of "widow" include women whose marriages have been annulled, with a wider concept for the qualifying maintenance;
  (c) the courts be empowered to treat an application by one person as an application by all who might apply;
  (d) the courts be empowered to set up a class fund where appropriate to deal with applicants as a class; and
  (e) protection be given to the administrator against claims by illegitimates of whose existence the administrator is unaware.

A comprehensive discussion of the issues and the recommendations of the Committee may be found at paragraphs 29–50 of its final report.

Legislative or Other Action Undertaken

The *Inheritance (Family and Dependants Provision) Act 1972* gave full effect to the Committee's recommendations.[2]

2 Western Australia, *Government Gazette*, 17 November 1972, 4379; Western Australia, *Parliamentary Debates*, Legislative Assembly, 23 March 1972, 272–273 (Mr TD Evans, Attorney-General).

Succession Rights of Illegitimate Children

Terms of Reference

In 1968, the Committee was asked to consider whether any alterations were desirable in the law of succession in Western Australia in relation to illegitimate children.

Background of Reference

In 1968 a minute prepared for Parliament by the Legal Officer for the Public Trust Office drew attention to specific examples of apparent injustice caused by the existing law of succession in Western Australia. One such example was of a woman who had died at the age of 82 years. She had three sons, one of whom survived her. The other two sons had pre-deceased her, leaving five grandchildren. In the course of winding up her estate the surviving son became aware that his mother and father had never married and that therefore he and her surviving grandchildren had no legitimate claim on the estate.

The subject of illegitimate succession was touched upon by the Committee in its report on Project No 2,[1] which recommended that legislation apply to intestacies and that illegitimacy no longer be a bar to application under the Act.

Nature and Extent of Consultation

The Committee issued a working paper in December 1968 which was distributed for comment to the Chief Justice, judges and the Master of the Supreme Court, the Law Society of Western Australia, the Public Trustee, private Western Australian trustee companies and law reform agencies. Submissions were received from the Law Society expressing general support for the proposals suggested in the Committee's working paper. The Committee published its final report in August 1970.[2]

Recommendations

After consideration of the issues the Committee made a number of recommendations, including that:

- the relationship of an illegitimate child to its parents be deemed legitimate for all purposes relating to intestate succession, so as not only to give the illegitimate the right to succeed to the property of either parent and vice versa, but also to establish the usual and corresponding rights of succession between the child and all other lineal and collateral kindred;
- the terms 'children', 'issue' and other words of relationship, where used in a will or other disposition, be deemed to include illegitimates and persons claiming through illegitimates, unless a contrary intention appears;
- special protection be given to personal representatives and trustees in the case of claims based on illegitimate relationships; and
- section 27 of the *Wills Act 1970* (WA) be extended to give illegitimates the benefit of the provision.

A comprehensive outline of the Committee's recommendations may be found in the final report at paragraphs 32–45.

Legislative or Other Action Undertaken

In 1971, Parliament enacted the *Administration Act Amendment Act 1971* (WA), the *Property Law Act Amendment Act 1971* (WA) and *the Wills Act Amendment Act 1971* (WA) to implement the Committee's recommendations.[3]

1 Law Reform Committee of Western Australia, *The Protection to be Given to the Family and Dependants of a Deceased Person*, Project No 2 (1970). Project No 2 is more commonly known as the *Testators Family Maintenance Act*.
2 Law Reform Committee of Western Australia, *Succession Rights of Illegitimate Children*, Project No 3 (1970). The reference was originally known as *Illegitimate Succession*.
3 Western Australia, *Parliamentary Debates*, Legislative Assembly, 18 November 1971, 112–113 (Mr TD Evans, Attorney-General).

4

Committal Proceedings

Terms of Reference

In 1968 the Committee was asked to consider whether any alterations were desirable in the procedures for the conduct of preliminary enquiries and committal proceedings and the publication of reports thereof.

Background of Reference

The reference arose from a growing perception that certain problems frequently attended the conduct of committal proceedings. These were identified as:

(a) the publicity given to committal proceedings and the possible adverse effects of such publicity;

(b) the inconvenience, waste of time and unnecessary expense involved in committal proceedings, particularly where the accused has pleaded guilty; and

(c) the delay that could result in bringing cases to trial.

The movement for reform of committal proceedings began in 1962 when the Solicitor General made a number of recommendations for improvement of the existing system. Concerns about the conduct of committal proceedings were later echoed by the Chief Crown Prosecutor, the Senior Stipendiary Magistrate and the Commissioner of Police. The issue was referred to the Committee as part of its first reform programme along with a related reference on summary trial of indictable offences.[1]

In December 1968 the Committee issued a working paper which investigated the law and practice in Western Australia and made comparisons with the law in other jurisdictions both in Australia and overseas.

Nature and Extent of Consultation

The working paper was sent for comment to the Chief Justice and judges of the Supreme Court, the Law Society of Western Australia, the University of Western Australia Law School, the Magistrates Institute, the Justices Association of Western Australia, the Commissioner of Police, the Under Secretary for Law and law reform agencies in other jurisdictions. In addition, as the question of publication of evidence at committal proceedings was dealt with in the paper, a copy was sent to West Australian Newspapers Limited. Comments on the paper were received from nine magistrates, the Commissioner of Police and the West Australian Newspapers Limited. The Committee also discussed its proposals with Mr OW Dixon (the Chief Crown Prosecutor), Senior Inspector TG Lee (representing the Commissioner of Police) and Mr DC Heenan and Mr TA Walsh (representatives of the Law Society). The final report containing the Committee's recommendations was delivered on 11 May 1970.[2]

Recommendations

After consideration of the matter alongside the Committee's complementary reference on summary trial of indictable offences, a number of recommendations were made. The Committee believed that these reforms would improve the administration of justice, streamline procedures and save time and expense.

In summary the Committee recommended that the law should be amended, subject to prescribed limitations, to:

(a) allow written statements of witnesses to be admitted in evidence for the purpose of the committal, trial and sentencing of persons charged with indictable offences; and

(b) permit an accused person to elect to go to trial without any preliminary hearing.

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1 See Law Reform Committee of Western Australia, *Summary Trial of Indictable Offences*, Project No 6 (1970).

2 Law Reform Committee of Western Australia, *Committal Proceedings*, Project No 4 (1970).

The Committee also recommended a number of other incidental changes to the law. A comprehensive outline of recommendations and the procedures proposed to implement them may be found at pages 7–12 of the Committee's final report.

Legislative or Other Action Undertaken

The Committee's recommendations were implemented in 1976 when Parliament passed the *Justices Act Amendment Act 1976* (WA).

5

Interim Damages in Personal Injury Claims

Terms of Reference

In 1968 the Committee was asked to consider the need for legislation to provide for hearings limited to the question of liability in personal injury cases where the prognosis as to the plaintiff's condition is in doubt, and the making of awards for the payment of interim damages.

Background of Reference

At the time of the reference it was well established that at common law, damages had to be assessed "once and for all" and there was no power in the court to order interim or periodic payments. It was widely recognised among judges and legal practitioners that in a number of cases, damages claimants[1] of modest means had suffered hardship because the final medical prognosis on which the damages were to be assessed were delayed months or even years. It was felt that there should be some reform addressing the lack of proper power by courts to deal with claims for personal injury damages.

Immediately prior to the reference, South Australia had amended its *Supreme Court Act* to enable its Supreme Court, inter alia, to make interim awards of damages. This prompted the Committee to suggest to the Attorney-General that the law in Western Australia also be reviewed.

Nature and Extent of Consultation

In October 1968 the Committee published a working paper on the subject, and received comments from the Law Society of Western Australia and the following individuals: Chief Justice Wolff and Justice Hale of the Supreme Court of Western Australia; and distinguished legal practitioners and scholars, Mr FTP Burt, Mr PL Sharp, Mr RC Cannon and Professor D Payne. The final report containing the Committee's recommendations was delivered in May 1969.[2]

Recommendations

The Committee carefully considered all the relevant issues and recommended that the *Supreme Court Act 1935* (WA) be amended to provide:

- That if any person has notice or reasonably believes that an action for damages for personal injury may be commenced against him then, if such action is not commenced within 12 months of the happening that gives rise to the prospective claim, he may thereafter by notice in writing require the prospective claimant within 42 days from receipt of such notice to commence such proceedings to ascertain such person's liability in respect of such claim.
- That if proceedings are not commenced within that period an application to a judge for an order enforcing compliance should be permitted, the judge being given wide discretionary powers on such application.
- That the court shall be at liberty to order the separate trial of the issue of liability in an action for damages with the consent of all parties or on cause being shown, to enter final declaratory judgment on such issue and to adjourn the final assessment of damages.
- That in any action for damages for personal injury the court shall have power, after having entered final declaratory judgment on the issue of liability, to make an interim award of damages in the plaintiff's favour in respect of special damages to the date of assessment and if necessary periodic payments

1 Persons injured in circumstances giving rise to a claim for damages at common law.
2 Law Reform Committee of Western Australia, *Interim Damages in Personal Injury Claims*, Project No 5 (1969).

thereafter to cover estimated future loss of earnings, hospital and medical expenses and other necessary outgoings pending final assessment.

- That where, by the declaratory judgment referred to above, the defendant's liability to pay damages is reduced in proportion to the plaintiff's degree of contributory negligence, then such interim award shall also be reduced in such proportion provided that the court may order payment of the full amount of special damages already suffered and immediately thereafter to be suffered where not to do so would impose hardship and it appears that a final award of damages would exceed such additional payment.
- That the court shall have a discretionary power to vary or discharge an interim award in so far as it provides for future payments. In exercising its discretion the court shall have regard to whether it is reasonably practicable to make a final assessment.
- That an appeal from a final declaratory judgment to the Full Court of the Supreme Court lies as of right and that such a judgment is not an interlocutory judgment.

Legislative or Other Action Undertaken

The recommendations dealing with the time limit for commencing an action were given effect by s 29 of the *Motor Vehicle (Third Party Insurance) Act Amendment Act (No 2) 1969* (WA).[3] No other legislative action has been taken with regard to the other recommendations made in the report.

Currency of Recommendations

The recommendations remain current. While the report was produced more than 30 years ago, the legal framework in which the need first arose remains the same. Comparable jurisdictions, such as New South Wales[4] and South Australia, have enacted legislation to deal with interim payments of damages. A number of judgments, primarily in those jurisdictions, have also allowed for the payment of interim damages.[5]

Action Required

Implementation of the Committee's recommendations requires amendment to the *Supreme Court Act 1935* (WA).

Priority — Low–Medium

Legislation is required to bring Western Australia into line with other comparable jurisdictions and also to address the need for reform which first gave rise to the reference. However, as no legislative action has been taken since the report was published more than three decades ago and there appears to have been no further calls for reform in this area of law, the priority of reform has been assessed at the lower end of the scale.

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3 The time limit for commencing an action was changed from 12 months to 6 months.

4 The *Supreme Court Act 1970* (NSW) s 76E allows the court to order the defendant to pay interim damages in certain circumstances. The power is not restricted to personal injury actions.

5 See for instance, *Dimkovski v Ken's Painting and Decorating Services Pty Ltd* [1999] NSWSC 795; *Howe v Matson and Gould-Hurst* [2001] SADC 13; *McLean v Darlington Point Sawmills Pty Ltd* [2000] NSWSC 787.

6

Summary Trial of Indictable Offences

Terms of Reference

In 1968 the Committee was asked to consider the need for further legislation to provide for summary trial of certain indictable offences.

Background of Reference

In most Australian jurisdictions there had been a movement towards the extension of the range of indictable offences that could be dealt with summarily. It was widely acknowledged that trials by judge and jury on indictment were lengthier and more costly than summary trials. It was also recognised that in many instances an accused may prefer summary trial because of its practical advantages. For instance, summary trials are resolved sooner, are often less public and the maximum penalty that may be imposed is generally less. The Committee was also simultaneously working on an incidental reference relating to the streamlining of committal proceedings.[1] It was recognised, however, that the time, costs and other disadvantages associated with trial on indictment would still be evident even if reforms were introduced to streamline the procedures for committal for trial.

The Committee prepared a working paper on the issue which was distributed in December 1968. The paper examined the existing state of the law in Western Australia and suggested possible reforms.

Nature and Extent of Consultation

Copies of the working paper were sent to the Chief Justice and judges of the Supreme Court, the Law Society of Western Australia, the University of Western Australia Law School, the Magistrates Institute, the Justices Association of Western Australia, the Commissioner of Police, the Under Secretary for Law and other law reform agencies with whom the Committee was in correspondence. The Committee received comments from magistrates, the Commissioner of Police, the Law Society and several legal practitioners. The final report was delivered in June 1970.[2]

Recommendations

The Committee made a number of recommendations on the basis that some extension of the jurisdiction to deal summarily with indictable offences was warranted. It was suggested that this approach, together with the changes proposed for committal proceedings, would result in a better distribution of work between the Supreme and District Courts and the Courts of Petty Sessions with a saving of time and expense. Amongst other things, the Committee recommended that:

A number of offences, including forgery and breaking and entering, should be added to the list of indictable offences which may be dealt with summarily, provided:
(a) the court is satisfied that the charge can be adequately dealt with and punished summarily; and
(b) summary trial is elected by the accused.

A comprehensive outline of all the recommendations, including the Committee's suggestions as to offences to be added to the list of indictable offences which may be dealt with summarily, may be found at pages 9–13 of the final report.

1 Law Reform Committee of Western Australia, *Committal Proceedings*, Project No 4 (1970).
2 Law Reform Committee of Western Australia, *Summary Trial of Indictable Offences*, Project No 6 (1970).

Legislative or Other Action Undertaken

In 1972 Parliament passed several legislative amendments implementing the Committee's recommendations: the *Criminal Code Amendment Act 1972* (WA), the *Justices Act Amendment Act 1972* (WA) and the *Child Welfare Act Amendment Act (No 2) 1972* (WA).

The principal object of the *Criminal Code Amendment Act 1972* was to extend the classes of indictable offences which may be tried summarily according to the Committee's recommendations. The provisions of the *Justices Amendment Act 1972* and the *Child Welfare Amendment Act (No 2) 1972* were consequential upon the amendments that were made to the *Criminal Code*.

7

Disposal of Uncollected Goods

Terms of Reference

In 1968 the Committee was asked to consider the need for legislation to permit bailees to dispose of abandoned or uncollected goods.

Background of Reference

In general terms a bailee is a person who, for whatever reason, has possession of goods which should have been collected by the owner, the bailor. Bailor/bailee relationships occur in a wide range of circumstances and therefore any reform to this area of law had the potential to impact upon a wide variety of people in situations from landlords to small businesses. At the time of the reference the law governing bailments (the goods and their disposal) was generally found in the common law. Case law imposed upon the bailee a duty of care (and resultant liability if breached) over all uncollected or abandoned goods. Furthermore, except in rare cases the bailee could not, without risk, unilaterally dispose of the property even where the owner's whereabouts were unknown and their conduct suggested abandonment of the property.

The reference arose as a result of calls for reform from various interested groups and associations. The Automobile Chamber of Commerce drew attention to the difficulties facing motor traders when vehicles left for repair were not collected. The Law Society of Western Australia brought attention to similar difficulties confronting keepers of boarding houses when furniture and other goods were left on premises following the decampment of a lodger. The media had also focused attention on similar problems faced by parties from shoe repairers to landlords.

The Committee produced a working paper on the subject in December 1968 which analysed the existing law in Western Australia and in other comparable jurisdictions both within Australia and overseas.[1]

Nature and Extent of Consultation

The working paper was distributed for comment to approximately 50 organisations and individuals throughout Australia and overseas including the Chief Justice and judges of the Supreme Court of Western Australia, The Australian Finance Corporation (WA Division) and the Law School of the University of Western Australia. As a result of the discussion generated by the paper and the significance that reform in this area had to the wider commercial community, the Committee held consultations with and considered reports from a great variety of interest groups. These included the Australian Finance Conference, the Law Society of Western Australia, the Perth Chamber of Commerce, the Police Department of Western Australia, the Real Estate Institute of Western Australia, the Retail Trade Association, the Trade Protection Association and the Western Australian Automobile Chamber of Commerce. The Committee submitted its final report in April 1970.[2]

Recommendations

The Committee recommended that specific legislation be enacted to deal with the disposal of uncollected goods.[3] Principally, the Committee recommended that:

- Goods should be divided into categories dependent on whether they had resulted from a commercial transaction or by other lawful, non-business means.

1 Specifically, the United Kingdom, Victoria, New South Wales, Queensland and Tasmania.
2 Law Reform Committee of Western Australia, *Disposal of Uncollected Goods*, Project No 7 (1970).
3 The Committee's detailed recommendations may be found in the draft Bill annexed to the final report.

- Goods accepted in the course of business should then be further categorised according to their monetary value, thus determining whether it is economic to apply the provisions of the Act. The Committee recommended separate methods for dealing with such goods ranging from legal disposal after three months, to the necessity for a court order to dispose of more valuable goods.
- Goods that did not originate in the course of business should only be disposed of by court order.
- A bailee that seeks to dispose of goods should be required to give notice to the Police Commissioner of their intention (thus enabling the police to ensure such goods are not stolen).
- Actions under the new legislation should be heard by a magistrate in the Court of Petty Sessions.
- The court should determine any questions in respect to unsettled disputes between bailor and bailee.
- The Bill should expressly preserve third party rights and, subject to good faith and notice requirements, the third party should gain an indefeasible title.
- Contrary to other legislation, sub-contractors have all the disposal rights that the principal bailee holds.
- Surplus money should be paid within twenty-eight days to the Treasurer who has power to pay the money to whomever he or she deems entitled.

A comprehensive summary of recommendations may be found at pages 3–9 of the Committee's final report.

Legislative or Other Action Undertaken

In 1970 Parliament passed the *Disposal of Uncollected Goods Act 1970* (WA) which was almost identical in language, purpose and process to the draft Bill produced by the Committee. The Act implemented all of the Committee's recommendations.

8(I)

Defamation: Privileged Reports

Terms of Reference

In 1968, the Committee was asked to examine and make recommendations for amendment to the *Newspaper Libel and Registration Act 1884* (WA) ("the Act"), and consider the necessity of alterations to the law relating to civil defamation in Western Australia.

Background of Reference

The reference was in part initiated by West Australian Newspapers Ltd which made a representation to the then Minister for Justice requesting amendments to the Act to ensure that the privilege given to reports under the Act be enjoyed by all newspapers.

Section 2 of the Act conferred on any newspaper a privilege for the publication, without malice and for the public benefit, of a fair and accurate report of the proceedings of a public meeting provided the newspaper has not refused to publish a reasonable letter or statement of explanation or contradiction. Amendments to the Act in 1888 gave a registered newspaper[1] absolute privilege for a fair and accurate report of the proceedings in a court of justice, or any state or municipal ceremonial, or political, municipal or public meeting.[2] However, the registration provisions under the Act did not apply to "joint stock companies", thereby precluding the registration of most major daily newspapers in the state.

The Committee prepared a working paper in July 1969 which discussed the issues and considered the findings of the New South Wales Law Reform Commission's (NSWLRC) working paper on defamation.

Nature and Extent of Consultation

The working paper was forwarded for comment to the Chief Justice and judges of the Supreme Court, the Law Society of Western Australia, the Law School of the University of Western Australia, the editors of all Western Australian newspapers including those not registered under the Act, legal practitioners and law reform agencies.

After consideration of submissions received in response to the working paper and examination of the findings of the NSWLRC in its ultimate report on the issue, the Committee published its final report in August 1972.[3]

Recommendations

The Committee appended a draft Bill to its final report which set out its recommendations and adopted the general framework of the legislation proposed in the NSWLRC report.[4] The Committee's primary recommendations were that:

- The *Newspaper Libel Act and Registrations Act 1884–1957* (with the exception of the provisions dealing with limitations) and the *Imperial Act Adopting Ordinance 1847* be repealed and that s 354 of the *Criminal Code* (which protected publication of parliamentary proceedings in the public interest) be replaced by provisions suggested in the draft Bill appended to the final report.
- The class of privileged reports be extended to include:

1 The register of newspaper proprietors under the Act was maintained at the Supreme Court of Western Australia.
2 Section 354 of the *Criminal Code 1913* (WA) protected the publication of parliamentary and other governmental proceedings if published in good faith and in the public interest.
3 Law Reform Committee of Western Australia, *Defamation: Privileged Reports*, Project No 8(I) (1972).
4 New South Wales Law Reform Commission, D*efamation*, Report No 11 (1971).

(a) reports of legislative and judicial proceedings and official inquiries elsewhere in Australia and overseas;
(b) reports of international conferences;
(c) reports of proceedings of local bodies elsewhere in Australia;
(d) reports of general meetings of companies within Australia;
(e) reports of proceedings of certain voluntary associations within Australia or having effect in Australia; and
(f) extracts from official records kept in Australia and statements published at the request of government officials elsewhere in Australia.

- The privilege attached to reports and documents referred to above would depend on the report being published in good faith for public information or education and, except for reports of legislative or judicial proceedings within Australia, on the publisher affording a person defamed a right of reply.

Legislative or Other Action Undertaken

Section 2 of the *Criminal Code Amendment Act 1977* partially implemented the recommendations of this report. The amending Act extended the defence of qualified privilege to reports of parliamentary proceedings and publications and to proceedings of Royal Commissions and statutory inquiries that have taken place elsewhere in Australia. The privilege was not extended to notices from government departments in other parts of the Commonwealth.[5]

5 Western Australia, *Parliamentary Debates*, Legislative Council, 4 August 1977, 213 (Mr GC MacKinnon, Leader of the House).

8(II)

Defamation

Terms of Reference

In 1968, the Committee was asked to consider whether any alterations were necessary or desirable in the law of defamation in Western Australia.

Background of Reference

The law of defamation considers two competing interests: the protection of individual honour, reputation and dignity; and protection of freedom of expression and access to information on public affairs. The laws governing these matters in Australia are complex and varied. The existing law, developed in 19th century England, takes little account of changed social conditions and technological advances in communication.

Because of the breadth of the reference the Committee approached it in two parts. Part I was concerned with the law relating to the publication under the *Newspaper Libel and Registration Act 1884* (WA). The Committee submitted its report on that subject, in August 1972.[1] Part II of the project, dealing with defamation generally, was deferred in 1973 pending the outcome of moves towards a uniform law of defamation throughout Australia. In 1976, the Australian Law Reform Commission (ALRC) was given a reference to consider uniformity of legislation in the area of defamation. Consequently, the Attorney-General of Western Australia asked the Commission[2] to give active consideration to the remaining Part II of its project and keep abreast of progress made by the ALRC.

Nature and Extent of Consultation

Commission staff attended meetings with the ALRC in 1976 and 1977 to discuss the content of its research on defamation. In 1977, representatives from the Commission attended the ALRC public hearing on defamation held in Perth and a seminar at the Western Australian Institute of Technology. Both Commissions enjoyed a close working relationship and representatives met on several occasions to discuss progress on proposals. In June 1979, the ALRC published its report.[3] The Commission submitted its independent report in October 1979.[4]

The role undertaken by the Commission in relation to this project proved challenging and rewarding. Although the fulfilment of the project imposed a considerable burden on the Commission's limited resources, the Commission and the ALRC nevertheless enjoyed a symbiotic relationship. For the first time in Australia, the ALRC and a state law reform commission shared the task of developing law reform proposals on a particular topic.[5]

Recommendations

In its report the Commission agreed with the ALRC on most issues. Specifically it agreed that:

- The distinction between libel and slander should be removed.
- The death of a person who was defamed when alive should not extinguish that person's cause of action.
- The death of a person who defamed another should not extinguish the latter's cause of action.

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1 Law Reform Commission of Western Australia, *Defamation: Privileged Reports*, Project No 8(I) (1972).

2 The Law Reform Committee of Western Australia was formally reconstituted as a Commission on 19 January 1973. It acquired the conduct of all unfinished Committee projects.

3 ALRC, *Unfair Publication: Defamation and Privacy*, No 11 (1979).

4 Law Reform Commission of Western Australia, *Defamation*, Project No 8(II) (1979).

5 The Commission was of the view that the cooperative approach adopted in this project was an extremely worthwhile method of undertaking law reform in Australia. Although the Commissions expressed divergent views on some issues, uniformity of the law of defamation was the objective of both.

- There should be an action to prevent defamation of a deceased person within three years of the date of death.
- Truth should be a defence to a defamation action.
- Defences such as fair comment, limited (or qualified) privilege and fair reporting should be clarified and widened to allow more scope for the publication of material of public interest.

On two substantial matters, however, the Commission disagreed with the ALRC. The first of these was the right of action against a person who publishes sensitive private facts.[6] As both Commissions were considering the protection of privacy generally[7] it was the view of the Commission that it would be preferable to deal with publications that infringe privacy as part of these projects.

The second matter of disagreement concerned the ALRC's proposal to extend the defence of fair report. This proposal would permit publication of defamatory material written or spoken by another, and which is not adopted by the publisher, provided it is on a topic of public interest, the maker is identified, publication is reasonable in the circumstances and an opportunity is given to the person defamed to reply. The person defamed, however, would retain a right of action against the named originator. The Commission's concern was that a remedy against the originator of the defamatory statement might not always be available or satisfactory. Further, the defence might tend to invite the publication of unsubstantiated rumours.

Legislative or Other Action Undertaken

Following its release, the Commission's final report and the report of the ALRC on the same subject, together with a draft uniform Defamation Bill were placed on the agenda of the Standing Committee of Attorneys-General for consideration. In May 1985, the Standing Committee announced that it had been unable to agree on a uniform defamation law for Australia.[8] The issue was reconsidered by the Standing Committee in 1997 and 1998 without agreement. The subject of uniform defamation laws was formally removed from the agenda in October 1998.

Currency of Recommendations

In 1992, the High Court recognised a freedom of political communication as a constitutional implication.[9] Thereafter, defamation law, whether based on state, federal or territory legislation or the common law, was subject to this implied freedom.[10] Recently, the High Court has reconsidered the law of defamation, expanding the common law defence of qualified privilege to make it available to publishers in the public media.[11]

The Commission's recommendations primarily aim to create uniform legislation and, in the absence of such law, remain relevant. However, the recommendations should properly be considered with regard to the implied constitutional freedom of political communication.[12]

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6 Whilst the Commission considered this proposal to be attractive, it was not convinced that a civil remedy, as opposed to an administrative one, was the most desirable way of protecting privacy interests. It was also concerned that debate over this policy issue could delay much needed reform of the law of defamation.

7 Law Reform Commission, *Privacy*, Project No 65(I) (referred 1976, withdrawn 1986); *Confidentiality of Medical Records and Medical Research*, Project No 65(II) (1990); Australian Law Reform Commission, *Privacy*, Report No 22 (1983).

8 Mr J M Berinson, Attorney-General of Western Australia, Press Release (3 May 1985).

9 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1997) 177 CLR 106.

10 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v Western Australian Newspapers Ltd* (1994) 183 CLR 211.

11 *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96.

12 It is also pertinent to note that the New South Wales Law Reform Commission considered the issue of defamation in its dedicated report on the subject in 1995: see, New South Wales Law Reform Commission, *Defamation*, Project No 75 (1995).

◀ Defamation

Action Required

Consultation and cooperation between state and federal governments is required for the enactment of an appropriate uniform legislative scheme to deal with the issue of defamation. To enable this, the subject will need to be reintroduced to the agenda of the Standing Committee of Attorneys-General.

Priority – Medium

Although the issue of uniform defamation laws has consistently been raised at meetings of the Standing Committee of Attorneys-General, it has proved difficult to achieve consensus and commitment across all jurisdictions. Nevertheless, it is desirable that steps be taken to resolve problems arising from existing inconsistent and incompatible laws. Such problems are likely to increase with the further development of new communication technologies such as the Internet and text-messaging.

Statute Law Revision

Terms of Reference

In 1968 the Committee assumed a reference to coordinate statute law revision and law reform in Western Australia.

Background of Reference

In January 1968, the then Minister of Justice published a press release that stated: 'One important function of the Committee will be to cooperate and help in the coordination of the work of the Statute Law Revision Section of the Crown Law Department'.[1]

In accordance with this release the Committee included statute law revision as a project in its first reform programme; however, its assistance on the subject was never sought.

Reference Withdrawn

The reference was withdrawn in 1970 following advice that the Statute Law Revision Section was to be attached to the Parliamentary Draftsman's Office.[2]

1 Minister of Justice, Press Release, (3 January 1968), referred to in Law Reform Committee of Western Australia, *Annual Report 1968*, 3.
2 Law Reform Committee of Western Australia, *Annual Report 1969-1970*, 4.

10

Motor Vehicle Insurance

Terms of Reference

In 1968 the Committee was asked to consider the law and practice relating to motor vehicle insurance and whether any alteration to the law was desirable.

Background of Reference

The reference arose out of a series of complaints by insured motorists over a period of years. Research conducted by the Committee revealed that the majority of complaints were in regard to:

(a) the unfairness to the insured of the use of compulsory arbitration as a means of settling disputes, particularly where complainants are obliged to bear their own costs regardless of the outcome of the dispute;

(b) the unfairness of certain conditions, warranties and exclusions forming part of most policies and the harshness of insurance companies in enforcing their strict legal rights; and

(c) the unnecessarily small size of print in some policies.

In May 1972 the Committee published a working paper that discussed these issues and advanced some preliminary proposals for reform.

Nature and Extent of Consultation

The working paper was forwarded for comment to vehicle insurers, courts, the Crown Law Department and the law reform community. A notice was also placed in *The West Australian* inviting public submissions. Comments were received from a number of independent legal practitioners, the Law Society and several insurance agencies. The Committee took all comments into consideration and issued its final report in December 1972.[1]

Recommendations

The Committee recommended that legislation be enacted:

- To ensure that applicants for a policy are sufficiently made aware of the type of policy offered (that is: agreed value, market value or indemnity cover) and are given adequate information as to its terms.
- To restrict the circumstances under which an insurer can avoid a contract of insurance.
- To require insurers to enhance accessibility of policies and provide the insured with a copy of the proposal which makes up the full legal contract.

The Committee's recommendations follow the reforms proposed in the earlier working paper, which met with general approval from all parties including the State Government Insurance Office and other independent vehicle insurers. A comprehensive outline of the Committee's recommendations may be found at pages 14–16 of the final report.

Legislative or Other Action Undertaken

No legislative action has been taken to implement the Committee's recommendations; however, the State Government Insurance Office moved quickly to implement the major recommendations administratively.

1 Law Reform Committee of Western Australia, *Motor Vehicle Insurance*, Project No 10 (1972).

Currency of Recommendations

The recommendations remain current but should be considered in light of relevant developments within the motor vehicle insurance industry, described below.

Action Required

As a result of internal administrative action by certain vehicle insurers and recent advancements forced upon the industry by consumer groups, legislative implementation of the Committee's recommendations would predominantly consolidate current practices in the motor vehicle insurance industry but also provide legislative certainty and formal avenues of appeal.

Priority — Low

Although the motor vehicle insurance industry is still without legislative intervention, it is now common practice for insurers to take extensive measures to ensure that applicants for a policy sufficiently comprehend and have access to its terms. Further, the circumstances in which an insurer can avoid a contract of insurance have also, in practice, been restricted and clarified since the release of the Committee's report.

11

Liability for Stock Straying on to the Highway

Terms of Reference

In 1978 the Commission was asked to consider and report on whether there should be any change to the law relating to liability for loss caused by stock straying on to the highway.[1]

Background of Reference

At common law there was a rule that owners and occupiers of land owed no duty to road-users to take reasonable care to prevent their animals straying onto a highway ("the rule"). The rule dates back to medieval England when unfenced land made it difficult to control grazing stock and road-users were responsible for their own care.[2] In 1976, the Full Court of the Supreme Court of Western Australia decided that the rule had no place in the modern jurisprudence of Western Australia and that loss caused by animals straying onto a highway should be subject to the ordinary law of negligence.[3] However, subsequent decisions in other jurisdictions, in particular the decision of the High Court of Australia in *State Government Insurance Commission (SA) v Trigwell*[4] cast doubt upon the correctness of the Full Court decision.

Nature and Extent of Consultation

The Commission issued a working paper on the subject in August 1980 proposing that the rule be legislatively abolished in Western Australia. The paper attracted comments from relevant government authorities, a senior judicial officer, representative associations, legal academics and a number of individuals. Only one commentator argued that the rule should apply in Western Australia in its traditional form. The Commission delivered its final report in June 1981.[5]

Recommendations

After consideration of the issues and submissions received in response to the working paper, the Commission recommended that:

- the rule in *Searle v Wallbank* be abolished in Western Australia;
- liability for loss caused by an animal straying on to the highway be determined according to the law of negligence only;
- when determining liability for negligence the court should be entitled to consider factors specific to this issue;
- an upper limit of $500 000 be placed on the amount of damages recoverable in respect of any one accident, with provision for this limit to be increased at regular intervals; and
- the existing law concerning contributory negligence and contribution between persons guilty of negligence apply to claims brought in respect of loss suffered as a result of an animal straying on to the highway.

Legislative or Other Action Undertaken

With the exception of the recommendation dealing with the issue of contributory negligence, the *Highway (Liability For Straying Animals) Act 1983* (WA) implemented the Commission's recommendations.

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1 This matter was originally referred to the Committee in 1969 and a report was produced in 1970. Due to developments in the case law on this subject, the matter was referred to the Commission again in 1978.
2 Despite its arguable applicability to modern conditions, the rule was affirmed by the House of Lords in *Searle v Wallbank* [1947] AC 341.
3 *Thomson v Nix* [1976] WAR 141.
4 (1979) 142 CLR 617.
5 Law Reform Commission of Western Australia, *Liability for Stock Straying onto the Highway*, Project No 11 (1981). The Commission essentially affirmed the recommendations in the Committee's 1970 report on the subject, however, it additionally recommended that the amount of damages recoverable by a successful claimant be limited.

12

Payment of Costs in Criminal Cases

Terms of Reference

In 1969, the Committee was asked to consider whether any alteration was desirable in the law relating to payment of costs to persons acquitted in prosecutions for criminal offences.

Background of Reference

At the time of the reference, the law provided that in summary trials the court had a general discretion to award costs to acquitted persons.[1] The established practice, however, was not to award costs to the acquitted person where the complainant was a police officer. Similarly, on appeals from summary trials the appellate court had a discretion[2] to award costs except against a police officer.[3] In trials on indictment the law provided that the Crown neither received nor paid costs. This resulted in very few acquitted persons being reimbursed for the legal costs of their defence.

In April 1971 Premier John Tonkin, announced at a press conference that the Government intended to introduce legislation making the Crown liable to pay costs when it failed in a prosecution.[4] In March 1972 the Committee issued a working paper which examined the law and practice in other jurisdictions and discussed the issues involved in devising a statutory scheme for awarding costs in criminal cases.

Nature and Extent of Consultation

The working paper was widely distributed and generated comments from a range of sources including judicial officers, law reform agencies, the Solicitor General, the Western Australian Crown Solicitor, the Law Society and the Police Department of Western Australia. The final report containing the Committee's recommendations was delivered in August 1972.[5]

Recommendations

After careful consideration of the issues involved in implementing the Government's policy to award costs to successful defendants, the Committee recommended that:

- The successful defendant should be entitled to costs and the court should be required to order costs in the defendant's favour, unless:
  (a) the charge was dismissed under s 669 of the *Criminal Code* dealing with first offenders;
  (b) the defendant did or omitted to do something which was unreasonable in the circumstances and which contributed to the institution or continuation of the proceedings;
  (c) the defendant did or caused to be done some act calculated to prolong the proceedings unnecessarily or cause unnecessary expense.
- The dismissal of a charge on a technical point should not be made a ground for denial of costs, due to the difficulty in defining the circumstances in which a prosecution may have failed on a 'technicality'.
- A special statutory fund should be established for the payment of costs in prosecutions by the police and officers of government departments and state instrumentalities. Other official prosecutions should have the costs awarded against the authority concerned and recoverable as a debt. Legislation should also be enacted to ensure that any existing statutory immunity did not preclude the award of such costs.

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1 *Justices Act 1902* (WA) ss 151 & 152.
2 *Justices Act 1902* (WA) ss 190 & 206.
3 *Justices Act 1902* (WA) s 219.
4 Law Reform Committee of Western Australia, *Payment of Costs in Criminal Cases*, Project No 12 (1972) para 2.
5 Ibid.

◀ Payment of Costs in Criminal Cases

- Appellate courts should be given the same power to award costs as given to courts of first instance. The appellate court's power should also extend to awarding costs in proceedings in the court below.
- The prohibition on awarding costs against justices or police officers should be maintained.
- Legislation should be enacted empowering the Governor in Council to prescribe a scale of costs, but allowing the court to depart from it whenever it thought fit.
- Legislation may be necessary to deal with some consequential matters not within the terms of reference of the report but raised in the working paper:
  - (a) the court should be empowered to grant the successful defendant part of his costs notwithstanding that he has been convicted of a lesser offence if he can satisfy the court that additional costs were incurred in defending the more serious charge;
  - (b) where the defendant is charged with several offences in the one complaint and is acquitted of one or more of the charges, the court should be given a discretion to award the extra costs incurred in defending such charges;
  - (c) the application for costs should generally be dealt with by the presiding magistrate as soon as the trial has ended but the magistrate may adjourn the application and grant leave to adduce further evidence; and
  - (d) costs should be awarded where a charge is not proceeded with or is withdrawn.
- The power to award costs should not be extended to order a convicted person to pay the costs of the successful prosecution.

Legislative or Other Action Undertaken

The Committee's recommendations were implemented in 1973 when Parliament passed the *Official Prosecutions (Defendants' Costs) Act 1973* (WA).

Affiliation Proceedings

Terms of Reference

In 1969 the Committee was given a reference to consider and report on whether, in affiliation cases in which it appears from the evidence that there are two or more putative fathers, it is desirable that the law should provide for:

(a) contribution of maintenance by such persons; or

(b) additional or alternative relief for the mother.

Background of Reference

The reference arose from a perception by legal practitioners that maintenance applications by the mother of a child (where the child was born to unmarried parents) were frequently defeated on the evidence of witnesses for the respondent who testified that they were possible fathers. The Law Society suggested that all witnesses to affiliation proceedings testifying on the part of the respondent be made liable to contribute to the maintenance of the child as possible fathers unless they could be ruled out by scientific or other evidence. The matter was subsequently referred to the Committee for consideration.

Nature and Extent of Consultation

Because of the nature of the issue the Committee declined to issue a working paper. Instead it engaged in lengthy consultation with experts[1] and researched the law in other jurisdictions. The Committee produced its report on the subject in March 1970.[2]

Recommendations

The Committee recommended certain amendments to the *Married Persons and Children (Summary Relief Act) 1965–1967* (WA). These amendments included allowing the court to draw adverse inferences from a respondent's refusal to provide a blood sample for testing in affiliation proceedings. In respect of witnesses who testify that they are, or may be the father, the Committee recommended that a court may take any refusal to submit to a blood test into account when assessing the witness' evidence.

Legislative or Other Action Undertaken

The *Married Persons and Children (Summary Relief Act), 1965–1967* was repealed in 1979. However, the Committee's recommendations were implemented in 1988 by amendment to the *Family Court Act 1975* (WA) which provides that when the parentage of a child is in issue in proceedings under the Act, the court may order a "parentage testing procedure" to determine the parentage of the child.[3]

1 Several local experts were consulted upon the psychological effects upon a child of a maintenance order against more than one putative father. Those consulted included Professor WB Macdonald, Professor CB Kidd and Dr W Tauss, all of the University of Western Australia.

2 Law Reform Committee of Western Australia, *Affiliation Proceedings*, Project No 13 (1970).

3 *Family Court Act 1975* (WA) s 82E.

14

Disqualification for Membership of Parliament: Offices of Profit Under

Terms of Reference

In 1969 the Committee was asked to consider whether any alteration was desirable in the law relating to persons holding offices of profit under, or having contracts with, the Crown in relation to their right to be Members of Parliament.

Background of Reference

Australia inherited from England its laws relating to the disqualification from Parliament of a person holding an office of profit under the Crown, or being party to a contract with the Crown. These laws reflect the principle of the separation of legislative and executive power. The English law in this area developed somewhat haphazardly and in an overly technical manner. As a result certain aspects of the law inherited by Australia were unsatisfactory. For example, many persons were disqualified from membership of Parliament notwithstanding that their relationship with the Crown was such that they could not be said to be subject to Crown influence at all. In other areas the law was so obscure that it was uncertain if a person was disqualified or not.[1] Further, under s 39 of the *Constitution Amendments Act 1899–1969* (WA) a Member who sat or voted in Parliament whilst disqualified was subject to a penalty of $400. Any person could sue for this penalty in the Supreme Court under the 'common informer' procedure.

In the United Kingdom, these problems had been acknowledged and resulted in reform of the law. The *House of Commons Disqualification Act 1957* (UK) amended and simplified the law in several ways. Firstly it provided a comprehensive schedule of the offices of profit under the Crown that would disqualify a person from entering Parliament. Secondly it provided that contracts with the Crown were no longer a sufficient reason for disqualification from Parliament.[2] It also provided that the 'common informer' procedure be abolished.[3]

Nature and Extent of Consultation

Because of the technical nature of the subject the Committee refrained from issuing a working paper. However the Committee was strongly influenced by the reforms that had occurred in the United Kingdom.[4] It submitted its report to Parliament in March 1971 with the recommendation that the report be considered as a working paper and referred to a Parliamentary Select Committee for consideration.[5]

Recommendations

The Committee made the following recommendations;

- The disqualifying offices of profit should be listed by name in a statute that should also contain a statement of the general principles in a Preamble.
- The law relating to office holders standing for Parliament should remain unchanged.
- Office holders in other jurisdictions of Australia should be disqualified.
- Contracting with the government should no longer be a disqualification.
- The 'common informer' procedure under s 39 of the *Constitution Amendments Act 1899–1969* (WA)

1 Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 October 1979, 3263 (Sir Charles Court, Premier).
2 Law Reform Committee of Western Australia, *Disqualification for Membership of Parliament: Offices of Profit Under the Crown and Government Contracts*, Project No 14 (1971) 9.
3 Ibid 4.
4 Ibid 10.
5 Ibid 15.

should be abolished. In its place a provision should be enacted empowering any person to apply to the Full Court for a declaration as to a Member's qualifications.

Legislative or Other Action Undertaken

In 1979 the Acts Amendment and Repeal (Disqualification for Parliament) Bill was introduced into Parliament. This Bill was drafted according to the Committee's recommendations but lapsed on prorogation.[6] In October 1980, Parliament established a Joint Select Committee to inquire into the law relating to offices of profit under the Crown. In particular the Select Committee was asked to consider the Committee's report and the 1979 Bill. It generally approved the 1979 Bill, recommending only minor modifications.[7]

In 1984 a modified version of the 1979 Bill was introduced into Parliament and subsequently passed as the *Acts Amendment and Repeal (Disqualification For Parliament) Act 1984* (WA). It incorporated the modifications suggested by the Joint Select Committee and substantially implemented the Committee's recommendations.

6 Western Australia, *Parliamentary Debates*, Legislative Assembly, 30 October 1984, 3131 (Mr Grill, Minister for Transport).
7 Ibid.

15

Imposition of Driving Disqualifications

Terms of Reference

In 1969, the Committee was asked to consider the need for legislation imposing driving disqualifications on persons who committed crimes involving the use of a motor vehicle.

Background of Reference

The reference arose from an increased recognition by police and the judiciary of the large role the motor vehicle had assumed in the commission of modern crime. Some members of the judiciary suggested that courts be empowered by a broad discretion to disqualify from driving a person who had used a vehicle in connection with the commission of a crime.

After considering the law in other jurisdictions, particularly where courts had the power to order disqualification, the Committee came to the preliminary conclusion that disqualification was ineffective both as a means of preventing crime and as a penalty. The Committee based this conclusion on three factors:

(a) that a person intending to commit an offence is likely to ignore a driving disqualification or obtain another person to drive, thereby rendering disqualification ineffective as a deterrent;

(b) that disqualification could unfairly burden some people more than others, particularly those whose livelihood depended upon retention of a driving licence; and

(c) that because of the social significance of driving, deprivation of the ability to drive might diminish an individual's usefulness as a member of society.

The Committee released a working paper on the subject in March 1971 setting out the research and reasons for reaching its preliminary conclusion.

Nature and Extent of Consultation

The working paper was forwarded to a number of interested parties including courts, government departments and other law reform agencies. The Committee received six submissions in response to the working paper. Some parties, including District Court judicial officers, the Commissioner of Police and the Law Society, supported the introduction of legislation empowering courts to make disqualification orders. However, the Child Welfare Department opposed the introduction of this sanction, noting that the proposal could unwittingly increase the crime rate by tempting offenders to steal a vehicle to avoid identification. The Deputy Commonwealth Crown Solicitor also expressed doubt that disqualification would act as an effective deterrent to crime. The Committee released its final report in June 1971.[1]

No Action Recommended

Following consideration of all submissions, the Committee concluded that the introduction of driving disqualification in this context, either as a penalty or as a means of preventing crime, was difficult to justify. In the circumstances, the Committee refrained from making any specific recommendations.

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1 Law Reform Committee of Western Australia, *Imposition of Driving Disqualifications,* Project No 15 (1971).

Local Courts: Jurisdiction, Procedures and Administration

Terms of Reference

In 1969 the Committee was given a general reference to review the *Local Courts Act 1904* (WA) ("the Act") and the *Local Court Rules 1961* (WA) ("the Rules").

Background of Reference

The reference resulted from submissions made by the Law Society of Western Australia that the Act and the Rules, which are derived from 19th century English legislation, were out of date. At the time of the reference, a number of reviews of court systems in Australia and other jurisdictions had been undertaken. Some of these jurisdictions had effected substantial modifications to court structures or procedures. This reference complemented the Commission's general reference to review the *Justices Act 1902* (WA) which regulates the procedure of the Courts of Petty Sessions.[1] The two projects together constituted a study of the entire inferior court system in Western Australia.

The Committee began work on the reference almost immediately by obtaining the views of magistrates and senior legal practitioners and conducting research on the jurisdiction and procedure of Local Courts. The conduct of the reference was taken over by the Commission upon its inception in 1973.[2] In 1980 the Commission decided to divide the reference into two parts. Part I dealt with Local Court jurisdiction, procedures and administration and Part II dealt with the enforcement of Local Court judgments. The primary aim of Part I was to simplify the procedures involved in Local Court cases. The Commission's guiding principles in making its recommendations were to ensure that courts of summary jurisdiction were able to deal with most minor disputes, that accessibility to the court process was enhanced and that the procedure employed in Local Courts was as simple and inexpensive as possible.

Nature and Extent of Consultation

The Commission began carrying out research in March 1977 by advertising in the press for preliminary submissions. A total of 14 responses were received, chiefly from solicitors with experience in summary litigation. These submissions assisted the Commission in preparing a working paper on the subject which was released for comment in April 1983. A short proposals paper was also issued in order to encourage and expedite submissions from the general public. These papers dealt generally with the jurisdiction, procedures and administration of Local Courts and raised a number of issues concerning the structure and operation of Local Courts. In response to the working paper the Commission received a substantial number of written and oral submissions from individuals and organisations including the Law Society of Western Australia, the Shire of Mundaring, the Crown Law Department and the Legal Aid Commission of Western Australia.

Throughout the consultation process, officers of the Commission were engaged in ongoing discussions with members of the judiciary, the magistracy, the staff of the Crown Law Department, legal practitioners and private individuals across Western Australia. A member of the Commission also visited courts and tribunals in New South Wales, Victoria, South Australia and Tasmania to discuss aspects of the reference with magistrates, administrators, registrars and legal practitioners in these jurisdictions. The Commission submitted its final report to the Attorney-General in June 1988.[3]

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1 See Project No 55.
2 The Law Reform Committee of Western Australia was formally reconstituted as the Law Reform Commission of Western Australia on 19 January 1973.
3 Law Reform Commission of Western Australia, *Local Courts: Jurisdiction, Procedures and Administration*, Project No 16(I) (1988).

Recommendations

The Commission's principal recommendations included a number of proposals to clarify and extend the basic jurisdiction of Local Courts and enable several administrative changes. Importantly, the Commission confirmed the recommendation in its earlier report on the *Justices Act 1902* (WA) that Local Courts and Courts of Petty Sessions be merged into a single court of combined civil and criminal jurisdiction.[4] The key recommendations of the Commission were that:

- Local Courts and Courts of Petty Sessions should be merged to form a single court of general inferior jurisdiction with the following divisions:
  (a) an Offences Division;
  (b) a Civil Division;
  (c) a Small Debts Division;
  (d) an Administrative Law Division; and
  (e) a Family Law Division.
- The basic jurisdiction of Local Courts should be clarified and extended by giving them express jurisdiction to:
  (a) determine money claims up to $15,000 and to make orders for the recovery of unlawfully detained goods up to $15,000;
  (b) grant relief against fraud or mistake and determine actions to restrain actual or threatened trespass or nuisance where the relevant amount does not exceed $15,000; and
  (c) dissolve partnerships or wind up their affairs on dissolution where the value of the firm's assets does not exceed $50,000.

With regard to Local Court procedure the Commission recommended that:

- The scope of provisions for summary judgment should be extended.
- Local Courts should be given power to set aside summary judgments on just terms.
- The position of third parties should be assimilated as far as is practicable to that of the principal parties.
- Provision should be made for the discovery and inspection of documents against a person who is not a party.
- Procedure in chambers should be simplified and magistrates should be empowered to deal with an application by telephone and to fix the costs of an application.
- Litigants in person should be able to be compensated for work done in preparing and arguing their case.

The Commission also made a number of administrative and consequential recommendations. A comprehensive discussion of the Commission's recommendations may be found in chapter 21 of the final report.

Legislative or Other Action Undertaken

The Commission's report was tabled during parliamentary proceedings in 1988 but the proposals contained therein were not debated.[5] In 1997 the Commission's recommendations were considered in a Ministry of Justice report on Amalgamation of Courts of Summary Jurisdiction.[6] The report acknowledged the widespread support for a proposed merger of Local Courts and Courts of Petty Sessions and contained proposals for the introduction of legislation to implement the Commission's recommendations.

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4 See Law Reform Commission of Western Australia, *Courts of Petty Sessions: Constitution, Powers and Procedure*, Project No 55(II) (1986).
5 Western Australia, *Law Reform Commission of Western Australia Report on Local Courts*, Parl Paper No 515 (1988) 6629.
6 Ministry of Justice Court Services, *Amalgamation of Courts of Summary Jurisdiction Report*, February 1997.

Currency of Recommendations

The currency of the Commission's recommendations should be considered in light of its more recent recommendations in the extensive review of the criminal and civil justice system ("Project No 92").[7] In that report the Commission stated that of all the courts in Western Australia exercising civil jurisdiction, the Local Court should be the most user-friendly and urged that the procedures be simplified and the antiquated Rules reformed. The Commission reaffirmed its recommendation for the establishment of a single new court, the Magistrates' Court, combining the civil jurisdiction of the Local Courts and the criminal jurisdiction of the Courts of Petty Sessions. However, instead of separate civil and administrative jurisdictions of the proposed Magistrates' Court (as recommended in Project No 16), the Commission suggested that those jurisdictions be transferred to a tribunal to be called the 'Western Australian Civil and Administrative Tribunal'.[8]

Apart from the recommendation pertaining to the administrative division of the proposed Magistrates' Court the Commission's recommendations remain current.[9] Since the Commission's 1988 report the Ministry of Justice has continued to acknowledge the importance of these reforms and has been progressing the implementation of legislative changes. The Courts Services Division at the Ministry (now Department of Justice) is currently in the process of preparing a Cabinet submission for approval to draft a Magistrates' Court Bill with the possibility of proclamation in 2003. This new legislation will establish a single Magistrates' Court of combined general inferior jurisdiction. The Department of Justice has indicated that this legislation will be drafted with the specific aim of incorporating as many of the Commission's recommendations from Project No 92 as possible. The Department of Justice is in the process of setting up a steering committee of key stakeholders to oversee the development of the Bill and to examine and consider how to incorporate and implement the Commission's recommendations.

Action Required

The Commission's recommendations may be effectively implemented by the enactment of legislation establishing a Magistrates' Court of combined summary jurisdiction. The introduction of this legislation will provide the opportunity for a complete review of the Rules with the aim of simplifying and refining current procedure.

Priority – High

The pressing need for substantial changes to the existing inferior court jurisdiction to simplify procedures and enhance accessibility has been widely acknowledged. In particular, the recommendation for merging the courts of inferior jurisdiction has received broad community and bipartisan political support.

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7 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999).

8 This recommendation has resulted in a further reference to the Commission to detail the jurisdiction and operation of the proposed tribunal. The Commission's final report on *Judicial Review of Administrative Decisions* (Project No 95) is expected to be submitted in early 2002.

9 It should be noted, however, that the Commission's recommendations in respect of the Local Court's jurisdiction to determine money claims is now significantly out of date. In its final report the Commission recommended that the jurisdiction be extended from $10,000 to $15,000. The Local Court currently has jurisdiction to determine claims of up $25,000.

16(II)

Enforcement of Judgments of Local Courts

Terms of Reference

In 1969 the Committee was given a general reference to review the *Local Courts Act 1904* (WA) ("the Act") and the *Local Court Rules 1961* (WA).

Background of Reference

The Commission inherited this reference from the Committee as an incomplete project in 1973.[1] When, in 1980, the Commission divided the reference into two parts it was decided that Part II, dealing with the enforcement of Local Court judgments, should be deferred pending results from statistical surveys and work that was being carried out on similar projects by the Australian Law Reform Commission and the New South Wales Law Reform Commission.[2] Work on the reference began again in 1991, after the Commission and the Attorney-General held a meeting to review the priority of the Commission's outstanding references. As a result of this meeting the reference was given high priority with the Government indicating a commitment to introduce legislation to reform procedures in this area. The Commission engaged Mr Archie Zariski, a Lecturer in law at Murdoch University, to prepare a discussion paper to elicit comment on the subject. The paper identified several problems with the existing system and made suggestions for a more just and efficient means of enforcing judgments or orders. It was recognised that inefficiency is undesirable because it undermines public confidence in the court system and is likely to increase the cost of credit and reduce its availability. It was also acknowledged that any recommended measures should aim to ensure that judgment debtors are free from unreasonable enforcement procedures. The major issues considered in the paper included whether there should be a system under which the court may order an employer of a judgment debtor to pay a part of each wage entitlement direct to the judgment creditor, whether the court should be able to order payment of a judgment debt by instalments and whether imprisonment should be removed from the Act as a possible consequence of failure to pay a judgment debt.

Nature and Extent of Consultation

The discussion paper was distributed for comment in February 1995 and the Commission received submissions in response from 18 organisations and individuals including the Aboriginal Legal Service of Western Australia, BankWest, the Institute of Mercantile Agents Ltd and the Law Society of Western Australia. In the preparation of its final report, the Commission took into account all the views expressed in these submissions. The final report containing the Commission's recommendations was delivered in December 1995.[3]

Recommendations

The Commission made a total of 116 recommendations. A number of the recommendations were aimed at improving the efficiency of the enforcement system. The Commission principally recommended that:

- The two proceedings of examination in aid and the judgment summons should be replaced with a single proceeding (the enforcement hearing) at which various orders can be made.
- Provision should be made allowing for the judgment creditor at an enforcement hearing to obtain information about the judgment debtor's financial affairs and have an appropriate order made to enforce the judgment, such as an order for payment by instalments.
- There should be provision for the attachment of earnings, such as wages and salaries, where a judgment debtor defaults under an order for payment by instalments.
- The court should have the power to punish a judgment debtor for contempt of court where the judgment debtor has the means to pay by instalments but wilfully and persistently, without honest and reasonable excuse, defaults in making the payments.

1 The Law Reform Committee of Western Australia was formally reconstituted as the Law Reform Commission of Western Australia on 19 January 1973.
2 See especially Australian Law Reform Commission, *Debt Recovery and Insolvency*, Report No 36 (1987).
3 Law Reform Commission of Western Australia, *Enforcement of Judgments of Local Courts*, Project No 16(II) (1995).

Several of the recommendations were directed at protecting the legitimate interests of judgment debtors. In this regard the Commission recommended that:

- Imprisonment for failure to pay civil debts should be abolished.
- Judgment debtors should be allowed to apply to the court for an instalment order, both at the time of the judgment and after judgment, regardless of the amount.
- There should be an expansion of the range of property exempt from execution by bailiffs to ensure that a judgment debtor is not deprived of property necessary for a frugal but dignified existence and to ensure that their ability to earn an income is not unduly impaired.

The Commission also made a number of other consequential recommendations. A comprehensive list of recommendations may be found in chapter nine of the Commission's final report.

Legislative or Other Action Undertaken

Following the release of the Commission's final report a project team was established within the Courts Services Division of the Ministry of Justice to review the civil judgment debt recovery system in light of the Commission's recommendations. In June 1997 the project team published a report proposing a uniform civil judgment debt recovery system for all courts and adopting many of the Commission's recommendations.[4] The scope of the project team's report went beyond that of the Commission's terms of reference to include the Supreme and District Courts. The project team recommended the enactment of a new piece of legislation: the *Enforcement of Judgments Act*. The project team considered that this proposed legislation would unify the procedures across all jurisdictions and would ensure a consistent and cost-effective approach to the enforcement of outstanding civil debts. In its final report the Commission had also acknowledged the convenience of uniform procedures for enforcing judgments and had attempted to harmonise the procedures where practicable. The proposed *Enforcement of Judgments Act* would substantially implement many of the Commission's recommendations. In 1998 the Ministry of Justice Court Services Division indicated that the proposal for an enforcement of judgments Act was in the process of implementation.[5] The third draft of the legislation was completed in 2000; however, its progress has since stalled.

Currency of Recommendations

In 1999 the Commission reinforced the need for greater efficiency and simplified procedures in the Local Court in its comprehensive review of the criminal and civil justice system.[6] A just and efficient system for the enforcement of judgments or orders is fundamental to maintaining community confidence in the court system. In terms of achieving this purpose, the recommendations of the Commission remain current.

Action Required

Legislative action similar to the proposed *Enforcement of Judgments Act* is required to implement the Commission's recommendations.

Priority – High

This assessment is based on the desirability of updating the legislation to achieve consistency in the procedures for enforcing judgments, the need for Western Australia to achieve uniformity with other Australian jurisdictions and the anticipated benefits to the community of establishing a more just and efficient system of enforcement and recovery of civil debts. This assessment is also influenced by the relative ease of implementing the Commission's recommendations. A workable Bill for the enforcement of civil judgments has already been drafted and simply requires Cabinet approval to proceed.

4 Ministry of Justice Court Services Division, *Civil Judgment Debt Recovery System: Part I Legislative Recommendations Report*, 1997.
5 Ministry of Justice, *Annual Report 1997-1998*, 1998.
6 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System*, Project No 92 (1999).

17

Manslaughter or Dangerous Driving Causing Death

Terms of Reference

In 1969, the Committee was asked to examine and report upon the law relating to the criminal culpability of a person who by reason of unreasonable conduct in the driving of a motor vehicle, was responsible for the death of another.

Background of Reference

The reference arose as a result of concerns expressed by the Chief Justice about the Crown's policy of preferring manslaughter charges in prosecutions over fatal road accidents instead of using the alternative charge of negligent driving causing death under section 219A of the *Criminal Code 1913* (WA) ("the *Criminal Code*").

Section 291A was introduced in 1945 to create an intermediate offence that would involve a lesser degree of proof and a shorter term of imprisonment. However, judicial interpretation[1] determined that the degree of negligence required to establish guilt for either offence was the same. Consequently, the Crown left it to the jury to decide under which of these headings they would convict instead of exercising discretion between cases and indicting accordingly.

The Committee issued a working paper in June 1970, which outlined areas of concern with the existing law and invited comment.

Nature and Extent of Consultation

The Committee had the benefit of detailed responses to the working paper from experts in the area, including, judicial officers of the Supreme and District Courts, the Chief Crown Prosecutor, the Commissioner of Police and the Law Society. After consideration of submissions and examination of the law in other Australian jurisdictions, the Committee delivered its final report in August 1970.[2]

Recommendations

The Committee recommended that the relevant provisions of the *Criminal Code*[3] remain unaltered except for minor drafting amendments.

Legislative or Other Action Undertaken

The *Criminal Code Amendment Act 1972* (WA) implemented the recommendations of the Committee by effecting the minor drafting amendments. The *Road Traffic Act 1974* (WA) later repealed s 291A of the *Criminal Code*[4] and provided for an offence of negligent driving causing death which could be dealt with either summarily or by way of indictment.[5]

1 *Callaghan v The Queen* (1952) 87 CLR 115.
2 Law Reform Committee of Western Australia, *Manslaughter or Dangerous Driving Casing Death,* Project No 17 (1970).
3 *Criminal Code Act 1913* (WA) ss 291A, 595, 277.
4 It also repealed and replaced the *Traffic Act 1919* (WA).
5 *Road Traffic Act 1974* (WA) s 59.

Commercial Arbitration and Commercial Causes

Terms of Reference

In November 1969, the Committee was given a reference to consider the law relating to the settlement of disputes by commercial arbitration with a view to preparing a revised Arbitration Act.[1]

Background of Reference

At the Law Society of Western Australia's Summer School in 1969, Mr HE Zelling QC drew attention to aspects of the existing arbitration system that he regarded as unsatisfactory. From the discussion that followed, it was apparent that many members of the legal and business communities shared Mr Zelling's views. The matter was subsequently referred to the Committee for consideration.

A sub-committee, constituted by the Hon Justice Burt, Mr JL Toohey QC, and Mr BW Rowland, was appointed to investigate the existing arbitration system. The sub-committee met with representatives of legal, business and commercial groups to ascertain their views on the subject and formulate proposals for reform. Further impetus for reform came in 1970 when the law reform agencies of South Australia and Queensland produced reports recommending that the arbitration legislation of their states should be brought up to date. The Committee issued a working paper containing proposals for reform in October 1971.

Nature and Extent of Consultation

In response to the working paper, the Committee received submissions from commercial arbitrators, government departments, legal practitioners, underwriters' associations and the State Electricity Commission. When the Committee was reconstituted as a Commission in January 1973, it inherited the project. The Commission published its final report containing recommendations for reform in January 1974.[2]

Recommendations

The Commission recommended that the *Arbitration Act 1895* (WA) be repealed and a revised Arbitration Act be enacted. The two principal recommendations[3] of the Commission were:

- A court should not be able to stay a legal action that had been commenced by a party on the basis that the party was bound by an arbitration agreement, unless the court was satisfied that justice would be better served by the dispute being determined by arbitration because of factors such as expense, delay, and the nature of the questions in issue.
- The court would be expressly empowered to stay arbitration proceedings commenced against a party so that the party who commenced them would be obliged to take court proceedings instead.[4]

The Commission also made a series of recommendations pertaining to arbitration procedures, including:

- The arbitrator should be required to make his award in writing and to give reasons for his decision in writing, unless the parties to the dispute waive those requirements.[5]

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1 The Commission found that it was not necessary to investigate Part B of the reference, which required an examination of the relevant Supreme Court Procedures, because the *Rules of the Supreme Court 1971* (WA) were subsequently changed to expedite the trial of actions.

2 Law Reform Commission of Western Australia, *Report on Commercial Arbitration and Commercial Causes*, Project No 18 (1974).

3 The Commission's recommendations were contained in a draft Bill attached at Appendix B to the final report.

4 The Commission made a supporting recommendation to enact a provision that limited the effect of *Scott v Avery* clauses (*Scott v Avery* (1856) 5 HL Cas 811). Such clauses in arbitration agreements provide that there is no right of action under the agreement except upon the award of an arbitrator. See Project No 18, above n 2, 30.

5 Ibid 32.

- A provision should be enacted that any agreement that parties in arbitration should bear their own costs of arbitration proceedings is void unless the parties have agreed after the dispute has arisen, to bear their own costs.
- The new Arbitration Act should bind the Crown.

Finally, the Commission recommended that the Supreme Court be given a number of express powers,[6] including the power to:

- Order security for costs and discovery of documents.
- Remove a dilatory arbitrator and appoint a fresh arbitrator.
- Authorise an application for an amendment to an award to provide for costs.
- Resolve disputes about an arbitrator's fees.
- Set aside an award for jurisdictional error and misconduct, including mistakes both of jurisdiction and within jurisdiction.

Legislative or Other Action Undertaken

After a minor amendment to the Commission's draft Bill, the recommendations were passed into law by the *Commercial Arbitration Act 1985* (WA).[7]

6 Ibid 32–38.
7 Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 November 1985, 3831–3838 (Mr Parker, Minister for Mines and Energy).

Chattel Securities and the Bills of Sale Act

Terms of Reference

In 1970, the Committee was asked to:

(a) review the law dealing with security of title in relation to the merchandising of goods on credit; and

(b) advise whether the *Bills of Sale Act 1899* (WA) should be amended or new legislation prepared to meet present day conditions.

Background of Reference

In the related Project No 35,[1] the Committee was asked to consider and report on the law relating to unauthorised disposal of goods by a bailee or hirer under a hire purchase agreement where the disposal takes place interstate. In 1972 the Standing Committee of Commonwealth and State Attorneys-General (SCAG) decided that the law on credit and chattel securities was to be reviewed on a uniform basis throughout Australia. The Committee's work on Project Nos 19 and 35 was deferred to await the outcome of the review. The Commission took over these, and all outstanding projects from the Committee, upon its inception in January 1973.[2]

In 1978, SCAG agreed that Victoria would introduce three Bills[3] dealing with consumer transactions for the purpose of seeking public comment. It was intended that the Bills, if suitable, would be the basis for uniform legislation. In October 1978, the Commission, with the agreement of the Attorney-General, revived its study of the two projects in order to submit comments on those aspects of the Bills dealing with chattel securities.

The Bills attracted substantial public comment and criticism and when the Victorian Parliament rose for the state election in May 1979, the Bills lapsed and the intention to redraft them was announced. Accordingly, the Commission again deferred work on the projects. The Bills were revised and re-introduced as the model consumer credit legislation into the Victorian Parliament at the end of April 1981. At the same time, four Bills[4] having a similar effect were introduced into the New South Wales Parliament.

Reference Withdrawn

In April 1983 the Minister for Consumer Affairs announced[5] that the model consumer credit legislation would be introduced into the Western Australian Parliament.[6] Since such legislation would substantially deal with matters covered by Project Nos 19 and 35, the Attorney-General withdrew both references.

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1. Law Reform Commission of Western Australia, *Unauthorised Disposal of Goods Interstate: Right to Repossession,* Project No 35 (referred 1972, withdrawn 1983).
2. The Law Reform Committee of Western Australia was formally reconstituted as the Law Reform Commission of Western Australia on 19 January 1973.
3. Credit Bill 1978 (Vic); Goods (Sales and Leases) Bill 1978 (Vic); Chattel Securities Bill 1978 (Vic).
4. Consumer Credit Bill 1981 (NSW); Credit-Sale Agreements (Repeal) Bill 1981 (NSW); Hire-Purchase (Repeal) Bill 1981 (NSW); Moneylending (Repeal) Bill 1981 (NSW).
5. Arthur Tonkin, Minister for Consumer Affairs, Press Release, No M88/457 (22 April 1983).
6. Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 November 1984, 4478-4492 (Mr M Trethowan): *Credit Act 1984* (WA); *Credit (Administration) Act 1984* (WA); *Commercial Tribunal Act 1984* (WA). See also the *Chattel Securities Act 1987* (WA).

20

Evidence of Criminal Convictions in Civil Proceedings

Terms of Reference

In 1970 the Committee was given a reference to consider the law relating to the introduction of evidence of criminal convictions in civil proceedings and report on the need, if any, for change.

Background of Reference

The rule in *Hollington v Hewthorn*[1] ("the rule") provides that in civil proceedings, a criminal conviction following trial cannot be tendered as evidence of the material facts upon which that conviction is based.[2] Since its creation, the rule has been widely criticised.[3] This criticism resulted in legislative and judicial reform in Australia, New Zealand and the United Kingdom in the late 1960s.

The English Law Reform Committee released a report in 1967[4] recommending that the rule be abolished. The United Kingdom Parliament responded by enacting the *Civil Evidence Act 1968* (UK) which, amongst other things, abrogated the rule.[5] In 1969 the opportunity arose for consideration of the continued application of the rule in respect of civil proceedings in New Zealand. The New Zealand Court of Appeal also criticised and declined to follow the rule.[6]

In Australia, prior to this reference, some statutory modification of the rule at Commonwealth and state level had already occurred.[7] In Western Australia s 79C of the *Evidence Act 1906* (WA) had been enacted to remedy some of the problems caused by the rule by allowing, subject to certain conditions, statements made in a document to be submitted as evidence. This meant that the transcript of evidence given at a criminal proceeding could later be adduced in civil proceedings. However, evidence of a conviction itself was still inadmissible. Other states enacted similar provisions[8] and others went further by enacting specific legislation to abolish the rule.[9]

As a result of moves in other states to completely abolish the rule, the Attorney-General asked the Committee to investigate if further statutory action should also be taken in Western Australia. The Committee issued a working paper in September 1971 that outlined the issues and considered reforms undertaken in other jurisdictions. It invited comment on whether s 79C of the *Evidence Act* made further reform unnecessary. It also raised specific questions relating to how any legislative reform, if decided upon, might operate.

Nature and Extent of Consultation

Because of the specifically legal nature of the reference, consultation was limited to the legal community. The working paper was forwarded for comment to judicial officers of the District and Supreme Courts, legal academics, legal practitioners, law reform agencies, the Law Society of Western Australia and the Western Australian Commissioner of Police.

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1 [1943] KB 587.
2 Andrew Ligertwood, *Australian Evidence* (3rd ed, 1998) para 5.94.
3 Law Reform Committee of Western Australia, *Evidence of Criminal Convictions in Civil Proceedings,* Working Paper, Project No 20 (1971) para 19.
4 English Law Reform Committee, *Fifteenth Report,* Cmnd. 3391.
5 See *Civil Evidence Act 1968* (UK) ss 11 & 13.
6 *Jorgensen v News Media (Auckland) Ltd* [1969] NZLR 961.
7 Law Reform Committee of Western Australia, above n 3, paras 13–15.
8 Ibid 15.
9 See, eg, *Evidence Act 1929-1960* (SA) s 34A; *Evidence Act 1939* (NT) s 26A.

The Committee received a very small number of submissions in response to the working paper. Most valuable of these was the response by the Law Society of Western Australia which canvassed its members on the issue and made proposals for reform. The Committee published its final report on the subject in April 1972 which contained recommendations that substantially reflected those made by the Law Society.[10]

Recommendations

The Committee decided that s 79C of the *Evidence Act* had alleviated many of the potential hardships that might be caused by the operation of the rule. The Committee also felt that the difficulties that might arise in deciding what weight should be given to evidence of prior convictions would mean that abolishing the rule could create more problems than it solved. Thus the Committee's primary recommendation was that the rule in *Hollington v Hewthorn* should remain in force in Western Australia. However, the Committee recommended that an exception to this rule be statutorily created to provide that in defamation actions in which the commission of an offence is in issue or is relevant to an issue, a conviction after trial shall be admissible and shall be conclusive evidence that the party committed the offence.

The Committee also provided the following alternative recommendations to provide for statutory guidelines, should Parliament choose to abolish the rule.

- Evidence of a conviction should be admissible as prima facie evidence only and should serve as proof only if no acceptable evidence to the contrary is adduced.
- Evidence of a conviction should not be admissible against third parties.
- Convictions after summary trial should only be admissible if to do so appears to the court to be necessary in the interests of justice.
- For the purposes of identifying the facts on which a conviction is based, the contents of the complaint, indictment or other document should be admissible in evidence.

Legislative or Other Action Undertaken

No legislative action has been taken to implement the recommendations contained in the Committee's report.

Currency of Recommendations

The Full Court of the Supreme Court of Western Australia considered the validity of the rule in *Mickelberg v Director of the Perth Mint*.[11] The Court rejected the application of the rule and held that evidence of a criminal conviction could be admissible as prima facie evidence of the facts on which the conviction depended.

In the absence of legislative support for the rule, this decision affects the currency of the Committee's primary recommendation that the rule be preserved. However, the Committee made alternative recommendations to direct legislative action should the rule be abolished. Although the Committee assumed that any abrogation of the rule would be performed by statute, these alternative recommendations remain current.

10 Law Reform Committee of Western Australia, *Evidence of Criminal Convictions in Civil Proceedings*, Project No 20 (1972) para 7.
11 [1986] WAR 365.

◀ Evidence of Criminal Convictions in Civil Proceedings

The Committee also recommended that in defamation actions, evidence of a conviction should not only be admissible but be conclusive evidence that the party committed the offence. This was due to concerns that a party could effectively have the issues of the previous conviction re-tried. Chief Justice Burt dealt with this potential abuse of process in the *Mickelberg* case.[12] This recommendation is no longer current.

Action Required

In September 1985, the Attorney-General announced that in view of the decision of the Full Court in the *Mickelberg* case, the Government had decided that it was now unnecessary to act on this report.[13] However, in light of the continued currency of the Committee's alternative recommendations, this decision could be revisited.

Priority – Low

Although the primary concerns that initiated the reference have been dealt with judicially, legislative action would bring greater precision and certainty to the reform. Such legislative action to abolish the rule has been taken by other Australian legislatures including Queensland, Victoria, South Australia, the Northern Territory and the Commonwealth.[14]

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12 [1986] WAR 365, 372
13 Western Australia, *Parliamentary Debates*, Legislative Council, 26th September 1985, 1630 (Mr J M Berinson, Attorney-General).
14 *Evidence Act 1977* (Qld) ss 78–82; *Evidence Act 1958* (Vic) ss 90–91; *Evidence Act 1995* (Cth) ss 91–92; *Evidence Act 1929-1960* (SA) s 34A; *Evidence Act 1939* (NT) s 26A.

Associations Incorporation Act 1895–1969

Terms of Reference

The *Associations Incorporation Act 1895–1969* (WA) ("the Act") was referred to the Committee for general review in 1971.

Background of Reference

The Act provides for the incorporation of associations, the affairs of incorporated associations and connected purposes. The Committee was aware of prevailing criticism about certain aspects of the Act and proposed that it be given the task of reviewing the Act, with the object of considering:

(a) whether any need at all existed for an alteration to the legislation dealing with the incorporation of non-profit associations; and

(b) whether this should be achieved by radically reshaping the legislation or by introducing specific amendments.

Nature and Extent of Consultation

In June 1971 the Committee issued a working paper setting out its provisional views, drawing attention to certain defects shown to exist and suggesting ways to deal with them. Nine commentators responded to the working paper, including legal academics, government departments and relevant associations. The commentators were in broad agreement with the proposals contained within the working paper. The Committee delivered its final report containing its recommendations for reform in March 1972.[1]

Recommendations

Having considered the submissions, the Committee made 22 recommendations to amend the Act, dealing with broad areas of concern including:

- The approval of incorporation of associations including the requirements for approvals and advertising.
- The procedure for cancelling, dissolution and amalgamation of the incorporation of associations.
- The procedure for winding up incorporated associations including the disposal of surplus assets and administrative requirements.
- Allowable activities and powers of an incorporated association including allowable trade and allowing incorporated associations to act as trustees.
- Obligations of incorporated associations including the submission of documents, the requirement to have 'Inc' as part of their name and the requirement to make certain provisions in their rules.
- That the jurisdiction for appeals should be transferred from the Supreme Court to the District Court.

A comprehensive outline of the recommendations may be found at pages 2–9 of the final report.

Legislative or Other Action Undertaken

In 1987 Parliament passed the *Associations Incorporation Act 1987* (WA) ("the new Act"), which adopted the majority of the recommendations of the report. Those that were not implemented were generally minor and included the requirements for verifying documents and some minor administrative requirements.

The new Act did however replace the previously existing jurisdiction of the Supreme Court to hear an appeal against rejecting an application for incorporation, with an appeal to the Minister whose decision on the matter is final. This differed from the Committee's recommendation that the appeal jurisdiction be transferred to the District Court.[2] Despite this difference the new Act appears to have been operating without significant criticism for the past 14 years.

1 Law Reform Committee of Western Australia, *Associations Incorporation Act,* Project No 21 (1972).

2 This matter was debated in Parliament but the provision passed unchanged. See Western Australia, *Parliamentary Debates,* Legislative Assembly, 28 October 1987, 5258 (Mr Mensaros).

22

Innocent Misrepresentation

Terms of Reference

In 1971 the Committee was asked to consider whether there were any alterations desirable in the law relating to innocent misrepresentation and the remedies available for such misrepresentations.

Background of Reference

At common law, the only remedy available to a person induced into entering a contract by an innocent misrepresentation (which was not a term of the contract) was rescission of the contract. Because rescission requires that parties be restored to their pre-contract positions, this remedy may be lost if the contract has been performed. Generally, the plaintiff had no right to damages for any loss suffered as a result of an innocent misrepresentation, although they could obtain a limited form of indemnity.[1]

In 1962, the English Law Commission published a report[2] on the subject of innocent misrepresentation. The recommendations contained in that report were substantially implemented by legislation[3] in the United Kingdom which allowed an award of damages and ensured that the right to rescission was not barred where a contract had been performed. South Australia enacted similar legislation in 1971.[4]

In May 1972 the Committee issued a working paper setting out its provisional views on the issue. The working paper invited comment on whether legislation should be enacted to expand the remedies available for innocent misrepresentation such that:

(a) the fact that a contract had been performed would not of itself be a bar to rescission;

(b) the court would be empowered to award damages in lieu of rescission;

(c) rescission would be available for a misrepresentation which had become a term of the contract;

(d) the equitable remedy of rescission would be available in cases of contracts for the sale of goods; and

(e) a buyer of goods would not be barred from rejecting goods for a misstatement which is a term of the contract until he or she had had reasonable opportunity of examining them.

Nature and Extent of Consultation

The working paper was widely distributed for comment and responses to the paper were received from the Hon John Hale, the Hon Justice Wallace and the Council of the Law Society of Western Australia. The respondents essentially agreed with the views that the Committee expressed in the working paper.

When the Committee was formally reconstituted as a Commission in January 1973, the Commission assumed the conduct of the project and delivered its final report on the subject in October of the same year.[5]

Recommendations

After considering the responses to the working paper and the reform made in other jurisdictions, the Commission recommended that the legal remedies available for an innocent misrepresentation that induced a contract be revised. The Commission outlined three alternative legislative schemes for reform:

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1 In granting rescission the court can order the defendant to indemnify the plaintiff for loss resulting from obligations created by the contract but not for any other loss.
2 Law Commission (UK), *Tenth Report*, Cmnd. 1782 (1962).
3 *Misrepresentations Act 1967* (UK).
4 *Misrepresentations Act 1971* (SA).
5 Law Reform Commission of Western Australia, *Innocent Misrepresentation,* Project No 22 (1973).

- That the available remedies for an innocent misrepresentation that induces a contract be identical to the remedies for a breach of a term of a contract.
- That courts be given a wide discretion to award rescission or damages or both for an innocent misrepresentation, and to choose between the contractual measure of damages and the tortious measure.
- That the court be empowered to award damages (as in tort) or rescission, or both, in the case of an innocent misrepresentation made negligently.

If one of the recommended legislative schemes described above were adopted, the Commission further recommended that:

- The law should not restrict the right of the parties to contract out of any statutory provision. Restrictions on freedom of contract should be made only in legislation specially designed to protect particular classes of persons, such as consumers.
- Equitable remedies should be available in the case of contracts for the sale of goods.

Legislative or Other Action Undertaken

In September 1984, the Attorney-General announced[6] that the Government had decided not to take any action on the recommendations contained in the Commission's report in view of developments in the law[7] since it had been submitted.

6 Mr J M Berinson, Attorney-General, News Statement (5 September 1984).

7 For example the *Trade Practices Act 1974* (Cth) ss 52–53 applies to all forms of misrepresentation by a corporation in trade or commerce and allows a wide range of relief including rescission, damages or both. Corresponding sections in the *Fair Trading Act 1987* (WA) allow similar relief against misrepresentations made by individuals in trade or commerce.

23

Legal Representation of Children

Terms of Reference

In 1971, the Committee was asked to consider in what circumstances the law should provide for the separate representation of children in court proceedings in which their interests are affected, but to which they are not parties.

Background of Reference

The reference arose from problems evident in court proceedings concerning a child's guardianship, custody or adoption, which were drawn to the attention of the Committee by the Chief Justice. It was pointed out that in those proceedings, and also in proceedings taken under the *Fatal Accidents Act 1959* (WA), protection of a child's interests by separate representation was lacking. The Chief Justice contrasted these situations with proceedings where a child is a party and acts through a next friend or a guardian ad litem.

In March 1972, the Committee issued a working paper examining the issue of, and alternatives to, legal representation for children. After considering both the inquisitorial[1] and adversarial[2] approaches to presenting evidence on behalf of a child, the Committee reached the provisional view that the adversarial method was preferable.[3] The Committee suggested that courts should be empowered to order the separate representation of children and that general legislation, rather than amendments to specific legislation, should achieve this. Finally, it was suggested that courts should have the discretion to order costs to any party in the proceedings, any fund the child has an interest in, or the Suitors' Fund.

Nature and Extent of Consultation

The Committee forwarded copies of the working paper to interested parties including the Chief Justice and judges of the Supreme and District Courts; the Crown Law Department; the Child Welfare Department; the Law Society of Western Australia; the Commissioner of Police and the Magistrates' Institute. The Committee received a number of detailed submissions in response to the working paper. All parties agreed in principle with the Committee's preliminary proposals, however, the Crown Solicitor suggested that the Suitors' Fund should only bear costs where there is no appropriate party or fund. The Committee's attention was also directed to welfare reports as a useful source of information for courts in deciding guardianship, custody and adoption cases.

The Committee released its final report on the subject in June 1972.[4]

Recommendations

Following consideration of the responses to the working paper, the Committee endorsed the provisional views in the working paper and recommended:

- That courts be empowered to order the separate representation of children.
- That a statute of general application be enacted empowering a court to order the appointment of a suitable person as guardian ad litem for a child when the court is of the view that the interest of the child is involved.

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1 Where the court has the power to call and examine witnesses.
2 Where the court has the power to appoint a suitable person to act for the child.
3 The Committee referred to the decision of the Full Court of the Supreme Court of Western Australia in *R v Smith; ex parte Mack* [1970] WAR 60 (Jackson CJ, Hale and Burt JJ) where the dangers of the inquisitorial approach were stressed.
4 Law Reform Committee of Western Australia, *Legal Representation of Children*, Project No 23 (1972).

- That where a court wishes the separate representation of a child in relation to only part of the proceedings, it be empowered to limit the functions of the guardian ad litem accordingly.
- That a provision be enacted empowering courts to order the costs of the representation to be paid, where appropriate, by a party to the proceedings or out of any fund in which the child has an interest, or, failing this, out of the Suitors' Fund.
- That the power of the courts to call for a welfare report be retained as a useful adjunct.

A comprehensive outline of recommendations may be found at pages 2–3 of the Committee's final report.

Legislative or Other Action Undertaken

The Committee's recommendations were substantially implemented[5] by the *Legal Representation of Infants Act 1977* (WA). This was complemented by the *Suitors' Fund Act Amendment Act 1977* (WA), which enabled courts to order costs from the Suitors' Fund for the representation of children.

5 The Committee's cost recommendation was not faithfully implemented. Rather, the provisional view of the working paper, that the court should have the discretion to order costs to any party, fund or the Suitors' Fund, was implemented. Further, due to a concern that a court may duplicate guardians where the Director of Child Welfare was already a child's guardian, sub-s 5(5) was introduced to the Legal Representation of Infants Bill 1977 (WA) requiring that an appointment not be made until notice had been given to the Director of the Department of Community Welfare and the Director had had an opportunity to respond.

24

Succession Rights of Adopted Children

Terms of Reference

In 1971 the Committee was asked to consider if it was desirable to alter the law in respect to the succession rights of adopted children.

Background of Reference

At the time of the reference, the law[1] in respect to rights of adopted children upon intestacy differentiated between their rights in respect to the family of their adoptive and natural parents. Specifically, it preserved their full rights of succession in relation to the relatives of their natural parents but acknowledged no such rights in relation to their adoptive parents. This demarcation ran counter to the general social aim of ensuring that adopted children become members of their adopted family in the fullest sense by ensuring that they were treated equally to children born of the marriage. Government agencies, academics and commentators all held the opinion that this legal position was unsatisfactory and legislation was required to rectify the situation. The specific measures to be taken were the subject of various dissenting opinions.

Nature and Extent of Consultation

The Committee issued a working paper in April 1971 stating the Committee's provisional views that the *Adoption of Children Act 1896* (WA) ("the Act") should be amended to provide for the complete assimilation of the legal position of adopted children and those born from the marriage. Comments on the paper were received from the Hon Justice Burt, the Council of the Law Society of Western Australia, the Acting Director of the Child Welfare Department and the Perpetual Executors, Trustees & Agency Company (WA) Ltd. The Committee submitted its final report in July 1971.[2]

Recommendations

The principal recommendation confirmed the tentative view expressed in the working paper; that the Act should be amended to provide for equality in the legal positions of adopted children and children of a marriage. Specifically the Committee recommended that:

- Sections 7 and 8 of the Act be repealed and in their place be enacted provisions corresponding to s 33(1), s 34 and s 37 of the *Adoption of Children Ordinance 1965* (ACT).
- Section 9 of the Act be amended along the lines of s 23(4) and (5) of the *Adoption of Children Ordinance 1965* (ACT) relating to the effect of discharge of an adoption order.
- Section 5(1) (8b) of the Act be amended so as to require the Child Welfare Department's report to include reference to the child's financial prospects.
- Section 102 of the *Property Law Act 1969* (WA) be amended to include adopted children.

Legislative or Other Action Undertaken

The Act was amended by the *Adoption of Children Amendment Act 1971* (WA) which equalised the position of natural and adopted children in respect to succession rights upon intestacy. The *Adoption Act 1994* (WA) later repealed the Act but carried through the reform by the stipulation in s 75 that the relationship between the adoptee and their adoptive parent is to be that of "child" and "parent". Together with legislative changes to the *Property Law Act 1969* (WA), these amendments implemented the Committee's recommendations.

1 *Adoption of Children Act 1896* (WA).
2 Law Reform Committee of Western Australia, *Succession Rights of Adopted Children*, Project No 24 (1971).

Legal Capacity of Minors

Terms of Reference

In 1971, the Committee was asked to consider the recommendations outlined in the New South Wales Law Reform Commission's *Report on Infancy in Relation to Contracts and Property* ("the NSWLRC report") as they relate to the laws of Western Australia, and to make recommendations in relation thereto.

Background of Reference

The NSWLRC report recommended that the age of majority be lowered to 18 years, and that the law applicable to those below that age in respect of contracts and property transactions be codified. As the Western Australian Government had previously announced its intention to lower the age of majority to 18 years, the Committee confined its attention to considering:

(a) the changes to be made in the law in Western Australia to give effect to the Government's intention; and

(b) the desirability of enacting a code governing the legal capacity of persons below the age of 18 years.

The Committee released a working paper in January 1972 that discussed these issues. Following the release of the paper the Committee determined that the issues were discrete and that reform of the law in these areas should proceed separately. The Committee therefore divided the reference into two parts: Part I was confined to issues relating to the lowering of the age of majority to 18 years such as, civic rights and responsibilities, age qualification for entry into certain occupations and terms and conditions of employment. Part II dealt specifically with the law relating to minors' contracts.

Nature and Extent of Consultation

The working paper was widely distributed and submissions were received from a cross-section of society, including judges of the Supreme Court, the Child Welfare Department, the Citizens' Advice Bureau (WA) and other professional groups. Following consideration of the submissions, the Committee published its final report in April 1972.[1]

Recommendations

The Committee supported the Government's policy decision to lower the age of majority from 21 years to 18 years. The Committee further recommended that:

- Legislation should be introduced:
  - (a) giving general legal capacity to persons in the 18 to 21 year age group;
  - (b) lowering to 18 years the minimum age for membership of state Parliament, voting at local body elections, membership of local bodies, taking declarations and witnessing land transfer documents;
  - (c) lowering to 18 years the minimum age for entry into certain occupations and removing any age requirement from the qualifications for entry into other occupations;
  - (d) providing that a person attains a particular age at the commencement of the day of the anniversary of their birth;
  - (e) replacing the word "infant" where it occurs in legislation by the word "minor."
- No change should be made to s 11 of the *Married Persons and Children (Summary Relief) Act 1965* (WA) or to ss 6 or 57(2) of the *Superannuation and Family Benefits Act 1938* (WA).

1 Law Reform Committee of Western Australia, *Legal Capacity of Minors*, Project No 25(I) (1972).

25(I)

Legal Capacity of Minors

The Committee declined to make recommendations relating to the terms and conditions of employment and matters relating to ss 39 and 49 of the *Child Welfare Act 1947* (WA) and s 19(6)(a)–(b) of the *Criminal Code 1913* (WA), which gave special protection to young persons. A comprehensive discussion of the Committee's recommendations may be found at pages 11–12 of its final report.

Legislative or Other Action Undertaken

The *Age of Majority Act 1972* (WA) gave full effect to the Committee's recommendations.[2]

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2 Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 May 1972, 1478 (Mr T D Evans, Attorney-General); Western Australia, *Parliamentary Debates*, Legislative Council 31 May 1972, 1752 (Mr C Court, Leader of the Opposition).

Terms of Reference

In 1971, the Committee was asked to examine the law relating to contracts made by minors. This reference was part of a general reference to review the legal capacity of minors in relation to contracts and property.

Background of Reference

The law in Western Australia governing contracts made by minors (that is, persons under the age of 18) is based on general common law principles developed by the English courts over many years. Under these principles, contracts made by minors are divided into a number of different categories with different consequences attaching to each. For instance contracts for necessary goods and services and beneficial contracts of service are generally binding upon a minor. Other contracts such as those involving the purchase of land or shares are voidable – the minor may repudiate them within a reasonable time of attaining the age of majority. Some contracts, such as those for the sale or purchase of motor vehicles and televisions, are void unless ratified in writing by the minor after attaining the age of majority. Finally, certain contracts are absolutely void – for instance where the minor is too young to understand the nature of the agreement or where the contract is not just non-beneficial, but prejudicial to the minor.

Where contracts are declared void for reason of legal incapacity, certain problems may arise, such as whether the ownership of property passes under an invalid contract, and the extent to which the law permits recovery of money or property transferred, either by or to a minor. On many of these matters, the law remains uncertain.[1] Apart from being uncertain and, in some cases, unnecessarily complex the law relating to minors' contracts was further perceived to be out of touch with modern conditions. For instance, the category of 'necessaries" depended upon the 'rank' and 'station in life' of the minor concerned. This nineteenth century language betrays a legal distinction based on wealth and status that is now widely considered objectionable.[2] Further, because the law is divided into strict categories it is perceived to be unreasonably inflexible such that if a contract does not fall within a category of enforceable contract it cannot be sued upon, even though beneficial to the minor.[3]

When the Committee was formally reconstituted as a Commission in January 1973, the new body assumed the conduct of this reference. The Commission released a working paper for comment in June 1978 but then suspended further work on the project in order to take advantage of the findings of the English Law Commission, which had undertaken a reference on the same topic. The English Law Commission submitted its report in 1984,[4] and its proposals were implemented in England by the *Minors' Contracts Act 1987* (UK).

Nature and Extent of Consultation

Following the release of the English Law Commission report, the project was revived and Mr LL Proksch, Senior Lecturer in Law at the University of Western Australia and former member of the Commission, was engaged as a consultant for the project. Mr Proksch visited the English Law Commission and studied its research and the responses to a survey it had undertaken. He also consulted with Canadian law reform agencies working in the same area. Mr Proksch's report, adopted by the Commission, drew upon the experience of these law and other reform agencies and was submitted in May 1988.[5]

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1 It is important to note that these rules were mainly developed by the common law courts and equitable doctrines such as undue influence or unconscionability (application of which lead to the contract being declared voidable and subject to rescission) have been little used by courts in the protection of minors. For a fuller account of the law see Law Reform Commission of Western Australia, *Legal Capacity of Minors,* Working Paper (No 2), Project No 25(II) (1978) ch 1.

2 Law Reform Commission of Western Australia, *Legal Capacity of Minors,* Project No 25(II) (1988) 31.

3 Ibid 33.

4 Law Commission (UK), *Minor's Contracts*, Report No 134 (1984).

5 Law Reform Commission of Western Australia, *Minors' Contracts,* Project No 25(II) (1988).

◀ Minors' Contracts

Recommendations

The Commission acknowledged the primary objective of the law of minors' contracts to be the protection of minors. However, rather than retaining the approach of the existing law, which seeks to place disincentives in the path of other parties intending to contract with minors, the Commission preferred to accept that minors will make contracts and that the law should provide relief for minors to the extent that protection is required. In summary, the Commission recommended that:

- Any contract to which a minor is a party should be enforceable both by and against the minor.
- General contractual principles found in the existing law, and particularly the equitable doctrines of undue influence and unconscionability, should continue to apply to contracts made with minors, in the same way as they do to contracts made between adults.
- In any action on or involving a contract made with a minor (including an action by the minor to seek relief from a contract, whether fully executed or not) the court should have the power, at the instance of the minor, to grant relief where it is satisfied that the contract is prejudicial to the minor's interests.
- The object of the court in granting relief should be to do what is fair, just and reasonable in all the circumstances of the case. Relief might take the form of deleting or altering terms of the contract, rescinding the contract, restoring property acquired under the contract, ordering repayment of money paid pursuant to the contract, or ordering the payment of compensation.

A comprehensive discussion of the Commission's recommendations may be found in chapters five and six of its final report.

Legislative or Other Action Undertaken

To date there has been no legislative action to reform the law relating to minors' contracts.

Currency of Recommendations

The Commission's recommendations remain current. Minors are significant consumers of goods and services. Particular markets such as entertainment, leisure and new technology specifically target young people.[6] The existing law does not reflect that some young people below the age of majority are in full-time employment and live independently. Such people should have greater contractual capacity, including the ability to enter credit contracts.

Action Required

The appropriate action would be to introduce legislation that reverses the general principle that a contract is not binding on a minor. This could be based on the law in comparable jurisdictions such as New South Wales.[7] The Australian Law Reform Commission, in its report *Seen and Heard: Priority for Children in the Legal Process,* considered that legislation based on the New South Wales model should be adopted nationally for young people aged 16 and 17.[8]

Priority – Medium–High

The existing law affecting minors' contracts does not reflect social reality. It is important that young people under the age of majority, particularly those who live independently, be able to enter valid contracts for essential services.

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6 This includes on-line shopping and access to a variety of web-based services and mobile telephone services. See Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84, (1997) Recommendation 52.

7 *Minors (Property and Contracts) Act 1970* (NSW). The Act provides that where a minor participates in a civil act (including a contract) for his or her own benefit, that act is presumptively binding on the child provided he or she has the necessary understanding to participate in it.

8 See above n 6, ch 11.

Review of Administrative Decisions: Appeals

Terms of Reference

In 1971 the Committee was asked to recommend the principles and procedures that should apply in Western Australia in relation to the review of administrative decisions both by way of appeal and by way of the supervisory jurisdiction of the Supreme Court.

Background of Reference

The conduct of this reference was taken over by the Commission when it was formally established to replace the Committee in January 1973. The Commission decided to deal with the matters raised by the terms of reference in three parts. Part I deals with the principles and procedures that should apply in relation to existing administrative appeals and Part II deals with review by way of the supervisory jurisdiction of the Supreme Court. Part III, now withdrawn, was to involve a consideration of the principles that should govern the question whether a right of appeal should be created from various decisions not presently subject to appeal.

The project initially arose out of a submission to government by the Law Society of Western Australia. The Society was concerned about the lack of coordination in the existing appellate arrangements in the administrative law area. There are a number of important generic reasons for reform of this kind: the rise in the volume of litigation; pressure in the funding of courts in comparison to the with the volume of work done; the need for courts to show that they provide value for money in servicing the legal needs of the public; the heightened scrutiny of courts as public institutions delivering measurable incomes within the framework of the legal system; and pressure for greater accountability and transparency.[1]

In November 1978 the Commission published a survey of those Western Australian statutes in force as at 31 December 1977 that made provision for appeal from an administrative decision. The survey was accompanied by a working paper, which discussed various methods of rationalising the existing law. At the time of the survey there were approximately 257 administrative decisions that were subject to a statutory right of appeal to more than 43 appellate bodies. The working paper noted that the existing division of appellate review of statutory boards and tribunals has no logical consistency. The proliferation of boards and tribunals has occurred with a lack of uniformity and a confusing variety of both internal operational procedures and appeal rights to the courts.[2] It was also noted that the nature of an appeal by way of re-hearing from a board or tribunal, as opposed to an appeal in the "strict sense",[3] is not uniform and depends upon the legislative context in which it arises. In each case in which a right of appeal is created by a statute, the ambit of the appeal and the powers of the appellate body depend on the terms of that statute.

Another defect with the existing appellate arrangements identified by the Commission was that in many cases the legislation did not provide for questions of law to be determined ultimately by the Supreme Court. There was also concern expressed about the procedures for appeals to the various appellate bodies, varying widely and that there was no procedure at all for appeals to the Local Court. Order 65 of the *Rules of the Supreme Court 1971* (WA) provides a code of procedure for administrative appeals to the Supreme and District Courts from certain statutory boards and tribunals, but it does not apply to other appellate bodies and recourse must be had to the Act creating the right of appeal or the regulations made under that Act. If an Act in which a right of appeal to the Local Court is created does not provide for the

1 See generally, B Opeskin, *Appellate Courts and the Management of Appeals in Australia* (2001).
2 See Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia,* Project No 92 (1997) ch 32, which deals with appeals generally.
3 An appeal in the "strict sense" refers to an appeal to a court that simply determines whether the decision in question was right or wrong on the evidence and the law at the time.

procedure to be followed, it is necessary for the Court to contrive its own procedure in that particular case.

Nature and Extent of Consultation

The working paper was distributed widely and submissions were received from numerous individuals and bodies including: the City of Melville; the Commissioner for Corporate Affairs; Department for Community Welfare; the Law Society of Western Australia; the Local Government Association of Western Australia; the Main Roads Department; D McColl; the Commissioner of Public Health and Medical Services; Dr GDS Taylor; the Town of Albany; JAD Treloar; and the Hon RL Young, MLA, Minister for Health.

The Commission also discussed certain matters raised by the working paper with Professor HWR Wade, Master of Gonville and Caius College (Cambridge), and Professor DC Pearce of the Australian National University. The Commission submitted its final report to the Attorney-General in January 1982.[4]

Recommendations

The Commission made 13 recommendations that may be conveniently summarised as follows:

- An administrative appeal system should be developed which should consist of the Full Court of the Supreme Court, an administrative law division of the Supreme Court and of the Local Court and a limited number of specialist appellate bodies. Where there is an appeal in the first instance to the Administrative Law Division of the Local Court or to a specialist appellate tribunal there should be a further appeal on points of law to the Administrative Law Division of the Supreme Court. Appeals to the Full Court should be restricted to appeals on questions of law.
- Provision should be made for the appointment of lay members of the Administrative Law Divisions by the Chief Justice or the Chief Stipendiary Magistrate in appropriate cases.
- The appellate bodies should have power to exercise all of the powers and discretions conferred on the original decision-maker and should have power to: affirm the decision; vary the decision, or; set aside the decision and substitute a decision of its own; or remit the matter for reconsideration with or without direction or recommendations from the appellate body. A judge of the Administrative Law Division of the Supreme Court should have the power, either on his or her own motion or on application of a party to an appeal, after giving parties the opportunity to be heard in chambers, to remit a matter from the Administrative Law Division of the Local Court or vice versa.
- Each party should bear its own costs, subject to any special reasons for the appellate body to order one party to pay the costs of the other.
- A code of procedure for the appellate bodies should be developed. The Commission suggested that the appellate bodies should not be bound by the rules of evidence, there should be provision made for preliminary conferences in appropriate cases, and a person entitled to appeal against a decision should be able to require the decision-maker to furnish written reasons, which include findings of material questions of fact, with reference to the evidence.
- An ongoing review should be established to review rights of administrative appeal and appeal processes.

A comprehensive list of recommendations may be found in chapter eight of the Commission's final report. The Commission's recommendations as to the rights of appeal initially to be conferred upon the

4 Law Reform Commission of Western Australia, *Review of Administrative Decisions: Appeals*, Project No 26(I) (1982).

Administrative Law Division of the Supreme Court, the Administrative Law Division of the Local Court, and specialist appellate bodies are listed in appendices II and IV of the final report respectively.

Legislative or Other Action Undertaken

There has been no legislative action to date; however, the *Report of the Royal Commission into Commercial Activities of Government and Other Matters Part II* (1992) para 3.4.8 recommended that the reforms contained in the Commission's final report should be implemented forthwith, subject only to the observations in para 3.5.2 about the establishment of an Administrative Appeals Tribunal.[5]

Currency of Recommendations

The recommendations should prudently be considered in light of the more recent recommendations made by the Commission in its *Review of the Criminal and Civil Justice System in Western Australia* ("Project No 92"). In that report the Commission made 26 recommendations that were directed to the review of the structure of boards and tribunals and the administrative appeals process. The key recommendations of Project No 92 as they relate to this reference are that:[6]

- A Western Australian Civil and Administrative Tribunal (WACAT) should be established to amalgamate the adjudicative functions of existing boards and tribunals, except in industrial relations and Workcover areas.
- The WACAT jurisdiction should extend beyond administrative review or appeals, to other adjudicative functions currently determined by tribunals, including the Small Claims Tribunal, the Residential Tenancies Tribunal and the Small Disputes Division of the Local Court.
- Administrative decisions of boards and tribunals should be subject to review by the WACAT rather than a court.
- An appeal to the Supreme Court from an administrative review or appeal determination by the WACAT should be established only upon grounds of questions of law; the complexity of the case; or when in the public interest.
- Jurisdiction should be conferred on the WACAT by legislation relating to the subject matter of the decision or complaint where appropriate.

These recommendations have prompted a further reference from the Attorney-General to the Commission. This reference, *Judicial Review of Administrative Decisions* ("Project No 95") is aimed at comprehensively reforming the law and procedures pertaining to the review of administrative decisions on their merits. The Government has further appointed a Civil and Administrative Review Tribunal Taskforce to assist and advise the Government and liaise with the Commission on this subject. The Commission's final report on Project 95 is expected to be submitted early in 2002. The Commission's recommendations in Project No 26(I) should therefore properly be regarded as subject to the more recent recommendations of the Commission in Project No 92 and its imminent and more detailed recommendations in Project No 95.

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5 The failure to implement the report was also criticised by the Commission on Government in its *Report No 4* (1996) para 5.2. See also Western Australia, *Parliamentary Debates*, Legislative Assembly 18 November 1997, 8004 (Dr G Gallop); Western Australia, *Parliamentary Debates*, Legislative Assembly, 23 December 1998, 5794 (Mr E Ripper representing the Attorney-General and Mr K Prince, Minister for Police).

6 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999) ch 33.

Judicial Review of Administrative Decisions

Terms of Reference

In 1971 the Committee was asked to recommend the principles and procedures which should apply in Western Australia in relation to the review of administrative decisions both by way of appeal and by way of the supervisory jurisdiction of the Supreme Court.

Background of Reference

The conduct of this reference was taken over by the Commission when it was formally established to replace the Committee in January 1973. The reference was divided into three parts, described in Project No 26(I) above. This Part deals with review of administrative action by way of the supervisory jurisdiction of the Supreme Court.

The twin pillars of judicial review of administrative action in Australia are, firstly, that the courts exercising powers of judicial review must not intrude into the "merits" of administrative decision-making or of executive policy-making and secondly, that it is for the courts and not the executive to interpret and apply the law, including the statutes governing the power of the executive.[1] Judicial review of administrative decisions is firstly concerned with ensuring that duties imposed on decision-makers by Parliament are performed. A decision-maker who fails to perform such a duty can be compelled to perform it by the Supreme Court. Secondly, judicial review is concerned with ensuring that a decision made was within the power of the decision-maker.

During 1979 a Registrar of the Supreme Court was briefed to complete a study of the law and procedure in Western Australia relating to the supervisory jurisdiction of the Supreme Court. This study was used to prepare a working paper, issued in June 1981, which discussed the desirability of codifying the grounds of judicial review of administrative action and certain procedural changes.

Nature and Extent of Consultation

The working paper was widely distributed for comment and consultations were undertaken with Australian and English experts on the subject. These included a number of judicial officers of the Supreme Court of Western Australia including the Chief Justice, the Hon Justice Woolf of the English Court of Appeals Queen's Bench Division, the Law Society of Western Australia, the Crown Solicitor's Offices of Western Australia and New South Wales, eminent academics[2] and senior members of the profession.[3]

After considering the views of those involved in the consultation process the Commission decided to narrow the scope of its report to a reform of the procedures for judicial review and a requirement, subject to exceptions, that administrative decision-makers give reasons for decisions. The principal reason for taking this approach was that there were reforms in the federal sphere being considered by the Administrative Review Council. The Commission delivered its final report in January 1986.[4]

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1 Justice R Sackville, 'The Limits of Judicial Review of Executive Action – Some Comparisons Between Australia and the United States' (2000) 28(2) *Federal Law Review* 315, 315–316.

2 Professor E Campbell, Monash University; Professor JM Evans, Osgoode Hall Law School (Canada); Professor JPWB McAuslan, University of Warwick (UK); Professor DC Pearce, Australian National University; Associate Professor LA Stein, University of Western Australia; Professor HWR Wade QC and Professor DGT Williams, University of Cambridge (UK).

3 Such as Mr AM Gleeson QC (Australia) and Mr RCH Briggs, Secretary of Justice (England).

4 Law Reform Commission of Western Australia, *Judicial Review of Administrative Decisions,* Project No 26(II) (1986).

Recommendations

The Commission recommended that:

- The existing procedures for obtaining certiorari, prohibition, mandamus and quo warranto should be replaced with a procedure whereby relief in the nature of these remedies would be obtained by an order in an ordinary civil action, commenced either by a writ of summons or an originating motion. The power of the court to grant this relief should continue to be discretionary and the court should have power to determine during the proceedings whether they should continue on the basis of affidavits or pleadings.
- Proceedings for relief in the nature of certiorari, prohibition or mandamus should generally be heard by a single judge of the Supreme Court, unless a matter is referred to the Full Court for cause shown. There should be a right of appeal from a single judge to the Full Court of the Supreme Court.
- A person seeking relief in the nature of certiorari, prohibition or mandamus should be required to commence proceedings promptly and in any event within six months from the date when the grounds for the first action arose, but the court should be empowered to extend that period if there is good reason for doing so.
- The court should be conferred additional powers, such as:
  (a) the power to dismiss proceedings on the ground that no matter of substantial importance is involved;
  (b) the power to give directions or make orders as necessary for the convenient and expeditious determination of the proceedings;
  (c) the power to make interlocutory orders for a stay of proceedings or to preserve the status quo; and
  (d) the power, where a decision is quashed or set aside, to make an order referring the matter to the person who made the decision for further consideration, subject to such directions as the court thinks fit.
- Any person with a sufficient interest in a decision made in the exercise of a public function should be entitled to obtain a statement in writing from the decision-maker setting out: the findings on material questions of fact; referring to the evidence or other material on which those findings were based; and giving reasons for the decision. The reasons should be deemed to form part of the decision and be incorporated in the record of the decision-maker.

A comprehensive discussion of the Commission's recommendations may be found in chapters five and six of the final report.

Legislative or Other Action Undertaken

There has been no legislative action to date.

Currency of Recommendations

The recommendations remain current; however, the Commission has recently been given a further reference, *Judicial Review of Administrative Decisions* ("Project No 95") which is aimed at comprehensively reforming the law and procedures pertaining to the judicial review of administrative decisions on their merits. In undertaking this reference, the Attorney-General has also directed the Commission that it have regard to the extent

to which it is desirable that the Western Australian reforms reflect the law and procedures of the judicial review of Commonwealth administrative decisions.

At the federal level, the Administrative Review Council undertook a review of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) in 1989[5] and made 26 recommendations to the federal government with respect to entitlement to reasons in 1991.[6] There has, however, been no formal government response to date.

Action Required

The action required to effectively implement the Commission's recommendations in Project No 26(II) is detailed in the report itself. Appendix IV of the report contains suggested provisions to be included in the *Supreme Court Act 1935* (WA) which are based on sections of the New South Wales and United Kingdom Supreme Court Acts[7] and provisions of New Zealand legislation.[8] Appendix V contains suggested amendments to the *Rules of the Supreme Court*, again drawing upon provisions of other jurisdictions.

There is no common law obligation upon an administrative decision-maker to provide reasons for an adverse administrative decision.[9] Appendix VI draws upon existing statutory provisions from other jurisdictions and suggests comprehensive provisions for an Administrative Decisions (Reasons) Bill.[10]

Priority – High

The *Report of the Royal Commission into Commercial Activities of Government and Other Matters Part II* (1992) recommended that an Administrative Decisions (Reasons) Bill be drafted and enacted as a matter of urgency[11] and that the other recommendations in Project No 26(II) be implemented forthwith. However, the terms of reference in Project No 95 – which are directed to specifically address both the judicial review of administrative decisions and the provision of reasons – appear to revisit the issues contained in this report. For that reason it may be prudent to await the outcome of the Commission's investigation expected in early 2002, before pursuing implementation.

5 Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989).
6 Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: Statements of Reasons for Decisions*, Report No 33 (1991).
7 *Supreme Court Act 1970* (NSW) ss 12 (proceedings in the nature of quo warranto are abolished), 69 (mandamus, certiorari or prohibition) and 70 (quo warranto and ouster from office), *Supreme Court Act 1981* (UK) s 31(5) (additional power where relief in the nature of certiorari granted). Note that although in New South Wales the writ of quo warranto has been abolished, equivalent remedies are available; see also Law Commission (UK), *Judicial Review and Statutory Appeals*, Report No 226 (1994).
8 *Judicature Amendment Act 1972* (NZ) s 8 (interlocutory orders).
9 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.
10 The proposed enactment draws upon the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 13 and 13A, and the *Tribunals and Inquiries Act 1971* (UK). Note that the latter Act has been replaced by the *Tribunals and Inquiries Act 1992* (UK) with the relevant provision being s 10; see also the *Administrative Decisions (Judicial Review) Act 1989* (ACT) s 13; *Administrative Decisions Tribunal Act 1997* (NSW), ss 3(e), 49–52; *Administrative Law Act 1978* (Vic) s 8; Administrative Review Council, above n 6.
11 *Report of the Royal Commission into Commercial Activities of Government and Other Matters Part II* (1992) para 2.210.

New Rights of Appeal

Terms of Reference

In 1971 the Committee was asked to recommend the principles and procedures which should apply in Western Australia in relation to the review of administrative decisions both by way of appeal and by way of the supervisory jurisdiction of the Supreme Court.

Background of Reference

The conduct of this reference was taken over by the Commission when it was formally established to replace the Committee in January 1973. The reference was divided into parts, described in Project No 26(I) above. Part I dealt with the principles and procedures that should apply in relation to existing administrative appeals and Part II dealt with review by way of the supervisory jurisdiction of the Supreme Court.

In its 1979–1980 annual report, the Commission stated that it did not regard the two parts as covering all the matters raised by the terms of reference, and indicated that it may consider, as a third part of the project, whether or not there were any administrative decisions that were not subject to appeal, but that should be made so. This intention was reiterated in subsequent annual reports but in each case it was indicated that it was not a project to which urgent priority was to be given. In its annual report for 1985–1986 (the year in which the final report for Project 26 (II) was submitted to the Attorney-General), Project 26 (III) was listed as a deferred project.[1]

Reference Withdrawn

The reference was withdrawn in 1986.[2] The Commission had submitted its reports on the other parts of the project and the work that it had planned to do on the criteria governing the creation of new rights of appeal no longer appeared justified.

1 Law Reform Commission of Western Australia, *Annual Report 1985–1986*, app III.
2 Law Reform Commission of Western Australia, *Annual Report 1986–1987*, para 3.7.

27(I)

Admissibility in Evidence of Computer Records and Other Documentary

Terms of Reference

In 1971, the Committee was asked to consider and report on what provision, if any, should be made for the admissibility in court proceedings of records produced by computers.[1] It was also asked to consider whether ss 79B–79E of the *Evidence Act 1906* (WA), which relate to the admissibility of documentary statements, should be revised in view of reforms made in other jurisdictions.

Background of Reference

At common law, the hearsay rule permits only statements made by persons actually testifying in court as to events within their personal knowledge, to be admissible in court proceedings as evidence of the facts asserted. Although there are a number of common law and statutory exceptions to this rule, the common law exceptions would not normally cover computer records and there was doubt whether the statutory exceptions were sufficiently wide to ensure their admissibility.

The Committee was asked to consider the reference in light of the recommendations of the Victorian Chief Justice's Law Reform Committee concerning the admissibility in court proceedings of records produced by computers, and related matters.[2] The Commission took over the reference from the Committee upon its inception in January 1973.[3]

Nature and Extent of Consultation

In May 1978, the Commission issued a working paper to inform the public of the issues involved in the project and to elicit relevant comment. The Commission received comments on the working paper from the Associated Banks in Western Australia, the Bureau of Consumer Affairs the Insurance Council of Australia and the Law Society of Western Australia.

Commission staff engaged in discussion with a number of suppliers and users of computers in order to gain an understanding of the operation and general applicability of computers. These discussions also cast light upon the extent to which computers were being used in Western Australia to record, store, process and communicate information. After extensive consultation and review of the law in other jurisdictions, the Commission submitted its report to the Attorney-General on 17 July 1980.[4]

Recommendations

It was the Commission's opinion that the existing law should be clarified and brought into accord with modern conditions by, amongst other things, providing a wide definition of "document". In summary, the Commission recommended that:

- In civil and criminal proceedings, a documentary statement should be admissible if it was made by, or directly or indirectly reproduces, or is derived from statements made by a person who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with by the statement. In a case where the statement is not admissible in evidence unless made by an expert on the subject of the statement, it should be shown that the maker is such an expert.
- Where a statement is made by or reproduces or is derived from a statement made by a person, the person should be called as a witness unless:
  (a) he or she is dead;
  (b) he or she is unfit by reason of physical or mental condition to attend or testify as a witness;

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1 Research on this project assisted the Commission in completing its report on privacy. See Law Reform Commission of Western Australia, *Privacy*, Project No 65(II) (1990). Part I of this project was withdrawn in 1986. Part II considered the confidentiality of medical records and medical research.

2 *Evidence (Documents) Act 1971* (Vic).

3 The Law Reform Committee of Western Australia was formally reconstituted as the Law Reform Commission of Western Australia on 19 January 1973.

4 Law Reform Commission of Western Australia, *Admissibility in Evidence of Computer Records and Other Documentary Statements*, Project No 27(I) (1980).

(c) he or she is out of the state and it is not reasonably practicable to secure his or her attendance;
(d) all reasonable efforts to identify or find him or her have been made without success;
(e) no party to the proceedings who would have the right to cross-examine the person requires him or her to be called as a witness;
(f) having regard to the time which has elapsed since he or she made the statement and to all the circumstances he or she cannot reasonably be expected to have any recollection of the matters dealt with in the statement;
(g) having regard to all the circumstances of the case, undue delay, inconvenience or expense would have been caused by calling him or her as a witness; or
(h) he or she is compellable to testify but refuses to be sworn.

- In civil and criminal proceedings, a documentary statement should be admissible if it directly or indirectly reproduces or is derived from information from one or more devices designed and used for the purpose of recording, measuring, counting or identifying information, not being information based on a statement made by any person.
- Provision should be made for the following safeguard and ancillary provisions:
  (a) weight to be attached to the evidence;
  (b) credibility of the person responsible for the statement;
  (c) corroborative evidence;
  (d) discretion to exclude a statement;
  (e) statements made or recorded for the purpose of or in contemplation of criminal proceedings;
  (f) withholding documents from a jury;
  (g) inferences;
  (h) production of documents in court; and
  (i) production of a medical certificate.
- Express provision should be made for the admissibility of evidence of the absence of a record or entry. For example, a periodic rent payment would be admissible to prove that a particular event of that description did not happen.
- Provisions relating to bankers' books be amended so as to make clear that they are merely a means of facilitating the production in court of copies of bankers' books.
- The definition of "bankers' books" should be amended to ensure that modern methods of recording information by banks, including computers, are not excluded from the provisions relating to bankers' books.
- As a mere visual inspection of computer tapes, disks or cards would be useless, the Commission recommended that the rules of court should make provision for the inspection of any such document by a print-out in a legible form.

A comprehensive record of the Commission's recommendations may be found at pages 15–36 and in Appendix II of its final report .

Legislative or Other Action Undertaken

In July 1985, the Attorney-General announced that the government had approved the drafting of legislation to address the recommendations made in this report.[5] In 1987, the *Evidence Amendment Act 1987* (WA) was enacted to implement the Commission's recommendations.[6]

5 JM Berinson, Attorney-General (WA), Media Statement (11 July 1985).
6 Implementation of the Commission's recommendations was discussed in the second reading speech, see Western Australia, *Parliamentary Debates*, Legislative Assembly, 16 September 1987, 3724 (Mr Pierce, Leader of the House).

27(II)

Admissibility in Evidence of Reproductions

Terms of Reference

In 1971, the Committee was asked to consider and report on whether and in what circumstances "reproductions" (such as photocopies and microfilm) of existing documents should be admitted into evidence, and the methods by which reproductions can be produced. This reference required a review of the provisions of the *Evidence Act 1906* (WA) ("the Act") governing the admissibility in evidence of reproductions.

Background of Reference

Where documentary evidence is admissible it is usually necessary to tender the original document in evidence. At common law, a copy of a document is generally not admissible unless the original is proved to have been lost or destroyed. However, a copy of a document may be tendered under one of three exceptions to the Act.[1]

In 1980, the Australian Law Reform Commission (ALRC) was in the process of carrying out a general review of the law of evidence in federal courts and territories, including a review of the law relating to the admissibility of reproductions. The Commission[2] and the ALRC agreed to cooperate and exchange information about reproductions on an informal basis. As part of this process, the ALRC sent the Commission a series of draft papers dealing with the admissibility of reproductions and sought its comment. In 1982, the Commission received the ALRC's *Secondary Evidence of Documents*[3] research paper which dealt with the question of admissibility of reproductions. The Commission evaluated the implications raised by the research paper in light of its recommendations in Project No 27(I). The Commission also met with representatives of a company that marketed reproduction equipment to discuss microfilming techniques and proposals for reform.

Reference Withdrawn

As the ALRC had received a comprehensive reference on evidence in federal and territory courts,[4] the Commission decided that further work on this project would be an unnecessary duplication. The reference was withdrawn in 1983. The Commission undertook to examine this aspect of the ALRC's final report when it was submitted.[5]

1 *Evidence Act 1906* (WA) ss 73B–73D.
2 The Committee was formally reconstituted as a Commission on 19 January 1973.
3 Australian Law Reform Commission, *Secondary Evidence of Documents*, Research Paper No 4 (1982).
4 See Australian Law Reform Commission, *Evidence*, Report No 38 (1987).
5 For comments relating to the Commission's consideration of ALRC Report No 38, see Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System*, Project No 92 (1999) paras 20.13–20.15, 35.1–35.3, 35.11–35.12.

Official Attestation of Forms and Documents

Terms of Reference

In 1972, the Committee was given a general reference to report on the law relating to the formality of oaths, declarations and the attestation of documents.

Background of Reference

The reference originated as a result of several long-standing concerns:

(a) the vast number of minor and unimportant documents that required formal witnessing by persons of special status;

(b) the lack of qualified witnesses available in Western Australia to witness such documents; and

(c) the large number of applications received from persons seeking to be appointed as Commissioners for Declarations for the purpose of witnessing such documents.

In 1973, the Commission took over the reference as an incomplete project from the previously existing Committee.[1] By this stage a great deal of research toward a preliminary working paper had been performed.

During a national conference of law reform agencies in 1975, the area of law covered by this reference was designated as being a suitable subject for uniform law reform across all Australian jurisdictions. The Conference resolved that the Commission, and its counterpart in Queensland should work together to recommend uniform legislation and prepare draft legislation.[2] The Commission revised its terms of reference to reflect the resolution of the Conference. As a result of the work already done, the Commission considered it convenient to divide the revised reference into two parts: Part I dealing with the official attestation of forms and documents and Part II addressing the formalities of oaths. The Commission released two working papers on the subject, the first in February 1973 addressing the original terms of reference and another in April 1977 which dealt with the revised terms of reference.

Nature and Extent of Consultation

Given the nature of the reference, consultation focused almost exclusively on government departments, institutions and professional associations. The preliminary working paper was forwarded for comment to 45 government departments and instrumentalities. The majority of submissions received in response to the paper supported the proposal for the creation of an unattested declaration.[3] The second working paper had a slightly larger consultation base and was forwarded to a number of government departments, professional associations, judicial officers and academics.

Although the terms of reference provided for a joint project, only limited consultation with the Queensland Law Reform Commission (QLRC) occurred. In 1977 the QLRC announced that, due to priorities and resource shortages, its parallel project would be delayed indefinitely.[4] The Commission delivered its final report in November 1978.[5]

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1 The Law Reform Committee of Western Australia was formally reconstituted as a Commission on 19 January 1973.

2 *Minutes of the Second Conference of the Australian Law Reform Agencies*, (Second Conference of the Australian Law Reform Agencies, Sydney 2–4 April 1975) 7.

3 Law Reform Commission of Western Australia, *Official Attestation of Forms and Documents*, Working Paper, Project 28(I) (1977) app III.

4 *Record of the Fourth Conference of the Australian Law Reform Agencies*, (Fourth Conference of the Australian Law Reform Agencies, Sydney, 1 July 1977) 34.

5 Law Reform Commission of Western Australia, *Official Attestation of Forms and Documents*, Project No 28(I) (1978).

Official Attestation of Forms and Documents

Recommendations

The Commission divided its recommendations into two categories. In respect of the first category, pertaining to statutory declarations, the Commission made the following recommendations:

- That provision be made for an unattested statutory declaration.
- That a recommended form be prescribed.
- That there should be no restriction on the range of circumstances in which an unattested statutory declaration could be made.
- That provision be made for an offence of making a statement in an unattested statutory declaration which is knowingly false in a material matter.
- That s 106 of the *Evidence Act 1906* (WA) be repealed.
- That s 27(2) of the *Oaths Act* (SA) be adopted in Western Australia.
- That s 171 of the *Criminal Code 1913* (WA) be repealed.
- That a declaration be valid only if signed by means of a handwritten signature and not by means of a rubber stamp or a facsimile.
- That an unattested statutory declaration be provided for in the *Declarations and Attestations Act 1913* (WA).
- That uniform legislation permitting the general use throughout Australia of an unattested statutory declaration be enacted.

The second category dealt with the signing of affidavits by the affixation of a rubber stamp. The Commission considered that both deponents of affidavits and Commissioners before whom an affidavit may be taken, should be required to affix a handwritten signature to the document. The affixation of a rubber stamp or facsimile in place of a handwritten signature was considered inappropriate.

Legislative or Other Action Undertaken

There has been no legislative action to date to implement the Commission's recommendations regarding changing the law to allow unattested statutory declarations. However, in 1987, the range of qualified witnesses under the *Declarations and Attestations Act 1913* (WA) was increased by amendment to allow certain individuals such as town clerks, police officers, university academics, pharmacists and legal practitioners to automatically qualify to witness documents without prior registration. This addressed some of the problems that motivated the original reference such as the lack of sufficient qualified witnesses and the backlog of applications for appointment of Commissioners for Declarations.[6]

Currency of Recommendations

Although the Commission's recommendations to provide for unattested declarations remain current, the necessity of such change has been questioned. In March 1983, the Standing Committee of Attorneys-General decided not to proceed with the Commission's proposals to allow unattested statutory declarations as a basis for a national uniform law. The Standing Committee was of the view that 'the benefits that flow from attestation outweigh the occasional practical inconvenience that sometimes results from a person having to find an attesting witness'.[7] The proposals were also considered by the Western Australian Parliament in 1987 but were defeated on the basis that the requirement for attestation by designated

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6 Western Australia, *Parliamentary Debates,* Legislative Assembly, 3 June 1987, 1795 (Mr Mensaros, Member for Floreat).
7 Law Reform Commission of Queensland, *A Bill to Replace the Oaths Act 1867-1981*, Working Paper No 31 (1988) 54.

witnesses reinforced the importance of declaratory documents.[8] This conclusion was repeated by the QLRC which, in its 1988 working paper on the subject, recommended that current practices requiring attestation of statutory declarations be retained.[9]

Action Required

The Commission's recommendations may be substantially implemented in Western Australia by amendment to the *Declarations and Attestation Act 1913* (WA) to provide for unattested statutory declarations.

Priority – Low

The 1987 amendments to the *Declarations and Attestation Act 1913* (WA) to allow for an increased range of automatically qualified witnesses, appear to have resolved many of the problems that initially prompted the reference. Except for the Northern Territory, no other Australian jurisdiction has passed amendments to allow for unattested statutory declarations.

8 Western Australia, *Parliamentary Debates*, Legislative Council, 1 April 1987, 65 (Mr J M Berinson, Attorney-General).
9 Law Reform Commission of Queensland, above n 7.

28(II)

Formalities of Oaths, Declarations and Attestation of Documents

Terms of Reference

In 1972, the Committee was given a general reference to report on the law relating to the formality of oaths, declarations and the attestation of documents.

Background of Reference

In 1973, the Commission adopted the reference as an incomplete project from its predecessor. By this stage a great deal of research on the subject of attestation of documents by way of statutory declaration had been performed. The Commission later decided to divide the reference into two distinct parts with formalities of oaths and attestation other than by way of statutory declaration being the subject of Part II. Both parts were intended to address reform of the law with a view to the development of uniform provisions that could be adopted as a model for the Commonwealth and the states.

Reference withdrawn

Following delivery of the Commission's final report on Part I of the reference, the Standing Committee of Attorneys-General decided not to proceed with the recommendations made for uniform law. As it seemed unlikely that uniform legislation in this area could be agreed upon, Part II of the reference was subsequently withdrawn.[2]

1 The Law Reform Committee of Western Australia was formally reconstituted as a Commission on 19 January 1973.
2 Law Reform Commission of Western Australia, *Annual Report 1982–1983*, 13.

Special Constables

Terms of Reference

In 1972 the Committee was asked to consider and report on the law relating to the appointment of special constables and on the extent of their powers.

Background of Reference

The reference arose partly as a result of the case *De Vaney v Moore*[1] which raised issues about the circumstances in which special constables may be appointed.[2] At the time of the reference, special constables in Western Australia could be appointed under five separate pieces of legislation.[3] However, the report focused primarily on appointments made under the *Police Act 1892* (WA), under which a special constable had identical powers to those of a regular police constable.[4] In addition, a special constable had the privileged position of being protected against liability in tort actions except where there was direct proof of corruption or malice.

When the Committee was formally reconstituted as a Commission in January 1973 it took over the conduct of the project. The Commission issued a working paper in June 1974, in which it found that almost all special constables had more legal power than was reasonably necessary to fulfill the purposes of their appointment while having little or no training in law enforcement.

Nature and Extent of Consultation

The working paper was widely distributed for comment and responses were received from a diverse range of organisations and individuals. Those who commented on the working paper included: the Police Departments of Australian Capital Territory, New South Wales, South Australia, Victoria, Western Australia and New Zealand; the Citizens Advice Bureau of Western Australia; the Civil Defence & Emergency Service of Western Australia; the Fremantle Port Authority; the Institute of Legal Executives; the Law Society of Western Australia; the Retail Traders' Association of Western Australia; the Royal Society for the Protection of Cruelty to Animals (WA); a justice of the peace; a private security company; and six individuals.

The final report containing the Commission's recommendations was delivered in March 1975.[5]

Recommendations

After extensive consultation and consideration of the issues, the Commission recommended:

- That the power to appoint special constables be retained, but be exercisable only in civil emergencies, with regard to police of other states, or with regard to employees of certain statutory bodies set out in a schedule to the *Police Act*.
- That special constables appointed in an emergency have all the powers and immunities of a regular constable, but only while on duty.

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1 Unreported, Perth Court of Petty Sessions, 1970, No 1261. An outline of the facts and excerpts from the judgment may be found in the working paper attached to the Commission's final report. See Law Reform Commission of Western Australia, *Special Constables*, Project No 29 (1975) app I.

2 For instance, the magistrate pointed out that the scope of s 35A of the *Police Act 1892* (WA), which empowered the Commissioner of Police to appoint special constables, was not clear as to what circumstances warranted such appointments. Ibid.

3 *Police Act 1892* (WA) ss 34 and 35A; *Government Railways Act 1904* (WA) s 74(1); *Prevention of Cruelty to Animals Act 1920* (WA) s 15; *Fremantle Port Authority Act 1902* (WA) s 19(4); *Port Hedland Port Authority Act 1970* (WA) s 17(4).

4 These included the power to arrest a person found committing any offence, wide powers to arrest on suspicion and power to stop and search persons and vehicles.

5 Law Reform Commission of Western Australia, *Special Constables*, Project No 29 (1975).

29

◀ Special Constables

- That the Commissioner of Police:
  - (a) be solely empowered to appoint special constables and to delineate the power they should possess;
  - (b) be responsible for the training of employees of statutory bodies appointed as special constables and be entitled to exercise disciplinary authority over them; and
  - (c) should formulate guidelines to be followed for appointing special constables in emergencies.

The Commission made further consequential recommendations regarding the payment of special constables, the identification of special constables while on duty, and the public provision of details of appointments of special constables by the Commissioner of Police.

Legislative or Other Action Undertaken

The Commission's recommendations were given effect with the passing of the *Police Amendment Act 1980* (WA).

Imposition of Fines

Terms of Reference

In 1972 the Committee was asked to consider and report on:

(a) the law relating to the imposition and enforcement of fines by the courts; and

(b) alleged inconsistencies and inadequacies in the imposition of penalties.

Background of Reference

The reference concerned questions as to maximum fines, the criteria to be taken into account in imposing fines and alternative means of enforcing payment in the event of default. In 1973, the Commission took over the reference as an incomplete project from the previously existing Committee.[1] At this stage substantial research, data collection and preliminary preparation of a working paper had been undertaken.

In 1979 the aspect of the reference that related to the enforcement of fines was incorporated as part of the Commission's comprehensive reference on the *Justices Act 1902* (WA).[2] The remaining aspects of the reference were deferred pending the results of inquiries that were being carried out by the Australian Law Reform Commission (ALRC) for its project on sentencing. The Commission was of the view that the ALRC inquiry would reveal relevant material, on an Australia-wide basis, which would be of use in consideration of this reference. The ALRC completed an interim report in 1980.[3] The report dealt particularly with inconsistencies in the imposition of penalties.

A Committee of Inquiry into the Rate of Imprisonment in Western Australia also dealt with the issues that arose as part of this reference. The Committee of Inquiry delivered its final report to Cabinet in May 1981.[4] The report contained a number of recommendations regarding the enforcement of fines and alternative penalties to imprisonment in the event of default.

Reference Withdrawn

The reference was withdrawn in 1982. The Commission was of the view that this reference should be withdrawn in light of the report of the Committee of Inquiry into the Rate of Imprisonment in Western Australia and the report of the ALRC on the sentencing of federal offenders. It was intended that any aspects of the reference not covered by the Committee of Inquiry's report and the work of the ALRC, were to be dealt with by the Commission as part of its extensive review of the *Justices Act*.

1 The Law Reform Committee of Western Australia was formally reconstituted as a Commission on 19 January 1973.
2 Law Reform Commission of Western Australia, *Justices Act*, Project No 55 (referred 1974).
3 Australian Law Reform Commission, *Sentencing of Federal Offenders*, Interim Report No 15 (1980).
4 Committee of Inquiry into the Rate of Imprisonment in Western Australia, *Report of the Committee of Inquiry into the Rate of Imprisonment in Western Australia*, 1981.

31

Competence and Compellability of Spouses to Give Evidence in

Terms of Reference

In 1972 the Committee was asked to consider and report on the law as to the competence and compellability of husband and wife to give evidence in criminal proceedings.

Background of Reference

At common law there was a rule that persons interested in the outcome of proceedings could not be competent witnesses. A major exception to this rule of incompetence arose where a person was charged with an offence against the person, health or liberty of their spouse. The law in Western Australia at the time of the Commission's inquiry stated that the spouse of an accused was a competent witness for the prosecution or the defence at every stage of criminal proceedings.[1] However, the law governing the compellability of an accused's spouse to give evidence in criminal proceedings was not as clear.

There are two opposing interests at issue when considering compellability: namely, the public interest in the detection and punishment of offenders, and the interest of society and the parties to a marriage in preserving marriage and its confidential nature. The general rule was that a person could not be compelled to give evidence against their spouse, but there were exceptions of uncertain extent to this rule.[2] For instance, a spouse was compellable in regard to specific offences, mainly of a sexual nature or involving the property of the spouse of the accused. Further, a spouse was possibly compellable when the accused was charged with an offence against the person, health or liberty of the spouse and in the case of offences tried summarily.

When the Committee was reconstituted as a Commission in 1973 it took over the conduct of the project.

Nature and Extent of Consultation

The Commission issued a working paper in February 1974, copies of which were circulated to the Chief Justice, judges of the Supreme and District Courts, the Solicitor General, the Commissioner of Police and a number of legal and community organisations. A notice was also placed in *The West Australian* newspaper inviting submissions from interested parties.

Several submissions were received in response to the Commission's working paper, including submissions from the Chief Justice of Western Australia and the Law Society. The Commission delivered its final report, outlining its recommendations, in January 1977.[3]

Recommendations

After extensive examination of the issues, the law in other jurisdictions and consideration of submissions, the Commission concluded that the law in this area be amended in certain respects. In summary, the Commission recommended that:

- The husband or wife of an accused should continue to be a competent witness for the prosecution or the defence, including a co-accused, in all criminal proceedings.
- The husband or wife of an accused should be compellable to give evidence on behalf of the accused in every case except where the two spouses are jointly charged.

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1 *Evidence Act 1906* (WA) s 8(1). For a comprehensive overview of the relevant law in Western Australia at the time of the inquiry, see Law Reform Commission of Western Australia, *Competence and Compellability of Spouses to Give Evidence in Criminal Proceedings*, Project No 31 (1977) ch 4.

2 *Evidence Act 1906* (WA) ss 9–10.

3 Law Reform Commission of Western Australia, *Competence and Compellability of Spouses as Witnesses*, Project No 31 (1977).

- The husband or wife of an accused should be compellable to give evidence on behalf of the prosecution with regard to serious sexual offences and offences involving personal violence or harm (including attempts or offences in which an element is the threat or fear of personal violence, including the offences listed in Table I of Appendix I of the report.
- Consideration should be given to providing for the husband or the wife of an accused to be compellable to give evidence on behalf of the prosecution in comparable sorts of cases including those offences listed in Table II of Appendix I of the report.
- The spouse on an accused should be compellable to give evidence on behalf of a co-accused in all cases, unless the spouse is a co-accused.
- The spouse of an accused should be compellable to give evidence for the prosecution against a co-accused only where the spouse would be compellable against the accused.
- Where a marriage has been dissolved the husband or wife of an accused should be compellable as if they had never been married.
- Where a marriage is void either party should be compellable in all cases.
- A spouse should not be made a compellable witness against his or her spouse simply because the spouses are separated, whether or not a non-cohabitation order has been made.
- All marital communications should be privileged except where the spouse of an accused is compellable to give evidence on behalf of the prosecution or the accused.
- The privilege should be that of the witness.
- The prohibition on comment by the prosecution on the failure of the husband or wife of an accused to give evidence in s 8(1)(c) of the *Evidence Act 1906* (WA) should be lifted.
- The legislation should be introduced in such a way as to remove the following anomalies:
  (a) the discrimination between compellability of a husband and the compellability of a wife;
  (b) the inconsistencies between the provisions of the *Evidence Act* and the specific provisions in the *Criminal Code* and the *Justices Act*;
  (c) the unnecessary duplication of statutory provisions with regard to committal hearings;
  (d) the uncertainty surrounding the application of s 9(5) of the *Evidence Act*; and
  (e) the obsolete provision, s 10 of the *Evidence Act*.
- The provision as to non-compellability should not be extended to relationships other than husband and wife.

A comprehensive list of the Commission's recommendations may be found in chapter seven of the final report.

Legislative or Other Action Undertaken

The *Acts Amendment (Evidence) Act 1991* (WA) implemented the Commission's recommendations.[4]

4 In *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999) the Commission recommended that the *Evidence Act 1906* (WA) and related legislation be redrafted to conform with the *Evidence Act 1995* (Cth) whilst retaining certain advantages of the current Western Australian legislation. Discussion on how such legislative reform might affect the question of competence and compellability of spouses in criminal proceedings may be found in: Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Evidence Law* (13 November 1996) paras 5.1–5.2.

32

The Immunity of Suit Between Husband and Wife

Terms of Reference

In 1972 the Committee was asked to consider and report on the law as to the immunity of suit between husband and wife.

Background of Reference

Historically, spousal immunity of action in tort was based on the legal concept that a husband and wife were one person.[1] At the time of the reference it had become obvious that this concept was dated and no longer acceptable. The immunity of suit had already been abolished in all other Australian jurisdictions. Similar reforms had also already occurred in the United Kingdom and New Zealand and reform was under way in Canada.[2]

When the Committee was formally reconstituted as a Commission in January 1973 it inherited the conduct of this reference. A working paper on the subject was issued in June 1973 which recommended that the immunity be abolished.

Nature and Extent of Consultation

The Commission undertook a broad-ranging consultation and copies of the working paper were forwarded for comment to various members of the legal community. Copies were also sent to the Motor Vehicle Insurance Trust, the Citizens Advice Bureau of WA and the Community Welfare Department. A public notice was also placed in *The West Australian* newspaper inviting submissions.

Comments upon the working paper were received from the Director of the Citizens Advice Bureau, the Council of the Law Society of Western Australia and the Director of the Community Welfare Department. All respondents agreed with the abolition of the immunity. After consideration of the submissions, the Commission submitted its final report in September 1973.[3]

Recommendations

The Commission recommended that the immunity of action between spouses in tort should be completely abolished. It also recommended that the court should not have a discretion (as had been provided in other jurisdictions) to stay an action if no substantial benefit would accrue to either party, or if the issue could be more conveniently dealt with under the relevant statute.

Legislative or Other Action Undertaken

In 1975 the federal Parliament enacted the *Family Law Act 1975* (Cth). Section 119 of that Act provides that 'either party to a marriage may bring proceedings in contract or tort against the other party'. This provision made implementation of the Commission's primary recommendation in Western Australia unnecessary.[4]

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1 Law Reform Commission of Western Australia, *Immunity of Suit Between Husband and Wife*, Project No 32 (1973) 3.
2 Ibid 2.
3 Ibid.
4 Law Reform Commission of Western Australia, *Annual Report 1976-1977*, 61.

Dividing Fences

Terms of Reference

In June 1972, the Committee was asked to consider and report on the law relating to dividing fences.

Background of Reference

When the Committee was formally reconstituted as a Commission in January 1973, it took over the conduct of this project and issued a working paper on the subject later that year. The paper compared the operation of the *Dividing Fences Act 1961* (WA) ("the Act") in Western Australia with similar legislation in other states. One of the primary purposes of the working paper was to clarify the circumstances under which an adjoining owner could be compelled to contribute to the construction or repair of a dividing fence and how to calculate the amount of such contribution.

Nature and Extent of Consultation

The Commission received a number of suggestions for reform from local government authorities, representative residents' bodies, government, legal practitioners, community organisations and members of the public.

Recommendations

The Commission's final report was tabled in Parliament in November 1975[1] and recommended that the Act be amended in the following ways:

- The test of a sufficient fence should not be its ability to prevent the trespass of cattle and sheep.[2]
- Section 9(3) should be amended to require the courts to take into account additional factors when ordering the type of fence to be constructed.
- Section 7 should be amended to empower the courts to decide upon the contribution to be made by adjoining owners where there is some imbalance between the parties.
- Section 12 should be amended to provide protection from surveyor's costs for either adjoining owner in the event of his or her belief as to the position of the common boundary line being correct.
- Section 9(2) should be amended to provide that adverse possession does not occur where adjoining owners have agreed that the fence is not on the common boundary.
- A new section should be enacted to provide for:
  - (a) An owner who had constructed a fence in the past to claim a right of contribution against an adjoining owner provided that the former had a reasonable excuse for failure to serve an earlier notice; and
  - (b) The liability of the adjoining owner to be half the value of the existing fence or half the value of a sufficient fence, whichever is the lesser.
- The application of s 13, which currently governs the liability of an adjoining owner to contribute to the cost of a dividing fence, should be limited to apply to dividing fences that were constructed before the new provision (described above) is enacted.
- Sections 14 and 15 should be amended to allow the courts to order the contribution of adjoining owners to fence repairs to be other than equal shares and to take into account the respective benefits to each of the adjoining owners when ordering the type of repairs.

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1 Law Reform Commission of Western Australia, *Dividing Fences*, Project No 33 (1975).

2 Repeal sub-s (c) in the definition of "sufficient fence" in s 5.

- Section 15(5a), which currently prevents a claim of adverse possession where the court had ordered that repairs to a fence are to take place otherwise than on the common boundary, should be extended to cases where repairs to a fence by agreement are not on the common boundary.
- Section 16 should be amended to provide that an owner who makes use of a fence on the other side of the road should pay interest to the owner of the land on which that fence is erected, and furthermore the provisions of the Act relating to repair should apply to that fence as if the fence were a dividing fence between adjoining land.
- The Act should be amended to provide for local authorities, the Crown, and trustees of public land to be liable to contribute to the cost of constructing or repairing a fence that separates their land from the land of an adjoining owner in a residential area.
- The Local Court, not the Court of Petty Sessions, should have jurisdiction over the Act.
- An appeal should lie in all cases from the Local Court to the District Court.
- A new section should be enacted to provide that substantial, rather than strict, compliance with an agreement or court order under the Act should be sufficient compliance.

Further recommendations were made pertaining to matters such as damage to a dividing fence, the definition of cost, application to the court for directions on any matter relating to the construction on repair of a dividing fence, and the ability to make court rules governing dividing fence disputes.

Legislative or Other Action Undertaken

There has been no legislative action taken to implement the Commission's recommendations. Although the Department of Local Government began a review of the Act in 2000[3] which included consideration of the Commission's recommendations, it appears that the review is no longer being pursued.

Currency of Recommendations

Despite the lengthy period that has passed since publication of the Commission's final report, the passage of time has not affected the relevance of the Commission's recommendations. Nevertheless, it should be noted that the subject of dividing fences has been considered more recently by other law reform agencies.

In 1988, the New South Wales Law Reform Commission published a comprehensive report on dividing fences[4] that led to the enactment of the *Dividing Fences Act 1991* (NSW). One of the key recommendations of that report was that mediation agreements made between adjoining owners about dividing fences should be binding in court. The Parliament of Victoria's Law Reform Committee has recently published a review of the fencing legislation in that state.[5] It emphasised the need for voluntary mediation and also recommended that the Victorian Civil and Administrative Tribunal should have jurisdiction over dividing fence disputes to provide a more cost efficient means of settling disputes.

The issue of Crown liability for dividing fences has received different treatment in different states. South Australia[6] and the Australian Capital Territory[7] have legislated to provide for limited liability attaching to

3 Department of Local Government, *Review of the Dividing Fences Act 1961*, Issues Paper (August 2000).
4 New South Wales Law Reform Commission, *Dividing Fences*, Report No 59 (1988).
5 Victorian Law Reform Committee, *Review of the Fences Act 1968*, Final Report (1999). Available on the internet at <http://www.parliament.vic.gov.au/lawreform/fences/default.htm>.
6 *Fences Act 1975* (SA) s 20.
7 *Dividing Fences Act* (ACT) s 2.

the Crown, but the New South Wales Parliament rejected that approach[8] when it implemented the *Dividing Fences Act 1991* (NSW).

Action Required

The Commission's recommendations may be implemented by non-controversial amendments to the current legislation. Full drafting instructions may be found in the Commission's final report. In view of the publication of more recent reports by the New South Wales Law Reform Commission and the Victorian Law Reform Committee, it may be prudent to consider the findings of those bodies in implementing the Commission's recommendations.

Priority – Low

Because it has been over 25 years since the Commission published its final report, the fact that the Commission's recommendations have not been adopted may indicate that the existing Act continues to provide a sufficient legislative framework for the resolution of dividing fences disputes. Nevertheless, the system may be easily and uncontroversially improved by implementation of the Commission's recommendations for reform.

8 Compare New South Wales Law Reform Commission, *Dividing Fences*, Report No 59 (1988) para 3.63 with s 25 of the *Dividing Fences Act 1991* (NSW). See also M H Hustler, "The Liability of the Crown under the New South Wales *Dividing Fences Act 1991*: A Need for Change" at <http://www.uws.edu.au/vip/mhustler/AP_Fence.html>.

34(I)

Distribution on Intestacy

Terms of Reference

In 1972, the Committee was asked to consider and report on the law relating to the distribution of estates of persons dying intestate. This reference was part of a general reference to review the law of trusts and the administration of estates, and was adopted by the Commission upon its inception.[1]

Background of Reference

The reference arose as a result of concerns that the laws in Western Australia relating to intestacy did not adequately reflect prevailing social attitudes. Further, it was considered that the law should be more readily ascertainable, with a focus on brevity and simplicity.

Nature and Extent of Consultation

A working paper was issued in December 1972 and distributed to parties with an interest in the administration of estates, including the Public Trustee, trustee companies, the judges of the Supreme and District Courts, and the Law Society of Western Australia. Submissions were also invited from other interested persons through an advertisement placed in *The West Australian* newspaper.

Responses to the working paper were received from a variety of sources including the Citizens' Advice Bureau, the Law Society of Western Australia, the Public Trustee, and members of the community. The Commission delivered its final report in February 1974.[2]

Recommendations

The Commission recommended that legislation be enacted to provide for the distribution of intestate estates to specified relatives of the deceased. The entitlement that a beneficiary would receive from an intestate estate differed depending upon the identity of the relative who survived the deceased.[3] Where there was no surviving relative,[4] the Commission recommended that the estate pass to the Crown.

Legislative or Other Action Undertaken

The *Administration Act Amendment Act 1976* (WA) implemented many of the Commission's recommendations.[5] The legislation deviated from the recommendations with respect to the value of entitlement to spouses, and the estate passing to the Crown where no listed relatives survived.[6] The remaining recommendations were implemented by the *Administration Amendment Act 1984* (WA).

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1 The Law Reform Committee of Western Australia was formally reconstituted as a Commission on 19 January 1973.

2 Law Reform Commission of Western Australia, *Distribution on Intestacy*, Project No 34(I) (1973).

3 For instance, where an intestate was survived by a spouse and children, the Commission recommended that the spouse receive the household chattels; first $25,000 + 5% interest thereon + 1/3 residue (1/2 residue if only one child or issue of one child); right to purchase the matrimonial home and other personal chattels at market value with the balance to the children per stirpes. Where an intestate was survived by a spouse alone the whole estate passed to the spouse. Where the intestate was survived by multiple children the estate was to be divided equally among them.

4 The Commission's definition of "relative" included; parents, siblings, grandparents, aunts, uncles and cousins.

5 The *Administration Act Amendment Act 1976* (WA) also incorporated recommendations from the Commission's report *Administration Bonds and Sureties*, Project 34(II) (1976).

6 Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 21 October 1976, 3354 (Mr IG Medcalf, Attorney-General).

Administration Bonds and Sureties

Terms of Reference

In 1972, the Committee was asked to consider and report on the law relating to administration bonds and sureties. This reference was part of a general reference to review the law of trusts and the administration of estates, and was adopted by the Commission upon its inception.[1]

Background of Reference

The primary purpose of the reference was to examine the adequacy of statutory requirements relating to administration bonds. In Western Australia, it was necessary for an administrator to execute a bond despite the fact that a comparable state of law to that which existed when the requirement was adopted no longer existed.[2]

Nature and Extent of Consultation

In June 1975, the Commission issued a working paper for distribution to parties with an interest in the administration of estates, including trustee companies, the Institute of Legal Executives, the judges of the Supreme and District Courts, and the Law Society of Western Australia. Submissions were also invited from other interested persons through an advertisement placed in *The West Australian* newspaper.

Responses to the working paper were received from a variety of sources including the Citizens' Protection Bureau, the Institute of Legal Executives, the Public Trustee, the Master of the Supreme Court, and the West Australian Trustee Executor and Agency Company. The Commission delivered its final report in March 1976.[3]

Recommendations

The Commission made recommendations abolishing the requirement for administrators to enter into a bond, and reducing the range of circumstances in which a surety is required to guarantee the due administration of the estate.

Legislative or Other Action Undertaken

The *Administration Act Amendment Act 1976* (WA) implemented the Commission's recommendations.[4]

1 The Law Reform Committee of Western Australia was formally reconstituted as a Commission on 19 January 1973.
2 The administration bond was introduced into English law by the *Statute of Distribution 1670.*
3 Law Reform Commission of Western Australia, *Administration Bonds and Sureties,* Project No 34(II) (1976).
4 Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 21 October 1976, 3354 (Mr IG Medcalf, Attorney-General).

34(III)

Administration of Deceased Insolvent Estates

Terms of Reference

In 1972, the Committee was asked to consider and report on the law relating to the administration of estates of persons dying insolvent. This reference was part of a general reference to review the law of trusts and the administration of estates, and was adopted by the Commission upon its inception.[1]

Background of Reference

The reference arose from problems recognised in the law relating to the administration of insolvent estates. The primary problems were the complexity of the law, a personal representative's right of preference over creditors, and the absence of separate provisions to deal with small insolvent estates.

Nature and Extent of Consultation

In April 1977, the Commission issued a working paper on the subject. The paper was distributed for comment to interested parties, including the Public Trustee, private trustee companies, the Institute of Legal Executives, the Commonwealth Bankruptcy Administration Department, and the state Taxation Department. Submissions were also invited from other interested persons through an advertisement placed in *The West Australian* newspaper.

The paper attracted a number of submissions which informed the preparation of the Commission's final report, delivered in December 1978.[2]

Recommendations

The Commission recommended that there should only be two ways of administering a deceased insolvent estate: either through formal bankruptcy orders, or informal administration reflecting bankruptcy rules relating to payment of debts and creditors rights. It was also recommended that the right of preference be abolished, giving creditors equal treatment, subject to lawful priorities. Finally, the Commission considered that it was not necessary to create a separate administration procedure for small deceased insolvent estates, as this would lead to increased complexity of the law.

Legislative or Other Action Undertaken

The *Acts Amendment (Insolvent Estates) 1984* (WA) which amended the *Administration Act 1903* (WA), implemented the Commission's recommendations.

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1 The Law Reform Committee of Western Australia was formally reconstituted as a Commission on 19 January 1973.
2 Law Reform Commission of Western Australia, *Administration of Deceased Insolvent Estates,* Project No 34(III) (1978).

Recognition of Interstate & Foreign Grants of Probate & Administration

Terms of Reference

In 1976, the Commission was asked to review the law relating to the recognition in Western Australia of grants of probate and of administration made outside Western Australia with a view to proposing uniform legislation thereon throughout Australia. This reference was an extension of the general reference to review the law of trusts and the administration of estates given to the Committee in 1972.

Background of Reference

The reference arose as a result of difficulties associated with the distribution of estates of individuals who die leaving assets outside the state or territory in which they resided. In addition, there may also be claims that remain in effect from another state or territory. The administration of these assets and claims is complicated by three factors:

(a) conflicting laws in different Australian jurisdictions;

(b) Australian law not recognising a deceased person's continuing legal personality; and

(c) the necessity for a personal representative of the deceased to have a grant of probate or administration in each specific jurisdiction in order to be recognised by the court.

To overcome these problems and simplify the task of the personal representative, all Australian states and territories introduced provisions allowing grants of probate and administration made elsewhere, either in Australia or overseas, to be "resealed" in that jurisdiction.[1] However, it is questionable whether resealing is the most efficient method of enabling the personal representative to deal with a deceased's assets, as it can involve considerable cost, inconvenience, and delay. Further, there is some disparity between the rules governing resealing in the various Australian jurisdictions.

Because this was a topic that lent itself to consideration of uniform laws, it was resolved by the Standing Committee of Attorneys-General that the Commission should conduct this reference with a view to making recommendations that were suitable for adoption on a uniform basis throughout Australia. The Commission therefore examined the relevant law in all Australian jurisdictions and consulted the appropriate officers in the various state and territorial Supreme Courts. The Commission also corresponded with the Commonwealth Secretariat in London which had, in the past, proposed that a uniform system of resealing grants of probate and letters of administration be adopted throughout the Commonwealth of Nations.

Nature and Extent of Consultation

The Commission issued a working paper in December 1980 that was distributed for comment throughout Australia to parties with an interest in the administration of estates, including the Registrars of the Supreme Courts of the states and territories, the state and territory law societies, law reform agencies and trustee companies. Notices were also placed in *The Australian*, *The West Australian* and the *Australian Financial Review* to encourage public submissions.

The working paper attracted a large number of submissions, which were considered by the Commission in the preparation of its final report, delivered in November 1984.[2]

1 *Administration and Probate Ordinance 1929* (ACT) s 80(2); *Wills, Probate and Administration Act 1898* (NSW) s 107(2); *Administration and Probate Act* (NT) s 111(4); *British Probates Act 1898* (Qld) s 4(1); *Administration and Probate Act 1919–1984* (SA) s 17; *Administration and Probate Act 1935* (Tas) s 48(2); *Administration and Probate Act 1958* (Vic) s 81(2); *Administration Act 1903–1984* (WA) s 61(2).

2 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Project No 34(IV) (1984).

Recommendations

The Commission made a total of 37 recommendations for reform, including the following primary recommendations.

- The procedure governing resealing in the various Australian states and territories should be made uniform and contained in a code to be drafted by the Parliamentary Counsel's Committee with assistance from the Probate Registrars of each state and territory.
- The uniform code of procedure should incorporate provisions relating to:
  (a) refusal of resealing;
  (b) people favoured by grants of resealing;
  (c) the lack of need for an administrator or executor to be in the jurisdiction of the resealing court;
  (d) grants to more than one executor;
  (e) the possibility of resealing of all types of grants; and
  (f) the powers and duties of persons to whom resealing is granted.
- All Australian states and territories should allow the resealing of a grant of probate or administration made by a court of competent jurisdiction in any part of the Commonwealth of Nations or any other country.
- An automatic recognition scheme should be adopted where a grant of probate or administration made by a court should be automatically recognised without resealing. This should be the case where the court is in the Australian state or territory where the deceased was domiciled, but not if the court is in a different jurisdiction (either Australian or foreign).
- Legislation should be enacted based on the national Companies Act to make it unnecessary for a personal representative to reseal grants of probate or administration in order to deal with money in financial institutions. These provisions should be extended to grants of probate and administration made in New Zealand and the United Kingdom.
- Courts in all Australian jurisdictions should be given power to make and reseal grants of probate and administration even where the deceased left no property within that jurisdiction.

A comprehensive outline of the recommendations may be found at pages 108–116 of the Commission's final report.

Legislative or Other Action Undertaken

In June 1986, the Governor announced that legislation to implement the recommendations made in the Commission's final report would be introduced,[3] however these plans subsequently stalled. In 1993—partly as a result of the failure of the Standing Committee of Attorneys-General to adopt the recommendations for uniform laws—the Queensland Law Reform Commission (QLRC) was asked to make recommendations designed to unify the laws in all Australian states and territories relating to succession on death.

At the suggestion of the QLRC, a national committee comprising representatives from each jurisdiction was set up, with Dr Peter Handford appointed as the Western Australian representative. The national committee has produced two reports, *The Law of Wills* and *Family Provision;* both presented to the Standing

3 Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, 10 June 1986, 5 (Prof. Gordon Stanley Reid, Governor).

Committee of Attorneys General in December 1997.[4] The reforms recommended by the Commission in its report on *Recognition of Interstate and Foreign Grants of Probate and Administration* are now being considered as part of the QLRC's continuing reference on uniform succession laws.[5]

The proposals were also revisited in the Commission's 1990 report on the *Administration Act 1903* (WA) (Project No 88) which recommended that the reforms be adopted.

Currency of Recommendations

The recommendations remain current. However, in so far as they address national uniformity of succession laws, they remain contingent upon the findings and proposals of the QLRC.

Action Required

Legislative action will be required to amend the *Administration Act 1903–1984* (WA), in order to implement the Commission's recommendations.

Priority – Low

Although problems remain in Western Australia in respect of grants of probate and administration, the primary aim of the reference was to create uniformity of the relevant law across all Australian jurisdictions. It may therefore be prudent to monitor and assist the progress of the QLRC with this objective in mind. If adoption of the uniform legislation ultimately developed by the QLRC becomes untenable, the Commission's report on *Recognition of Interstate and Foreign Grants of Probate and Administration* suggests that a number of the recommendations for reform might nevertheless be enacted.[6]

4 The final report on the *Law of Wills* contained model legislation to be used as the basis for reform by individual states and territories. The Northern Territory has enacted legislation (based upon the Uniform Model Wills Bill) which came into effect on 1 March 2001.

5 The Queensland Law Reform Commission anticipates that a discussion paper on *Interjurisdictional Recognition of Grants of Probate and Administration* will be released by late 2001.

6 Law Reform Commission of Western Australia, *Report on Recognition of Interstate and Foreign Grants of Probate and Administration*, Project No 34(IV) (1984) 117.

34(V)

Trustees' Powers of Investment

Terms of Reference

The Commission was asked to consider and report on the law relating to trustees' powers of investment as authorised by the *Trustees Act 1962–1978* (WA) ("the Act"). This reference was part of a general reference to review the law of trusts and the administration of estates given to the Committee, and was adopted by the Commission upon its inception.[1]

Background of Reference

The reference arose as a result of submissions made by individuals to the Attorney-General which expressed concern that the investments that were authorised by Part III of the Act were inadequate. The shortcomings related to the ability to preserve the capital of the trust fund in prevailing inflationary circumstances, a situation which could be alleviated if trustees were enabled to take advantage of new forms of investment.

Nature and Extent of Consultation

The Commission issued a working paper in December 1981 which was widely distributed amongst persons and organisations with expertise or interest in issues related to trust investments. The paper attracted a large number of submissions, including responses from the Commercial Law Committee of the Law Society of Western Australia, the Stock Exchange, the Public Trustee, the Australian Finance Conference, the Council of Authorised Money Market Dealers, the Western Australian Permanent Building Societies Association, the Institute of Finance Brokers of Western Australia, and independent trustee companies.

After consideration of the issues and submissions, the Commission delivered its final report on the subject in January 1984.[2]

Recommendations

The Commission made a large number of recommendations regarding reform of the Act. The recommendations focused on widening trustees' powers of investment in relation to mortgages, land, deposits in financial institutions, company securities, and bank indorsed bills. It was also recommended that a specialist trustee investments review committee be appointed by the Attorney-General to periodically review the list of authorised trustee investments.

Legislative or Other Action Undertaken

The *Public Trustee Amendment Act 1984* (WA) extended the Public Trustee's power to invest in land. The amendments were in terms that reflected the Commission's recommendations.

Parliament also established a specialist Trustee Investments Review Committee constituted by members with expertise in the relevant areas of investment and law. The Review Committee substantially adopted the Commission's recommendations,[3] resulting in the *Trustees Amendment Act 1987* (WA).

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1 The Law Reform Committee of Western Australia was formally reconstituted as a Commission on 19 January 1973.
2 Law Reform Commission of Western Australia, *Trustees' Powers of Investment*, Project No 34(V) (1984).
3 Western Australia, *Parliamentary Debates (Hansard)*, Legislative Assembly, 24 November 1987, 6417 (Peter Dowding, Minister for Works and Services).

Charitable Trusts

Terms of Reference

The Commission was asked to consider and report on the law relating to charitable trusts. This reference was part of a general reference to review the law of trusts and the administration of estates given to the Committee in 1972 and adopted by the Commission upon its inception.[1]

Background of Reference

The Commission determined that this part of the reference should not extend to a complete review of the law of charitable trusts but should be limited to an investigation of the relationship between the equitable doctrine of cy-près and the provision in s 7 of the *Charitable Trusts Act 1946* (WA), under which the purposes of a charitable trust may be varied.

From the outset, this part of the broader reference was given a lower priority than other parts of the reference where urgent reform was required. However, when it came to be considered in more detail, an issue arose as to whether the subject matter of this part of the reference required a full report.

Reference Withdrawn

During 1995, Mr Peter Creighton, a member of the Commission and a specialist in the law of trusts, carried out a review of the issues involved in this aspect of the reference and confirmed the Commission's earlier view that the subject did not warrant further inquiry.[2] It was also established that the Ministry of Fair Trading was conducting a concurrent inquiry into the law relating to charitable collections.[3] In December 1995, the Commission reviewed the project on charitable uses in light of its decision to restructure its operations and determined that no further work should be done on the project. The reference was subsequently withdrawn.

1 The Law Reform Committee of Western Australia was formally reconstituted as a Commission on 19 January 1973.
2 Law Reform Commission of Western Australia, *Annual Report 1995–1996*, 40.
3 Ibid.

Administration of Assets of the Solvent Estates of Deceased Persons in

Terms of Reference

The Commission was asked to consider and report on the administration of the assets of the solvent estates of deceased persons with regard to the payment of debts and legacies. This reference was part of a general reference to review the law of trusts and the administration of estates given to the Committee in 1972 and adopted by the Commission upon its inception.[1]

Background of Reference

The law relating to the administration of estates of deceased persons in Western Australia is largely contained in the *Administration Act 1903* (WA). The rules contained within the Act that govern the order in which assets are to be applied to the testator's debts are widely recognised as being archaic, overly technical and obscure. Upon receiving the general reference in 1972, the Commission identified this as an area requiring reform.

Nature and Extent of Consultation

Due to the technical nature of the subject matter the Commission did not issue a discussion paper for general circulation. However, a draft version of the report was distributed to government and other agencies concerned with the administration of estates, the Law Society of Western Australia and selected firms of solicitors for their comments. Responses were received from the Public Trustee, WA Trustees, Perpetual Trustees, the Probate Registrar, the Conveyancing Committee of the Law Society and a number of solicitors. All commentators expressed approval of the Commission's proposals. The Commission delivered its final report on the subject in June 1988.[2]

Recommendations

The Commission examined the systems of law operating in England, New Zealand, and Australian state jurisdictions and concluded that the Queensland statute[3] should serve as a model for Western Australia, subject to several modifications. Specifically, the Commission recommended that:

- The law embodied in s 5 (as to the definition of "property"), ss 29, 55, and 59–61 of the *Queensland Succession Act 1981* be enacted as part of the *Administration Act 1903* (WA), subject to the following additional recommendations.
- The legislation should provide that the interests of general legatees and of beneficiaries of charged but exonerated property abate rateably, so changing the rule in *Lutkins v Leigh*.[4]
- *Donationes mortis causa* should not be capable of being applied in payment of the debts of the donor.
- The uncertainty concerning the effect of s 29 of the Queensland Act should be resolved by redrafting it as suggested in paragraph 5.18 of the final report.
- Section 59(2) of the Queensland Act should be clarified by redrafting it as suggested in para 4.38 of the final report.
- The phrase "general legacies" should be used instead of "pecuniary legacies".
- Locke King's Act (in Western Australia, s 28 of the *Wills Act 1970*) should be reformed so as to provide

1 The Law Reform Committee of Western Australia was formally reconstituted as a Commission on 19 January 1973.
2 Law Reform Commission of Western Australia, *Administration of Assets of the Solvent Estates of Deceased Persons in the Payment of Debts and Legacies*, Project No 34(VII) (1988).
3 *Succession Act 1981* (Qld).
4 (1734) 25 ER 658.

that the creation of a trust or charge for the payment of debts ousts the Act unless the will provides to the contrary, but that Class 1 assets should be first applied in the payment of unsecured debts.

A comprehensive outline of the recommendations may be found at pages 43–48 of the Commission's final report.

Legislative or Other Action Undertaken

In 1993, partly as a result of the failure of the Standing Committee of Attorneys-General to adopt the recommendations from the report on *Recognition of Interstate and Foreign Grants of Probate and Administration*,[5] the Queensland Law Reform Commission (QLRC) was asked to make recommendations designed to unify the laws in all Australian states and territories relating to succession on death. The Uniform Succession Law Project Committee, which was established to further the work of the QLRC, presently has representatives from every jurisdiction except Western Australia.[6] In June 1999, the Project Committee issued a discussion paper, which addressed succession law reform generally.[7] The proposals were also considered in the Commission's 1990 report[8] on the *Administration Act 1903*, which recommended that the reforms be adopted.

Currency of Recommendations

The recommendations remain current, but are now contingent upon the findings and proposals of the Uniform Succession Law Project Committee.

Action Required

Legislative action will be required to amend the *Administration Act 1903* (WA) in order to implement the recommendations. However, the Commission's more recent report on the *Administration Act 1903* proposed that the Act be repealed and replaced, incorporating suggested reforms.

Priority — Low

This area of law is currently the subject of discussions aimed at unifying the law in all Australian jurisdictions. Whilst the issues that the recommendations address remain, uniform law is undoubtedly preferable. In this regard, the progress of the Uniform Succession Law Project Committee should be monitored and its ultimate recommendations considered.

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5 Law Reform Commission of Western Australia, *Report on Recognition of Interstate and Foreign Grants of Probate and Administration*, Project No 34(IV) (1984).

6 The Commission's Executive Officer Dr Peter Handford represented Western Australia from 1995 to 1997 until the government of the day withdrew its support for the project.

7 Queensland Law Reform Commission, *National Committee for Uniform Succession Laws: Administration of Estates of Deceased Persons*, Discussion Paper MP 37 (1999).

8 Law Reform Commission of Western Australia, *Report on the Administration Act 1903*, Project No 88 (1990).

34(VIII)

Protection and Remuneration of Trustees

Terms of Reference

The Commission was asked to consider and report on the law relating to the protection and remuneration of trustees. This reference was part of a general reference to review the law of trusts and the administration of estates given to the Committee in 1972 and adopted by the Commission upon its inception.[1]

Background of Reference

From the outset, this part of the broader reference was given a lower priority than other parts of the reference where urgent reform was required. However, when it came to be considered in more detail, an issue arose as to whether the subject matter of this part of the reference required a full report.

Reference Withdrawn

During 1995, Mr Peter Creighton, a member of the Commission and a specialist in the law of trusts, carried out a review of the issues involved in this aspect of the reference and confirmed the Commission's earlier view that the subject did not warrant further inquiry.[2] In December 1995, the Commission reviewed the project on protection and remuneration of trustees in light of its decision to restructure its operations and determined that no further work was to be done on the project. The reference was subsequently withdrawn.

1 The Law Reform Committee of Western Australia was formally reconstituted as a Commission on 19 January 1973.
2 Law Reform Commission of Western Australia, *Annual Report 1995–1996*, 40.

Unauthorised Disposal of Goods Interstate: Right to Repossession

Terms of Reference

In 1972, the Committee was asked to consider and report on the law relating to unauthorised disposal of goods by a bailee or hirer under a hire purchase agreement where the disposal takes place interstate.

Background of Reference

In the related project, *Chattel Securities and the Bills of Sale Act* ("Project No 19"),[1] the Committee was asked to review the law dealing with the security of title in relation to the merchandising of goods on credit, and advise whether the *Bills of Sale Act 1899* (WA) should be amended, or new legislation prepared, to meet present day conditions.

In 1972, the Standing Committee of Commonwealth and State Attorneys-General (SCAG) decided that the law on consumer credit and chattel securities should, as a matter of policy, be reviewed on a uniform basis throughout Australia. As a result the Committee's work on these projects was deferred by the then Attorney-General. When the Committee was formally reconstituted as a Commission in 1973, it took charge of these, and all outstanding projects.

In 1978, SCAG agreed that Victoria would introduce three Bills[2] dealing with consumer transactions for the purpose of seeking public comment. It was intended that the Bills, if suitable, would be the basis for uniform legislation. In October 1978, the Commission, with the agreement of the Attorney-General, revived its study of the two projects in order to submit comments on those aspects of the Bills dealing with chattel securities. The Bills attracted substantial public comment and criticism and when the Victorian Parliament rose for the state election in May 1979, the Bills lapsed and the intention to redraft them was announced. Accordingly, the Commission again deferred work on the projects.

The Bills were revised and re-introduced as the model consumer credit legislation into the Victorian Parliament at the end of April 1981.[3] At the same time, four Bills having a similar effect were introduced into the New South Wales Parliament.[4]

Reference Withdrawn

In April 1983 the Minister for Consumer Affairs announced[5] that the model consumer credit legislation would be introduced into the Western Australian Parliament.[6] Since such legislation would substantially deal with matters covered by Project Nos 19 and 35, the Attorney-General withdrew both references. The Commission commented that the security aspects of non-consumer credit might require further consideration in due course.

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1 Law Reform Commission of Western Australia, *Chattel Securities and the Bills of Sale Act*, Project No 19 (referred 1970, withdrawn 1983).
2 Credit Bill 1978 (Vic); Chattel Securities Bill 1978 (Vic); Goods (Sales and Leases) Bill 1978 (Vic).
3 *Credit Act 1981* (Vic); *Chattel Securities Act 1981* (Vic); *Goods (Sales and Leases) Act 1981* (Vic).
4 Consumer Credit Bill 1981 (NSW); Credit-Sale Agreements (Repeal) Bill 1981 (NSW); Hire-Purchase (Repeal) Bill 1981 (NSW); Moneylending (Repeal) Bill 1981 (NSW).
5 Arthur Tonkin, Minister for Consumer Affairs, Press Release, No M88/457, (22 April 1983).
6 Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 November 1984, 4478-4492 (Mr M Trethowan): *Credit Act 1984* (WA); *Credit (Administration) Act 1984* (WA); *Commercial Tribunal Act 1984* (WA). See also the *Chattel Securities Act 1987* (WA).

36(I)

Limitation and Notice of Actions: Latent Disease and Injury

Terms of Reference

In June 1982 the Commission was asked to examine and report on the law relating to the limitation and notice of actions as it applies to civil actions brought by or in respect of persons who contract a disease or suffer an injury that remains latent for a significant period of time.

Background of Reference

The reference arose as a result of community concern that sufficient legal recourse be available to persons suffering asbestos-related diseases. It followed a spate of diagnoses of individuals who had resided in Wittenoom and other asbestos mining areas in Western Australia. The Attorney-General requested that the Commission give urgent consideration to the issue of latent personal injury and disease in the context of limitation of actions. The Commission had already received a general reference to review the law relating to limitation and notice of civil actions, referred in 1972. Because of the urgency of this new reference, the Commission decided to split the reference into two parts, assigning latent injury and disease to Part I and the broader reference to Part II.

Taking legal action for latent personal injury becomes a problem when statutory limitation periods have run before the plaintiff becomes aware that he or she has suffered an actionable injury. For example, a sufferer of a lung disease who was not diagnosed until many years after the act of damage had first occurred was not in a position to take a common law action because of the operation of restrictive limitation periods. In 1964, in the case of *Cartledge & Others v Jopling & Sons Ltd*,[1] the House of Lords held that a person's cause of action runs from the time the injury occurred, not from the time that it became manifest. As a result the *Limitation Act 1963* (UK) was amended to make provision for the running of the limitation period to be postponed in certain cases. Following that lead, equivalent Acts in Australian jurisdictions were amended to allow the extension of the limitation period on various grounds. The Western Australian Act was not amended in this regard.

Nature and Extent of Consultation

The urgency of the project made it impossible for the Commission to follow its usual procedure of issuing a working paper and inviting public comment before finalising its report. Nevertheless, in order to secure as much comment as possible, the Commission placed an advertisement in *The West Australian* calling for submissions from members of the public, and also requested submissions from a number of individuals and organisations with a special interest or expertise in the area. The Commission further distributed a draft of the report to these individuals and organisations for urgent comment.

The Commission received preliminary submissions from organisations and individuals, including the Asbestos Disease Society (WA), the Trades and Labor Council of Western Australia and the State Government Insurance Commission. Seven comments on the draft report were received, including comments from Sir Francis Burt (the then Chief Justice of Western Australia), Judge DC Heenan (as he then was) in his capacity as Chairman of Judges in the District Court, Judge GT Sadlier, and the Motor Vehicle Insurance Trust.

In preparing its final report, the Commission had regard to limitation legislation in New South Wales, Queensland, Victoria, South Australia, Tasmania and the United Kingdom. The Commission delivered its final report in October 1982.[2]

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1 [1963] AC 758.

2 Law Reform Commission of Western Australia, *Limitation and Notice of Actions: Latent Disease and Injury*, Project No 36(I) (1982).

Recommendations

The Commission recommended that the limitation period for all personal injury claims should continue to be six years (with certain exceptions) but that this period should not apply where it was unjust that it should do so.

The Commission recommended that this question be determined by the court in light of all the circumstances of the case, including:

- The reasons why the plaintiff did not commence the action within the statutory period, including, where applicable, that there was a significant period of time after the cause of action accrued during which the plaintiff neither knew nor ought reasonably to have known that he or she had suffered the injury giving rise to the cause of action.
- The steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he or she may have received.
- The extent to which the plaintiff acted promptly and reasonably once he or she knew that the alleged act or omission of the defendant might be capable at that time of giving rise to an action for damages.
- The conduct of the defendant after the cause of action accrued relevant to the commencement of proceedings by the plaintiff.
- The extent to which the defendant may be prejudiced in defending the action, other than relying on a defence of limitation, if the limitation period does not apply.
- Alternative remedies available to the plaintiff if the limitation period applies.
- The duration of any disability of the plaintiff whether arising before or after the cause of action accrued.

The Commission further recommended that in making a determination that the limitation period does not apply, the court may impose such conditions as it deems necessary. Other consequential recommendations as to transitional and procedural matters were also made.[3]

Legislative or Other Action Undertaken

The *Limitation Act 1935* (WA) ("the Act") was amended by the insertion of s 38A[4] to cater for "a latent injury that is attributable to the inhalation of asbestos". Consequential amendments were also made to s 6 of the *Crown Suits Act 1947* (WA), s 7 of the *Fatal Accidents Act 1959* (WA) and s 4 of the *Law Reform (Miscellaneous Provisions) Act 1941* (WA).

Currency of Recommendations

The 1983 amending Act was narrow in light of the Commission's recommendations. Western Australia is the only Australian jurisdiction that has limited its equivalent legislation to a particular kind of latent disease. The general discussion paper prepared in 1992 by the Commission on limitation periods contains strong argument for further reform in this area.[5]

To the extent that the 1983 amending Act did not implement the wider reforms recommended by the Commission, the recommendations remain current.

3 Ibid paras 4.36–4.53.
4 Inserted by the *Acts Amendment (Asbestos Related Diseases) Act 1983* (WA).
5 Law Reform Commission of Western Australia, *Limitation and Notice of Actions*, Discussion Paper, Project No 36(II) (1992).

◀ Limitation and Notice of Actions: Latent Disease and Injury

Action Required

Ideally, the Act should be repealed and replaced with one that addresses the broader recommendations for reform of this difficult area of law. Such recommendations for reform are dealt with exhaustively in the Commission's final report on the general limitation and notice of actions reference published in 1997.[6]

However amendments to the current Act in terms of the above recommendations could be fast-tracked through Parliament when the straightforward nature of the reforms is considered in light of the factors supporting the priority assessment below.

Priority – High

This priority assessment is based upon the following:

(a) the logical inconsistency and lack of policy basis in protecting the position of a certain category of litigants with a particular type of loss;

(b) to ensure that the quality of administration justice is maintained; and

(c) the need to achieve uniformity with other jurisdictions.

There is a competing consideration: the "flood of litigation" argument. However, this has not been the experience of other jurisdictions where there has been no discernible increase in the rate of litigation.[7] It is not the case that extensions of time will be as of right, but rather they will be at the discretion of the court. The proposed reform will benefit persons other than those who suffer a latent disease or injury, and it will be possible for a court to disregard the limitation period in any personal injury case, provided it considers it just to do so.

6 Law Reform Commission of Western Australia, *Limitation and Notice of Actions*, Project No 36(II) (1997).
7 Western Australia, *Parliamentary Debates*, Legislative Assembly, 30 April 1997 (Ms A McTiernan, Opposition Member for Armadale).

Limitation and Notice of Actions

Terms of Reference

In 1972 the Commission was asked to examine and report on the law relating to the limitation and notice of civil actions, and incidental matters.

Background of Reference

The law of limitation of actions deals with the rules governing the period of time within which a person must commence civil proceedings. In Western Australia, these periods of time vary, depending upon the cause of action.[1] The *Limitation Act 1935* (WA) ("the Act") is the major source of law on this topic. All common law jurisdictions have rules prescribing the period within which civil actions must be commenced. The reasons for having limitation periods are:

(a) to protect defendants from claims relating to incidents which occurred many years before and about which they, and their witnesses, may have little recollection or no longer have records;

(b) the public interest in having disputes resolved as quickly as possible and as close in point of time to the events upon which they are based so that recollections of witnesses are as clear as possible; and

(c) to enable persons to arrange their affairs on the basis that a claim can no longer be made against them after a certain time.

The Western Australian Parliament passed the Act in 1935, but in no sense did this represent any reform of the law. The intention behind it was simply to consolidate the statutory limitation provisions in force at that time.

Nature and Extent of Consultation

The Commission engaged Mr Nicholas Mullany to prepare a research paper to inform the Commission of relevant issues and assist in the preparation of a discussion paper for general distribution. The research paper and a draft version of the discussion paper were circulated to, and commented upon by the Law Society of Western Australia, the Hon Justice P L Seaman of the Supreme Court of Western Australia and Mr J F Young from the Western Australian Crown Law Department. In February 1992, the Commission issued the finalised discussion paper inviting submissions from interested parties.

Submissions were received from the Law Reform Commission of British Columbia, the Law Reform Committee of South Australia, the Law Society of Western Australia, the Western Australian Aids Council and a number of legal practitioners and members of the public. The final report was delayed due to the vacation of office of two Commissioners which prevented the necessary quorum endorsement of the report. The report was revised and published following the appointment of new Commissioners in 1997.[2]

Recommendations

The Commission's primary recommendations included that:

- The Act be repealed and replaced by an entirely new Act which adopts a uniform approach to all causes of action.
- All claims (with some minor exceptions) should be subject to two limitation periods: a "discovery period" and an "ultimate period".

1 See the list of limitation periods contained in *Causes of Action and Time Limitations* (1985), a seminar presented by the Law Society of Western Australia.

2 Law Reform Commission of Western Australia, *Limitation and Notice of Actions*, Project No 36(II) (1997).

- All claims should be time-barred upon expiry of either the discovery period or the ultimate period,[3] subject to a judicial discretion to permit the action to proceed in exceptional cases.
- The discovery period should expire if the claimant does not commence proceedings within three years after the date on which the plaintiff first knew, or ought to have known that:
  (a) The injury in respect of which he or she brings the proceedings had occurred;
  (b) The injury was attributable to the conduct of the defendant; and
  (c) Assuming liability on the part of the defendant, the injury warrants the commencement of proceedings.
- The discovery period should replace the existing rules on the limitation period running from the time of accrual of the action.[4]
- All claims should be subject to an ultimate limitation period that would expire if the claimant does not commence proceedings 15 years after the claim arose.

In sexual abuse and latent injury cases, a plaintiff's claim is vulnerable to defeat, irrespective of implementation of the above reforms. For this reason the Commission recommended that:

- The legislation provide for a very narrow discretionary power that enables the court to disregard either the discovery period or the ultimate period in appropriate cases.
- In the exercise of its discretion the court may take all the circumstances of the case into account, including factors such as:
  (a) The lengths and reasons for the delay on the part of the plaintiff;
  (b) The extent to which, having regard to the delay, there is or is likely to be prejudice to the defendant;
  (c) The nature of the plaintiff's injury; and
  (d) The position of the defendant, including the extent to which the defendant could have been expected to be aware that claims might arise long after the acts or omissions in question.

The Commission also made a wide range of consequential recommendations that covered such matters as the onus of proving limitation periods, common law actions, equitable claims, actions relating to land and survival of actions in cases of wrongful death. The consequential recommendations essentially have the effect of bringing specialised areas of law into line with the Commission's major recommendations. Two of the more significant of those recommendations involve the retrospective operation of the new Act and limitation periods for actions against the Crown and local government authorities.

The Commission made three recommendations in relation to the retrospective operation of the Act:

- In cases where the cause of action has accrued at the time the new Act comes into force, the action should be regarded as having been brought within time if it complies with the requirements of either the old or the new law.

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3 If the running time for the bringing of actions was to be regulated only by the discovery period, then defendants could remain vulnerable to a claim for a potentially unlimited length of time. See, eg, *Duke v Royalstar* [2001] WASCA 273, (Unreported, 7 September 2001), where the Full Court concluded that there is no limitation period in relation to a claim for specific performance. This was the view of the Commission in its report at para 13.12. In this case the vacuum in the Act was filled by resort to the doctrine of laches and the application of general principles of prejudice and delay.

4 This recommendation is based on the *Limitations Act 1996* (Alberta). The Commission recommended that the proposed Western Australian Act should adopt a definition of "injury" in broadly similar terms to the Alberta Act, which provides that "injury" means personal injury, property damage, economic loss, non-performance of an obligation or, in the absence of any of these, the breach of a duty. The Commission recommended that the definition should make clear when the discovery period will begin to run in cases where there is more than one potential injury. It was further recommended that "personal injury" should include all cases of trespass to the person, and that "breach of duty" should include trespass to land or goods, and conversion or detention of goods.

- In respect of causes of action for personal injury, the provisions of the new Act should apply whether or not the action was barred by the provisions of the previous law, but in all other cases, the Act should not operate to revive a statute barred cause of action.
- The new Act should not apply retrospectively to cases that have already been resolved, either by a court judgment or by settlement.

With respect to actions against the Crown, s 6 of the *Crown Suits Act 1947* (WA) provides that no right of action lies against the Crown unless the plaintiff gives notice in writing to the Crown Solicitor within three months or as soon as practicable (whichever is the longer) and within one year of the day on which the cause of action accrued. Similarly, s 47A of the *Limitation Act 1935* (WA) provides that a one-year limitation period applies for actions against public authorities. There is no practical difference between the wording of the two provisions, they simply have application to different defendants.

The Commission noted that Western Australia was alone in retaining special limitation and notice provisions for the Crown and public authorities. Accordingly, the Commission recommended that the special limitation period and notice requirements in s 6 of the *Crown Suits Act 1947* should be abolished and rules that apply in actions against the Crown and local authorities should be the same as those that apply in actions against all defendants. The host of detailed rules with which a plaintiff must comply before a writ can be served only apply to government agencies (no private company or individual must be given such notice before a writ is served) and as such, the failure to give notice has become cause for a great deal of litigation. This dimension of unfairness and denial of justice to certain litigants created by the present regime has been noted by Parliament.[5]

Legislative or Other Action Undertaken

In 1983 the Act was amended to allow asbestosis and mesothelioma sufferers to avoid the six year limitation period for industrial diseases with long latency periods. These amendments were made in response to the Commission's report on Part I of this project.[6]

There has been no substantive legislative action to date in respect of Part II.

Currency of Recommendations

The recommendations remain current.

Action Required

Implementation of the Commission's comprehensive recommendations will require that the Act be repealed and replaced.

Priority – High

Although Western Australia's approach to reform in this area has been dilatory, it is now in the enviable position of being able to learn from the experience of other jurisdictions in the drafting of legislation to implement these important reforms.[7]

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5 Western Australia, *Parliamentary Debates,* Legislative Assembly, 30 April 1997 (Ms A McTiernan, Opposition Member for Armadale).

6 Law Reform Commission of Western Australia, *Limitation and Notice of Actions: Latent Disease and Injury,* Project No 36(I) (1982).

7 See Queensland Law Reform Commission *Review of the Limitation of Actions Act 1974* Report No 53 (1998), which contains a comparative table showing how the existing law would be changed by the implementation of the Commission's recommendations, and New Zealand Law Reform Commission, *Limitation of Civil Actions*, Preliminary Paper, Report No 39 (2000), which contains a

Most common law jurisdictions have adopted modern statutes based on the reformed 1939 English legislation. The Western Australian enactment remains a verbatim consolidation of provisions from a range of previous English statutes dating from 1623 to 1878. The following difficulties attend this:

(a) the archaic drafting style;

(b) the use of obsolete legal concepts and the perpetuation of out-of-date distinctions;[8] and

(c) the failure to reflect modern legal distinctions in the law of obligations.

Implementation of the Commission's recommendations would eliminate the maze of distinctions that currently govern the law of limitation in Western Australia, and would simplify the law so that all actions have the same limitation period. The recommendations regarding the defined "discovery period" and judicial discretion would provide a more just regime for latent injury, sexual abuse victims[9] and other such plaintiffs whose claims are presently barred.

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comparative summary of the current legislative position in a number of common law jurisdictions. See also Law Commission for England and Wales, *Item 2 of the Seventh Programme of Law Reform: Limitation of Actions,* Report No 270 (2001), for a recent and comprehensive review of the law in Great Britain including a draft Limitation Bill with explanatory notes.

8 See, eg, *State Government Insurance Commission v Teal* (1990) 2 WAR 105 where Commissioner Williams QC concluded that 'the reasoning process necessary to reach a conclusion to the question whether s 38 (1)(e)(i) applies, involving consideration of forms of action abolished more than a century ago, highlights the need for a thoroughgoing review of the *Limitation Act 1935*'.

9 See A Beck 'Limitation of Sexual Abuse Claims' (1999) *New Zealand Law Journal* 329 for an analysis of the approach of the New Zealand Court of Appeal to sexual abuse cases under the *Limitation Act 1950* (NZ); see also J Mosher 'Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest' (1994) 44(2) *Toronto Law Journal* 169.

Land Agents Act

Terms of Reference

In 1972 the Committee was asked to review the *Land Agents Act 1921* (WA) and report on amendments required to effectively exercise control over land transactions and whether provisions of the Act should be extended to cover other sales by agents or developers. In particular, the Committee was asked to consider:

(a) the system of licensing;
(b) the need for provision for renewal of licenses which have lapsed through unforeseen circumstances;
(c) the need for further control over agents, as in New South Wales;
(d) the need to restrain agents from arranging sales which may be impossible to complete, as where such a sale is induced by the agent's misrepresentation as to the availability of finance;
(e) the need for improved auditing requirements;
(f) the need for control over salespeople employed by developers; and
(g) the need for control over the activities of land settlement agencies.

Background of Reference

The reference arose from a desire, expressed by peak bodies involved in the real estate profession as well as legal practitioners, that the activities of people working within the real estate industry be regulated by statute.[1] The project was given priority by the Attorney-General and was transferred to the Commission upon its inception in 1973.[2]

Nature and Extent of Consultation

The Commission issued a working paper in June 1973 which separately discussed the regulation of land agents, developers and settlement agents. The paper was widely distributed throughout the real estate and legal professions and public submissions were sought through newspaper advertisements. The paper attracted a large number of responses from a variety of sources including legal practitioners, real estate professionals, commercial and public interest groups and private individuals. The Commission submitted its final report in January 1974.[3]

Recommendations

The principal recommendations of the Commission included:

- That the Land Agents Supervisory Committee of Western Australia be replaced by a more broadly based body with wider powers of licensing and discipline.
- That the conditions under which a company or firm can obtain a land agent's license be tightened.
- That the supervising authority be empowered to prescribe rates of commission.
- That the grounds for claims against the Fidelity Guarantee Fund be extended.
- That a land agent's auditor be required to report directly to the supervising authority and any change of auditor to require approval of that authority.
- That the supervising authority be empowered to cancel or suspend the right of an auditor to conduct land agent audits.

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1 The Committee had already discussed some proposals regarding the regulation of licensed land agents in an earlier report; see Law Reform Committee of Western Australia, Working Paper, *Protection for Purchasers of Home Units and Sales of Land Through Land Agents,* Project No 1(Parts II & III) (1972).
2 The Law Reform Committee of Western Australia was formally reconstituted as a Commission on 19 January 1973.
3 Law Reform Commission of Western Australia, *Land Agents Act*, Project No 37 (1974).

- That land auctions be held only under the control of licensed land agents.
- That only licensed land agents be permitted to operate as business agents.
- That developers be controlled by statute in a similar manner to that applying in New South Wales.

The report also discussed whether the activities of settlement agents should be prohibited or controlled. The majority of the Commission recommended that the completion of land transactions on behalf of others should only be performed by or under the supervision of legal practitioners. The minority view was that settlement agents should be permitted to continue, but that their activities should be firmly regulated. The Commission was unanimous on the point that if settlement agents were to continue to operate, their activities should be controlled by statute. It was recommended that such a statute provide for a fidelity guarantee fund, the maintenance of trust accounts and compulsory audit, a licensing system and prescribed fees.

A comprehensive discussion of the issues and the Commission's recommendations may be found in its final report at paragraphs 8–79 (land agents), 80–85 (developers) and 86–104 (settlement agents).

Legislative or Other Action Undertaken

The *Real Estate and Business Agents Act 1978* (WA) gave effect to the majority of the Commission's recommendations.[4]

4 Western Australia, *Parliamentary Debates*, Legislative Assembly, 20 April 1978, 999-1002 (Mr DH O'Neil, Deputy Premier).

Sale of Undivided Shares in Land

Terms of Reference

In 1972 the Committee was asked to investigate schemes that invite the public to purchase undivided shares in land.

Background of Reference

Increasingly, the advertisements and invitations associated with schemes for the sale of undivided shares in land were found to be misleading. As well, some of the schemes had an excessive number of co-owners, some of whom were difficult to locate. Of particular concern were schemes where no precise commercial enterprise or development was specifically proposed at the time of sale or where no mechanism had been put in place for the proper administration of the scheme.

When the Committee was formally reconstituted as a Commission in January 1973, the reference was handed over as an incomplete project. In March 1973 the Commission issued a working paper which outlined the schemes and matters of concern and discussed a number of possible solutions.

Nature and Extent of Consultation

The working paper was forwarded for comment to a number of parties including judicial officers of the Supreme and District Courts, the Law Society of Western Australia, the Law School of the University of Western Australia, industry associations, relevant government departments and law reform agencies in other jurisdictions. A notice was also placed in *The West Australian* inviting public submissions on the subject. Eight commentators responded to the working paper including the Law Society of Western Australia, the Registrar of Companies, a number of relevant industry associations and institutes and two individuals. The Commission delivered its final report in May 1973.[1]

Recommendations

After consideration of the issues the Commission recommended that the *Sale of Land Act 1970* (WA) be amended to ensure:

- That no person shall offer to the public for purchase, or shall invite the public to purchase, any undivided share in land unless they have complied with specific provisions and the offer is of a specific character.
- That if these provisions are breached the person(s) that commits the breach should be criminally liable and the purchaser should have the right to avoid the contract and recover any money paid.
- That the legislation should apply to offers made and offers accepted after the coming into force of any amending Act.

A comprehensive outline of the Commission's recommendations may be found at pages 7–9 of the final report.

Legislative or Other Action Undertaken

In 1974 Parliament enacted the *Sale of Land Act Amendment Act 1974* (WA). This Act introduced sections 19A–19D into the *Sale of Land Act 1970* (WA) and effectively implemented the recommendations of the Commission.

1 Law Reform Commission of Western Australia, *Sale of Undivided Shares in Land*, Project No 38 (1973).

39

Compensation for New Street Alignments

Terms of Reference

In 1973 the Commission was asked to review s 364 of the *Local Government Act 1960* (WA) ("the Act").

Background of Reference

Due to local government concerns that the operation of sub-s 364(7) did not result in fair compensation, s 364 of the Act was rarely used in practice. The Attorney-General asked the Commission to consider whether the formula for assessing the amount of compensation payable to adjoining owners affected by new street alignments under sub-s 364(7) of the Act was fair.

In March 1974, the Attorney-General asked the Commission for its comments on detailed proposals made by the Minister for Local Government for a revision of the whole of s 364 of the Act. These proposals dealt not only with the compensation payable to the adjoining owner but also with the powers of local governments to alter otherwise permissible plot ratios and to permit building on the affected strip. The proposals also considered the power other bodies had to prescribe new street alignments.

The Attorney-General also indicated that, since the Minister for Local Government had already given his approval to the amendments, it would be inappropriate to deal with the matter as a project. Thus, the Commission proceeded with the reference as a 'comment only' project rather than a comprehensive report. In June 1976, following a change of government, the new Attorney-General renewed the request for comments on the previous government's proposals.

Nature and Extent of Consultation

As the matter was not to proceed by way of report the Commission limited its consultation to discussions with interested bodies, including the Secretary for Local Government, who was consulted to elaborate on the operation of s 364 of the Act in practice.

The Commission reported to the Attorney-General, by letter, dated 16 March 1977.[1]

No Action Recommended

Because the Commission was asked only to comment on the reforms proposed by the former Minister for Local Government, it made no formal recommendations for legislative action. However, the Commission did identify problem areas and suggest alternative solutions. The Commission also outlined the broader consequences of the proposed reforms and identified other statutes that would require either amendment or repeal in part, in order to remain consistent with the proposed amendments to s 364 of the Act.

1 Law Reform Commission of Western Australia, *Compensation for New Street Alignments*, Project No 39 (1977).

Production of Medical and Technical Reports in Court Proceedings

Terms of Reference

In 1973 the Commission was asked to report on the extent to which the privilege attaching to medical and technical reports should be altered, and to recommend any changes it considered desirable.

Background of Reference

At the time of the reference, the position at common law in Western Australia was to allow a party to litigation to withhold from the other party, a medical or technical report, which was created predominantly for the purpose of litigation. The privilege attaching to medical and technical reports was an extension of the common law legal professional privilege. This common law position was varied to some degree by the rules of court and by statute such that:

(a) a litigant may be entitled to refuse to produce for inspection a report to which privilege attached, but he or she is not entitled to refrain from disclosing its existence; [1]

(b) a party to litigation may require another party to be medically examined; [2] and

(c) any medical reports to be used in motor vehicle personal injury actions cannot be withheld on the ground of privilege. [3]

In practice, the parties to personal injury actions generally exchanged all medical reports, whether favourable or not. The exchange of non-medical expert reports was less common. In addition, it was the practice of some doctors in Western Australia to send copies of their reports to the Motor Vehicle Insurance Trust without first obtaining the permission of the patient or the patient's solicitor. In short, there were discrepancies in the practice as compared to the law in relation to the production of reports in court cases.

In 1972, the English common law privilege for expert reports (which is similar to that in Western Australia) was significantly altered by the *Civil Evidence Act 1972* (UK). It provided for the pre-trial production of all expert reports, the substance of which a party intends to rely on at the trial. Also, in New South Wales, South Australia and Tasmania there already existed provisions for the pre-trial production of expert reports. The question arose as to whether Western Australia should follow these jurisdictions and limit the privilege with regard to pre-trial production of expert reports. The Commission produced a working paper on the subject in June 1974 which examined the law in Western Australia and other jurisdictions and posed specific questions for respondents.

Nature and Extent of Consultation

The working paper was widely distributed for comment and attracted many submissions. Those responding to the issues raised in the working paper included; the Western Australian branches of the Australian Dental Association and the Australian Medical Association, the Consumer Protection Bureau, the Law Reform Committee of South Australia, the Law Society of Western Australia, legal practitioners, the Royal Australian Institute of Architects, a District Court judicial officer, and a number of private individuals.

The final report containing the Commission's recommendations was delivered in July 1975.[4]

1 *Rules of the Supreme Court 1971* (WA) O 26, *Local Court Rules 1961* (WA) O 17.
2 *Rules of the Supreme Court 1971* (WA) O 28 r 1.
3 *Motor Vehicle (Third Party Insurance) Act 1943* (WA) s 33(3).
4 Law Reform Commission of Western Australia, *Production of Medical and Technical Reports in Court Proceedings*, Project No 40 (1975).

◀ Production of Medical and Technical Reports in Court Proceedings

Recommendations

After examining the issues involved and submissions received, the Commission recommended that:

- Medical reports in personal injury actions and expert reports in all other types of actions, the substance of which are to be relied on at the trial, must be produced to the other party before trial, unless the court otherwise directs.
- A medical report need not be produced if:
  (a) the action is one for medical negligence; or
  (b) the report may contain evidence as to the manner in which the injuries were sustained or as to the genuineness of the symptoms.
- An expert report need not be produced if:
  (a) the expert evidence is based on a version of facts in dispute; or
  (b) the expert evidence is based on facts which are neither ascertainable by the expert himself nor within his professional knowledge.

The Commission made several other consequential recommendations pertaining to the procedure governing the exchange of reports. It also recommended amendments to specified statutes to facilitate the exchange of reports.[5]

Legislative or Other Action Undertaken

The Commission's recommendations were implemented by the *Acts Amendment (Expert Evidence) Act 1976* (WA).

5 Ibid 29. Specifically, the Commission recommended that amendments be made to the rule-making powers contained in the *Supreme Court Act; District Court Act; Married Persons and Children (Summary Relief) Act; the Workers' Compensation Act; and the Arbitration Act*.

Tenancy Bonds

Terms of Reference

In 1973 the Commission was asked to inquire into the law and practice relating to bonds between landlord and tenant.

Background of Reference

At the time of the reference, there were no statutory provisions regulating the use of tenancy bonds in Western Australia. Issues such as how much bond money was payable, where the bond money was to be held, whether interest was payable to the tenant and whether the bond reflected a genuine pre-estimate of damage, were governed only by the terms of the agreement between the landlord and tenant. Few actions relating to tenancy bonds were commenced because of the perceived difficulties with the court process, particularly since the amounts involved were usually small, and the tenants tended to be of limited means.

The Government received a number of proposals for reform from the Council of Social Services of WA (Inc), the Land Agents Supervisory Committee of Western Australia, a State Housing Commission study committee, a sub-committee of the Consumer Affairs Council, and the Australian Labor Party.

In June 1974 the Commission issued a working paper which examined the law and practice in Western Australia and other Australian states, as well as New Zealand, England, South Africa, Canada and the United States. The paper discussed issues involved in the regulation of tenancy bonds and the methods for dealing with disputes.

Nature and Extent of Consultation

Following distribution of the working paper the Commission had the benefit of further consultation and advice from a number of organisations including the Land Agents Supervisory Committee of Western Australia, the Consumer Protection Bureau, the Citizens' Advice Bureau, the Real Estate Institute of Western Australia and the Council of Social Services of WA (Inc). The final report containing the Commission's recommendations was delivered in January 1975.[1]

Recommendations

After careful consideration of the issues involved, the Commission recommended that:

- The *Small Claims Tribunals Act 1974* (WA) be amended to:
  - (a) clarify the procedure by which a tenant may bring a tenancy bond claim before a Small Claims Tribunal; and
  - (b) expressly prohibit a tenant from contracting out of his right of access to a Small Claims Tribunal.

Legislative or Other Action Undertaken

The Commission's recommendations were implemented in full by the subsequent enactment of the *Small Claims Tribunals Amendment Act 1975* (WA).

1 Law Reform Commission of Western Australia, *Tenancy Bonds*, Project No 41 (1975).

42

Unrepresented Defendants

Terms of Reference

In 1973 the Commission was invited to consider and report on the desirability of any alterations in the procedures of the Courts of Petty Sessions in cases involving unrepresented defendants.

Background of Reference

The reference arose because of a number of problems caused by the position of unrepresented defendants in the Courts of Petty Sessions. It was recognised that unrepresented defendants may sometimes plead guilty to charges they do not understand and that this had occurred in circumstances where the defendant might not have been convicted if a lawyer had presented all the facts to the court on their behalf. There was also concern that unrepresented defendants, when found guilty, may be unable to make a satisfactory plea in mitigation. The risk that unrepresented defendants may be treated unjustly was a primary consideration.

In 1981 the Commission acknowledged that the extent of these problems had possibly changed since 1973 because of the rapid developments that took place in those years in the area of legal aid. The formation of the Western Australian Legal Aid Commission and the Aboriginal Legal Service and the operation of the Duty Counsel Scheme alleviated many of the problems. It was recognised, however, that increasing the availability of legal aid would not necessarily solve the problems covered by this reference. Many unrepresented defendants in the Courts of Petty Sessions may be able to afford a lawyer, but do not appreciate the desirability of representation. In order to determine the effectiveness of these legal aid initiatives the Commission prepared a number of detailed surveys, in consultation with the Australian Bureau of Statistics. These surveys were to be distributed to various persons operating in the Courts of Petty Sessions system, including Duty Counsel, the Aboriginal Legal Service, Magistrates, Justices of the Peace, Police Prosecutors and private legal practitioners. The Commission planned to issue a working paper when the surveys and remaining research had been completed.

Reference Withdrawn

The reference was withdrawn in 1982. It was decided that the Commission should deal with the subject matter of this reference as part of the comprehensive reference on the *Justices Act 1902* (WA).[1]

1 Law Reform Commission of Western Australia, *Justices Act*, Project No 55 (referred 1974).

Compensation For Persons Detained in Custody

Terms of Reference

In 1973 the Commission was given a reference to consider whether legislation should be enacted to provide compensation for people detained in custody and subsequently acquitted.

Background of Reference

Detention in custody may involve personal hardship beyond the immediate loss of liberty, such as loss of income, property and employment. While a person in Western Australia may obtain compensation for legal costs in some circumstances, the only compensation for other losses is by means of an ex gratia payment from the Crown. At the time of the reference only one person had ever been compensated after having served a sentence for a wrongful conviction. The question for the Commission was whether persons wrongly imprisoned should be compensated and if so, to what extent.

From the outset it was recognised that only in exceptional circumstances could a person who had been detained in custody, and subsequently acquitted, be awarded compensation. The Commission issued a working paper on the subject in November 1976, which dealt with two aspects of the administration of the criminal law that might warrant consideration for compensation. Firstly, where a plaintiff is detained in custody pending final disposition of their case and is then acquitted, either at trial or on appeal; and secondly, where a plaintiff has been convicted and has served part, or all, of their sentence before they are pardoned or their conviction is quashed. The paper also drew attention to legislative schemes in other jurisdictions[1] which made provision for compensation in such cases. The paper was widely distributed and attracted a number of comments, some of which raised points that caused the Commission to conduct further research in preparation for delivery of a final report.

Reference Withdrawn

Research continued until 1981 when the project was deferred at the request of the Attorney-General. The reference was not revived and was formally withdrawn in 1983.

1 Specifically those schemes operating in Holland, West Germany, France, Sweden and the United States of America.

44

Alteration of Ground Levels

Terms of Reference

In 1973 the Commission was invited to examine and report on the rights and obligations of adjoining owners when one alters the ground level of their land, and to recommend such changes to the law as it considered desirable.

Background of Reference

The reference arose out of the concerns of some local authorities that they did not have adequate power to control excavations that might affect the support to adjoining land and buildings, or to control the filling of land so as to prevent the fall of soil onto adjoining land. The terms of the reference, however, extended to include consideration of both the common law and statutory remedies available to the adjoining owners.

Alterations of ground levels have taken place more frequently since the advent of the concrete slab-on-ground method of construction. On sloping sites the ground on which the slab is to be laid must be levelled first. This means the site must be filled or excavated, or both. Excavation can withdraw support from adjoining land, whilst filling may cause the fall of soil to adjoining land or damage to dividing fences. Excavations required for modern high-rise buildings also create difficulties because they may threaten the support of adjoining buildings. Damage in these situations can be considerable in monetary terms. In addition, alteration of ground levels may affect the natural drainage of water and may also threaten the safety of adjoining owners if, for instance, a safety fence around a swimming pool is rendered inadequate by filling on adjoining land.

In September 1984 the Commission issued a discussion paper to obtain information about the problems resulting from alteration of ground levels and details of the inadequacies in the existing law. The paper discussed possible reforms and invited public comment.

Nature and Extent of Consultation

The discussion paper was distributed as widely as possible amongst interested groups and the general public. The paper attracted comment from a range of persons and organisations including a number of local authorities, the Royal Australian Institute of Architects (WA Chapter), the Institution of Engineers (WA Division), the Master Builders' Association of Western Australia and the Law Society of Western Australia. In preparing its final report the Commission considered all the views expressed. The final report containing the Commission's recommendations was delivered in February 1986.[1]

Recommendations

After extensive examination of the issues and consideration of the public submissions, the Commission concluded that both the existing private rights and public controls needed to be extended. The Commission made a number of recommendations summarised as follows:

- The enactment of a provision to extend the common law right of support for adjoining land to include buildings and other structures on that land. This provision should be included in the *Property Law Act 1969* (WA).
- Amendment of s 391 of the *Local Government Act 1960* (WA) to:
  (a) include excavations not associated with building activity;

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1 Law Reform Commission of Western Australia, *Alteration of Ground Levels*, Project No 44 (1986).

(b) make it clear that a retaining wall is to be regarded as a building for the purposes of the section but a fence is not;
(c) reduce to twenty-one days the period of notice which the excavator is required to give to the adjoining owner;
(d) provide that the excavator must inform the adjoining owner of the method by which the excavator proposes to underpin or strengthen the foundations of the adjoining building; and
(e) provide for arbitration of disputes.

- Section 391 and its associated sections should be transferred to the *Property Law Act*.
- The clarification and amendment of the *Uniform Building By-laws 1974* (WA). Amendment of the *Local Government Act 1960* (WA) to extend the powers of local authorities to regulate the alteration of ground levels which could affect the drainage or water table of adjoining land and where the safety, stability and use of adjoining land or buildings could be substantially and adversely affected. As with building by-laws, any by-laws made under the powers recommended above should be uniform general by-laws.
- If an owner raises the level of their land so that the safety fencing around a swimming pool on adjoining land no longer complies with safety requirements, the obligation to rectify the fence should remain on the owner of the swimming pool, but that owner should have the right of indemnity from the owner who altered the ground level. The *Local Government Act 1960* (WA) should be amended to empower local authorities to impose safety requirements, whether of fencing or otherwise, in relation to alteration of ground levels generally. Amendment of the *Dividing Fences Act 1961* (WA) to provide that where it is proposed to erect a structure comprising both a retaining wall and a dividing fence so that the two constitute an integral unit, the wall should be deemed to be part of the dividing fence.
- Amendment of the *Dividing Fences Act 1961* (WA)[2] to:
  (a) extend s 15(7)(c) to cover all cases where one owner would be liable at common law for any damage to a dividing fence; and
  (b) empower the court to decide on the extent of contribution payable by adjoining owners where there is some imbalance between the parties as to their needs or as to the degree of benefit each will receive from the type of fence to be constructed.

A comprehensive outline of the Commission's recommendations may be found in chapter eight of the final report.

Legislative or Other Action Undertaken

The Minister representing the Attorney-General confirmed receipt of the final report during Parliamentary proceedings on 12 June 1986.[3] There has, however, been no legislative action to implement the Commission's recommendations.

In September 1992 a Working Party, comprised of representatives from private industry and state and local government, reported to the Minister for Local Government in respect of a proposed Integrated Building Act.[4] The Working Party did not adopt the recommendations of the Commission that the

2 This confirmed the Commission's recommendations in its final report on dividing fences, see Law Reform Commission of Western Australia, *Dividing Fences*, Project No 33 (1975).
3 Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 June 1986, 238 (Mr Peter Dowding, Minister representing the Attorney-General)
4 Integrated Building Act Committee, *Integrated Building Act: Report of the Working Party*, 1992.

common law right of support for land should be extended to buildings. In August 2000 the Department of Local Government released an issues paper on the Review of the *Dividing Fences Act*[5] The paper identified the issue of alteration of ground levels as a significant and increasing area of concern to be considered further during the review process. The paper represents the most recent statement on the issue of alteration of ground levels and the Commission's recommendations. Proposals have been submitted to the Minister for Local Government with regard to a new Building Act. Whether any of the Commission's recommendations will be implemented in this new legislation is yet to be determined.

Currency of Recommendations

The Department of Local Government has acknowledged that the significant legal and practical problems identified and examined by the Commission in the mid 1980s are continuing and increasing, particularly in large urban areas.[6] The recommendations of the Commission therefore remain current.

Action Required

The *Property Law Act 1969* (WA) and the *Dividing Fences Act 1961* (WA) should be amended to implement the Commission's recommendations. Drafting instructions may be found in chapter eight of the Commission's final report. The *Local Government (Miscellaneous Provisions) Act 1960* (WA)[7] should be amended to widen the regulatory powers of local authorities to deal with alteration of ground levels according to the Commission's recommendations. Further consideration may be necessary in relation to these local government recommendations and the possibility of these reforms being implemented as part of the new Building Act.

Priority – Medium

The problems identified by the Commission in its final report are continuing and apparently increasing. Improvement upon the current situation may be attained with relative ease by amending the *Property Law Act 1969* WA), the *Dividing Fences Act 1961* (WA) and the *Local Government (Miscellaneous Provisions) Act 1960* (WA) in accord with the Commission's recommendations.

5 *Review of the Dividing Fences Act 1961: Issues Paper*, Department of Local Government, 2000.
6 Ibid.
7 The *Local Government Act 1960* (WA) was amended and renamed by the *Local Government Act 1995* (WA).

Mortgage Brokers

Terms of Reference

In 1973 the Commission was asked to consider and report on the question whether legislation should be enacted to control the activities of mortgage brokers.

Background of Reference

A number of persons were carrying on the business of mortgage brokers in Western Australia either separately or in association with another business, such as a land agency. The most common function of a mortgage broker was to arrange, for a fee, loans on the security of mortgages over land; although some brokers arranged loans which were secured on personal property or wre not secured at all. Some brokers also borrowed funds at fixed rates of interest from various persons for re-investment. They were not required to have sufficient financial resources to maintain a stable business nor were they required to lodge a fidelity bond. Further, they were not required to be of good character nor, even though they held themselves out as having certain expertise, were they required to understand the business of finance broking.

The reference was prompted by comments received on an earlier working paper published by the Commission: *Review of the Land Agents Act*[1] All commentators on the subject favoured the licensing of mortgage brokers. Indeed the Mortgage Brokers' Association had for some years been making representations to government seeking the introduction of a system of licensing.

Nature and Extent of Consultation

The Commission issued a working paper in February 1974 which was circulated widely for comment to interested parties including judicial officers, the Law Society of Western Australia, the Citizens' Advice Bureau and finance and property organisations including the Mortgage Brokers Association of WA and associated Western Australian banks. The Commission received a number of submissions with most commentators agreeing that some statutory control of mortgage brokers was necessary.

The Commission delivered its final report on the subject in September 1974.[2] In the report the Commission defined a mortgage broker as a person who in the course of business as an agent negotiates or arranges loans of money for or on behalf of another for reward. The Commission appreciated that this definition may bring within the ambit of its report categories of persons who would not normally describe themselves as mortgage brokers but as finance brokers. Accordingly where the Commission made recommendations in its report with respect to mortgage brokers, such recommendations also extended to finance brokers.

Recommendations

The Commission recommended that a licensing regime be established for mortgage brokers where potential licensees are subject to a requirement of character fitness and are under the control of a supervisory authority. The Commission also recommended that mortgage brokers be required to maintain trust accounts which should be subject to audit and that they be required to contribute to a fidelity guarantee fund or to enter into a fidelity bond with an approved surety.

Legislative or Other Action Undertaken

The *Finance Brokers Control Act 1975* (WA)[3] implemented the Commission's recommendations.[4]

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1 Law Reform Commission of Western Australia, *Review of the Land Agents Act,* Project No 37 (1974). The resulting legislative action was the *Real Estate and Business Agents Act 1983* (WA).
2 Law Reform Commission of Western Australia, *Mortgage Brokers,* Project No 45 (1974).
3 See also the *Finance Brokers Control (General) Regulations 1977* (WA).
4 Western Australia, *Parliamentary Debates*, Legislative Assembly, 29 April 1975, 1208 (Mr DH O'Neil, Minister for Works).

Criminal Injuries Compensation

Terms of Reference

In 1974 the Commission was asked to conduct a review of the *Criminal Injuries (Compensation) Act 1970* (WA) ("the Act").

Background of Reference

The original terms of reference were confined to consideration of whether the maximum amounts of compensation payable under the Act should be increased. However, the Commission was also concerned that orders for compensation were made against offenders who usually could not pay the amounts owing, leaving victims looking to the state for compensation. Also, there was no provision for compensation for victims where the offender was not brought to trial, or if brought to trial was acquitted on the ground of insanity. As a result of these additional concerns, the Commission obtained approval to undertake a complete review of the Act.

The Commission issued a working paper in June 1975 which outlined a number of proposed changes to the legislation including increasing the amount of compensation available and amending the Act so that compensation orders are made payable out of the Consolidated Revenue in the first instance.

Nature and Extent of Consultation

The working paper was distributed widely amongst interested parties and the general public. A notice, inviting submissions, was also placed in *The West Australian* newspaper. Submissions supporting the Commission's proposed amendments to the legislation were received from a variety of sources including the Crown Law Department, the Commissioner of Police, the Australian Labor Party, the Law Society of Western Australia, government departments, legal practitioners and private individuals. After consideration of all submissions and examination of the law in other Australian jurisdictions, the Commission delivered its final report in October 1975.[1]

Recommendations

The Commission's primary recommendations included:

- Amending the Act so that compensation orders may be made against the Consolidated Revenue fund in the first instance, with the state having a right of recovery from the offender.
- Creating a special tribunal to determine the question of compensation.
- Outlining the powers and responsibilities of a special tribunal.
- Making provision for compensation in cases where offenders are not brought to trial or are acquitted.
- Increasing the limit of compensation to $7 500.
- Determining who may claim compensation in addition to the immediate victim.
- Ensuring that full rights of appeal are available to the applicant for compensation and the offender against whom an order has been made.

A comprehensive outline of recommendations may be found at pages 26–30 of the final report.

Legislative or Other Action Undertaken

The Act was replaced by the *Criminal Injuries (Compensation) Act Amendment Act 1976* (WA) which substantially implemented the Commission's recommendations. However, at this stage the government did not act on the recommendation that a special tribunal be created to deal with claims of compensation, nor that claims be met from the Consolidated Revenue fund. These outstanding recommendations were subsequently implemented by the *Criminal Injuries Compensation Act 1982* (WA).[2]

1 Law Reform Commission of Western Australia, *Criminal Injuries Compensation*, Project No 46 (1975).
2 This legislation was repealed in 1985 and replaced by the *Criminal Injuries Compensation Act 1985* (WA) which, amongst other things, increased the amount of compensation available to victims.

Jailing of First Offenders

Terms of Reference

In 1973 the Commission was invited to examine and report on the introduction of legislation to prevent the jailing of first offenders, in matters dealt with at a magistrates court level, for offences which carry a penalty of up to six months jail.

Background of Reference

In 1979 a Committee of Inquiry was appointed by Cabinet to consider whether the rate of imprisonment in Western Australia, particularly for non-indictable offences, could be reduced. The report of the Committee of Inquiry was delivered in May 1981.[1] The report contained a number of recommendations including several suggested measures in relation to the jailing of first offenders. In particular, the Committee of Inquiry recommended that the Courts of Petty Sessions should consider very carefully the use of imprisonment as an option and that, where possible, alternative forms of punishment should be used. In relation to first offenders the Committee of Inquiry recommended that pre-sentence reports should be submitted to the court as a measure aimed at possibly reducing the rate of imprisonment for first offenders.

In 1980 the Australian Law Reform Commission (ALRC) delivered an interim report on sentencing of federal offenders.[2] One of the major proposals suggested by the report was new alternatives to imprisonment. These recommendations arose out of concerns in Australian society over the high costs of imprisonment, not only in economic terms but also in human terms.

Reference Withdrawn

The reference was withdrawn in 1982. It was recommended that the reference be withdrawn in light of the report of the Committee of Inquiry into the Rate of Imprisonment in Western Australia and the report of the ALRC on the sentencing of federal offenders.

1 Committee of Inquiry into the Rate of Imprisonment in Western Australia, *Report of the Committee of Inquiry into the Rate of Imprisonment in Western Australia*, 1981.
2 Australian Law Reform Commission, *Sentencing of Federal Offenders*, Interim Report No 15 (1980).

48

Appeals from Courts of Petty Sessions

Terms of Reference

In 1973 the Commission was asked to consider and report on the procedure for appeals from decisions of Courts of Petty Sessions, with a view to such appeals being simplified, and amongst other things, rendered less costly.

Background of Reference

Before any substantive work began on this reference, the Commission received a general reference to review the *Justices Act 1902* (WA), which regulates the procedure of the Courts of Petty Sessions. Because the latter reference demanded a comprehensive review of the Courts of Petty Sessions, including the appeals process, a decision was taken to merge the two references. Project No 48 therefore became Project No 55(I).[1]

1 See Law Reform Commission of Western Australia, *Review of the Justices Act 1902: Appeals*, Project No 55(I) (1979).

The Suitors' Fund Act

Terms of Reference

In 1973 the Commission was asked to inquire into the operation of the *Suitors' Fund Act 1964* (WA), for the purpose of determining whether the purposes for which the Act was introduced were being fulfilled, and if not, for the purpose of rendering the Act more effective.

Background of Reference

The purpose of the *Suitors' Fund Act 1964* (WA) ("the Act") is to provide a fund ("the Fund") that can be drawn upon to assist in the payment of costs incurred by litigants where decisions are upset on appeal or proceedings are rendered abortive through no fault of their own such as by the death or long illness of a judicial officer. The Fund is financed by contributions by litigants (a levy upon certain originating processes in the courts)[1] together with interest accruing from investment of any sum not immediately required and is administered by the Appeal Costs Board.

The Act applies to both criminal and civil proceedings, though the circumstances in which costs are payable in these two types of proceedings are not identical. Accordingly the Commission decided to deal with the reference in two parts: Part A was concerned with civil proceedings and Part B with criminal proceedings.

In respect of civil proceedings the Fund is available to assist in the payment of costs incurred by:

- An unsuccessful respondent in an appeal that succeeds on questions of law.
- An unsuccessful respondent in an appeal or motion for a new trial relating to the quantum of damages.
- A successful appellant in an appeal on a question of law where, because of some Act or rule of law, the court did not order the respondent to pay the costs of the appeal.
- Parties to proceedings rendered abortive by the death or protracted illness of the presiding judicial officer, or the disagreement of a jury.
- Parties to proceedings where the hearing was discontinued through no fault of any of the parties and a new trial ordered.

In criminal proceedings the Fund covers the same broad areas as in civil proceedings, namely appeals and abortive or discontinued proceedings, but there are significant differences as to who can claim upon the Fund and the circumstances in which claims can be made. In regard to criminal appeals the Fund is available to:

- An unsuccessful respondent in an appeal that was successful on a question of law.
- A successful appellant in an appeal in which a conviction for an indictable offence was quashed without a new trial being ordered.
- A successful appellant in an appeal on a question of law where, because of some Act or rule of law, the court did not order the respondent to pay the costs of the appeal.
- A successful appellant in an appeal on a question of law against a conviction for an offence, on indictment or complaint, where a new trial is ordered.

In the case of abortive, discontinued and adjourned criminal proceedings, the Fund is available to assist in the payment of costs incurred by the accused:

- In trials rendered abortive by the death or protracted illness of the presiding judicial officer, or disagreement of the jury.
- In trials where the hearing were discontinued through no fault of the accused or his or her legal adviser and a new trial is ordered.
- Where proceedings in a court were adjourned by the prosecution through no fault of the accused or his or her legal adviser.

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1 The issue of a writ of summons in the Supreme Court and the District Court, on the entry of a plaint in the Local Court and on the issue of a summons to a defendant upon a complaint in a Court of Petty Sessions: *Suitors' Fund Act 1964* (WA) s 5.

◀ The Suitors' Fund Act

The Commission was of the view that the Act had a number of anomalies and deficiencies, principally concerning the limits of compensation, the method of financing the Fund, the types of proceedings covered and the classes of litigants who can qualify for benefits.

The Commission issued a working paper in March 1975 that had regard to salient features of legislation of a similar type in other Australian jurisdictions.[2]

Nature and Extent of Consultation

The working paper was distributed widely among judicial officers, legal practitioners and relevant organisations, including the Australian Legal Aid Office, the Law School of the University of Western Australia, the Solicitor General, Appeal Costs Board and various law reform agencies. Those who commented on the paper included the Law Society of Western Australia, the Institute of Legal Executives (WA) (Inc), the Treasury Department, Mr RH Burton SM and Mr ID Temby. A notice was also placed in *The West Australian* inviting public submissions.

The Commission delivered two separate reports on the subject: *Part A Civil Proceedings* in March 1976,[3] and *Part B Criminal Proceedings* in May 1977.[4]

Recommendations

In Part A, the Commission made 20 key recommendations, that may be summarised as follows:

- The limits of compensation, where they apply should be raised and the controller of the Fund should be able to insure the Fund against certain claims.
- The contribution to the Fund should be by way of a levy on civil court fees.
- Costs of successful appeals on fact should be covered by the Fund.
- The Family Court and the Full Court of the Family Court of Australia and the District Court should be included in the list of appellate bodies to which the Act applies.
- In the case of a series of appeals, each appeal should be dealt with separately, as far as concerns the issuing of an indemnity or costs certificate.
- An indemnity certificate or costs certificate once granted, should not be revocable.
- A respondent should be able to claim reimbursement of his own costs notwithstanding that he or she was not ordered to pay the appellant's costs.
- In the case of appeals, relief should be granted if the applicant had acted reasonably at the trial of the hearing.
- All companies, the Crown and legally aided litigants should be eligible for relief under the Act.
- The Appeals Costs Board should be abolished and its functions given to a Master of the Supreme Court.

In regard to Part B the Commission's primary recommendation was that the Act should no longer apply to criminal proceedings, but rather that the legal costs of accused persons be payable under the *Official Prosecutions (Defendants' Costs) Act 1973* (WA).[5] The Commission also recommended certain amendments to that Act. The principal reason for the Commission's determination to remove criminal proceedings from the ambit of the Act was the fact that different principles apply to civil and criminal proceedings[6] and that the provision for contribution to the Fund in criminal proceedings was at variance with the fact that the Fund was essentially designed as a compulsory insurance scheme for litigants.

2 Specifically, New South Wales, Queensland, Tasmania and Victoria.
3 Law Reform Commission of Western Australia, *Suitors' Fund Act Part A: Civil Proceedings* Project No 49 (1976).
4 Law Reform Commission of Western Australia, *Suitors' Fund Act Part B: Criminal Proceedings* Project No 49 (1977).
5 This legislation arose from the implementation of the Commission's recommendations in a previous report, see Law Reform Committee of Western Australia, *Payment of Costs in Criminal Cases*, Project No 12 (1972).
6 It does not seem unreasonable that defendants in civil proceedings should be obliged to contribute to the fund to which they can have recourse if mistakes occur in that process. An accused person is not in that position, in that the accused cannot be said to be

The Commission identified a number of benefits, in the nature of fairness to litigants and administrative improvements, that would accrue upon implementation of its recommendations. In respect of civil proceedings such benefits included the widening of types of proceedings covered by the Fund, the increase in maximum levels of compensation for litigants and a more clearly defined basis for the exercise of the discretion to grant relief from the Fund.

Legislative or Other Action Undertaken

The *Suitors' Fund Act Amendment Act 1978* (WA) was introduced to redress an injustice concerning persons suffering from a disability. The *Suitors' Fund Act Amendment Act (No 2) 1978* (WA) was introduced to remedy the situation where an unsuccessful respondent to an appeal on a question of law from a Local Court to the District Court could not be indemnified in respect of his or her own, and the appellant's, costs. Both amendments were highly specific and laudable but failed to implement the substantive recommendations.

Currency of Recommendations

The reforms recommended by the Commission in respect of civil proceedings (Part A) remain current. However, in its recent report on the *Review of the Criminal and Civil Justice System in Western Australia*[7] ("Project No 92") the Commission made two recommendations that run counter to the reforms recommended in respect of criminal proceedings contained in this report:

- That the *Official Prosecutions (Defendants' Costs) Act 1973* (WA) should be repealed.[8]
- That the provisions of the *Suitors' Fund Act 1964* (WA) should be amended to enable any additional costs incurred by defendants through no fault of their own after an initial criminal trial to be fully met from the Fund.[9]

In making these recommendations, the Commission had regard to the Australian Law Reform Commission's (ALRC) 1995 report *Cost Shifting: Who Pays for Litigation*[10] and noted that the current law on the recovery of costs in criminal matters in Western Australia is neither internally consistent, nor consistent with the recommendations of the ALRC. No mention of the reforms recommended in Project No 49 (Part B) was made in the final report of Project No 92; however, it may be presumed that the Commission intended its later recommendations to stand.

Action Required

Implementation of the recommended reforms for civil proceedings require that the Act be amended and the regulations be reviewed.

Priority – Low

Despite the benefits of reform identified by the Commission, the current legislative regime appears to be working satisfactorily. There has been no significant reform to the legislative schemes of other jurisdictions examined by the Commission in its cross-jurisdictional analysis of the law in the area. However, since the Commission concluded its report on this reference, South Australia has enacted the *Appeals Costs Fund Act 1979* (SA) and, in 1994, the Northern Territory Law Reform Commission undertook an inquiry into the desirability of establishing a suitors' costs fund for civil and criminal proceedings in that jurisdiction.[11]

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submitting to the jurisdiction of the court in the way a civil litigant/defendant does. The Commission therefore considered that if accused persons were to be entitled to reimbursement of their costs in certain cases, the scheme of reimbursement should not require them to contribute to it. This principle had already been established in Western Australian law in the case of summary trials under the *Official Prosecutions (Defendants' Costs) Act 1973* (WA).

7 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia,* Project No 92 (1999).
8 Ibid recommendation 341.
9 Ibid recommendation 344.
10 Australian Law Reform Commission, *Cost Shifting: Who Pays for Litigation,* Report No 75 (1995).
11 Northern Territory Law Reform Commission, *Report on a Suitors' Costs Fund,* Report No 16 (1994).

50

Appeals to the Privy Council

Terms of Reference

In 1973, the Commission was given a reference to consider and report on the question whether the right of appeal to the Privy Council should be abolished.

Background of Reference

Research toward the preparation of a working paper on this subject was not completed, as it became apparent that Commonwealth legislation was being drafted to address the issue.

The *Privy Council (Appeals from the High Court) Act 1975* (Cth) abolished appeals from the High Court to the Privy Council in all matters of state jurisdiction. However, it remained possible for appellants to choose between appealing to the High Court or the Privy Council on state matters until corresponding state and federal Acts abolished this remaining avenue of appeal in 1986.[1]

Reference Withdrawn

As a consequence of the Commonwealth legislation, the Commission deferred work on the project in 1976. The reference subsequently lapsed due to the abrogation of appeals to the Privy Council from all Australian courts.

1 See the *Australia Act 1986* (Cth) and corresponding state Acts of the same name.

Unclaimed Money

Terms of Reference

In 1973 the Commission was asked to consider and report upon the subject of unclaimed money.

Background of Reference

Prior to the reference, the law in Western Australia relating to unclaimed money differed depending on how a potential claim to the money might arise. The law could conveniently be divided into four categories:

(a) where money was owed, normally in the form of debt. This was governed by the *Unclaimed Moneys Act 1912–1947* (WA) ("the Act");

(b) where money had been lost but found. This was governed by legal principles derived from case law;

(c) where money owed by a trustee to a beneficiary remained unclaimed; and

(d) unclaimed money owing under special circumstances dealt with by specific statutes.

Under each category, there existed provision for money to be paid to the Treasurer where it remained unclaimed for a certain period of time. However the requisite period of time before such payment was required differed in respect of each category. Further, upon receiving a payment, the Treasurer was required to deal with the money differently depending on which category the payment arose from. There was an obvious need for consolidation of the law.

There were also specific concerns arising from provisions of the Act. Prior to the reference the Treasurer would hold unclaimed moneys paid to the state for six years before paying them into the Consolidated Revenue. Payment into the Consolidated Revenue was being justified under certain provisions of the *Audit Act 1904* (WA); however it was not clear that these provisions were intended to apply to unclaimed moneys. This uncertainty as to the disposition of capital was a primary reason for the reference.[1]

In 1976 the Commission issued a working paper that discussed the issues involved and examined the law in other jurisdictions. It was found that there was a large amount of variation between jurisdictions. It was also noted that the Act had been passed in response to concerns regarding unclaimed money in bank accounts. These concerns were to a large extent no longer relevant as moneys held in trading accounts were now governed by the *Banking Act 1959* (Cth).

Nature and Extent of Consultation

Consultation was broad ranging. Copies of the working paper were sent to (amongst others): members of the legal profession; judges of the Supreme and District Courts; magistrates; legal academics; banks; various statutory bodies; the Institute of Chartered Accountants; private trustee companies; and several large Western Australian corporations. Public comment was also sought by a notice placed in *The West Australian* newspaper. After considering the responses to the working paper the Commission submitted its final report in December 1980.[2]

Recommendations

The Commission recommended that the Act be repealed and that a revised Act be passed to deal with the payment of unclaimed trust money and non-trust money to the Treasurer. The new Act would replace the provisions currently dealing with such payments under the *Public Trustee Act 1941* (WA), the various private trustee company Acts, and the *Audit Act 1904* (WA).

1 Law Reform Commission of Western Australia, *Unclaimed Money*, Project No 51 (1980) 6.
2 Ibid.

51

◀ Unclaimed Money

The Commission's primary recommendations were that:

- The new Act should contain provisions compelling certain categories of person to pay unclaimed money to the Treasurer.
- The new Act should contain a provision enabling the voluntary payment of unclaimed money to the Treasurer.
- The legislation should be clear in defining when money is unclaimed, and the circumstances under which an obligation to pay the money to the Treasurer would arise.
- Prior to the payment of unclaimed money to the Treasurer, notice of the money and the persons to whom it is owed should be advertised.
- Unclaimed moneys paid to the Treasurer should be available immediately for public use.
- A person should be able to claim money owing to him from the Treasurer at any time.
- There should be no change to the law relating to persons who find money that has been lost and remains unclaimed.
- With several modifications, unclaimed money owing to Aborigines should continue to be governed by the *Aboriginal Affairs Planning Authority Act 1972* (WA) ss 35–36.

A comprehensive outline of the Commission's recommendations may be found at pages 68–73 of the final report.

Legislative or Other Action Undertaken

In 1990 Parliament passed the *Unclaimed Money Act 1990* (WA) which substantially implemented the Commission's recommendations. The only recommendations not implemented by the legislation were those incidental to the main focus of the report. These dealt with reforms to the *Aboriginal Affairs Planning Authority Act 1972* (WA) and to the jurisdiction of Supreme Court Masters to make orders under s 66 of the *Trustees Act 1962* (WA).

Local Body Election Practices

Terms of Reference

In 1974 the Commission was asked to consider and report on:

(a) whether s 143 of the *Local Government Act 1960* (WA) ("the Act") should be extended to cover printed materials at present excluded from its ambit;

(b) the extent to which access should be restricted to copies of local body electoral rolls which have been marked to indicate who voted; and

(c) Whether s 140 of the Act should be amended to expressly include within the definition of bribery, the transport of an elector to and from a polling place by a candidate or his supporter, with a view to influencing the elector's vote.

Background of Reference

In respect to the matter set out in (a) above, the purpose of s 143 of the Act was to enforce mandatory disclosure of the name of the person printing or authorising an electoral advertisement, handbill or pamphlet. The Commission's attention was drawn to two articles in periodicals which might have had the effect of promoting candidates for local body elections but which did not appear to be subject to the provisions of s 143.

The Commission was asked to specifically look into the issues contained in (b) above, following a complaint made to the Minister for Local Government that sitting councillors had access to electoral rolls after they had been used in local government elections and had been marked to show which persons had voted. It was claimed that this gave sitting councillors an advantage when campaigning in subsequent elections.

With regard to (c) above, s 140 of the Act lists the acts that constitute bribery. This section did not include the provision of transport for voters, which was a widespread practice.

Nature and Extent of Consultation

In July 1975 the Commission issued a working paper that discussed the issues involved. This was sent to judges of the Supreme and District Courts, local council associations and institutes, local councils, the University of Western Australia, the Law Society of Western Australia, relevant government departments and law reform agencies in other jurisdictions. A notice was also placed in *The West Australian* inviting anyone interested to obtain a copy of the paper and submit comments. The Commission received 18 submissions in response to the working paper. After considering the comments the Commission delivered its final report in October 1975.[1]

Recommendations

In summary, the Commission recommended that:

- The scope of s 143 should be broadened to provide that any letters and articles concerning forthcoming elections, regardless of whether they are published in a newspaper or not should have the name and address of the person authorising publication. If the letter or article is published elsewhere than in a newspaper it should also include the name and address of the printer.
- Access should not be further restricted to electoral rolls.

1 Law Reform Commission of Western Australia, *Local Body Election Practices*, Project No 52 (1975).

- Electoral rolls should be kept for two years.
- No change should be made to s 140 of the Act.

A comprehensive outline of the Commission's recommendations may be found at pages 5–9 of the final report.

Legislative or Other Action Undertaken

In 1995 the Government enacted the *Local Government Act 1995* (WA) as part of a comprehensive reform of local government. This Act incorporated the first recommendation of the Commission, regarding the authorisation of electoral materials. No provision was included to ensure that election rolls are retained for two years. However, Parliament stated a clear intention that each local council be authorised to make regulations concerning the disposal or retention of electoral material.[2]

2 *Local Government Act 1995* (WA), s 4.84.

Privilege for Journalists

Terms of Reference

In 1974 the Commission was asked to consider the proposal that journalists called to give evidence in judicial proceedings should be given the right to refuse to disclose the identity of their sources of information.

Background of Reference

The subject of the reference was relevant to the Commission's reference on privacy, the terms of which included the question whether any changes in the law were required to provide protection against the disclosure of information given in confidence.[1] The Commission's terms of reference on privacy paralleled those given by the Commonwealth Attorney-General to the Australian Law Reform Commission. Both references required the respective Commissions to have regard to the development of a uniform privacy law throughout Australia. The two Commissions agreed that the question of a journalist's privilege would be considered in the course of the study on privacy.

The Commission issued a working paper in June 1977 which specifically addressed the legal issues surrounding the privilege for journalists and examined proposals for reform in Australian and overseas jurisdictions.

Nature and Extent of Consultation

The working paper was circulated to interested parties within the print and electronic media, including the publishers of all the major Australian newspapers, radio and television licence-holders, the Australian Broadcasting Commission and others. Following consideration of submissions the Commission delivered its final report on the subject in February 1980.[2]

Recommendations

The Commission recommended that journalists called to give evidence in judicial proceedings should not be granted a statutory right to refuse to disclose the sources of their information. The Commission was of the opinion that the disadvantages of such an absolute statutory privilege far outweighed the benefit that might reasonably be expected by conferring it.

The Commission commented that a qualified judicial discretion was desirable, if put in statutory form, to protect the confidence of the journalist-informant relationship. However, the Commission declined to recommend the adoption of any qualified privilege at the time of handing down its report to await further judicial development in the area.

Legislative or Other Action Undertaken

The Commission had the opportunity to reconsider the issue of a privilege for journalists in a wider context when reporting upon its reference on Professional Privilege for Confidential Communications ("Project No 90").[3] In its final report on that reference, the Commission restated its earlier recommendation and extended it, concluding that courts should be given a general discretion to excuse a witness from answering a question or producing a document that would otherwise be a breach of confidence. The Commission further recommended that confidential information held by journalists, including the identity

1 Law Reform Commission of Western Australia, *Privacy*, Project No 65(1) (referred 1976, withdrawn 1986).
2 Law Reform Commission of Western Australia, *Privilege for Journalists*, Project No 53 (1980).
3 Law Reform Commission of Western Australia, *Professional Privilege for Confidential Communications*, Project No 90 (1993). Because of the great number of developments in the law since completing its report on the subject of journalists' privilege the Commission did not consider itself bound by its previous recommendations.

of sources, could be withheld in appropriate circumstances as a result of the exercise of that discretion.[4] However, in making a decision whether to exercise the discretion, courts would have to take into account the public interests in preserving confidential information held by journalists.

In 1994 the Senate Standing Committee on Legal and Constitutional Affairs published its inquiry into the rights and obligations of the media,[5] specifically addressing laws for the protection of journalist's confidential sources. In its report, the Standing Committee did not accept that journalists have a claim to an absolute privilege in protecting their confidential sources, as ultimately the courts must remain the final arbiter of the fundamental rights of citizens. The Standing Committee concluded that legislation for a form of statutory judicial discretion to excuse a journalist from answering questions about the identity of a confidential source was the best way to balance competing public interests. The Standing Committee cited with approval the recommendations of the Commission in its report on *Professional Privilege for Confidential Communications*. To date no legislative action has occurred to specifically create a privilege for journalists to protect confidential communications.

Currency of Recommendations

The Commission's recommendations, as reformulated in Project No 90, remain current. There is a need for the justice system to acknowledge the special role of the media in maintaining a democratic system of government. The investigative activities of journalists allow citizens to make informed decisions on issues that may otherwise go undetected. Decisions of the High Court have emphasised the essential character of the freedom of communication in facilitating the discussion of political and economic issues in a democracy.[6]

Action Required

Implementation of the Commission's primary recommendation requires legislative enactment[7] of a judicial discretion to recognise a qualified privilege that identifies the appropriate balance between the competing public interests in freedom of communication in a democracy and the maintenance of public confidence in the Australian system of justice. It is possible that this could occur as part of the initiative towards uniform evidence legislation based on the model of the Commonwealth *Evidence Act 1995*.[8]

Priority– Medium

Currently, journalists have no legal right to refuse to disclose relevant information in their possession, or the confidential identity of the sources of such information, in judicial proceedings. The absence of such a privilege has resulted in a number of journalists having been punished for contempt of court for refusing to reveal their sources.[9] A general judicial discretion to excuse a witness from providing information in certain circumstances would assist journalists in avoiding unnecessary proceedings for contempt of court.

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4 Ibid paras 4.85–4.98.

5 Standing Committee on Legal and Constitutional Affairs, *Off the Record: Shield Laws for Journalist's Confidential Sources*, Parliament of the Commonwealth of Australia (1994).

6 See, eg, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth [No 2]*(1992) 177 CLR 106.

7 The Commission considered that the most appropriate location for the recommended statutory provision would be the *Evidence Act* 1906 (WA).

8 See Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999) ch 20.

9 See, eg, *Director of Public Prosecutions v Luders* (unreported) Court of Petty Sessions (WA), 27 November 1989; *Copely v Queensland Newspapers Pty Ltd* (unreported) Queensland Supreme Court, 20 March 1992.

Contractors' Liens

Terms of Reference

In June 1974 the Commission was asked to advise on the practical effects of enacting liens and charges legislation to protect the interests of persons involved in the building and construction industry.

Background of Reference

The reference arose from sustained evidence of problems experienced by the building and construction industry primarily as a result of the practice of subcontracting. In a conventional building contract the client pays the head contractor, who engages other contractors (or subcontractors) to perform particular work or supply materials. Problems occur when there are insufficient funds available to pay subcontractors for work done or materials supplied, for example if the head contractor is declared insolvent. Liens legislation would permit subcontractors to register liens against the land on which building operations were being carried out, as security for payments due to them under their contracts. Charges legislation would enable subcontractors to charge money due from the owner to the builder, and the superior subcontractors.

Work on the reference proceeded swiftly and the Commission submitted an interim report setting out its tentative views in July 1974. This report was followed in August 1974 by a working paper which was released for public comment.

Nature and Extent of Consultation

The working paper attracted a number of submissions including responses from contractors and suppliers, industry associations, the Australian Finance Conference, regulatory boards, public utilities, the Federal Minister for Housing and Construction, legal agencies, the Perth Chamber of Commerce and a number of individuals. Two thirds of respondents advocated other forms of protection for subcontractors.

No Action Recommended

Following consideration of the submissions, the Commission recommended that no legislative action be taken to provide for registration of contractors' liens and charges. It did, however, suggest that alternative proposals for the protection of those engaged in the building and construction industry be examined by government.

In 1986 the Commission was asked to consider other alternatives to resolve the issue. The Commission subsequently made detailed recommendations for implementation of a legislative scheme to overcome these problems.[1]

1 Law Reform Commission of Western Australia, *Financial Protection in the Building and Construction Industry*, Project No 82 (1998).

55(I)

Review of the Justices Act 1902: Appeals

Terms of Reference

In 1974 the Commission received a general reference to review the *Justices Act 1902* (WA), which regulates the procedure of the Courts of Petty Sessions.

Background of Reference

Earlier, in 1973, the Commission was given a specific reference to consider and report on the procedure for appeals from Courts of Petty Sessions with a view to such appeals being simplified, and amongst other things, rendered less costly.[1] The Commission subsequently received this reference to comprehensively review the *Justices Act 1902* (WA) ("the Act"). It was decided that the two references be merged and that the question of appeals be dealt with as Part I of the comprehensive review of the Act.

At the time of the reference, a number of unsatisfactory features of the law and procedure for appeals from Courts of Petty Sessions had become apparent. For instance, under Part VIII of the Act there were two modes of appeal from Courts of Petty Sessions: ordinary appeals and appeals by way of an order to review. Because of the different characters of the two modes of appeal, different procedures were provided in the Act for each. In some respects the procedures coincided, but in many instances they differed, sometimes for no apparent reason. Their development along separate lines appeared largely to be the result of historical accident. It was felt that there was a need to reduce the costs of the appeal process, to simplify the right of appeal and to remove technical restrictions and other difficulties associated with the two separate procedures.

In 1976 the Commission carried out a survey of appeals instituted under Part VIII of the Act. The Commission also undertook a study of the law in other Australian jurisdictions and in England and New Zealand. In February 1977, as part of the consultative process for the entire reference, the Commission placed a press advertisement inviting preliminary submissions from interested individuals and organisations regarding practical problems experienced with the operation of the Act. A number of the submissions received related to the issue of appeals. These informed the preparation of a working paper, delivered in February 1978.

Nature and Extent of Consultation

The working paper was circulated for comment to various individuals and organisations including the Aboriginal Legal Service of Western Australia, the Chief Justice and judges of the Supreme Court, the Law School of the University of Western Australia, the Commissioner of Police and the Law Society of Western Australia. A notice was also placed in *The West Australian* inviting comments and criticism on the paper. A number of responses were received, including submissions from the Law Society of Western Australia and several individuals. The Commission considered all submissions in preparing its final report, which was delivered to the Attorney-General in April 1979.[2]

Recommendations

The Commission considered that the existing dual system of appeals was unnecessarily cumbersome and recommended that it be replaced by a single system, with an emphasis on clarity and simplicity.

1 See Law Reform Commission of Western Australia, *Appeals from Courts of Petty Sessions*, Project No 48 (referred 1973, became Project No 55(I)).

2 Law Reform Commission of Western Australia, *Review of the Justices Act 1902: Appeals,* Project No 55(I) (1979).

A number of other consequential recommendations were also made. A complete record of the Commission's recommendations, including detailed recommendations in respect of procedural changes required to ensure the viability of the appeals system, may be found in chapter seven of the final report.

Legislative or Other Action Undertaken

The Attorney-General confirmed receipt of the Commission's report during parliamentary proceedings on 6 December 1979.[3]

In 1989 Parliament passed the *Justices Amendment Act 1989* (WA) which substantially implemented the Commission's recommendations. Importantly, the amending Act enacted the Commission's principal recommendation to provide for a single mode of appeal.

3 Western Australia, *Parliamentary Debates*, Legislative Council, 6 December 1979, 5900 (Mr I Medcalf, Attorney-General).

55(II)

Courts of Petty Sessions: Constitution, Powers and Procedure

Terms of Reference

In 1974 the Commission received a general reference to review the *Justices Act 1902* (WA), which regulates the procedure of the Courts of Petty Sessions.

Background of Reference

For a number of years, the Commission had been examining this reference alongside its corresponding review of the *Local Courts Act 1904* (WA) and the *Local Court Rules 1961* (WA).[1] These parallel references constituted a comprehensive review of the inferior courts system in Western Australia. Because of its size, this reference was divided into three parts. In Part II of the reference, the Commission examined the role of Justices of the Peace, the constitution, powers and procedures of the Courts of Petty Sessions, orders to keep the peace and the position of unrepresented defendants.

As part of the research for this reference the Commission carried out a study of the relevant law in other Australian jurisdictions and in England and New Zealand. This research informed the preparation of a discussion paper which was issued in June 1984. The Commission also drafted a questionnaire, which was distributed with the discussion paper in order to stimulate public comment on these issues.

Nature and Extent of Consultation

The Commission received a large number of responses to the discussion paper. Various organisations and individuals made written submissions and completed the questionnaire. Responses were received from members of the magistracy, Clerks of Petty Sessions, the Aboriginal Legal Service, the Criminal Lawyers' Association, the Legal Aid Commission of Western Australia, branches of the Justices Association, government departments and members of the public. Following the publication of the discussion paper, representatives from the Commission attended meetings of branches of the Royal Association of Justices of Western Australia at Albany, Geraldton, Gnowangerup, Narrogin, Pinjarra and Stirling to discuss issues raised in the paper. As well as making oral submissions during these consultations, a large number of Justices of the Peace responded with written submissions. In total, the Commission received over 100 written submissions. These comments and submissions were analysed and taken into account by the Commission in formulating its recommendations. The final report, containing the Commission's recommendations, was delivered in November 1986.[2]

Recommendations

The Commission made 114 recommendations. In particular, the Commission recommended that Courts of Petty Sessions and Local Courts should be merged and that the rules relating to Justices of the Peace and the procedure in Courts of Petty Sessions should be reformed along specified lines. The principal recommendations were that:

- A statutory body should be established to regulate the appointment, selection, distribution, training and performance of Justices of the Peace.
- Courts of Petty Sessions and Local Courts should be merged to create a single court of general inferior jurisdiction with the following divisions:
  (a) an Offences Division;
  (b) a Civil Division;

1 See Law Reform Commission of Western Australia, *Local Courts: Jurisdiction, Procedure and Administration*, Project No 16 (I) (1988).
2 Law Reform Commission of Western Australia, *Courts of Petty Sessions: Constitution, Powers and Procedure*, Project No 55(II) (1986).

(c) a Small Debts Division;
(d) an Administrative Law Division; and
(e) a Family Law Division.[3]

- The procedure for dealing with offences tried summarily should be reformed so that:
  (a) complaints are in writing and contain the necessary particulars for giving reasonable information regarding the nature of the charge;
  (b) pre-trial hearings may be held at the discretion of the court;
  (c) the court has power to exclude people from the courtroom only where it is necessary in the interests of justice; and
  (d) a simple procedure by way of application on notice to the other party is introduced to deal with applications to the court.
- The system for committal proceedings should be altered so that:
  (a) defendants are allowed to plead guilty at an early stage of the proceedings, subject to certain safeguards;
  (b) committal proceedings are held in open court, subject to the power of the presiding officer to exclude members of the public where it is necessary in the interests of justice; and
  (c) the presiding officer has a discretion to award costs to the defendant where he or she is not committed for trial.
- There should be changes to the provisions relating to restraining orders to ensure that:
  (a) any person having the care or charge of another person may apply for a restraining order for the protection of that person; and
  (b) the court has the power to award costs at the hearing on the return of a summons to show cause why an ex parte order should not be confirmed.
- Changes should be made to improve the position of unrepresented defendants so that:
  (a) before proceeding to impose a sentence on an unrepresented defendant who has pleaded guilty, the court must ensure that the plea is unequivocal; and
  (b) the training of justices includes instructions on the measures which they should adopt to ensure that unrepresented defendants are dealt with fairly.

The Commission also made a number of other consequential recommendations. A complete outline of all the recommendations may be found in chapter 11 of the Commission's final report.

Legislative or Other Action Undertaken

The Attorney-General acknowledged receipt of the final report during parliamentary proceedings on 27 October 1987.[4] In 1991 Parliament addressed a number of the Commission's more minor recommendations by enactment of the *Miscellaneous Repeals Act 1991* (WA). This Act repealed a number of Imperial statutes relating to Justices of the Peace as recommended by the Commission.

The Commission's primary recommendations were considered in a 1997 Ministry of Justice report on the Amalgamation of Courts of Summary Jurisdiction.[5] The Ministry of Justice report analysed the current structure and jurisdiction of the lower courts, examined the Commission's recommendations and considered the situation in other Australian jurisdictions where similar legislation has been enacted. This report

3 An identical recommendation was made by the Commission in its review of the Local Court; see above n 1.
4 Western Australia, *Parliamentary Debates*, Legislative Council, 27 October 1987, 5041 (Mr JM Berinson, Attorney-General).
5 Ministry of Justice Court Services, *Amalgamation of Courts of Summary Jurisdiction Report*, February 1997.

recognised the widespread support for a proposed merger of Local Courts and Courts of Petty Sessions and contained proposals for the introduction of legislation to implement the Commission's recommendations.

Currency of Recommendations

Generally, the Commission's recommendations remain current. Since delivery of the final report in 1986, however, some aspects of the Commission's recommendations have become redundant through the enactment of contrary legislation.[6] Others have been superseded by recommendations in more recent Commission reports; for instance, the 1999 *Review of the Criminal and Civil Justice System in Western Australia* ("Project No 92").[7] This review reaffirmed the need for a thorough overhaul of the *Justices Act 1902* (WA). Importantly, the Commission restated its recommendation for a merger of the Courts of Petty Sessions and Local Courts to form a single court of general inferior jurisdiction.

Since the Commission's 1986 report the Ministry of Justice has continued to acknowledge the importance of these reforms and has been progressing the implementation of legislative changes. The Courts Services Division at the Ministry (now Department of Justice) is currently preparing a Cabinet submission for approval to draft a Magistrates' Court Bill with proclamation anticipated for 2003. The Ministry of Justice has indicated that this legislation will be drafted with the specific aim of incorporating as many of the Commission's Project No 92 recommendations as possible. Recently, the Department of Justice initiated the establishment of a steering committee, comprised of key stakeholders, to oversee the development of the Bill and to examine and consider how to incorporate and implement the Commission's recommendations

Action Required

The Commission's recommendation for the merger of Courts of Petty Sessions and Local Courts could be effectively implemented through the introduction of the proposed Magistrates' Court Bill. Further consideration may need to be given to the possibility of reforming the procedure, administration and powers of Courts of Petty Sessions within the context of the Commission's more recent recommendations in Project No 92.

Priority – High

This assessment is influenced by the continuing need for substantial reform of the criminal justice system. The need for reform was reaffirmed by the Commission in its comprehensive review of the criminal and civil justice system and has been further endorsed by the Department of Justice. The Government has indicated that reform of the criminal justice system, according to the recommendations of the Commission in Project No 92, should be given high priority status. This assessment is also influenced by the need for efficiency and consistency in the inferior court system and the fact that a combined inferior court already operates successfully in most other Australian jurisdictions.

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6 For instance the provisions in the *Justices Act 1902* (WA) relating to the preventative jurisdiction of the Courts of Petty Sessions and s145 which provided for the payment of a fine to the victim of an assault have since been repealed.

7 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999).

Enforcement of Orders Under the Justices Act 1902

Terms of Reference

In 1974 the Commission received a general reference to review the *Justices Act 1902* (WA), which regulates the procedure of the Courts of Petty Sessions.

Background of Reference

Part III of the reference dealt with the enforcement of orders of Courts of Petty Sessions. Generally, this involves the collection of fines and the consequences of default in their payment. At the time of the reference, fines were the most frequently used penalty by Courts of Petty Sessions.

This reference had been closely associated with the Commission's parallel reference to review the *Local Courts Act 1904* (WA) and the *Local Court Rules 1961* (WA).[1] The Commission had originally decided to combine the two parts of each of the parallel references, which dealt respectively with the enforcement of orders of Courts of Petty Sessions and the enforcement of judgments of Local Courts and to draft one discussion paper canvassing all the issues raised by each reference. Mr Archie Zariski, a Senior Lecturer in law at Murdoch University, was engaged to prepare this paper. In September 1993, however, the Attorney-General indicated that the Commission should give a high priority to the issue of enforcement of orders of Courts of Petty Sessions. This was because the Attorney-General wanted the Commission to comment on the Cullen Report,[2] a Ministry of Justice inquiry on fines enforcement, which was to be completed early in 1994. The Commission accordingly abandoned its plans to produce a joint discussion paper and instead, with the assistance of Mr Zariski, prepared a final report which dealt with improvements to the system of enforcing orders of Courts of Petty Sessions and commented on the proposals of the Cullen Report.

The inquiry that led to the Cullen Report was established in June 1993. The Cullen Report identified a number of problems with the fines enforcement system. In particular, the report found that the amount of people imprisoned for fine default was too high, that the value of fines as a sentencing option may fall into disrepute if offenders believe they can ignore or manipulate the system and that the system was cumbersome and costly to administer.

Nature and Extent of Consultation

In April and June of 1992 the Commission wrote to a number of organisations and individuals asking for preliminary submissions to assist in the identification of issues for consideration. The preparation of the final report was assisted by those responses. The Commission submitted its final report to the Attorney-General in April 1994.[3]

Recommendations

Essentially, the Commission agreed with the recommendations of the Cullen Report, but concluded that the recommendations did not give sufficient consideration to the position of indigent fine defaulters, both at the time that the fine is imposed and when payment arrangements were settled and enforced. The Commission's primary recommendations were designed to ensure that indigent defaulters were not inequitably affected by the proposals.

1 See Law Reform Commission of Western Australia, *Local Courts: Jurisdiction, Procedure and Administration*, Project No 16 (I) (1988).
2 Ministry of Justice and Police Fines Policy Development, *Infringement Notice and Fines Management System Western Australia*, 1993.
3 Law Reform Commission of Western Australia, *Enforcement of Orders Under the Justices Act 1902*, Project No 55(III) (1994).

Enforcement of Orders Under the Justices Act 1902

Legislative or Other Action Undertaken

In 1994 the Parliament enacted the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) ("the *Fines Act*") and the *Acts Amendment (Fines, Penalties and Infringement Notices) Act 1994* (WA) to implement the proposals of the Cullen Report as well as a number of the Commission's recommendations.

The recommendations that were not adopted either did not meet the policy objectives of the government at the time or were subjected to further consideration because they related to local government authorities. The Commission had further recommended that the provisions relating to enforcement of orders of Courts of Petty Sessions should be retained in the *Justices Act 1902* (WA) rather than within a new enactment.

Many of the recommendations of the Commission that were not adopted related to the notion of flexibility within the fines enforcement system. A number of amendments were ultimately made to the *Fines Act* in 2000 to address issues of inflexibility, hardship and to generally improve the operation of the enforcement system.[4] These amendments allowed for fines to be converted to a work and development order where an offender has no capacity to pay and licence suspension is unlikely to be effective and provided the Fines Enforcement Registrar with the discretion to not impose a licence suspension where undue hardship may be caused to the offender. These amendments reflect the essence of the Commission's primary recommendations for a more equitable enforcement system and for ensuring that indigent fine defaulters are not disadvantaged.

4 These amendments were effected by the enactment of the *Acts Amendment (Fines Enforcement) Act 2000* (WA) and the *Acts Amendment (Fines Enforcement and Licence Suspension) Act 2000* (WA).

The Strata Titles Act

Terms of Reference

In 1974 the *Strata Titles Act 1966–1978* (WA) was referred to the Commission for general review.

Background of Reference

The *Strata Titles Act 1966* (WA) ("the Act") was enacted in response to the growing demand in Western Australia for occupation of individual units in the one building on an ownership basis and the generally unsatisfactory methods of dealing with that demand. The Act was modelled on the *Conveyancing (Strata Titles) Act 1961* (NSW). In 1973 New South Wales enacted new legislation[2] to address perceived problems with the previous regime. In light of this complete revision of the model legislation and the increased popularity of ownership of strata title units, the Commission was asked to perform a full review of the Western Australian legislation.

In September 1975, in order to help identify the problems in relation to the Act, the Commission issued an invitation to the public to make preliminary submissions. Eighty-three submissions were received, many from proprietors of strata title units. The submissions identified a number of perceived inadequacies with the existing legislative scheme, particularly in respect of:

(a) resolution of disputes between unit proprietors;[3]

(b) the allocation by a developer of unit entitlements;

(c) matters dealing with unit ownership and common property;

(d) the assessment of rates on strata titles;

(e) the extent of the powers and duties of a strata company and the manner in which those powers and duties should be exercisable;

(f) controlling tenants;

(g) disclosure to purchasers of relevant information and protection of intending purchasers; and

(h) the application of the Act to duplexes.

The Commission released a working paper in February 1977. Apart from presenting an analysis of issues raised by commentators in the preliminary submissions, the working paper also examined the provisions of the 1973 New South Wales strata titles legislation and discussed their suitability for adoption in Western Australia.

Nature and Extent of Consultation

Sixty-nine commentators responded to the working paper including banks, local councils, government departments and authorities, relevant professional institutions and property owners. During the course of the project Mr Charles Ogilvie, the Commissioner in charge of the project, visited Sydney and Melbourne to discuss their respective legislative schemes with strata titles officials, solicitors, land agents and other persons with practical knowledge of the schemes. The Commission also corresponded with officials in Queensland where strata titles legislation providing for cluster (or group) titles[4] had been introduced.[5]

1 This included be means of tenancy in common and using the home unit company system.

2 *Strata Titles Act 1973* (NSW).

3 Under the Western Australian legislation disputes between unit proprietors were litigated in the ordinary courts. The 1973 New South Wales legislation established a scheme whereby disputes could be referred to the Strata Titles Commissioner or the Strata Titles Board.

4 A cluster titles system involves the subdivision of land into an area of small lots (on which dwellings can be erected) and common property. The proprietors of the lots become a statutory company and through that company control the common property which they own as tenants in common.

Many aspects of the Queensland and New South Wales schemes were used by the Commission in making its recommendations. The Commission delivered its final report in December 1982.[6]

Recommendations

In making its recommendations, the Commission's aim was to retain the basic framework of the existing legislation whilst at the same time recommending refinements designed to increase the flexibility of the strata title concept, to remove anomalies, to enable the more efficient management of strata schemes and generally to improve the working of the system. The Commission recommended that the Act be repealed and replaced with a new Act that retained many of the features of the existing legislation but which further provided for:

- An increased range of possible strata title developments by removing certain impediments to registration.
- The facilitation of more efficient administration of strata schemes by improving the existing election and voting systems and providing for the establishment of a reserve fund for the purpose of accumulating money for non-routine expenses.
- The clarification and extension of powers and duties of strata companies.
- The requirement that a detailed unit entitlement plan be lodged with the strata plan upon registration.
- The increased control of tenants by requiring that they be bound by the relevant by-laws of the strata company.
- The establishment of an office of Strata Titles Referee with wide powers to make orders in respect of disputes between unit proprietors. The Referee would act in an administrative fashion and appeal would lie to the proposed Administrative Division of the Local Court.[7] Further there should be power to remit a matter from the Referee to the Supreme Court.
- Certain improvements in the method of assessment of rates and taxes.
- The requirement that developers give prospective purchasers written notice of certain details of the strata scheme before they enter into a contract.

The final report also included a consideration of the desirability of introducing a cluster titles system into Western Australia and recommended that appropriate legislation be enacted to enable this practice. A comprehensive outline of the Commission's recommendations may be found at pages 349–379 of the final report.

Legislative or Other Action Undertaken

In 1985 Parliament passed the *Strata Titles Act 1985* (WA) and the *Acts Amendment Act (Strata Titles) 1985* (WA) (collectively "the new Act"). Most of the Commission's principal recommendations were implemented by the new Act.[8] However, in the absence of the establishment of separate divisions of the Local Court, the dispute resolution process that the Commission recommended was altered to allow that appeal lies

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5 *Building Units and Group Titles Act 1980–1981* (Qld).

6 Law Reform Commission of Western Australia, *Strata Titles Act*, Project No 56 (1982).

7 The establishment of an Administrative Division of the Local Court was proposed in the Commission's report on *Appeals from Administrative Decisions*, Project No 26(I) (1982). However, later reports recommended that Local Courts and Courts of Petty Sessions be merged to create a combined court of summary jurisdiction with separate divisions: see Law Reform Commission of Western Australia, *Courts of Petty Sessions: Constitution, Powers and Procedure*, Project No 55(II) (1986); *Local Courts: Jurisdiction, Procedures and Administration*, Project No 16(I) (1988).

8 Western Australia, *Parliamentary Debates*, Legislative Assembly, 16 April 1985, 2018 (Mr McIver, Minister for Lands and Surveys).

from a decision of the Strata Titles Referee directly to the District Court. Further, the Commission's recommendation to Parliament that detailed consideration be given to the issues of cluster titles and staged development has not been realised.

In 1995 a Strata Titles Taskforce was established by government to address problems perceived in respect of insurance of strata title units.[9] The recommendations of this taskforce led to the enactment of the *Acts Amendment Act (Strata Titles) 1996* (WA) which addressed those issues and made minor administrative adjustments to the legislation but did not enact the Commission's outstanding recommendations.

Currency of Recommendations

To the extent that the new Act did not implement the recommendations identified above, the Commission's recommendations remain current. However, it is clear that where minor differences can be seen between the Commission's recommendations and the provisions of the new Act, those differences were intended by Parliament.[10] Further, the new Act has been subjected to ongoing parliamentary scrutiny over the past 16 years.[11]

Action Required

Implementation of the outstanding recommendations would require consideration of detailed amendments to the new Act to provide for a system of cluster titles and staged development in Western Australia. Given that a decade has passed since the Commission's recommendations on these matters, a further commissioned review may be necessary. Additionally, it may be beneficial to re-examine the existing process of appeal from decisions of the Strata Titles Referee in the light of the proposed introduction of the Western Australian Civil and Administrative Tribunal.[12]

Priority – Low

This assessment is based on the fact that Parliament appears to have considered the strata titles scheme in some detail over the past 16 years and the outstanding recommendations are not integral to the workings of the existing legislative scheme.

9 Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 October 1996, 6786 (Mr G Kierath, Minister for Lands).
10 For instance, the Commission suggest that the strata company could surrender a lease for common land by unanimous vote. However, the new Act prohibits any such vote being taken by the lessor of the land if they are also a proprietor. Thus the vote need only be a majority of the remaining voting parties. Further, the Commission suggested that the proceeds from any sales prior to the registration of a strata plan should be payed into a trust fund. This was not provided for in the new Act, as the Government believed that there were already enough safeguards against inappropriate use of funds. See Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 April 1985, 2022 (Mr McIver, Minister for Lands and Surveys).
11 See Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 October 1996, 6782 (Mr G Kierath, Minister for Lands).
12 The Government has recently given the Commission a further reference to investigate the judicial review of administrative decisions in Western Australia. A Civil and Administrative Review Tribunal Taskforce has also been established to advise and assist the government and to liaise with the Commission on the conduct of this reference. The final report on this reference, *Judicial Review of Administrative Decisions* (Project No 95), is expected in early 2002.

57

Enforcement of Custody Orders

Terms of Reference

In 1974 the Commission received a general reference to review the law relating to the powers of police to enforce court orders where the custody of children was involved.

Background of Reference

At the time of the reference, the only remedy generally available to a person who had a custody order in his or her favour was to apply to the court for an order of attachment or committal for contempt against the person in default. The Commission was asked to consider whether police and authorised officers of the Department of Community Welfare should be empowered to enforce child custody and access orders without further court proceedings, that is, by physically removing the child from the person in default.

Reference Withdrawn

In 1975, the *Family Law Act 1975* (Cth) ("the Act") was passed. Section 64 of the Act empowered the court to issue a warrant authorizing the person to whom it was addressed to take possession of the child and deliver the child to the person entitled to custody. Although most custody orders would be made under the Act, the Commission considered that some custody orders would still be made in proceedings covered by state law.

In a letter to the Attorney-General on 16 December 1975, the Commission drew attention to s 64 of the Act and sought instructions as to whether it should take any further steps in relation to the reference. On 27 April 1976, the Attorney-General informed the Commission that s 64 of the Act covered the matter of concern and advised the Commission that the reference was withdrawn.

Section 2 of the Gaming Act

Terms of Reference

In 1975 the Commission was asked to consider whether s 2 of the *Gaming Act 1835* (Imp) should be amended or repealed.

Background of Reference

The law of securities for gaming debts was regulated by legislation dating back to 1664. Since that time, many statutes had been passed which resulted in great complexity and uncertainty, particularly in respect of the civil liability arising from a gaming debt contract.

The *Gaming Act 1835* (Imp) ("the Act") was an English imperial statute that was adopted in Western Australia by an Ordinance passed in 1844.[1] Under s 2 of the Act, a person who has given a 'note, bill or mortgage' as security for, or in satisfaction of, a gaming debt and who actually pays to any 'indorsee, holder or assignee' of such security the money secured, may recover that money from the person to whom he gave the security. The full effect of s 2 was not generally appreciated until the House of Lords' decision in *Sutters v Briggs*,[2] where it was determined that a cheque is a "bill" within the meaning of the Act. Accordingly, if a cheque was given to a winner in satisfaction of a gaming debt, then whether the cheque was cashed by the winner or by a transferee of the winner, the loser could recover the value of the cheque from the winner.

Although actions under s 2 were rare in Western Australia, on at least four occasions action had been threatened. This was a source of anxiety for bookmakers as it gave people paying a betting debt by cheque an opportunity to recover the value of the cheque.

The Commission issued a working paper in February 1976 drawing attention to defects and anomalies in the existing legislation. The Commission suggested various solutions that included repealing s 2, repealing the whole Act, and repealing section 84I of the *Police Act 1892* (WA).

Nature and Extent of Consultation

Copies of the working paper were sent to over 20 government and non-government agencies that had a special interest in the subject matter. A notice was also placed in *The West Australian* newspaper inviting interested persons to obtain a copy of the working paper and submit comments.

There were eight responses to the working paper including responses from racing and bookmakers' organisations, the Law Society of Western Australia, the Police Department and the Liberal Party (WA Division). The Commission released its final report in January 1977.[3]

Recommendations

The Commission recommended that:

(a) Section 2 of the Act should be repealed;

(b) Section 1 of the Act and s 84I of the Police Act 1892 should be amended so as no longer to apply to securities given in payment or satisfaction of bets unauthorized by the *Betting Control Act 1954*;

1 7 Vic. No. 13 (Imperial Acts Adopting Act).
2 [1922] 1 AC 1. Shortly after this decision s 2 was repealed in England by the *Gaming Act 1922* (UK).
3 Law Reform Commission of Western Australia, *Section 2 of the Gaming Act*, Project No 58 (1977).

(c) The *Betting Control Act 1954* should be amended so as to provide for the enforceability of bets authorized by that Act;

(d) A provision should be enacted to provide for the recovery of money lent in regard to lawful betting and for the enforceability of securities given in connection with the repayment of money so lent;

(e) The *Betting Control Act 1954* should be amended (subject to any relevant Government policy), to provide for Tattersall's Club in Perth and other appropriate premises to be registered as places where settling of bets authorised by that Act may take place;

(f) Section 1 of the Act and s 84I of the *Police Act 1892* (as amended in accordance with this report) should be re-enacted in new legislation, which should include the proposed provision regarding recovery of money lent (see (d) above); and

(g) The Acts of 16 Car.II C.7 and 9 Anne C.14 should be declared not to be in force in Western Australia.

Legislative or Other Action Undertaken

The Commission's recommendations were fully implemented by a sequence of legislative action, which ultimately repealed the Act. The first stage of the Commission's recommended regime was implemented in 1978 by amendments to s 5 of the *Betting Control Act 1954* (WA).[4] In 1985, amendments were made to the *Police Act* so that it no longer applied to securities given in payment for, or satisfaction of, bets unauthorised by the *Betting Control Act*.[5] Further amendments to the *Police Act* provided for the enforcement of contracts relating to prescribed gaming or betting.[6] In the same year, the Act was repealed in full[7] and a declaration made that the Acts of 16 Car.11 C.7 and 9 Anne C.14 did not have effect in Western Australia.[8]

4 *Betting Control Act Amendment Act 1978* (WA) s 3. This amendment implemented the Commission's recommendation (e).

5 *Gaming and Betting (Contracts and Securities) Act 1985* (WA) ss 3–4. This amendment implemented the Commission's recommendation (b).

6 *Gaming and Betting (Contracts and Securities) Act 1985* (WA) ss 5–6. This amendment implemented the Commission's recommendation (d). It also essentially implemented recommendation (c) although s 11(12) of the *Betting Control Act*, inserted by the *Acts Amendment and Repeal (Betting) Act* 1992 (WA), extended this power of enforcement.

7 *Acts Amendment (Gaming and Related Provisions) Act 1985* (WA) s 4. Section 84I of the Police Act 1892 was repealed by *Acts Amendment (Gaming and Related Provisions) Act 1985* (WA) s 5. These provisions implemented the Commission's recommendations (a), (b) and (f).

8 *Acts Amendment (Gaming and Related Provisions) Act 1985* (WA) s 3. This declaration implemented the Commission's recommendation (g).

Audit Provisions of the Local Government Act

Terms of Reference

In 1975 the Commission was given a reference to review sections of the *Local Government Act 1960–1967* (WA) ("the Act") relating to audit matters.

Background of Reference

The Commission received the reference following suggestions by accountants that many provisions of the Act were defective and no longer in accordance with modern commercial audit practice.

At the Commission's request, the Institute of Charted Accountants (WA Branch) made a detailed submission explaining the alleged defects and suggesting amendments. The submission was forwarded to the Department of Local Government ("the Department") and the Local Government Association of Western Australia Inc for comment. The Commission received detailed comments on the various issues from the Department.

Reference Withdrawn

The Commission considered that the substance of the project concerned accounting procedures and practice rather than legal issues. In addition, a government decision had been made to transfer local government audit services from the Department to the Auditor General.

In August 1980 the Commission drew the Attorney-General's attention to these issues and suggested that consideration be given to withdrawal of the reference. The reference was formally withdrawn in June 1982.

60

Alternatives to Cautions

Terms of Reference

In 1975 the Commission was asked to consider alternative ways of dealing with offenders charged with offences which, in the past, may have been dealt with by way of a caution.

Background of Reference

It had long been the practice of magistrates and judges, if they found a charge proved but considered that there were extenuating circumstances, to convict an offender and merely "caution" him. The purported legal effect of a caution was that, whether or not the offender was ordered to pay the complainant's costs or some other order was made against him, he was unconditionally discharged.

As a result of the 1975 Supreme Court decision *Walsh v Giumelli; White v Gifford*,[1] which held that a Court of Petty Sessions had no power to impose a caution on a convicted offender, the Attorney-General referred the matter to the Commission for consideration of possible alternatives to the use of cautions.

Nature and Extent of Consultation

The Commission issued a working paper in August 1975 which was widely distributed for comment. The Commission received submissions in response to the working paper from the Crown Law Department, the Department for Community Welfare, the Law Society of Western Australia, the Parliamentary Commissioner for Administrative Investigations, the Western Australian Alcohol and Drug Authority, the Western Australian Police Department and four individuals. The final report containing the Commission's recommendations was delivered in November 1975.[2]

Recommendations

Following extensive examination of the issues and submissions, the Commission recommended that:

- Courts of Petty Sessions and superior courts should be able to dismiss a proven charge without conviction where the offence carries a maximum penalty that does not exceed three years' imprisonment.
- Courts of Petty Sessions and superior courts should be able to convict an offender and discharge him conditionally or unconditionally except in respect of those offences where there is a mandatory or minimum sentence.
- The power to discharge offenders without penalty, whether with or without conviction and whether conditionally or unconditionally, should not be limited to first offenders.
- Dismissal without conviction or discharge following conviction should not be a bar to civil proceedings, and should not affect the power of a court to make any other order, such as a compensation order or an order as to costs payable by the defendant.

The Commission made several other consequential recommendations outlining a court's discretion to impose conditions on the dismissal or discharge, and the criteria to be considered by the courts when deciding whether or not a dismissal or discharge should be granted.[3]

Legislative or Other Action Undertaken

In 1979 Parliament enacted the *Criminal Code Amendment Act 1979* (WA) to implement the Commission's recommendations.

1 [1975] WAR 114.
2 See Law Reform Commission of Western Australia, *Alternatives to Cautions*, Project No 60 (1975).
3 Ibid 16–18.

Enforcement of Judgment Debts

Terms of Reference

In March 1975, the Minister for Justice wrote to the Commission asking it to comment and report on a working paper that was prepared by Mr D St L Kelly, of the University of Adelaide, for the Commonwealth Commission of Inquiry into Poverty ("the Commission of Inquiry").

Background of Reference

When the Commission of Inquiry subsequently published its final report, the Commission extended its terms of reference to include an examination of the full report. One of the primary concerns of the Commission of Inquiry was to avoid undue hardship to judgment debtors.[1] The central recommendation of the Commission of Inquiry was that a debt recovery tribunal should determine an appropriate enforcement remedy only after an examination hearing of the judgment debtor.[2] The other recommendations of the Commission of Inquiry concerned a legislative regime to support the central recommendation.

Nature and Extent of Consultation

As the terms of reference called for comments on the Commonwealth report rather than an independent investigation of the subject, no working or discussion paper was issued. The Commission delivered its report in April 1977.

No Action Recommended

Because the Commission was asked only to 'comment and report' on the subject, it made no formal recommendations for legislative action. However, after examining the report in the context of the position in Western Australia, the Commission made detailed comments on the relevance of the recommendations made by the Commission of Inquiry.

With regard to the Commission of Inquiry's central recommendation (that a debt recovery tribunal should determine an appropriate enforcement remedy only after an examination hearing of the judgment debtor), the Commission commented that:

- While a creditor can initiate an examination hearing, it is arguable that the debtor should also be able to initiate an examination hearing so as to be able to re-organise his or her financial affairs.
- Enabling orders to pay by instalments to be made on the basis of an attested questionnaire, without the debtor having to specifically attend court, might save expense, inconvenience and delay.

The Commission deferred consideration of a debts recovery tribunal for its concurrent Project No 63.[3] In that report, the Commission recommended that the *Local Courts Act 1904* (WA) and its accompanying rules be amended to create a Small Debts Division in Local Courts.[4] However, the purpose of the proposed Small Debts Division was only to provide a simplified procedure for small disputes.[5] In this sense, the Commission did not agree with the recommendation of the Commission of Inquiry that a debt recovery tribunal should concern itself with protecting the debtor from hardship.

1 Law Reform Commission of Western Australia, *Report on Enforcement of Judgment Debts*, Project 61 (1977) 6.
2 Ibid 1.
3 Law Reform Commission of Western Australia, *Small Debts Court*, Project No 63 (1979).
4 These recommendations were implemented by the *Local Courts Amendment Act 1982* (WA).
5 Project No 63, above n 3, paras 3.10–3.11; 3.13.

62

Liability of Highway Authorities for Non-Feasance

Terms of Reference

In 1975 the Commission was given a reference to advise whether there should be any change in the common law rules concerning the liability of a highway authority for injury or damage which is occasioned by accidents on the highway, and if so, what changes should be made.

Background of Reference

The Commission interpreted these terms of reference as requiring to report on whether there should be any change to the common law rule known as "the non-feasance rule".[1] According to this rule, highway authorities are under no duty to undertake active measures to safeguard persons using their highways against dangers which make them unsafe for normal use, except in respect of dangers they have created or where there is a statutory provision to the contrary. Reform of the non-feasance rule was perceived to be necessary because:

(a) the rule prevents the recovery of damages in some deserving cases; and

(b) the rule is in practice unsatisfactory because the distinctions drawn in connection with it are difficult to apply or justify.

The Commission released a working paper in 1978 describing and evaluating the operation of the non-feasance rule in Western Australia and certain other jurisdictions, and called for public comment on the issues raised and discussed in the paper.

Nature and Extent of Consultation

Twenty-one commentators responded to the working paper. These included relevant government authorities, municipal planners and engineers, private individuals, the Law Society of Western Australia and a senior judicial officer. Of those that provided submissions, only five believed that the non-feasance rule should be retained. The Commission delivered its final report in May 1981.[2]

Recommendations

The Commission recommended that:

1. The non-feasance rule should be abolished through legislation.
2. When determining whether a highway authority has fulfilled the duty of care, a court should be entitled to consider, among other matters, a number of specific criteria.
3. The burden of proving that a highway authority failed to fulfil the duty of care be upon the person claiming damages for breach of that duty.
4. The present law concerning contributory negligence, and concerning contribution between persons claiming damages, apply to claims brought against highway authorities for breach of that duty of care.
5. The present law concerning giving notice to highway authorities of claims to be brought against them, and concerning the time within which those claims can be brought, apply to claims for breach of that duty.
6. Breach of the duty of care be made the only ground upon which highway authorities can be liable for non-feasance.

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1 The non-feasance rule dates back to medieval England. It was first applied in Australia in *Municipal Council of Sydney v Bourke* [1895] AC 433.

2 Law Reform Commission of Western Australia, *Liability of Highway Authorities for Non-Feasance,* Project No 62 (1981).

7. The duty of care recommended above apply to the Crown when it is a highway authority.
8. Responsibility for Forests Department's roads be clarified.
9. The Act of Parliament creating the duty of care not come into force until a complete financial year had elapsed after it was passed.

Legislative or Other Action Undertaken

Although, in 1985 the final report was acknowledged by the Attorney-General as being under consideration,[3] no specific legislation has resulted.

Currency of Recommendations

The High Court of Australia has recently overturned the common law non-feasance rule.[4] This effectively renders the Commission's primary recommendation (Recommendation 1) defunct. However, the remaining recommendations are relevant and desirable to limiting the liability of highway authorities in the absence of the non-feasance rule.

Action Required

Implementation of the regime recommended by the Commission requires legislative action. This will necessitate the amendment of several Acts as specified in appendix II of the final report.[5]

Priority – Medium

It is particularly desirable that rights and responsibilities in this area of law be clarified to ensure that highway authorities are not unduly burdened by the effect of the High Court's recent abrogation of the non-feasance rule.

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3 Western Australia, *Parliamentary Debates*, Legislative Assembly, 26 September 1985, 1630 (Mr JM Berinson, Attorney-General).

4 *Brodie v Singleton Shire Council*; *Ghantous v Hawkesbury City Council* [2001] HCA 29 (31 May 2001).

5 With regard to the Acts listed in appendix II, it should be noted that the *Local Government Act 1960–1980* (WA) was repealed by the *Local Government Act 1995* (WA) and the *Forests Act 1918–1976* (WA) was repealed by the *Conservation and Land Management Act 1984* (WA).

63

Small Debts Court

Terms of Reference

In 1976 the Commission was asked to examine the desirability of expanding the jurisdiction of the Small Claims Tribunal into a comprehensive Small Debts Court or of making some other special provision for the hearing of claims in respect of small debts.

Background of Reference

The Commission was given the reference following increasing complaints that access to the Small Claims Tribunal was restricted to a very narrow range of litigants and did not address the needs of a significant section of the commercial community.

The Small Claims Tribunal allowed consumers to bring a claim against a trader where the claim was less than $1000. The process of bringing such a claim was inexpensive and fast.[1] By contrast, a trader with a claim against a consumer was required to pursue the claim through the ordinary courts. Such claims were generally heard in the Local Court, which had jurisdiction over various matters up to $3000, including debts.[2] Traders felt they were at a disadvantage because of the difficulties of delay and cost that attend a Local Court action. In some cases such action was abandoned because legal costs would likely exceed the value of the claim.

Nature and Extent of Consultation

The Commission issued a working paper in June 1978, and received comments from a wide range of organisations and individuals, including the Consumer Affairs Council, the Department for Consumer Affairs, the Perth Chamber of Commerce, the Master Painters, Decorators and Signwriters' Association, the Master Plumbers' Association, magistrates, and individuals directly involved in small business.

On 14 November 1978 one of the Commissioners Mr DK Malcolm, presented a paper entitled "The Proposed 'Small Debts Court'"[3] to a seminar organised by the Australian Institute of Credit Management (WA Division). There was a general consensus of opinion at the seminar that the proposal to establish a simplified procedure for the settlement of small debts within the Local Court was a worthwhile reform.[4] The final report containing the Commission's recommendations was delivered in April 1979.[5]

Recommendations

The Commission examined the various alternatives[6] and recommended the establishment of a 'Small Debts Division' within the Local Court as the most suitable forum for addressing the problems raised by the reference. The Commission preferred this approach because it could be introduced on a statewide basis through the existing Local Court system at minimal cost and within a relatively short time.

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1 At the time of the reference, a claimant in the Small Claims Tribunal was required to pay a very modest $3 filing fee and the action would be listed for hearing within five weeks. There were no pleadings or interlocutory proceedings and the hearing was conducted without solicitors. The referee would attempt to negotiate a settlement, and if the attempt failed, would proceed to determine the matter. The decision of the referee was final and there was no right of appeal.

2 *Local Courts Act 1904* (WA).

3 A copy of this paper may be viewed at the offices of the Law Reform Commission of Western Australia.

4 The seminar was attended by almost three hundred representatives drawn from all sections of the credit industry in Western Australia.

5 Law Reform Commission of Western Australia, *Small Debts Court*, Project No 63 (1979).

6 The three alternatives considered by the Commission were:
(i) To extend the jurisdiction of the Small Claims Tribunal;
(ii) To establish a separate small debts tribunal; or
(iii) To establish a special division of the Local Court.

The Commission also made an in-depth examination of the procedural issues attending the establishment of a Small Debts Division. In this regard the Commission recommended that:

- The Small Debts Division should have a simplified procedure similar to that of the Small Claims Tribunal.
- The jurisdiction of the Small Debts Division should be to adjudicate small disputed claims for debts or liquidated demands with a monetary limit not exceeding $1000.
- The jurisdiction should be exercised only by magistrates, who should have all the powers of a referee of the Small Claims Tribunal to make orders in addition to the powers derived from the Local Courts Act and Rules.
- The procedure and fees for lodging a claim should be the same as for any other claim in the Local Court.

The Commission made several other consequential recommendations dealing with service of summonses, rules regarding hearings, costs and the enforcement of judgments. Details of these and other recommendations may be found in the Commission's final report at pages 39–42.

Legislative or Other Action Undertaken

The Commission's recommendations were legislatively implemented by the *Local Courts Amendment Act 1982* (WA).

X

Protection of Money Awarded as Damages

Terms of Reference

In 1976 the Commission was asked to report, in an informal manner, on whether it might be desirable to enact legislation to protect plaintiffs who recover substantial damages in a court judgment but who lack the capacity to handle their own affairs (although not an incapable person mentally).[1]

Background of Reference

In June 1976, the Attorney-General informed the Commission that the former Chief Justice of Western Australia, Sir Lawrence Jackson, had raised the question of whether legislation was required to protect plaintiffs who recover substantial damages but were unable to manage their own affairs. The Attorney-General asked the Commission for its views on how the problem could be approached and drew attention to the *Aged and Infirm Persons' Property Act 1940* (SA) which enables a court to make an order restraining such persons from dissipating money awarded as damages to the detriment of themselves and their families.[2]

At the time of the reference, the existing law in Western Australia dealing the management of a person's affairs was contained in several provisions within the *Mental Health Act 1962* (WA)[3] and the *Public Trustee Act 1941* (WA).[4] The operation of these provisions depended on a finding or certification that a person is "incapable" of managing his or her affairs. Under the South Australian legislation, the court is able to act on its own motion, and can make a protection order where a person is unable "wholly or partially" to manage their affairs, or is subject to undue influence or otherwise in a position that renders it in their interests that their property be protected.[5]

Nature and Extent of Consultation

As the report was conducted on an informal basis, no consultation with the wider community was undertaken. The Commission submitted its report in a letter to the Attorney-General dated 3 August 1976.

Recommendations

The Commission examined the South Australian legislation and recommended that similar legislation be enacted in Western Australia. The Commission also reviewed several methods by which such reform could be achieved but did not recommend any particular method.

Legislative or Other Action Undertaken

There has been no legislative action undertaken to give effect to the Commission's recommendation.

Currency of Recommendations

The Commission's recommendation remains current. Other jurisdictions, such as New South Wales and the Northern Territory, have since enacted legislation similar to that recommended by the Commission.[6]

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1 Although this reference appears chronologically following Project No 63, because it was an informal report it was not allocated a specific project number. For the purposes of this publication, the reference has been designated "Project X".
2 *Aged and Infirm Persons' Property Act 1940* (SA), s 8a.
3 *Mental Health Act 1962* (WA) s 64.
4 *Public Trustee Act 1941* (WA) s 35.
5 See Law Reform Commission of Western Australia, *Annual Report 1976–1977*, 32.
6 *Protected Estates Act 1983* (NSW); *Aged and Infirm Persons' Property Act 1992* (NT). This legislation does not deal specifically with the protection of money received as damages, but rather provides for the protection of property of "incapable persons".

Action Required

Legislation is required to give effect to the Commission's recommendation. Since the Commission did not specifically recommend a particular method of reform, a working paper on this issue may be appropriate.

Priority — Medium

There is an argument that as the population ages, there may be a corresponding increase in the number of persons unable to manage their own affairs.[7] By following the Commission's recommendation, Western Australia could develop its own scheme for dealing with the property of incapable persons to meet that community need.

7 See Brian Porter, 'Protected Persons and Their Property: New Law and Practice' (1987) 25 *Law Society Journal* 54–57, which discusses the merits of the *Protected Estates Act 1983* (NSW) – a system for dealing with property problems related to incapable persons.

Bail

Terms of Reference

In 1976 the Commission was asked, as a matter of priority, to review the law and procedure relating to bail.

Background of Reference

At the time of the reference the law governing the grant of bail was contained in 117 provisions of 14 different statutes and regulations. The diversity of legislation led to the undesirable situation where doubts about irregularities, omissions and ambiguities in the law existed. In addition, some practices, such as the imposition of a condition requiring a cash surety, were not authorised. As a consequence, decisions regarding bail were often taken on an ad hoc basis without adequate or comprehensive guidelines, and sometimes without sufficient relevant information about the defendant. In many cases excessive use was made of the requirement that a defendant find a surety as a condition of their release on bail. Failure to meet this condition had added significantly to the number of remand prisoners in Western Australian jails. There was also no clear procedure for either the defendant, or the prosecution, to appeal against decisions made relating to bail.

Nature and Extent of Consultation

Because the issue was one of potentially wide public concern the Commission broadened the scope of consultation. In order to attract public submissions on the matter, an advertisement was placed in *The West Australian* newspaper and a survey was taken of remand prisoners at Fremantle Prison. Extensive consultation was also had with persons involved at all stages of the bail process, including police and judicial officers at all levels of the state judicial hierarchy.

These preliminary submissions and the research undertaken by the Commission informed a working paper which was distributed for comment in November 1977. The working paper analysed the existing law and discussed the issues surrounding various reform proposals, both in Western Australia, and in other comparable jurisdictions. It proposed consolidation of the existing provisions into a single statute with the inclusion of procedures to enhance the supply of relevant and accurate information about a defendant seeking bail. The paper attracted comment from a wide range of individuals and groups including government departments, judicial officers, the Law Society of Western Australia, Probation and Parole Services, the Royal Association of Justices of Western Australia and the Council for Civil Liberties in Western Australia.

The Commission submitted its final report in March 1979.[1]

Recommendations

The Commission made detailed recommendations to consolidate, clarify and reform the law and procedure relating to bail. The primary recommendation was to enact a separate *Bail Act* to deal comprehensively with bail for defendants in all levels of court in Western Australia and at all stages of criminal proceedings. The Commission also recommended further reforms designed to improve bail procedures that could not appropriately be included in the proposed legislation.

The principal recommendations may be summarised as follows:

- The proposed *Bail Act* should provide that bail be considered for all criminal offences in Western Australia.

1 Law Reform Commission of Western Australia, *Bail,* Project No 64 (1979).

- All unconvicted defendants should have a qualified right to bail. Certain provisions should limit this right. These provisions ranged from the likelihood of certain behaviour whilst on bail to the requirement of further information about the defendant.
- Bail conditions should be reasonable, specified and relevant.
- The law relating to sureties should be specified and streamlined.
- Greater use should be made of summons procedures.
- Bail centres should be established in Western Australia.
- Steps should be taken to improve conditions for defendants who are remanded in custody, and to reduce pre-trial delay.
- Better interview facilities should be provided for prisoners on remand.
- There should be sufficient Justices of the Peace available to perform bail decision-making duties in rural and remote areas.
- Consideration should be given to the establishment of a body to provide a continuing review of bail procedures.

A comprehensive outline of the Commission's recommendations may be found in chapter 10 of the final report.

Legislative or Other Action Undertaken

In 1982 Parliament passed the *Bail Act 1982* (WA) which implemented the Commission's primary recommendation for consolidation of bail provisions. In July 1986 the Government conducted a further review of the legislation[2] which resulted in the implementation of the remaining recommendations by the *Bail Amendment Act 1988* (WA).

2 Western Australia, *Parliamentary Debates*, Legislative Assembly, 2 July 1986, 1287.

65(I)

Privacy

Terms of Reference

In 1976 the Commission was asked to advise upon:

(1) the extent to which undue intrusions into or interferences with privacy arise or are capable of arising under the laws of Western Australia, and the extent to which procedures adopted to give effect to those laws give rise or permit such intrusions or interferences, with particular reference to but not confined to the following matters:

  (a) the collection, recording or storage of information by state departments, authorities or corporations, or by persons or corporations licensed under those laws for purposes related to the collection, recording, storage or communication of information;

  (b) the communication of the information referred to above to any government department, or to any authority, corporation or person;

  (c) powers of entry on premises or search of persons or premises by police and other officials; and

  (d) powers exercisable by persons or authorities other than courts to summon the attendance of persons to answer questions or produce documents.

(2) (a) what legislative or other measures are required to provide proper protection and redress in the cases referred to above;

  (b) what changes are required in the law in force in the state to provide protection against, or redress for, undue intrusions into or interferences with privacy arising, inter alia, from the obtaining, recording, storage or communication of information in relation to individuals, or from entry onto private property with particular reference to, but not confined to, the following:

    (i) data storage;
    (ii) the credit reference system;
    (iii) debt collectors;
    (iv) medical, employment, banking and like records;
    (v) listening, optical, photographic and other like devices;
    (vi) security guards and private investigators;
    (vii) entry onto private property by persons such as collectors, canvassers and salesmen;
    (viii) employment agencies;
    (ix) press, radio, and television;
    (x) confidential relationships such as lawyer and client and doctors and patient.

(3) any other related matter; but excluding inquiries on matters falling within the Terms of Reference of the Commonwealth Royal Commission on Intelligence and Security or matters relating to national security or defence.

The terms of reference were widened in 1978 when the Attorney-General requested that they include 'consideration as to whether a person's criminal record should be expunged after a stipulated time, and if so, in what circumstances and under what conditions, and as to whether the record should revive in the event of the person sustaining a further conviction'.

Background of Reference

The Commission's reference was parallel to a reference given by the Commonwealth Attorney-General to the Australian Law Reform Commission (ALRC). The purpose of the parallel reference was to enable the Commission to evaluate the recommendations of the ALRC, to make appropriate recommendations at the state level, and to explore the possibility of developing legislation suitable for adoption on a uniform basis throughout Australia.

To supplement the exercise undertaken by the ALRC, and to minimise duplication of effort, the Commission produced a working paper examining the exercise of statutory powers of intrusion by state officials. The working paper led to preparatory work towards a draft report, but this was never completed.

The ALRC reference resulted in a privacy report.[1] Although this report ultimately led to legislation,[2] the continual changes to the Commonwealth proposals and the need to concentrate the Commission's resources on projects with higher priority led to work on the reference being deferred.

Reference Withdrawn

The reference was deferred in 1986, with the Commission and the Attorney-General agreeing to identify specific areas affecting privacy for individual examination. The reports on *Confidentiality of Medical Records and Medical Research*[3] and *Professional Privilege for Confidential Communications*,[4] certain aspects of the report on *Police Act Offences*,[5] and the earlier working paper on *Privacy and Statutory Powers of Intrusion* [6] all dealt with aspects of the terms of reference of the privacy project. The reference was formally withdrawn in 1993.

1 Australian Law Reform Commission, *Privacy*, Report No 22 (1983).
2 *Telecommunications (Interception) Amendment Act* 1987 (Cth); *Privacy Act* 1988 (Cth).
3 Law Reform Commission of Western Australia, *Confidentiality of Medical Records and Medical Research*, Project No 65(II) (1990).
4 Law Reform Commission of Western Australia, *Professional Privilege for Confidential Communications*, Project No 90 (1993).
5 Law Reform Commission of Western Australia, *Police Act Offences*, Project No 85 (1992).
6 Law Reform Commission of Western Australia, *Privacy and Statutory Powers of Intrusion*, Working Paper and Survey, Project No 65 (1991).

65(II)

Confidentiality of Medical Records and Medical Research

Terms of Reference

In 1987 the Commission was asked to review the law relating to the use of patients' medical records for the purpose of medical research.

The reference was directed towards a specific area of privacy, under the general privacy reference,[1] which was agreed between the Commission and the Attorney-General in 1986.

Background of Reference

The Health Department had become increasingly concerned that the developing law of confidentiality would unduly restrict or obstruct medical research in Western Australia. Unlike the legislation of the Commonwealth[2] and some other Australian states,[3] there is no specific statutory provision in Western Australia regulating the use of medical records for research purposes.

Given the absence of statutory authority, it was feared that a hospital's disclosure of medical records to a researcher, in a form that identified individual patients, was a breach of a legal duty of confidence. The breach would only be avoided if the patients had consented to the disclosure. Researchers claimed that in many cases it was impracticable to obtain such patient consent.

The Commission issued a discussion paper in March 1989 for the purpose of obtaining public comment. The Commission's report[4] was delivered in August 1990.

Nature and Extent of Consultation

The Commission received 32 comments upon the discussion paper from a variety of sources including research organisations, hospitals, doctors and private individuals.

Recommendations

The Commission made the following recommendations:

1. The law should be clarified to ensure that the disclosure to researchers of patient-identifiable information without patient consent does not involve a breach of the legal duty of confidence, provided the research has been approved by a prescribed Institute Ethics Committee (IEC) in accordance with specified criteria.
2. Prescribed IEC's should be those of the teaching hospitals, WA universities and the state Health Department and of any other body prescribed by the Minister for Health which have consented to being prescribed.
3. In giving its approval the IEC should be satisfied that:
   (a) The research project has as its purpose the advancement of medical knowledge or the improvement of health services in Western Australia;
   (b) Access to patient-identifiable information is necessary for the scientific validity of the project;
   (c) Access to that information without patient consent is justified having regard to specified factors; and that
   (d) The public interest in undertaking the project outweighs the public interest in maintaining confidentiality.

1 Law Reform Commission of Western Australia, *Privacy*, Project No 65(I) (referred 1976, withdrawn 1993).
2 *Privacy Act 1988* (Cth); *Epidemiological Studies (Confidentiality) Act 1981* (Cth).
3 *Health Administration Act 1982* (NSW); *Privacy and Personal Information Act 1998* (NSW); *Health Act 1937* (Qld); *Health Commission Act 1976* (SA); *Health Services Act 1988* (Vic).
4 Law Reform Commission of Western Australia, *Confidentiality of Medical Records and Medical Research*, Project No 65(II) (1990).

4. As a further condition of the project being granted approval, the researcher should be required to comply with a prescribed code of conduct for the safeguarding of the information in his or her hands.
5. Record-keepers of patient-identifiable information should be entitled to act on a certificate of a prescribed IEC that the project conforms to the statutory criteria.
6. The researcher, and any other person who acquires patient-identifiable information directly or indirectly from the researcher, should be placed under an express duty of confidence towards the subject of the information.
7. It should be an offence for a researcher or third party, without lawful excuse, to communicate patient-identifiable information to any other person.
8. Patient-identifiable information in researchers' hands should be immune from disclosure in judicial proceedings.
9. Legislation should be enacted so as expressly to authorise disclosure of Health Department records for research purposes, subject to specified safeguards.
10. Departments and agencies should be required to impose restrictions on access to any patient-identifiable information in their records when transferring those records to the state archives.

Legislative or Other Action Taken

The Attorney-General withdrew the general privacy reference in 1993, influenced by the fact that proposals for a Privacy Bill were being developed by the Ministry of Justice. In February 1996, an information and options paper prepared by the Ministry of Justice, was forwarded to the Attorney-General and the Ministry of Premier and Cabinet.

The development of a Privacy Bill has stalled, primarily due to the perceived need for uniformity between Australian state jurisdictions. This issue has been considered at various times by the Standing Committee of Attorneys-General, which established its own working party on privacy.

Currency of Recommendations

On 21 December 2001 the *Privacy Amendment (Private Sector) Act 2000* (Cth) ("the Act") came into effect, extending the operation of the *Privacy Act 1988* (Cth) to cover the private health sector throughout Australia. The Act establishes a national scheme providing, though codes of practice adopted by private sector organisations and the National Privacy Principles ("the Principles"),[5] for the appropriate collection, holding, use, correction, disclosure and transfer of personal information by private sector organisations. The Act provides greater protection of sensitive personal information and medical records by placing stricter limits on how this information is collected and handled by private sector organisations.

In most cases, private organisations will not be able to collect sensitive information without consent. Where the information is relevant to public health, public safety, or the management, funding or monitoring of a health service, health information may be used for research. This is subject to the proviso that there was no reasonable way of obtaining a patient's consent, that the organisation has shown that the information is necessary for research and that all identifying features have been removed prior to publication. The Act also allows Australians to access their own medical records in accordance with guidelines set by the Privacy Commissioner[6] and allows for the disclosure of confidential patient information in certain circumstances to family members and health professionals.[7]

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5 National Privacy Principles are legislative benchmarks for handling personal information. Private organizations may develop privacy codes in accordance with the Principles that, once approved by the Privacy Commissioner, operate in place of the legislative standards.

6 The Office of the Privacy Commissioner was created as a separate Commonwealth statutory authority by the *Privacy Amendment (Office of the Privacy Commissioner) Act 2000* (Cth).

7 Office of the Federal Privacy Commissioner, 'Guidelines on Privacy in the Private Health Sector', 8 November 2001, <http://www.privacy.gov.au/publications/hg_01.doc>. See also <http://www.law.gov.au/privacy>.

There is still, however, a need for legislative uniformity as existing state privacy provisions vary widely.[8] For instance:

- In New South Wales, a state Privacy Commissioner with jurisdiction generally limited to the public sector has been established.[9]
- Victoria passed the *Information Privacy Act 2000* (Vic) adapting the Principles to the state public sector. Additionally, on 1 July 2002 the *Health Records Act 2001* (Vic) will come into effect to protect all personal information held by health service providers in the public and private sectors.[10]
- In December 2000 an administrative regime was approved for the Queensland public sector involving guidelines based on the Principles that apply to the Commonwealth Government public sector.
- South Australia has issued an administrative instruction requiring its government agencies to generally comply with the Principles and at this stage does not intend to develop privacy legislation for either the public or private sectors.[11]
- Tasmania issued its own Information Privacy Principles in 1997 based on the federal legislation and recommended them to Tasmanian government agencies.[12]
- The Act applies to Australian Capital Territory government agencies and is currently administered by the federal Privacy Commissioner.
- The Northern Territory intends to introduce legislation to cover the Northern Territory public sector to "complement the Commonwealth legislation and create a seamless framework of privacy protection".[13]

Western Australia does not currently have a privacy regime. However, various confidentiality provisions cover government agencies and some of the Principles are reflected in Freedom of Information legislation.[14] With the establishment of a comprehensive national scheme, the Commission's recommendations may be implemented to complement the federal legislation.

Action Required

A new legislative enactment is required to implement the Commission's recommendations. However, rather than being a discrete piece of legislation dealing specifically with confidentiality of medical records and medical research it is desirable that these be encapsulated within more general privacy legislation which reflects the existing Commonwealth legislation.

Priority – High

There is an increasing need for Western Australia to adopt laws that safeguard the use of confidential information. However, this need is tempered by the desirability of uniformity in Australian jurisdictions, particularly in light of advances in information technology which allow instantaneous data exchange across jurisdictional boundaries. With the expanded operation of the Commonwealth legislation, Western Australia has the opportunity to enact comprehensive state legislation to complement the federal scheme and enhance national uniformity in the protection of an individual's acknowledged right to privacy.

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8 Office of the Federal Privacy Commissioner, 'Good Privacy, Good Business: Privacy in Australia', October 2001, <http://www.privacy.gov.au/publications/pia.doc>.
9 *Privacy and Personal Information Protection Act 1998* (NSW).
10 See <http://www.dhs.vic.gov.au/privacy/index.htm>.
11 Above n 8.
12 See <http://www.justice.tas.gov.au/legpol/privacy/index.htm> for the full text of the Tasmanian Information Privacy Principles.
13 On 22 April 1999 the Northern Territory Chief Minister issued a Ministerial Statement to the Northern Territory Legislative Assembly on Access to Information and Privacy, above n 8.
14 "The Privacy Situation in Western Australia", 29 October 2001, <http://www.ecc.online.wa.gov.au/matrix/priv-wa.htm>.

Fatal Accidents

Terms of Reference

In July 1976 the Commission was asked to consider whether the *Fatal Accidents Act 1959* (WA) should be amended to:
(a) widen the class of persons (including any posthumous child) entitled to claim; and
(b) provide for an amount to be awarded in the nature of solatium.[1]

Background of Reference

At common law, a person cannot receive damages in tort for the death of another.[2] In 1846 an English statute, generally known as '*Lord Campbell's Act*', was enacted to remedy this situation. Western Australia adopted *Lord Campbell's Act* by Ordinance in 1849[3] and this formed the basis of the *Fatal Accidents Act 1959* (WA) ("the Act"). The class of people entitled to claim damages for a wrongful death under the Act was restricted to the deceased's surviving spouse, children, step-children, grandchildren, parents, step-parents and grandparents. Additionally, claims were limited to economic and material loss and did not include non-economic loss such as grief, loss of companionship and mental suffering.

The limited class of claimants and the lack of provision for solatium under the Act was brought to the attention of the legal profession by a conference paper delivered in 1976 by Mr PL Sharp QC.[4] Shortly thereafter the Attorney-General referred the matter to the Commission for consideration.

After considering applicable compensatory provisions in other legislation[5] and the law in other jurisdictions, the Commission reached the provisional view that the existing class of claimants was inadequate. In February 1978, the Commission released a working paper in which it suggested various solutions including extending the class of relatives and creating a general provision to protect either 'familial relationships' or 'dependants'. The Commission also considered a report by the English Law Commission[6] and raised a number of questions regarding the introduction of a solatium award.

Nature and Extent of Consultation

The working paper was distributed for comment to a number of interested parties and a notice was placed in the West Australian newspaper inviting public submissions. The Commission received submissions in response to the working paper from the Law Society, the Motor Vehicle Insurance Trust, an academic lawyer and a number of legal practitioners, including Mr PL Sharp QC. After considering these responses the Commission released its final report in December 1978.[7]

Recommendations

Following a comprehensive review of the issues the Commission concluded that the Act required significant reform. The Commission made 12 recommendations including that:

- The class of persons entitled to make a claim under the Act be extended to include the deceased's:
  (a) defacto spouse in certain circumstances;
  (b) divorced spouse;

1 Solatium is compensation allowed for injury to the feelings: West Publishing Co, *Black's Law Dictionary* (6th ed, 1990).
2 *Baker v Bolton* (1808) 1 Camp 493.
3 Ordinance 12 Vict. No. 21 (1849).
4 PL Sharp, 'Methodology in Assessment of Damages in Personal Accidents' [1976] *Law Society of Western Australia: Law Summer School Papers*.
5 *Law Reform (Miscellaneous Provisions) Act 1941* (WA), *Workers' Compensation Act 1912–1976* (WA), *Criminal Injuries Compensation Act 1960–1976* (WA), *Social Services Act 1947* (Cth).
6 English Law Commission, *Personal Injury Litigation: Assessment of Damages*, Report No 56 (1973).
7 Law Reform Commission of Western Australia, *Fatal Accidents*, Project No 66 (1978).

(c) brothers and sisters, including half brothers and sisters;
(d) illegitimate children;[8]
(e) adopted children;
(f) posthumous child whether it is legitimate or illegitimate;
(g) a person to whom the deceased stood in loco parentis; and
(h) a person who stood in loco parentis to the deceased;.

- A 'loss of assistance and guidance award' be introduced to compensate certain close relatives[9] for the loss of the non-pecuniary benefit they may have expected to derive from the deceased's guidance and assistance. This award should be limited[10] and be in addition to any award for pecuniary loss.
- Courts be empowered to order a person to be added to proceedings and permit or require separate representation[11] for a person for whose benefit an action lies under the Act.

A comprehensive outline of recommendations may be found at pages 33–35 of the Commission's final report.

Legislative or Other Action Undertaken

The *Fatal Accidents Amendment Act 1985* (WA) implemented the Commission's recommendations to expand the existing class of claimants under the Act. However, Parliament decided against implementation of the Commission's recommendation for an award of damages for 'loss of assistance and guidance'.[12]

8 The Commission recommended that an illegitimate child should be treated as a legitimate child. This recommendation was expressed to be dependant upon completion of Project No 68 on illegitimacy, which was withdrawn in 1986. The Commission did provide for an alternative procedure if Project No 68 was not completed or implemented.
9 'Close relatives' was defined to include the deceased's lawful spouse, a defacto spouse in certain circumstances, parents, an unmarried child and an unmarried person to whom the deceased stood in loco parentis.
10 The Commission recommended a limit of $5000 for a spouse and defacto and $2500 for the remainder and also empowering the Governor in Council with the discretion to increase the maximum amounts.
11 See Law Reform Commission of Western Australia, *Legal Representation of Children*, Project No 23 (1972).
12 This was said to be due to a number of reasons, including that such a provision did not exist in other jurisdictions, that it may be difficult to apply judicially and may affront, rather than give solace to, claimants. See Western Australia, *Parliamentary Debates*, Legislative Council, 22 March 1984, 6464 (Mr JM Berinson, Attorney-General).

Writs and Warrants of Execution

Terms of Reference

In 1976, the Commission was asked to review the law relating to writs and warrants of execution as they relate to the *Transfer of Land Act 1893* (WA) ("*Transfer of Land Act*") and to review the priority of writs and warrants of execution generally, including warrants of execution under the *Justices Act 1902* (WA).

Background of Reference

Section 133 of the *Transfer of Land Act* provides that a writ of *fieri facias* is binding on land for a non-extendable period of four months. In 1971, a case came before the Supreme Court where the binding period of such a writ was likely to expire before the Court could schedule a trial and reach a decision.[1] The presiding judge suggested that a court issuing a writ of *fieri facias* should be able to extend the four-month period. This prompted the Attorney-General to refer the issue to the Commission for consideration.

Work began on the reference immediately but progress was sporadic, primarily because of the prioritisation of resources[2] and a perceived overlap with Project Nos 16(II)[3] and 55(III).[4] The Commission considered that there was a need for increased uniformity of enforcement of judgments and orders across civil and criminal courts. The Commission, the Attorney-General and the Crown Law Department discussed the possibility of the Commission receiving a general reference on enforcement procedures that would encompass Project Nos 16(II), 55(III) and 67. After lengthy deliberation, it was decided that the procedures of the Supreme and District Courts should be considered separately. In 1991, the Attorney-General confirmed that the Commission would not receive a broader reference and that work should continue on the existing references.

Nature and Extent of Consultation

After some initial general consultation, the Commission received detailed preliminary submissions on the subject from the Chief Justice, the Sheriff of Western Australia and the Deputy Commissioner of Titles. Additionally, the Commission considered a report by the Court Services Division of the Ministry of Justice that recommended the introduction of unified legislation for the civil judgment debt recovery system.[5]

Due to the technical nature of the report a discussion paper was considered untenable, however, in November 1998, a draft report was circulated for comment. The draft report included a research summary examining the relevant statutory and non-statutory law, identifying issues and suggesting possible solutions. In response to the draft report the Commission received eight detailed submissions from various parties including the Executive Director of the Ministry of Justice, the Acting Director of Legal Aid, the Assistant Crown Solicitor, the Metropolitan Bailiffs' Association and the Department of Minerals and Energy. A proposal was also received from Mr JE Shillington and Mr GT Staples.

Publication of the final report was temporarily delayed to await completion of the *Review of the Criminal and Civil Justice System in Western Australia* ("Project No 92"),[6] so that it could be reconsidered in light of that project's recommendations. The Commission submitted its final report to the Attorney-General in June 2001.[7]

1 *Rathjen v Service Contractors Pty Ltd* (Unreported, Supreme Court of Western Australia, Hale J, 22 November 1971, No 2840/1971).
2 This project was not given high priority status until 1992.
3 Law Reform Commission of Western Australia, *Enforcement of Judgments of Local Courts,* Project No 16 (II) (1995).
4 Law Reform Commission of Western Australia, *Enforcement of Orders of Courts of Petty Sessions,* Project No 55 (III) (1994).
5 Court Services Division, WA Ministry of Justice, *Civil Judgment Debt Recovery System: Part I – Legislative Recommendations* (June 1997).
6 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia,* Project No 92 (1999).
7 Law Reform Commission of Western Australia, *Writs and Warrants of Execution,* Project No 67 (2001).

67

Writs and Warrants of Execution

Recommendations

After extensive review of the law in comparable jurisdictions and detailed consideration of submissions, the Commission made a series of recommendations, summarised as follows:

- There should be one unified civil debt recovery system for the Local, District and Supreme Courts.
- All Western Australian state courts should have simple common rules, forms and procedures in plain English for the recovery of civil judgment debts.
- There should be a single, simple, standard form of Application for Judgment Enforcement available with a simple booklet that outlines the court's procedures. The form should clearly identify parties, the relevant judgment, orders sought and any relevant facts.
- A judgment creditor should be able to seek and courts should have the power to order a judgment debtor or a non-party or any third party to deliver information, custody or control over assets of any kind in the course of any investigation of the judgment debtor.
- Courts should be able to make various orders and be able to rescind, vary or suspend any previous orders in aid of enforcement in response to the application of any party.
- The duration of orders for judgment enforcement by sale under s 133 of the *Transfer of Land Act* should be extended to eight months with provision for the court to extend this time limit if necessary. This involves amending s 133 of the *Transfer of Land Act* and repealing s 90 of the *Transfer of Land Act*.
- The Supreme Court should be empowered to order the removal of caveats. A caveator may not lodge a further caveat on the same, or substantially the same, grounds unless the caveator has the judgment creditor's consent.
- Certain provisions from the Imperial Judgments Acts of 1838, 1839, 1849 and 1855 as adopted by the *Imperial Acts Adopting Ordinance 1867* (WA) should be repealed and the *Registration of Deeds Act 1856* (WA) and *Property Law Act 1969* (WA) should be amended to clarify the binding effect of an order for judgment enforcement by sale[8] and the priority point.
- All orders for judgment enforcement by sale shall be lodged with the office of the Sheriff of Western Australia who may delegate the order to a bailiff located in the region in which the goods or land to be seized are located.
- Where a judgment creditor is a registered proprietor under the *Transfer of Land Act* and that interest is sold under a judgment enforcement by sale, a judgment creditor whose order is binding under s 133 of the *Transfer of Land Act* at the time of the sale shall have priority to the proceeds of sale over a judgment creditor whose order is in force but not binding over the interest under s 133 *Transfer of Land Act*. If more than one judgment creditor's order is binding, priority should be determined by the time of service of the order for judgment enforcement by sale on the Registrar of Titles.

A comprehensive outline of recommendations may be found at pages 35–40 of the Commission's final report.

Legislative or Other Action Undertaken

There has been no action taken to implement the Commission's recommendations.

8 This is the equivalent of writs and warrants of execution.

Currency of Recommendations

The Commission's recommendations remain both current and relevant. The proposed unified civil debt recovery system complements recommendations made by the Court Services Division of the Ministry of Justice in its 1997 report and supports the recommendations of previous reports of the Commission, including those made in Project No 92.

Action Required

Implementation of the Commission's recommendations requires amendment to, and repeal of, certain legislative provisions as specified in the final report. In order to ensure successful practical implementation of the recommendations, it is suggested that a simple booklet outlining the refined court procedures also be produced.

Priority – High

This assessment is based upon the desirability of improving the effectiveness and efficiency in which writs and warrants of execution are utilised in this state. The law as it currently stands is archaic and unsatisfactory. Implementation of the Commission's recommendations will assist in ensuring that the court system is just, efficient, accessible to the wider community and able to deliver justice in a fair and timely manner.

68

Illegitimacy

Terms of Reference

In 1976 the Commission was given a reference to consider and report on the rights of putative fathers in relation to their illegitimate children, including but not confined to the following matters:

(a) whether they should receive notice of adoption proceedings;

(b) their rights in relation to adoption;

(c) their rights to custody and access;

(d) potential conflicts in the law which should be remedied;

(e) what recommendations may be made to overcome situations of personal conflict, considering that the interests of the child are paramount; and

(f) generally.

The project was initially titled *Rights of Fathers of Illegitimate Children.*

Background of Reference

In 1977, following preliminary research, the Commission considered the law relating to proof of paternity and decided that the topic would also cover the father's rights in situations:

(a) where he seeks custody or access in respect of the child, including his rights in the case where the child's custodian has died;

(b) where he seeks to have some control of the child's upbringing but without claiming custody;

(c) where the child is to be adopted; and

(d) where he seeks a share in his deceased child's estate.

In 1978 the project was renamed *Illegitimacy* and the terms of reference were expanded when the Attorney-General requested that they include 'whether the law should be amended so as to remove all or any of the remaining disabilities of illegitimacy'.

The terms of reference were further amended in 1980 when the Attorney-General requested that the Commission also address 'problems concerning children conceived by artificial insemination procedures, including the position of semen donors and the parents of such children'. Consequently, the Commission divided the project into two parts. Part A dealt with the rights of fathers of illegitimate children and was given priority at the request of the Attorney-General. Part B dealt with other difficulties relating to illegitimate children including problems arising from artificial insemination procedures.

Research progressed towards the preparation of a working paper. However, as it became apparent that many of the matters raised would fall within Commonwealth legislative jurisdiction,[1] the paper was never completed. In 1982, the Commission deferred work on the project awaiting resolution of the jurisdictional question.

Reference Withdrawn

The Attorney-General withdrew the reference in 1986 with the issue of legislative jurisdiction unresolved. However, in the interim, many of the problems that had prompted the reference were addressed by amendments to the *Adoption of Children Act 1986* (WA) and related legislation.[2]

1 If there was a referral of power from certain states to the Commonwealth, pursuant to section 51(xxxvii) of the *Commonwealth of Australia Constitution Act 1900.*

2 The *Adoption Act 1994* (WA) repealed the *Adoption of Children Act 1896* (WA).

The Criminal Process and Persons Suffering from Mental Disorder

Terms of Reference

In December 1976,[1] the Commission was asked to consider:

(a) to what extent and on what criteria the law should recognise mental disorder or abnormality in a person accused of a criminal offence as a factor affecting his liability to be tried or convicted;

(b) whether there is any need for the continuance of the power in s 662 of the *Criminal Code Act Compilation Act 1913* (WA) ("the *Criminal Code*") to impose an indeterminate sentence on a convicted person simply on the grounds of his 'mental disorder';

(c) what procedures should be provided for reviewing the situation of persons who have been ordered to be detained or kept in custody because of their mental condition by orders made under ss 631, 652, 653, 662 or 693(4) of the *Criminal Code*, with a view to determining whether their detention or custody can be terminated. Such procedure should provide for review by way of administrative routine as well as at the request of the person detained or kept in custody;

(d) to consider whether it is desirable for there to be a judicial investigation as to the guilt or innocence of an accused person notwithstanding that he has been found to be of unsound mind and ordered to be kept in custody pursuant to ss 631 or 652 of the *Criminal Code*, or admitted to an approved hospital consequent on an order made under sub-s 36(2) of the *Mental Health Act 1962* (WA) ("*Mental Health Act*");

(e) whether courts of summary jurisdiction require any powers beyond those in s 36 of the *Mental Health Act* to permit them to deal fully with accused persons who come before them suffering from mental disorder, in particular to consider whether they require powers analogous to those in ss 631, 652 and 653 of the *Criminal Code*;

(f) whether it is desirable that the prosecution and defence should be obliged to exchange, before trial, all expert reports relating to the mental condition of the accused which are intended to form the basis of evidence to be adduced at the trial, and if that is thought to be desirable, to propose appropriate rules for the enforcement of that obligation;

(g) whether the courts should have power to obtain psychiatric reports, and if so, for what purpose, and in what circumstances, and by what procedure; and

(h) to review Division 6 of Part IV of the *Mental Health Act* (which deals with security patients) and its relationship to s 34C of the *Offenders Community Corrections Act 1963* (WA), formerly the *Offenders Probation and Parole Act 1963* (WA).[2]

Background of Reference

The insanity defence had been criticised for failing to provide a practical rule, causing confusion for juries and leading to erratic results. Some commentators had proposed that it be abolished[3] whilst others recognised that the defence is essential to the moral integrity of the criminal law and although requiring reformulation, should remain.[4]

1 This reference was extended on 11 August 1978 to include a review of the law relating to security of patients.

2 This initially also included an examination of the relationship between the *Mental Health Act 1962* (WA) Div 6 Pt IV and the *Prisons Act 1903* (WA) s 54.

3 As has occurred in some American states (Montana, Idaho and Utah) and has been recommended in Tasmania. See Law Reform Commission of Tasmania, *Insanity, Intoxication and Automatism*, Report No 61 (1988).

4 See the recommendations in the Report of the Committee, *Mentally Abnormal Offenders,* Cmnd 6244 (1975) ("Butler Committee Report"); Law Commission of England and Wales, *A Criminal Code for England and Wales,* Report No 177 (1989); Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Report No 34 (1990).

The Criminal Process and Persons Suffering from Mental Disorder

After beginning its investigation into the law in this area, research was deferred in 1983 pending the release and consideration of the Murray Report.[5] The Attorney-General revived the reference in 1984. In February 1987 the Commission released a discussion paper that outlined the arguments for the retention, abolition and reformulation of the insanity defence. The Commission also considered whether an indeterminate period of detention interfered with a person's right to review of their detention period by a court or a judicial tribunal. The Commission suggested that a court or tribunal should have the power to order a defendant's discharge if it is clear they are no longer suffering from a mental disorder. The discussion paper also examined the law in other jurisdictions and discussed whether a partial defence of diminished responsibility should be introduced and whether guidelines should be enacted for determining whether a defendant is fit to stand trial.

In 1988, work was again postponed pending consideration by the government of the report by the Inter-Departmental Committee on the Treatment of Mentally Disordered Offenders, ("the Inter-Departmental report").[6] Although the primary concern of the Inter-Departmental report was the facilities for mentally disordered offenders, it did consider some of the matters within the Commission's terms of reference. In 1989, work resumed and the Commission, at the Attorney-General's request, asked for comments on the Inter-Departmental report and its recommendations.

Nature and Extent of Consultation

To identify the principal problems with the existing regime, the Commission held initial consultations with experts and invited preliminary submissions through advertisements placed in the newspaper. The Commission also consulted with other law reform agencies and in 1985, hosted a visit from Mr George Zdenkowski of the Australian Law Reform Commission. In 1986, Commissioners Mr Charles Ogilvie and Mr Peter Johnston and Executive Officer Dr Peter Handford attended a conference on Health, Law and Ethics where Mr Johnston presented a paper dealing with aspects of the Commission's work on this project.[7]

A draft discussion paper was circulated to experts for comment. These comments were considered before the release of the formal discussion paper in February 1987. The Commission received 26 responses to the paper including submissions from the Chief Justice, judges of the Supreme and District Courts, a stipendiary magistrate, psychiatrists, the Citizens Against Crime Association, the Authority for Intellectually Handicapped Persons, private organisations and members of the public.

In 1988, Mr Ian Campbell, a senior lecturer at the University of Western Australia, was appointed to assist the Commission in the completion of its work on this project. The Commission released its final report in August 1991.[8]

Recommendations

The Commission made 52 recommendations in total. In relation to the criminal responsibility of mentally disordered offenders, the Commission recommended that:

- The insanity defence should be retained.
- The existing relationship between ss 23 and 27 of the *Criminal Code* and the burden of proof of the

5 MJ Murray QC, *The Criminal Code: A General Review* (1983) ("the Murray Report").
6 Law Reform Commission of Western Australia, *Annual Report 1988–1989*, para 5.9.
7 PW Johnston, 'Psychiatric Evidence in Insanity Defences' (Paper presented at the Health, Law and Ethics conference organised by the American Society for Medicine and Law, Sydney, August 1986). A revised version of this paper was subsequently published as P A Fairall and PW Johnston, 'Antisocial Personality Disorder (APD) and the Insanity Defence' (1987) 11 *Criminal Law Journal* 78.
8 Law Reform Commission of Western Australia, *The Criminal Process and Persons Suffering from Mental Disorder*, Project No 69 (1991).

insanity defence should be maintained, however, the term "mental disease or natural infirmity" used in s 27 of the *Criminal Code* should be replaced with the term "abnormality of mind (from mental illness or intellectual disability)".

- The defence of diminished responsibility should be introduced and formulated in the same manner as it has been formulated in Queensland.
- The verdict of guilty but mentally ill should not be introduced.
- A specialist review board should be established.[9]

The Commission also recommended that:

- The criteria and procedure for fitness to stand trial should be altered.[10]
- Courts, not the Executive, should decide the disposition of a person to be unfit to stand trial and a limit should be placed on the time a person can be detained in custody following a finding of unfitness to stand trial.
- The Parole Board should be responsible for deciding when a person serving an indeterminate sentence under s 662 of the *Criminal Code* should be released on parole.
- Courts of Petty Sessions should have express powers to acquit a defendant on the grounds of unsoundness of mind, accept a plea of not guilty on account of unsoundness of mind and to discharge the defendant absolutely.
- The prosecution and defence should be obliged to exchange, before trial, all expert reports relating to the mental condition of the defendant which are intended to form the basis of evidence to be adduced at trial. The court should be given a discretion to call an expert witness where the issue of fitness to stand trial has been raised.

A comprehensive outline of the Commission's recommendations may be found at pages 108–117 of the final report.

Legislative or Other Action Undertaken

After an extensive review of the law in this area the *Mental Health Bill 1996* (WA),[11] together with the *Criminal Law (Mentally Impaired Defendants Bill) 1996* (WA) and the *Mental Health (Consequential Provisions) Bill 1996* (WA) were introduced into Parliament. The Commission was consulted on various drafts of the legislation throughout the parliamentary process. The package of Bills was assented to on 13 November 1996.

The *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) ("the *Mentally Impaired Defendants Act*") and the *Mental Health (Consequential Provisions) Act 1996* (WA) ("the *Consequential Provisions Act*") implemented a number of the Commission's recommendations together with the recommendations of various other

9 The Commission recommended that this board should monitor the position of every person subject to a court order following a special verdict and each case should be reviewed annually and also on the application on the person concerned or an interested person on their behalf. The powers of this board, the onus of establishing whether continued detention is necessary, the appeal process and the criteria for release are outlined in Recommendations 16–20.

10 The Commission recommended that s 631 of the *Criminal Code* should be supplemented by providing that a person is not capable of understanding the proceedings so as to make a proper defence in certain circumstances. Section 652 of the *Criminal Code* should be repealed and s 631 should be amended so that it applies at any time during the trial.

11 This resulted in the *Mental Health Act 1996* (WA), which replaced the *Mental Health Act 1962* (WA). The *Mental Health Act 1981* (WA) was never proclaimed.

inquiries.[12] The *Mentally Impaired Defendants Act* established the Mentally Impaired Defendants Review Board,[13] provided that courts should determine whether a defendant should be the subject of a custody order[14] and outlined the criteria and procedure for fitness to stand trial.[15] The *Consequential Provisions Act* redefined mental illness in the *Criminal Code*[16] and amended the procedure for mental fitness to stand trial[17] and the consequences for an acquittal on account of unsoundness of mind[18] in the *Criminal Code*.

Currency of Recommendations

The Acts departed from the Commission's recommendations by maintaining that the Governor in Executive Council be responsible for the ultimate release from custody of mentally impaired defendants.[19] The legislation also failed to implement the Commission's primary recommendation of introducing a defence of diminished responsibility. To that extent, the Commission's recommendations remain current.

Action Required

Implementation of the remaining recommendations would require amendment to the *Mentally Impaired Defendants Act* and the *Criminal Code*.

Priority – Medium

Because the legislation was fast-tracked through Parliament,[20] important debate on the viability of a partial defence of diminished responsibility and the control of indeterminate sentences may have been overlooked. The concept of diminished responsibility has been introduced in England, New South Wales, Queensland and the Northern Territory, whilst in Victoria the courts maintain control of indeterminate sentences.[21] Implementation of the outstanding recommendations would align Western Australia with these jurisdictions and assist in ensuring that mentally impaired offenders receive just and humane treatment in our justice system.

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12 Most particularly, the inquiries resulting in the Murray Report and the Inter-Departmental Report. See, Western Australia, *Parliamentary Debates*, Legislative Assembly, 5 September 1996, 5283 (Mr K Prince, Minister for Health).
13 *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) s 41.
14 Where the offence is minor, the court can discharge the defendant either unconditionally or conditionally.
15 *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) s 12 provides that this is a question for the presiding officer.
16 This was redefined in accordance with the High Court decision in *R v Falconer* (1990) 96 ALR 545. See *Criminal Code 1913* (WA) s 1; *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) s 8.
17 *Mental Health (Consequential Provisions) Act 1996* (WA) s 14 inserted s 609A into the *Criminal Code*.
18 The *Mental Health (Consequential Provisions) Act 1996* (WA) s 17 repealed and substituted s 652 of the *Criminal Code* while s 18 of the same Act repealed and substituted s 653 of the *Criminal Code*.
19 Although s 662 of the *Criminal Code* was repealed by s 26 of Act No 78 of 1995, the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) s 35 maintains the position that the Governor and not the Parole Board is ultimately responsible for the release of mentally impaired defendants.
20 Western Australia, *Parliamentary Debates*, Legislative Assembly, 31 October 1996, 7727 (Mr J McGinty, Deputy Leader of the Opposition).
21 *Homicide Act* 1957 (UK) s 2; *Crimes Act 1900* (NSW) s 23A; *Criminal Code* (Qld) s 304A; *Criminal Code* (NT) s 37; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 27, 28 and 35.

Pre-Judgment Interest

Terms of Reference

In 1977 the Commission was asked to consider whether the law and practice relating to interest on judgments was adequate or whether it was in need of reform.

Background of Reference

In May 1981 the Attorney-General asked the Commission to furnish a priority report on pre-judgment interest. For this reason the reference was divided into two parts: Part I dealing with pre-judgment interest and Part II dealing with subsidiary matters.

"Pre-judgment interest" is interest on a sum of money which a court orders a defendant in legal proceedings to pay to the plaintiff in respect of a period prior to judgment. It is awarded to compensate the plaintiff for being kept out of money which ought to have been paid at an earlier date. At the time of the reference pre-judgment interest could only be recovered in a limited number of cases[1] and often the complexity and technicality of the rules involved would prevent such recovery. It was recognised that this could lead to great injustice where a person was kept out of their money for a long period of time. In such cases, the person retaining the money had the benefit of being able to use it between the date payment was due and the date of recovery. Further, the real value of the amount eventually recovered would reduce as a consequence of inflation. Because the power of the courts to award interest was limited, there were cases in which debtors would withhold payment and force their creditors to litigate to recover the debt, simply because it was considered to be good business to do so.[2]

Nature and Extent of Consultation

Due to the urgency of reform and because the issues involved had been thoroughly examined in other comparable jurisdictions,[3] the Commission decided not to issue a working paper. However, a draft report was completed in June 1981 and sent to various law reform agencies and experts for comment. The Commission delivered its final report to the Attorney-General in August 1981.[4]

Recommendations

In order to overcome the problems perceived in the existing law the Commission recommended that:

- Sections 32 and 33 of the *Supreme Court Act 1935* (WA) should be amended so that the court has discretion to award pre-judgment interest if they were persuaded that the circumstances of the case warranted it.[5]
- The court's discretion should extend to the character of the award, for example the rate of interest and the period over which interest is calculated.
- Interest should be recoverable where judgment is obtained in default.
- A plaintiff's claim should state that an award of interest will be sought.
- Interest should be included in the calculation when costs are being considered.

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1 For instance, under the *Supreme Court Act 1935* (WA) ss 32 and 33.
2 Law Reform Commission of Western Australia, *Annual Report 1980–1981,* 40.
3 New South Wales made extensive reform in this area in 1970 and, amongst other things, gave the Supreme Court a general discretion to award interest on any award for the recovery of any money (including debt or damages or the recovery of goods). In Victoria there has been a general discretion to award interest on debts or damages since 1962. In 1972 Queensland enacted legislative change which mirrored the New South Wales legislation in all material aspects. The United Kingdom enacted a general discretion to award damages in 1934.
4 Law Reform Commission of Western Australia, *Pre-Judgment Interest,* Project No 70(I) (1981).
5 The Commission recommended that the provision be enacted in terms similar to the *Supreme Court Act 1970* (NSW) s 94.

- The recommendations in the report should apply only to the Supreme Court, District Court and Local Courts.[6]

Legislative or Other Action Undertaken

Excepting the recommendation concerning judgments obtained in default, all of the Commission's recommendations were implemented by the *Supreme Court Amendment Act 1982* (WA). The Hansard report indicated that the Parliament believed that pre-judgment interest would be recoverable for judgments obtained in default however this was not expressly provided for in the Act.[7] In its Annual Report for the year 1981–1982, the Commission reported that implementation of this outstanding recommendation would now appear unnecessary as recent case law suggested that pre-judgment interest was already recoverable in cases of default judgments under statutory provisions similar to those suggested by the Commission.[8]

6 In Local Courts this was to be restricted to awards over $750.
7 Western Australia, *Parliamentary Debates*, Legislative Council, 17 August 1982, 2367 (Mr Rushton, Deputy Premier).
8 *Alex Lawrie Factors Ltd v Modern Injection Moulds Ltd* [1981] 3 All ER 658. See Law Reform Commission of Western Australia, *Annual Report 1981–1982*, 7.

Interest on Judgments

Terms of Reference

In 1977 the Commission was asked to consider whether the law and practice relating to interest on judgments was adequate or whether it was in need of reform.

Background of Reference

At the time of the reference, the law in Western Australia governing the recovery of interest on judgments was a complex mix of common law, equity, admiralty and statute law which permitted interest to be recovered in some deserving cases but not in others. At common law, in the absence of mercantile usage or agreement, interest could not be claimed on debts. However, under the *Supreme Court Act 1935* (WA) provision had been made for the payment of interest in certain circumstances at various rates. Since the advent of high inflation it had appeared that interest, even where payable, sometimes did not provide sufficient compensation to creditors for being kept out of their money. This led to a tendency by some individuals and firms to delay payment of debts as long as possible.

At the time that this reference was given, the Commission had a great number of current references which were completed according to the level of priority assigned to each one. When in May 1981, the Attorney-General asked the Commission to furnish a priority report on pre-judgment interest, the Commission divided the reference into two parts. The report on Part I, which dealt with pre-judgment interest, was delivered in August 1981. The report on Part II of the reference was listed as a non-priority project.

Reference Withdrawn

By agreement between the Commission and the Attorney-General, Part II of the reference was withdrawn in 1987. The Commission was of the view that the report on Part I had addressed the primary problem underlying the reference. This decision was influenced by the fact that, in the United Kingdom, the Government had decided not to implement the recommendations of the UK Law Commission's report[1] on the same subject.

1 Law Commission (UK), *Law of Contract: Report on Interest*, Law Com No 88 (1978).

71

Exemption from Jury Service

Terms of Reference

In 1977, the Commission was asked to review the law relating to exemption from jury service and to make proposals for establishing the principles and procedures necessary to ensure that exemption, particularly class exemption, applies only in legitimate cases.

Background of Reference

At the time of the reference the law on this subject was contained in the *Juries Act 1957* (WA) ("the Act"). The Commission was concerned that the Act:

(a) did not distinguish between persons who should be ineligible for jury service and those who should be given the right of excusal;
(b) was discriminatory in giving women an absolute right to cancel their liability for jury service; and
(c) was confusing and inconsistent in relation to the kinds of person disqualified from serving as a juror.

Nature and Extent of Consultation

The Commission issued a working paper in August 1978, which outlined provisional proposals for reform. The paper was distributed widely amongst interested parties and the general public. A notice, inviting submissions, was also placed in *The West Australian* newspaper.

Twenty-six submissions were received from a variety of sources including the Law Society of Western Australia, the Sheriff of Western Australia, government departments, the Institute of Legal Executives, women's organisations, legal practitioners and private persons. After extensive examination of the law in other Australian jurisdictions and consideration of all submissions, the Commission delivered its final report in June 1980.[1]

Recommendations

The Commission recommended the following summarised reforms:

- That the concept of "exemption" in the Act should be replaced by the concepts of "ineligibility" and "excusal as of right".
- That certain persons should be ineligible for jury service. For example, Members of Parliament, legal practitioners, government officials employed in law enforcement, the ill or infirm, those exempted under the *Jury Exemption Act 1965* (Cth) and persons unable to read and understand the English language.
- That certain persons should be entitled to excusal as of right. For example, persons employed; by the emergency services, in healthcare, in religion, and persons who have certain family commitments.
- That the right of women to cancel their liability for jury service should be abolished.
- That the right of a woman to be excused from attendance at a particular trial on special grounds should be abolished.
- That the Act be amended to provide guidelines for the summoning officer and the Judge for the exercise of their power to excuse from attendance in the case of a particular sitting or trial.
- That any changes to the classes of those ineligible or entitled to excusal as of right be facilitated by statute.

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1 Law Reform Commission of Western Australia, *Exemption From Jury Service*, Project No 71 (1980).

- That disqualification from jury service should be restricted to those convicted of an offence and sentenced to a prescribed term of imprisonment.
- That the announcement, currently made to the jury panel relating to possible bias, should be widened and put on a statutory basis.
- That the provisions in the Act as to the proportion of men and women required to be summoned for jury service should be repealed.
- That persons disqualified, ineligible or entitled to excusal as of right in relation to jury trials in the Supreme and District Courts should also be disqualified, ineligible or entitled to refusal as of right in the case of coroners' juries.

A comprehensive outline of recommendations may be found at chapter five of the Commission's final report.

Legislative or Other Action Undertaken

The *Juries Amendment Act 1984* (WA) implemented all recommendations outlined in the Commission's final report.

72

Retention of Court Records

Terms of Reference

In 1978 the Commission was asked to consider and report on the law relating to the retention of records of Courts of Petty Sessions and Local Courts.

Background of Reference

The Commission was asked to consider this matter because the State Intermediate Records Repository, where the records of these courts are retained, was nearing full capacity.

Nature and Extent of Consultation

In March 1979 the Committee issued a working paper to inform the public of the issues involved in the project and to elicit comment on those issues. Comments were received from the Crown Law Department, the State Archivist and an individual. The Commission submitted its final report on the subject in June 1980.[1]

Recommendations

Having considered the submissions, the Commission made the following recommendations:

- That a record of the Court of Petty Sessions and Local Courts should be retained for 15 years from the date of the commencement of the proceeding.
- That a complaint from the Court of Petty Sessions should be retained for 53 years.
- That the Foreign Executions Re-issue Book of the Local Court should be retained indefinitely.
- That a provision reflecting Part X of the *Justices Act 1902-1979* (WA) should be provided in the case of records of Local Courts.
- That the Court of Petty Sessions and the Local Courts should publicise the fact that their records may be destroyed after 15 years.
- That an application may be made to retain court records for a further year in addition to the periods specified above.
- That any legislation relating to the destruction of records of Court of Petty Sessions or Local Courts should be subject to the state archival legislation.

A comprehensive outline of the Committee's recommendations may be found at pages 22–23 of the final report.

Legislative or Other Action Undertaken

In 1981 and 1982 the Parliament passed the *Local Courts Amendment Act 1981* (WA), *Justices Act Amendment Act 1982* (WA) and *District Court of Western Australia Amendment Act 1982* (WA). These implemented most of the Commission's primary recommendations, however differed in the following ways:

- The *Local Court Act 1904* (WA), does not make provision for extending the time for retaining records, whereas the *Justices Act 1902* (WA) does.
- There was no express provision stating that a Foreign Exchange Re-issue Book should be retained indefinitely, although the provisions relating to the retention of court documents excluded them.
- There were no express provisions relating to archival legislation.

No reference was made to the reason for these omissions in the Western Australian *Parliamentary Debates*. However, the differences are relatively minor and in some cases reflect current standard practice.

1 Law Reform Commission of Western Australia, *Retention of Court Records*, Project No 72 (1980).

Absconding Debtors Act 1877

Terms of Reference

In September 1978, the Attorney-General asked the Commission to review the use and operation of the *Absconding Debtors Act 1877* (WA) ("the Act").

Background of Reference

The Act was originally enacted because of difficulties encountered with the assisted passage scheme to colonial Western Australia. It was intended to enable the colony to claim the cost of passage from those who departed the colony within three years' of arrival. Broadly, the Act enabled a person who had a legitimate claim in debt or otherwise to prevent another from leaving the state without first paying the debt or meeting the claim. The issue for the Commission was whether the Act was so infrequently used as to warrant its repeal or replacement. The question whether the Act infringed s 92 of the Commonwealth Constitution, which protected free trade and intercourse between the states, was also in issue.

Nature and Extent of Consultation

Initially, the Commission asked the Stipendiary Magistrates' Institute of Western Australia, the Royal Association of Justices of Western Australia and the Law Society of Western Australia to solicit the opinions of their members on the operation of the Act. In December 1980, the Commission also issued a working paper to stimulate public comment.

The Commission received submissions from justices of the peace, legal practitioners, magistrates, the Law Society of Western Australia, the Commissioner of Police, banks, the representative associations of financial institutions, and private citizens. The Commission delivered its final report on the subject in November 1981.[1]

Recommendations

After considering the operation of the Act, the Commission concluded that it should be repealed and replaced by a new Act. The Commission made 23 recommendations in total including:

- Recommendations providing that the new legislation should make it possible to prevent a person who is about to leave or remove assets from the state from doing so where that person's departure would prejudice the prosecution of the claimant's cause of action and the cause of action relates to a sum of money that is not less than $500.
- Recommendations pertaining to the procedure of issuing warrants and the hearing of the matter once the respondent is arrested. The recommended system provides that once the respondent is placed in custody, the respondent may obtain his or her release by settling the claim. Alternatively, if the respondent does not settle the claim, he or she will be brought before a justice of the peace for a hearing into the matter.
- Recommendations as to the protection of respondents in order to prevent the abuse of the proposed legislation.
- Recommendations relating to the variation or discharge of warrants, which provide that justices of the peace or judicial officers should have the power to vary or discharge their own orders or alternatively those orders can be discharged or varied by a Supreme Court judge in Chambers.
- Recommendations pertaining to restraints on the removal of property and other consequential matters.

1 Law Reform Commission of Western Australia, *Absconding Debtors Act 1877,* Project No 73 (1981).

The Commission also tentatively concluded that there would be no foreseeable problem with infringement of s 92 of the Commonwealth Constitution in the implementation of the proposed regime.

Legislative or Other Action Undertaken

The Commission's recommendations were substantially enacted[2] by the *Restraint of Debtors Act 1984* (WA), which commenced on 11 July 1986.[3]

2 Western Australia, *Parliamentary Debates*, Legislative Council, 2 August 1984, 329–330. (Mr JM Berinson, Attorney-General).
3 Western Australia, *Government Gazette*, 11 July 1986, 2333.

Limited Partnerships

Terms of Reference

In 1978 the Commission was asked to review the *Limited Partnerships Act 1909* (WA).

Background of Reference

The reference arose from practical difficulties experienced with limited partnerships. There are two classes of partnership:

(a) general partners who have unlimited personal liability in the same way as a person in an ordinary partnership; and

(b) limited partners who, provided they do not take any part in the management of the business, are liable only for the amount of money they have contributed or have agreed to contribute to the partnership equity.

The Commission recognised the public interest in protecting creditors and limited partners and the considerable difficulties in adapting company procedure to the circumstances of limited partnerships.[1] The Commission conducted preliminary research into all aspects of the reference for a working paper on the topic.

Reference Withdrawn

At the request of the Attorney-General, the project was subsequently deferred to enable the government to consider new initiatives in the area of limited partnerships. This led to the preparation of a new Limited Partnerships Bill, based on developments in other states and as a consequence the reference was withdrawn in 1992.

1 For further discussion of the Commission's preliminary consideration of this reference, see Law Reform Commission of Western Australia, *Annual Report 1978–1979,* paras 3.59–3.60.

75

United Kingdom Statutes in Force in Western Australia

Terms of Reference

In 1978 the Commission was asked to review the Imperial Acts in force in Western Australia at the time of its founding and to recommend which of those still in force should be repealed and which should be re-enacted (whether in the same or different form) by the Parliament of Western Australia.

Background of Reference

Under a well-established common law rule, at the time of the settlement of Western Australia in 1829, all statutes in force in the United Kingdom ("UK statutes"), which were reasonably applicable to conditions in the new colony, automatically became part of the law of Western Australia.[1] This included approximately 7000 statutes dating from 1235. Although many of these statutes had been replaced, of the statutes that remained in force[2] many were regarded as obsolete or unsuitable to modern conditions, at least in their existing form. There was also concern that these statutes were inaccessible due to archaic expression and the limited availability at public libraries.

Over a period of 12 years, the Commission built up a substantial database of information on the subject which included action taken by other domestic legislatures and recommendations of law reform agencies both in Australia and overseas.[3]

Nature and Extent of Consultation

Due to the technical nature of the report, the Commission decided against the publication of a discussion paper. Instead, the Commission forwarded a copy of its 1993 draft report to interested members of the judiciary, academia and legal profession for comment. The Commission received 12 submissions in response to the draft report including submissions from the Chief Justice and other senior judicial officers, the Director of Public Prosecutions and the Assistant Parliamentary Counsel. The Commission released its final report in October 1994.[4]

Recommendations

Emphasising the need to create and maintain certainty, clarity and accessibility of laws,[5] the Commission recommended that:

- One hundred and forty-two UK statutes that applied by reception should cease to be in force in Western Australia.[6]
- Twenty-three UK statutes should be repealed and re-enacted in whole or in part as they contain provisions that are still an important part of the law of Western Australia. This includes 13th century statutes that form the basis of the private landowning system and a provision of a statute that ensures that Parliament, and not the Crown, may levy a tax.

1 This rule is often known as the 'Blackstone applicability test'.
2 Because of the difficulty of retrospective application of the Blackstone applicability test, it is difficult to ascertain exactly how many UK statutes might have been received into law and might therefore still be in force in Western Australia.
3 Specifically, New Zealand and Papua New Guinea.
4 Law Reform Commission of Western Australia, *United Kingdom Statutes in Force in Western Australia,* Project No 75 (1994).
5 This was reinforced in Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia,* Project No 92 (1999), which emphasised the importance of plain language drafting in working towards an accessible legal system. Recommendation 2 of Project No 92 recommended that "...plain English should be implemented when revising or drafting new legislative and procedural provisions in response to recommendations in this Report and generally."
6 The Commission considered that because the statutes are those of the United Kingdom Parliament and its predecessors, it would be more appropriate to provide that they cease to be in force (as has occurred in the Australian Capital Territory and Queensland) than to repeal them (as has occurred in New South Wales and Victoria).

- Eleven UK statutes, including the *Magna Carta* and the *Bill of Rights* 1688, should be preserved because of their historical value.
- Forty UK statutes should be preserved pending a review.

A number of consequential recommendations were also made including recommendations regarding the implementation of statutes that should be re-enacted, the avoidance of a clawback clause and the inclusion of a general saving clause along the lines of s 37 of the *Interpretation Act 1984* (WA). A comprehensive outline of recommendations may be found at pages 112–122 of the Commission's final report.

Legislative or Other Action Undertaken

In 1995, Cabinet approved the drafting of legislation to implement this report.[7] Parliamentary Counsel prepared a first draft, the Imperial Acts (Law Reform) Bill, and requested comments from the Commission. In August 1996, representatives of the Commission, the Solicitor General and Parliamentary Counsel met with the Attorney-General to discuss the proposed legislation. No further action has been taken.

Cabinet separately approved the drafting of legislation to repeal the *Sunday Observance Act 1677* ("the Act"), a statute the Commission recommended should be preserved pending a review. There was a concern that the service of telephone restraining orders under the *Restraining Orders Act 1997* (WA) on Sundays would be prevented by the operation of s 6 the Act which prevented the service of writs on a Sunday.[8] The *Sunday Observance Laws Amendment and Repeal Act 1997* (WA) repealed this Act.

Currency of Recommendations

The recommendations remain current and crucial to achieving certainty and clarity in the Western Australian legal system.

Action Required

Parliamentary Counsel have finalised a draft of the Imperial Acts (Law Reform) Bill for tabling in Parliament as soon as is practicable. Enactment of the Bill would substantially implement the Commission's recommendations.

Priority – Medium–High

This assessment is based on the ease with which the recommendations of the Commission may be implemented combined with the importance of removing archaic language, ensuring certainty in the legal system and achieving uniformity with other jurisdictions.

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7 Law Reform Commission of Western Australia, *Annual Report 1995–1996*, 28.
8 See Western Australia, *Parliamentary Debates*, Legislative Council, 15 October 1997, 6799/1; Western Australia, *Parliamentary Debates*, Legislative Assembly, 20 November 1997, 8386/2; Western Australia, *Parliamentary Debates*, Legislative Assembly, 26 November 1997, 8726/1.

76(I)

Wills: Substantial Compliance

Terms of Reference

In 1979 the Commission was asked to examine and report upon two matters with respect to the law of wills:

(a) whether or not it would be desirable to adopt some modification of the requirement of strict compliance with the formalities of the *Wills Act 1970* (WA) by the adoption of the doctrine of substantial compliance; and

(b) the effect of marriage or divorce on a will including, in particular, the wills of people who subsequently lose the mental capacity to make a new will.

The Commission divided the reference into two parts: Part I dealing with the question whether the doctrine of substantial compliance should be adopted, and Part II dealing with the effect of marriage and divorce on wills.

Background of Reference

At the time of the reference the *Wills Act 1970* (WA) ("the Act") provided that a will was not valid unless certain formalities were met.[1] Although the requirements were not unduly onerous, a testator could fail to comply due to oversight or misreading the technical requirements. Judges had expressed regret that on such occasions they were forced to make the entire will invalid. Various academic commentators and law reform agencies had urged that the courts be given power to validate wills that had substantially complied with the formalities if they could be certain that the document represented the intention of the testator.

The Commission issued a discussion paper on the subject in November 1984, which outlined the arguments for and against change and analysed the provisions in other Australian jurisdictions and overseas.[2] The paper concluded that the functions the formalities served were important and that nothing should be done which would unduly weaken them, however case law served to suggest that some discussion of the issue was needed. No final view was formed on whether there should be a judicial discretion to dispense with the formalities in certain circumstances, and if so what form it should take or what standard of proof should be required. As such, the Commission welcomed views and specifically called for examples of cases where a testamentary document was held to be invalid due to failure to comply with the formalities.

Nature and Extent of Consultation

As an area of potentially wide public concern, the paper was circulated widely both in Western Australia and elsewhere. To broaden the scope of consultation an advertisement was placed in *The West Australian* newspaper. The paper was also discussed in an article in *Brief* the journal of the Law Society of Western Australia. Consequently, the Commission received a large number of oral and written submissions from a variety of sources including; academics from Universities within Australia and overseas, judicial officers, government departments and legal practitioners.

The Commission submitted its final report in November 1985.[3]

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1 See Law Reform Commission of Western Australia, *Wills: Substantial Compliance*, Project No 76(I) (1985) para 2.7 for the precise requirements.
2 Specifically, Canada, Manitoba and British Columbia.
3 Above n 1.

Recommendations

The Commission recommended that the Act be amended to allow for substantial compliance by adopting a provision similar to that which existed in South Australia.[4] Such a provision would give the Supreme Court the power to dispense with the formalities of the Act if satisfied that the testator intended the document to constitute their will. The high standard of proof recommended was suggested as a safeguard against fraudulent claims. It was also intended that adoption of the South Australian provision would enable lawyers and others to rely on South Australian case law.

The Commission further recommended that the proposed provision should also apply to alterations to a will, revocation of a will by a later will or by a written instrument, and revival by re-execution of a revoked will. It was finally recommended that the provisions should take effect only in relation to the estates of people dying after the provisions came into effect.

A comprehensive summary of all the recommendations may be found in chapter seven of the Commission's final report.

Legislative or Other Action Undertaken

The *Wills Amendment Act 1987* (WA) and the *Wills Amendment Act 1989* (WA) implemented the Commission's recommendations.

4 *Wills Act 1936* (SA) s 12(2).

76(II)

Effect of Marriage or Divorce on Wills

Terms of Reference

In 1979 the Commission was asked to examine and report upon the effect of marriage or divorce on a will including, in particular, the wills of people who subsequently lose the mental capacity to make a new will.

Background of Reference

The provisions in the *Wills Act 1970* (WA) ("the Act") in relation to marriage and divorce carried consequences that could undermine the intentions of the testator and lead to potentially unfair results. These provisions, and the general lack of testator knowledge of the law in this area, presented substantial concern, particularly in respect of the potential ability to impact on a great number of Western Australian families.

Under the Act, when a person makes a will and later marries, the marriage automatically revokes the will. There are two statutory exceptions to this rule.[1] The first exception applies where there is a declaration that the will is made in contemplation of the marriage. This exception can defeat the deliberate intention of the testator as there is some doubt whether a will expressed simply in favour of "my fiancée X" will save the will from being revoked upon the subsequent marriage of the testator to X.[2] Because the statutory provision is unclear and provides no guidance as to what wording will actually stop the will from being revoked, this exception has been the subject of differing judicial interpretation and practical application. The second exception relates to wills made in exercise of a power of appointment. Currently this section means that a will which both disposes of property and also exercises a power of appointment is revoked as to the disposition, but good as to the exercise of the power of appointment. However, this is unclear from the wording of the provision and has led to confusion and the intention of the testator being defeated

The general rule of marriage revoking an earlier will can on occasions work unfairly. One example would be where a testator makes a will intended to honour family commitments and then, after having been divorced or predeceased by the spouse, subsequently marries again. If the testator dies without having made a new will the second spouse is likely to receive the bulk of the testator's estate under the intestacy rules and the first family little or nothing. A further problem is that although marriage generally revokes a prior will, divorce does not. As a high proportion of marriages end in divorce, there is the possibility that the law can therefore operate in an unfair way. An example of this is where, following a divorce, there has been a comprehensive property settlement by a testator in favour of the former spouse and a substantial time later the former spouse inherits the testator's estate under a will made during their marriage but left unrevoked.

In relation to these issues the Public Trustee expressed concern to government at the number of incapable people under his protection whose marriages were dissolved and who did not have the testamentary capacity to revoke their wills or make new ones. He also stated that, in his experience, the community in general was not aware that divorce does not revoke a former will and this sometimes caused problems when a former spouse died. Because in looking at the effect of divorce on wills, the question of revocation of wills by marriage also naturally arises the Commission was also asked to examine and report on that topic.

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1 *Wills Act 1970* (WA) s 14(1).

2 A detailed discussion of this complex issue may be found in Law Reform Commission of Western Australia, *Effect of Marriage or Divorce on Wills*, Project No 76(II) (1991) ch 2.

In March 1990, the Commission issued a discussion paper which addressed the issues raised by the terms of reference and investigated the law in other jurisdictions. The paper suggested that if the general rule of revocation upon marriage were to be retained, some modification of the exception relating to wills made in contemplation of a particular marriage would be desirable. The paper discussed the extent to which extrinsic evidence should be admissible to determine whether words used in the will were an expression of contemplation of marriage, and whether it should be sufficient if the will was made in contemplation of marriage, even though that contemplation was not expressed in the will at all. In relation to divorce, the paper canvassed the arguments for and against the existing law, for example that the law should be reluctant to interfere with the express intention of testators.

Nature and Extent of Consultation

The discussion paper was widely distributed and prompted 19 submissions from a broad range of organisations including the Family Law Council, the Law Society of Western Australia, the Public Trustee and the Citizens' Advice Bureau. The Commission also received responses from several members of the public. The Commission submitted its final report in March 1991.[3]

Recommendations

The Commission made detailed recommendations to clarify and reform the law relating to the effect of marriage and divorce on wills. In relation to the effect of marriage on wills the Commission recommended that:

- The general rule contained in section 14(1) of the Act that the marriage of the testator revokes, by operation of law, a will made before the marriage should be retained.
- Where the will was made in contemplation of marriage, and this was not expressly stated in the will, extrinsic evidence should be admitted to establish this intention and the marriage should not then revoke the will.
- The exception contained in section 14(1) of the Act with respect to wills made in exercise of a power of appointment should be retained but it should be redrafted so that it is clearer in its presentation.

In relation to the effect of divorce on wills the Commission recommended that:

- The Act should be amended to provide a general rule of revocation in relation to the former spouse.
- Legislation should provide for a number of exceptions and qualifications to the general rule. Namely, in circumstances of contrary intention, in relation to specific debts and liabilities expressed in the will, gifts that exactly reflect contractual agreements, secret trust situations, and the existing right of a former spouse to apply under the *Inheritance (Family and Dependants Provision) Act 1972* (WA) for a disposition recognising prior maintenance arrangements.

The Commission also made a number of consequential recommendations, including that:

- The legislation should provide that for the purposes of the reform a "divorce" shall be taken to occur in the following circumstances under the *Family Law Act 1975* (Cth):
  (a) when an absolute decree for dissolution is made;
  (b) when a decree of nullity or a declaration of invalidity of marriage is made; or
  (c) on an overseas dissolution or annulment which would be recognised by courts exercising jurisdiction.

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3 Ibid.

- Any union in the nature of a marriage which has been entered into outside Australia and is, or has at any time been, polygamous shall be deemed to be a marriage for the purpose of the reform.
- Private international law problems associated with the proposed reforms should be determined by the common law rules of private international law.
- The proposed reforms should only apply to the wills of testators who are divorced after the reform comes into operation irrespective of when the will was made.
- The Family Court of Western Australia should adopt a practice aimed at informing the parties to a divorce of the testamentary effect of a divorce.

A comprehensive summary of all the recommendations may be found in chapter five of the Commission's final report.

Legislative or Other Action Undertaken

There has been no legislative action to implement the Commission's recommendations. During 1995–1996 the Commission was consulted about the implementation of the recommended reforms and the Commission's Executive Officer and Director of Research attended a meeting with representatives of the Strategic and Specialist Services Division of the Ministry of Justice and the Office of the Public Trustee, for this purpose. Discussions with the Crown Solicitor's office continued throughout 1996–1997; however, action to implement the recommendations appears to have subsequently stalled.

Currency of Recommendations

The passage of time has not affected the relevance of the Commission's recommendations and the problems underlying the reference remain.

Action Required

Amendment to the *Wills Act 1970* (WA), specifically to s 14, would remedy many of the problems addressed in the Commission's report. It is also apparent from the Commission's research that the community remains largely ignorant of the effect of marriage and divorce on wills. In this regard, a general community education programme on the subject (including any legislative amendment) may assist in ensuring that a testator's intention is not defeated and expenditure on litigation to contest wills is reduced.

Priority – Medium–High

The Commission's recommendations are relatively uncontroversial and follow the legislative provisions in the majority of other Australian jurisdictions. For instance, the definition of "divorce" suggested by the Commission is reflected in current Commonwealth and state legislation.[4] With respect to the exception in relation to contemplation of marriage, legislation in New South Wales, Tasmania and Victoria ensures that a subsequent marriage does not revoke a will made in contemplation of that marriage, even where the contemplation was not expressly provided for in the will.[5] On the question of divorce, only the Northern Territory provisions currently reflect the law in Western Australia, with all other Australian jurisdictions providing the more equitable solution that divorce automatically revokes all gifts, grants and appointments that favour the former spouse, subject to certain exceptions.[6]

4 *Wills, Probate and Administration Act 1898* (NSW) s 15A(5), *Wills Act 1936* (SA) s 20A(3), *Wills Act 1958* (Vic) s 16A(2), *Succession Act 1981* (Qld) s 18, *Wills Act 1968* (ACT) s 20A(4), Family Law Act 1975 (Cth). The only other state apart from Western Australia where no such provision exists is the Northern Territory.

5 *Wills, Probate and Administration Act 1898* (NSW) s 15(3), *Wills Act 1992* (TAS) s 19(b), *Wills Act 1958* (Vic) s 16(2)(b) & (c).

6 *Wills, Probate and Administration Act 1898* (NSW) s 15A(5), *Wills Act 1936* (SA) s 20A, *Wills Act 1958* (Vic) s 16A, *Succession Act 1981* (Qld) s 18, *Wills Act 1968* (ACT) s 20A.

Medical Treatment for Minors

Terms of Reference

In 1981 the Commission was given a general reference to examine the law relating to medical treatment for minors and report on the adequacy of existing civil and criminal law in Western Australia as to:

(a) the age at which minors should be able to consent, or refuse to consent, to medical treatment;

(b) the means by which such consent, or refusal of consent, to treatment should be given;

(c) the extent to which, and the circumstances in which, the parents, guardians or other persons or institutions responsible for the care and control of minors should be informed of such consent, or refusal to consent, to treatment; and

(d) the extent to which, and the circumstances in which, the persons referred to in (c) should be able to consent, or refuse to consent, to treatment on behalf of a minor.

Background of Reference

The Commission prepared a discussion paper on the subject in 1988.[1] The discussion paper provisionally suggested a statutory scheme that would allow mature children to authorise their own medical treatment, and give doctors immunity if they treated such children in good faith. Among particular cases of treatment considered by the Commission were contraception and sterilisation. The paper also dealt with other important issues, such as the special problems of handicapped, seriously and terminally ill children. Following the response to this paper, the Commission engaged Ms Mala Dharmananda to produce a research report on the subject of informed consent to medical treatment with the aid of a grant from the Law Society of Western Australia Public Purposes Trust and with the assistance of the Western Australian Council of Social Service. The research report was released in December 1992.[2]

Resignations of Commissioners and Research Officers involved in the reference, as well as the priority given to other projects, caused the production of the final report to be suspended in early 1993.

Reference Withdrawn

The reference was withdrawn in 1998. No recommendations had been made by the Commission upon the reference.

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1 A number of submissions received in response to the discussion paper referred to the question of sterilisation of children. As a result of these submissions and developments in the law following the release of the discussion paper, the Commission decided to divide the reference into two parts.

2 M Dharmananda, *Informed Consent to Medical Treatment: Processes, Practices and Beliefs* (1992).

77(II)

Consent to Sterilisation of Minors

Terms of Reference

In 1981 the Commission was given a general reference to examine the law relating to medical treatment for minors and report on the adequacy of existing civil and criminal law.

Background of Reference

The Commission prepared a discussion paper on the broader reference in 1988. A number of submissions received in response to the discussion paper referred to the question of sterilisation of children. As a result of these submissions and developments in the law following the release of the discussion paper, the Commission decided to divide the reference into two parts. This part ("Part II") deals with the question whether sterilisation of children should be permissible, and if so, in what circumstances; and whether parents should be able to consent to such a procedure or whether it should be carried out under the authority of a court.

Work on the report for Part II was suspended in 1990 to await the decision of the High Court in *Department of Health and Community Services v JWB & SMB ("Marion's Case").*[1] In 1992 the High Court published its reasons for decision. A majority of the Court held that a decision to sterilise a child should not come within the normal scope of parental consent to medical treatment.[2] The majority considered that in order to protect the best interests of the child, a court authorisation was necessary. However, recognising problems of cost and delay associated with court proceedings, the High Court recommended legislative reform to introduce a more appropriate decision-making process in respect of applications for sterilisation of a minor.[3]

In completing its final report on this subject, the Commission focussed upon the implications of the decision in *Marion's Case* and how the recommendation by the High Court regarding legislative reform of decision-making could best be implemented in Western Australia. The final report was delivered in October 1994.[4]

Nature and Extent of Consultation

Following the High Court's decision in *Marion's Case* the Commission invited submissions through advertisements placed in public newspapers. The issue was given significant publicity and a number of media interviews were conducted by Commission officers. As a result of this, the Commission received a large number of written and oral submissions from parents, representative bodies, government, community organisations, religious groups, medical and legal practitioners and others.

Recommendations

1. That the Commonwealth be asked to vacate the field in matters of sterilisation, so that the Western Australian Parliament can enact the Commission's ideal scheme. Under this scheme, all sterilisation decisions would be made by the Guardianship and Administration Board. It would be competent to deal with all children, both those who were children of a marriage and those who were not. The federal jurisdiction of the Family Court of Australia under the *Family Law Act 1975* (Cth) and the jurisdiction of the Family Court of Western Australia in state matters, would be excluded.

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1 (1992) 175 CLR 218.
2 The High Court distinguished sterilisation that would occur as a consequence of surgery proposed for the treatment of some malfunction or disease (therapeutic) from the sterilisation of a healthy person undertaken solely to cause infertility (non-therapeutic). Parental consent would suffice in respect of the former but not the latter.
3 *Marion's Case* (1992) 175 CLR 218, 253.
4 Law Reform Commission of Western Australia, *Consent to Sterilisation of Minors*, Project No 77(II) (1994).

2. If the Commonwealth enacts legislation giving exclusive jurisdiction in matters of sterilisation to state Guardianship Boards, the Commission recommends (provided the Commonwealth legislation is in acceptable form) that Western Australia should enact mirror legislation giving state jurisdiction in such matters to the Guardianship and Administration Board of Western Australia.
3. If the Commonwealth enacts legislation giving exclusive jurisdiction in matters of sterilisation to the Family Court of Australia, the Commission recommends (provided the Commonwealth legislation is in acceptable form) that Western Australia should enact mirror legislation giving state jurisdiction in such matters to the Family Court of Western Australia.
4. If the Commonwealth:
   (i) enacts legislation under which the Family Court of Australia retains non-exclusive jurisdiction in matters of sterilisation; or
   (ii) elects not to enact any legislation, so that the Family Court of Australia retains its current non-exclusive jurisdiction,

   the Commission recommends (provided Commonwealth legislation is in acceptable form) that Western Australia enact legislation giving state jurisdiction to the Guardianship and Administration Board.

Legislative or Other Action Undertaken

It may be discerned from the recommendations that legislative action by Western Australia is contingent upon Commonwealth legislation defining the jurisdiction. To date no relevant legislative action in regard to defining the jurisdiction for determinations upon the lawful sterilisation of minors has been taken by the Commonwealth. However, certain Commonwealth initiatives have been implemented to prevent *unauthorised* sterilisation of young women including notations to the Medicare Benefits Schedule, advice to professional medical bodies, amendment to Legal Aid guidelines and education programmes.[5]

Currency of Recommendations

The Commission's recommendations remain current. The proposed allocation of jurisdiction in respect of sterilisation of minors to the Guardianship and Administration Board of Western Australia continues to be both feasible and desirable. Similar allocation of jurisdiction prior to *Marion's Case* in New South Wales and South Australia continues to operate effectively. The High Court has indicated the legitimacy of such allocation of concurrent jurisdiction so long as the relevant state legislation does not attempt to remove or alter the existing powers of the Family Court of Australia under the *Family Law Act*.[6]

Since the publication of the Commission's 1994 report on this subject there have been a series of further reports and investigations by other bodies. Most notable of these is the recent report commissioned by the Human Rights and Equal Opportunity Commission.[7]

Action Required

Having regard to the lack of Commonwealth legislation in this area, the only feasible option available to the Western Australian Parliament is that outlined in Recommendation 4. Currently Western Australia has

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5 For a fuller outline, see Commonwealth, Minister for Family and Community Services and the Minister Assisting the Prime Minister for the Status of Women, *Sterilisation of Women and Young Girls with an Intellectual Disability* (6 December 2000).

6 *P v P* (1994) 120 ALR 545.

7 S Brady, J Briton and S Grover, *The Sterilisation of Girls and Young Women: Issues and Progress*, commissioned jointly by the Sex Discrimination Commissioner and Disability Discrimination Commissioner, Human Rights and Equal Opportunity Commission (2001). See also S Brady and S Grover, *The Sterilisation of Girls and Young Women in Australia: a Legal, Medical and Social Context*, commissioned by the Disability Services Commissioner, Human Rights and Equal Opportunity Commission (1997).

exclusive responsibility for ex-nuptial children and those under state care. Western Australia may legislate with regard to nuptial children, provided such legislation is not inconsistent with Commonwealth law.

The remaining of the Commission's alternative recommendations are somewhat dependent upon legislative action by the Commonwealth Parliament. However, the Commission's preferred option (Recommendation 1), could be assisted by a formal request of the Commonwealth Parliament to vacate the field to allow Western Australia to legislate in accordance with the Commission's recommendations.

Priority – Medium-High

It is now almost a decade since the High Court decision in *Marion's Case* where the pressing need for reform was highlighted. Statistics revealed in the most recent HREOC report[8] on the subject demonstrate that families are more likely to seek authorisation for sterilisation of a minor where the guardianship tribunal option is available. The very small number of sterilisation applications brought before the Family Court of Western Australia[9] may be taken to suggest that unauthorised sterilisations are being performed in this state. Expeditious implementation of suggested reforms can only improve the current situation.

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8 S Brady, J Briton and S Grover, *The Sterilisation of Girls and Young* Women*: Issues and Progress*, above n 7, fn 73.

9 Only one case was brought before the Family Court of Western Australia between 1992 and 1998 in contrast with 17 in New South Wales and 12 in South Australia where the jurisdiction is exercised by a tribunal. Ibid, table 3.4.

Joint Tenancy and Tenancy in Common

Terms of Reference

In 1994 the Commission was given a reference 'to review the law relating to joint tenancies and tenancies in common of real and personal property in law and equity in respect to:

(a) the rules of construction governing the creation of joint tenancies and tenancies in common;
(b) the severance of joint tenancy by notice; and
(c) whether the *Inheritance (Family and Dependants Provision) Act 1972* should be amended to empower the court to include a deceased person's interest in a joint tenancy in the property from which provision for an applicant may be made'.

Background of Reference

The reference arose from concerns about certainty in case law and practice in relation to the rules governing joint tenancies and tenancies in common. Currently, the law in Western Australia requires extensive, technical formalities (in the form of construction of an 'express trust') to be followed in order to enact severance of a joint tenancy. Recent cases[1] where severance intentions have failed because of failure to adhere to trust requirements, demonstrate the need for reform in this area. The current ambit of the law in relation to severance further enables individuals to avoid the legislative intention of the *Inheritance (Family and Dependants Provision) Act 1972* (WA).[2] Through a lifetime transaction the testator can dispose of property and defeat the ability of the court to provide for any dependants.

In view of the technical nature of the project, the Commission engaged Dr John Mugumbwa, a Senior Lecturer in Law at Murdoch University and a specialist in real property law, to prepare a draft report on the subject.

Nature and Extent of Consultation

The draft report was circulated for comment to a number of interested parties, including lawyers specialising in property law. Following consideration of the submissions, the Commission delivered its final report in November 1994.[3]

Recommendations

After extensive consideration, including detailed analysis of the relevant law in other Australian jurisdictions and overseas, the Commission concluded that:

- the law as to whether a joint tenancy or tenancy in common is created should be made more certain;
- the common law right to sever a joint tenancy secretly should be abolished; and
- notice should become a statutory precondition for severance.

Specifically the Commission recommended that:

1. Section 60 of the *Transfer of Land Act 1893* (WA) should be repealed. The section should be replaced by a new provision which requires instruments of transfer to two or more persons submitted for registration to specify whether the co-owners are joint tenants or tenants in common. Any instrument which does not state the nature of the co-ownership must not be registered.
2. A simple explanation of the significance of the distinction between a joint tenancy and a tenancy in common should be contained in the instrument of transfer.
3. The presumption of joint tenancy should be replaced by a statutory presumption of tenancy in common as in Queensland and New South Wales. Except where excluded, the presumption should apply to dispositions of personal and real property including land registered under the *Transfer of Land Act 1893* (WA).

1 The primary case in this area is *Corin v Patton* (1990) 169 CLR 540.
2 The application of ss 6 and 7 enables the Supreme Court to provide for testator's dependants against the intention of the will.
3 Law Reform Commission of Western Australia, *Joint Tenancy and Tenancy in Common*, Project No 78 (1994).

4. The provision should be modelled on s 35 of the Queensland *Property Law Act 1974*, subject to the following amendments:
   (a) the statutory presumption should only be operative *in equity* for choses in action;
   (b) the Queensland provision creating exceptions to the operation of the statutory presumption should be retained and extended to include property disposed of to married people; and
   (c) the presumption should be rebuttable by evidence of contrary intention. This should be made clear by express provision.
5. Unilateral severance of joint tenancy should not be effective without written notice to the other joint tenants.
6. The law of unilateral severance should be reformed by inserting in the *Transfer of Land Act 1893* a provision along the lines of s 59 of the Queensland *Land Title Act 1994*. However, the section should expressly empower the Registrar at his discretion to dispense with the requirement to produce the certificate of title to enable a transfer to be registered.
7. The common law rule that joint tenancy cannot be severed by will, should not be reversed.
8. The rule that a joint tenancy may be severed if all the joint tenants mutually agree to hold as tenants in common should not be altered statutorily.
9. The rule that a joint tenancy may be severed by a course of dealing sufficient to intimate that interests of all were mutually treated as constituting a tenancy in common should not be altered statutorily.
10. The *Inheritance (Family and Dependants Provision) Act 1972* (WA) should not be amended to deal solely with property the subject of a joint tenancy. However further consideration should be given to the general issue of the extent to which the Act should be amended to bring within its ambit property disposed of by the deceased by lifetime transactions.

Legislative or Other Action Undertaken

There has been no legislative action taken to implement the Commission's recommendations. No practical reference has been made to the report by the courts, Parliament, or relevant government departments. However, the current practice of the Department of Land Administration follows Recommendation 1.

Currency of Recommendations

The recommendations remain current. There are no contingent factors that would impact upon legislative action.

Action Required

Amendments to the *Transfer of Land Act 1893* (WA) should be drafted to reflect Recommendations 1–6. Further consideration should be given to the issue of how the *Inheritance (Family and Dependants Provision) Act 1972* (WA) should be amended, as discussed in Recommendation 10. No further action is required to implement Recommendations 7–9.

Priority – Low-Medium

Due to their relatively non-controversial nature, implementation of the majority of the Commission's recommendations may be undertaken without complication. Implementation of Recommendations 6 and 10 should, however, be given greater priority as they address reforms which will significantly enhance the practical operation of the relevant legislation. The desirability of updating the legislation to achieve conformity with other Australian jurisdictions[4] that have already addressed this subject reinforces the need for reform.

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4 See for instance, reforms made to the *Land Title Act 1994* (Qld) and the *Real Property Act 1900* (NSW). For further examples of legislative enactment of relevant reforms in other jurisdictions see Law Reform Commission of Western Australia, *Joint Tenancy and Tenancy in Common*, Project No 78 (1994) 14–51.

Prescribed Interests Under the Companies Code

Terms of Reference

In 1981 the Commission received a reference to enquire into and report upon the existing law in Australia as it concerns the issue to, or offer to, the public for subscription or purchase of any "prescribed interest" within the meaning of s 5(1) and Part IV Division 6 of the *Companies (Western Australia) Code*, with the object of recommending suitable legislative reform whether within the scope of the companies legislation or not. In considering the foregoing and without limiting the generality thereof, the Attorney-General requested that particular attention be paid to the need to facilitate fund-raising schemes which benefit the community, but at the same time, provide adequate safeguards for the investor, having regard to the nature and size of the investment.

Background of Reference

Section 5(1)[1] was introduced primarily to regulate unit trusts. However, as the definition of "prescribed interests" within the section was very broad, it covered a large range of collective investment schemes, many of which had developed since the legislation was introduced. The legislation covered not only conventional unit trusts (property and share trusts) but also time-sharing of real and personal property, horse racing syndicates, film production syndicates, plantation schemes and gold and silver bullion schemes. It was suggested that the legislation was inappropriate to regulate these investments and also possibly inappropriate to regulate traditional unit trusts.

The Commission worked on the reference for a period of just over 2 years, during which Commission staff prepared a seminar paper[2] on the subject and attended a relevant national conference.[3]

Reference Withdrawn

In early 1984, the Companies and Securities Law Review Committee was established to undertake research and recommend reform in company and securities law at the national level. The Ministerial Council for Companies and Securities decided that, as the matter required review on a nation-wide basis, the Companies and Securities Law Review Committee should be given a reference on prescribed interests. To avoid duplication the Commission's reference was withdrawn.

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1. Section 5(1) of the *Companies (Western Australia) Code* essentially reproduced the definition of "prescribed interest" in the *Companies Act 1961* (WA) s 76(1).
2. DR Williams and R W Broertjes, 'Prescribed Interests: An Overview' (Paper presented at the Law Council of Australia: Business Law Section Seminar, Perth, 1984).
3. The Fourth Annual Convention of the Australian Resort Time-Sharing Council, Sydney, February 1983. This conference considered a wide range of practical and legal problems confronting developers.

Problem of Old Convictions

Terms of Reference

In April 1982 the Commission was asked, as a matter of priority, to examine and report on whether a person's criminal record should be erased after a stipulated time, and, if so, in what circumstances and under what conditions.[1]

Background of Reference

The subject originally formed part of the Commission's reference on the withdrawn Project No 65(I)[2] and as a result the Commission had already carried out research into certain aspects of the new reference when it was received.

The reference was prompted by various difficulties faced by people with a record of criminal convictions. In Western Australia any act or omission which under state law renders the person doing the act or making the omission liable to punishment is called an offence. A record of the offence could be held in a number of places from the relevant court records to individual police departments. Because of the potential of unwarranted disclosure of criminal records, ex-offenders faced a variety of problems associated with their past convictions even where they may have long since ceased to offend and may regard themselves as law-abiding members of the community. The protections that were in place to protect against disclosure were regarded as being ineffective to ameliorate all of the problems a person in this situation could encounter.[3] Fear of disclosure and the resultant embarrassment or prejudice this could provoke was isolated as the main cause of concern, with a variety of further difficulties premised on this factor. These included issues ranging from reluctance to participate in legal action either as a witness or plaintiff, fear of relationship destruction, loss of commercial interests, discrimination in employment opportunities and credit/insurance refusal to deterrence from seeking public office or prevention from obtaining appointment to a government agency. The Commission recognised that any suggestions for reform in this area required a balance to be struck between the interests of the ex-offender, the needs of the police and the courts in the administration of the justice and the need to protect the free flow of relevant information for purposes of government and commerce.

In March 1984 the Commission released a detailed discussion paper addressing these issues. A shorter issues paper was also published summarising the general issues and seeking public submissions concerning particular experiences. A number of proposals were put forward for public discussion including proposals centred around the idea of concealing or failing to disclose in certain situations to treating the convicted person after a specified period of time as if they have no conviction.

Nature and Extent of Consultation

As part of its research, the Commission examined overseas schemes dealing with the sealing or expunction of criminal records, the rehabilitation of offenders, and the avoidance of discrimination against convicted people. The Commission further corresponded with the United Kingdom Home Office with respect to the operation of the *Rehabilitation of Offenders Act 1974* (UK) which allows those convicted of certain offences to treat themselves as having no conviction.

To widen the consultation process an advertisement was placed in *The West Australian* offering to send a copy of the discussion and issues papers to interested persons with the purpose of encouraging public

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1 Prior to 1983 the project was titled 'Expunction of Criminal Records'.
2 Law Reform Commission of Western Australia, *Privacy,* Project No 65 (I) (referred 1976, withdrawn 1986).
3 See Law Reform Commission of Western Australia, *Report on the Problem of Old Convictions,* Discussion Paper, Project No 80 (1984) 10.

submissions on the subject. The papers received considerable publicity both in newspapers and on radio programmes. Submissions were received from an broad range of individuals and groups including the Equal Opportunity Commission, Police Scientific Branch, Prisons Department, Finance Brokers' Supervisory Board, Psychologists' Board, Public Health Service, United States Consul General, Australian Law Reform Commission, Canadian Solicitor-General's department, the British Section of the International Commission of Jurists, the United Kingdom Home Office, and a number of other people with specialist knowledge or interest in the issues involved.[4]

At the time of the reference many other jurisdictions in Australia[5] and overseas had considered the problem of old convictions and some had enacted legislation to address the issues. The Commission therefore had the advantage of being able to learn from the experiences of those jurisdictions and consider the merit of legislative change either proposed or implemented elsewhere. The Commission submitted its final report on the subject in June 1986.[6]

Recommendations

The Commission recommended a legislative scheme consisting of two draft Bills, the Equal Opportunity Amendment Bill and the Spent Convictions Bill, which were annexed to the final report. The draft Bills essentially limited the effects of old convictions and incorporated the majority of the 60 detailed recommendations. The Commission recommended that convictions which could be regarded as spent should be divided into three categories:
(a) convictions for which a sentence other than imprisonment was imposed;
(b) convictions for which the imprisonment sentence was not more than one year; and
(c) convictions for which the imprisonment sentence was over a year.

Determinations could then be ascertained accordingly, varying from a prescribed time period of ten years before a conviction could be regarded as spent to a requirement that a conviction be regarded as spent only after judicial declaration.

The Commission determined that the following effects should follow a spent conviction:

- Discrimination against a person on such grounds should be unlawful and dealt with in the same way as all existing discrimination, under the *Equal Opportunities Act 1984* (WA).
- Unless the context indicates otherwise the only references to convictions in legislation should be in relation to those that are unspent and legislative references to a person's character or fitness should not be interpreted as permitting or requiring account to be taken of spent convictions.
- Questions about a person's criminal record and obligations to disclose information about convictions should be taken to refer only to non-spent convictions.
- Information about spent convictions should continue to be available in court proceedings.
- Disclosure of information about spent convictions from official records should continue to be dealt with by internal disciplinary procedures and existing offence provisions.
- In other circumstances, disclosure of information relating to spent convictions should not be a criminal offence, nor should there be any change in the law relating to civil liability for defamation.

4 For an exhaustive list of contributors see Law Reform Commission of Western Australia, *Report on the Problem of Old Convictions*, Project No 80 (1986) 165–166.
5 Queensland was the only state that had legislated on the problem of old convictions. However, proposals for legislative reform had been made in several other states and in the Commonwealth.
6 Above n 4.

- Ten years after a conviction has become spent (either automatically or by judicial order) it should be possible to apply to the Commissioner of Police to request that the official police record of the conviction be destroyed.

Special provisions were recommended to deal with particular problems, such as the effect of subsequent convictions, concurrent and cumulative sentences of imprisonment, and special orders that the court may make. The Commission also recommended certain amendments to other legislation including the *Child Welfare Act 1947* (WA), which already contained broadly similar provisions applying to children convicted of offences. A comprehensive outline of all the recommendations may be found in chapter 13 of the Commission's final report.

Legislative or Other Action Undertaken

In 1988, Parliament passed the *Spent Convictions Act 1988* (WA) which substantially implemented the Commission's recommendations. The *Acts Amendment (Spent Convictions) Act 1989* (WA) implemented the majority of the remaining recommendations.

The Pawnbrokers Act 1860-1984

Terms of Reference

In 1984 the Commission was asked to review the *Pawnbrokers Act 1860–1984* (WA) ("the Act") having regard to the requirements of associated legislation.

Background of Reference

The reference arose as a result of a complaint of an abuse of pawnbroking practice which the *Pawnbrokers Amendment Act 1984* (WA) was designed to correct. The Government announced that a review of the Act would be undertaken as a matter of priority. Accordingly in September 1984 the Attorney-General asked the Commission to undertake the task.

After many years in decline, the pawnbroking industry underwent a resurgence in Western Australia in the early 1980s. Consequently, both the number of pawnbroking licenses and the total value of pawnbroking transactions, substantially increased. The Commission recognised that existing legislation was archaic and often confusing and did not contain safeguards to ensure fair dealing. Of further concern was the lack of an appropriate licensing system and specific mechanism for enforcement.

Nature and Extent of Consultation

The Commission issued a discussion paper in January 1985 after taking into consideration the response to an earlier public request for preliminary submissions. The paper outlined proposals for reform of the legislation and was widely distributed amongst interested groups and the general public inviting further submissions. Commission officers also conducted a number of interviews with licensed pawnbrokers. As a result of this, the Commission received a large number of written and oral submissions from a wide range of persons and organisations including the Association of Western Australian Pawnbrokers, individual pawnbrokers, the Commissioner of Police, the Council for Civil Liberties and several community law centres and social welfare groups. After consideration of all submissions, the Commission delivered its final report in June 1985.[1]

Recommendations

The Commission's principal recommendation was that the Act should be redrafted in modern terms with amendments that address the legislative concerns outlined in the report. Primary areas to be addressed included:

- The development of an appropriate licensing system.
- The regulation of the relationship between pawnbroker and client.
- The general duties of a pawnbroker.
- Powers of the police and other authorities in relation to enforcing provisions of the legislation.

A comprehensive outline of the Commission's recommendations may be found in chapter seven of the final report.

Legislative or Other Action Undertaken

The Act was replaced by the *Pawnbrokers and Secondhand Dealers Act 1994* (WA) which substantially implemented the recommendations contained in the Commission's report.

1 Law Reform Commission of Western Australia, *The Pawnbrokers Act 1860–1984,* Project No 81 (1985).

Financial Protection in the Building and Construction Industry

Terms of Reference

In 1985 the Commission was given a reference to recommend what changes in the law if any (other than contractors' liens and charges), should be adopted for the protection of the interest of subcontractors, workers and others in the building and construction industry in receiving payment for work done or materials supplied.

Background of Reference

The reference arose from sustained evidence of problems experienced by the building and construction industry as a result of the practice of subcontracting. In a conventional building contract the client pays the head contractor, who engages other contractors (or subcontractors) to perform particular work or supply materials. Problems occur when there are insufficient funds available to pay subcontractors for work done or materials supplied, for example if the head contractor is declared insolvent.

In a previous report,[1] the Commission recommended that contractors' liens and charges were not a satisfactory way of dealing with this problem. In this reference, the Commission was asked to examine whether any other suitable alternatives exist. In 1995 the Attorney-General asked the Commission to extend the scope of the project to cover financial protection for all parties involved in the building industry.

Nature and Extent of Consultation

The Commission issued a discussion paper in December 1995, along with a paper detailing the major matters under review and outlining the possible alternatives and their advantages and disadvantages. Thirty-one commentators responded including contractors, accountants, industry associations, unions, the Western Power Corporation and a number of individuals. The Commission delivered its final report on the subject in May 1998[2] following examination of the issues and consideration of submissions.

Recommendations

The Commission made 49 recommendations including:

- That the law should be amended to regulate the payment of head contractors, subcontractors, workers and others in the building and construction industry.
- That a trust scheme be established to ensure that any participant in a project who holds or receives money on account of the contract, and is under an obligation to pay another participant, should hold those moneys as a trustee.
- In the alternative, the Commission recommended the use of bonds as a means of securing payment.
- That certain statutory requirements of all building contracts be introduced by legislation.
- That certain schemes should not be introduced.[3]

Legislative or Other Action Undertaken

There have been no steps taken toward the introduction of a legislative scheme to implement the Commission's recommendations.[4]

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1 Law Reform Commission of Western Australia, *Contractors' Liens*, Project No 54 (1974).
2 Law Reform Commission of Western Australia, *Financial Protection in the Building and Construction Industry*, Project No 82 (1998).
3 These related to insurance, stop notices, holdback funds and the grading or licensing of builders.
4 The *Building Legislation Amendment Act 2000* (WA) further regulates the registration of builders and contractors. However, this only indirectly deals with the issue and the Commission's Recommendation 49 suggests that this is not an adequate measure of resolving the problem discussed in the terms of reference.

During the production of the Commission's report there were a number of independent studies conducted on the subject of security of payment for subcontractors.[5] One of these studies, conducted by the Australian Procurement and Construction Council, produced a proposal for a National Action on Security of Payment in the Construction Industry.[6] The Western Australian Cabinet endorsed this and the proposals were implemented.[7] However, this was criticised as relating primarily to contracts involving the government or an arm of government.[8]

The Minister for Works indicated that the Western Australian government was taking a 'watch-and-see approach' in respect of the New South Wales and Queensland legislative schemes[9] and created a taskforce to further consider the issue.[10] The taskforce has not yet reported any findings or recommendations to Parliament, however, the Department of Housing and Works has indicated that the taskforce is preparing a draft Bill for public comment.[11]

Currency of Recommendations

Although the Government has endorsed the National Action on Security of Payment in the Construction Industry, the problem inherent with subcontractors securing payment remains largely unresolved. Therefore the recommendations made by the Commission are still current.

Action Required

The Department of Housing and Works indicated that the draft Bill being prepared by the taskforce was similar to the legislation in New South Wales and the United Kingdom. These jurisdictions have implemented trust schemes, of the kind recommended by the Commission in its final report. Given that the Commission's recommendations pertaining to the establishment of a trust scheme were made with particular regard to the law in all relevant jurisdictions, but designed to complement the laws of Western Australia, it would be prudent to make particular reference to the Commission's final report in the preparation of any Bill responding to the problem.

Priority – High

The desirability of swift action to address the problems outlined in the Commission's final report is supported by the frequency of reference to these problems in parliamentary debates and the reports of independent bodies and government departments. Legislative action ensuring security of payment to subcontractors in the construction industry would also assist in the maintenance of consumer confidence in the industry and enhance its overall stability.

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5 Among these were studies conducted by the Victorian Government Taskforce, Building and Construction Advisory Council and Small Business Procurement Advisory Council.

6 This scheme suggested measures such as the introduction of pre-qualification of participants, the introduction of a code of practice, prompt payment in accordance with the treasurer's instructions, and statutory declarations from head contractors that subcontractors have been paid.

7 Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 September 1999, 909 (Mr Board, Minister for Works).

8 Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 October 1999, 2088 (Mr Baker).

9 Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 October 1999, 2089 (Mr Board, Minister for Works). The legislative schemes in other jurisdictions are summarised in the Commission's final report at pages 32–50.

10 The Security of Payment Taskforce. See discussion in Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 October 1999, 2422 (Mr Johnson, Minister for Works).

11 A media release on 27 August 2001 announced that the Taskforce was still canvassing in Broome on this issue. Department of Housing and Works, *Security of Payment Taskforce Chair Visits Broome,* Press Release (27 August 2001), <http://www.dhw.wa.gov.au/index_IE.cfm>.

83

Payment of Witnesses in Civil Proceedings

Terms of Reference

In 1986, the Commission was asked to consider and report on the law and practice relating to the payment of compensation in respect of persons who appear, or who are required or undertake to appear, as witnesses in, or who are required or undertake to produce any document or thing in, a civil or other legal proceeding but excluding criminal proceedings.

Background of Reference

The Commission was originally invited to investigate the situation that arises when state public servants are called to give evidence. Because public servants are paid by their employer while attending court, they do not receive an allowance from a party to the proceedings. Consequently, state government departments or agencies bear the cost of this aspect of the proceedings rather than the party that calls the witness. A similar problem arises with private employers who pay their staff when they attend a hearing.

Comments were invited and received from a number of individuals and organisations, both on these issues and any difficulties that had been encountered in practice. The terms of reference were drafted in response to these comments, which indicated that a wider inquiry was justified. The Commission was also concerned that the law in Western Australia relating to the payment of witnesses in civil proceedings lacked uniformity across the courts.

The Commission issued a discussion paper in 1988. The paper proposed the creation of a statutory entitlement to compensation for loss of time or expenses incurred in attending as a witness or in producing a document, record or object for a court. It also discussed reimbursement of employers for salaries paid to employees attending civil proceedings as a witness.

Nature and Extent of Consultation

The discussion paper was widely distributed amongst interested groups and the general public. The paper attracted submissions from a range of persons and organisations including a number of government departments, professional organisations, a District Court judge, the Chief Stipendiary Magistrate and the Registrar of the District Court.

The Commission also surveyed government departments that had commented on the discussion paper. It concluded that very few of the agencies surveyed considered that the absence of employees due to court attendance was a problem either in terms of working hours lost or in lack of compensation for lost working hours. The Commission's final report was delivered in July 1989.[1]

No Action Recommended

The report discussed the common law origins of present-day rules relating to the payment of witness fees. The Commission suggested that the justification for change to the existing law hinge on three propositions:

- That the amount should be a realistic compensation for losses and expenses incurred, not a nominal sum.
- That employers, including government departments, should be entitled to compensation because they incur a loss.
- That legislation should be generally applicable to all courts and tribunals and not on a case-by-case basis depending on the particular court or tribunal.

1 Law Reform Commission of Western Australia, *Payment of Witnesses in Civil Proceedings*, Project No 83 (1989).

After considering the desirability of changing the law, the Commission concluded that to do so might exacerbate the high cost of legal proceedings. Further, the arguments in favour of extending current rights to compensation for witnesses were outweighed by the need to make the legal system more, not less, accessible to the general public.

Consequently, the Commission concluded that it would recommend that no changes be made to the current law relating to the payment of witnesses in civil proceedings.

Medical Treatment for the Dying

Terms of Reference

In 1986 the Commission was asked to review the criminal and civil law in so far as it relates to the obligations to provide medical or life supporting treatment to persons suffering conditions which are terminal or recovery from which is unlikely. In particular, it was asked to consider whether medical practitioners or others should be permitted or required to act upon directions by such persons against artificial prolongation of life. The reference did not seek to address the issue of euthanasia.

Background of Reference

As a result of developments in recent decades, modern science can often substantially prolong life, even in respect of diseases for which there is no long-term cure. However, many illnesses and conditions eventually reach a point of hopelessness, such that there is neither any prospect of the patient being cured nor any prospect of a further period of life with reasonable quality.

In these circumstances, the patient, if able to make a rational decision, may express the desire that treatment aimed at the prolongation of life should cease in favour of palliative care which is designed to ensure that the minimum of pain and distress is suffered before death. Under the existing law, patients have a number of important rights including the right not to be treated without their consent. However, certain duties in the Criminal Code may conflict with this right. Two of these duties, the duty to provide the necessities of life and the duty to perform acts which, if omitted, may be dangerous to human life or health, are capable of applying to the provision of medical treatment.[1] Some doctors have expressed the fear that they remain bound by these duties notwithstanding the patient's withdrawal of consent to treatment.

Further, under the present Western Australian law there is no means by which people may give legally binding directions as to withdrawing or withholding treatment should they become incompetent. Nor is it legally possible for a person to appoint someone to make treatment decisions on their behalf.

Recognising the importance of resolving these issues, the Attorney-General asked the Commission to consider whether the law in Western Australia required clarification or amendment.

Nature and Extent of Consultation

With the aim of seeking public comment on the issues involved, the Commission published a discussion paper in 1988. A large number of individuals and organisations made submissions. These submissions did much to enable the Commission to gain a deeper appreciation of the emotional and social context in which patients, doctors, family and friends are placed in making decisions relating to terminal illness.

The Commission also had the benefit of detailed responses to the discussion papers from experts in the area, including, Dr CR Goucke of Sir Charles Gairdner Hospital; Ms Helga Kuhse of the Centre for Human Bioethics, Monash University; Mrs Jean Davies, President of the World Federation of Right to Die Societies and Professor Ian Kennedy of King's College, London. The Commission's final report was delivered in February 1991.[2]

Recommendations

The Commission's recommendations, like the Victorian provisions on which they are based,[3] are capable of applying to all patients, and not just those who are terminally ill. The Commission's primary recommendations were:

1 *Criminal Code Act 1913* (WA) ss 262 & 267.
2 Law Reform Commission of Western Australia, *Medical Treatment for the Dying*, Project No 84 (1991).
3 The Commission's recommendations are primarily based on the model enacted in Victoria by the *Medical Treatment Act 1988* (Vic) and subsequent amendments.

- Adult patients should be able to complete a "refusal of treatment" certificate specifying that they do not wish to receive life-supporting treatment. As a corollary, doctors who act in accordance with the certificate would be immune from civil and criminal liability.
- Persons should be able to appoint an agent, in an enduring power of attorney, to make treatment decisions on their behalf. A person could not execute an enduring power of attorney unless the person was an adult who understood the nature and effect of the power.
- The agent would be required to make decisions in light of what the agent believed the patient would have wanted, as far as this was known. That is, a "substituted judgment" should be made. Where a patient has never indicated a preference, the agent should make a decision based on what would be conceived by a reasonable person in the patient's circumstances to be in the patient's best interests.
- Doctors should not be civilly or criminally liable for administering drugs or other treatment for the purpose of controlling or eliminating pain and suffering. This is the case even if the drugs or other treatment incidentally shorten the patient's life, providing that consent of the patient or the patient's agent, if the patient is not competent, is obtained and the administration of the drug or treatment is reasonable in all the circumstances.

A comprehensive outline of recommendations may be found at chapter six of the Commission's final report.

Legislative or Other Action Undertaken

The Medical Care of the Dying Bill (WA), which was intended to implement many of the recommendations in the Commission's report, was introduced into the Legislative Assembly in March 1995. It was considered in Committee in May 1996. Although the Bill was accepted in principle, certain issues pertaining to the drafting of the proposed legislation were not resolved and the Bill did not progress further than the second reading.[4]

Currency of Recommendations

The Commission's recommendations remain current. The legal problems involved in the treatment of the terminally ill are part of a wide-ranging debate about the care of the dying. In other Australian jurisdictions, legislation has been enacted which, in various ways, clarifies the obligations of doctors and provides specific legal mechanisms whereby people can exercise some control over the treatment they receive.[5]

Action Required

The Commission's recommendations may be effectively implemented by the reintroduction into Parliament of the Medical Treatment of the Dying Bill, following resolution of the drafting concerns. As the principle of the Bill was accepted in the second reading of the legislation, it is envisaged that it may be fast-tracked through Parliament.

Priority – High

This assessment is based upon the desirability to clarify the obligations of doctors and provide specific legal mechanisms whereby terminally ill people can exercise some control over the treatment they receive.

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4 Western Australia, *Parliamentary Debates,* Legislative Assembly, 15 May 1996, 2027–2036.
5 *Medical Treatment Act 1988* (Vic); *Natural Death Act 1983* (SA); *Natural Death Act 1988* (NT).

85

Police Act Offences

Terms of Reference

In 1986 the Commission was asked to 'review offences created by Parts V, VI and VII of the *Police Act 1892* (WA) ("the Act") and to report:

(a) as to whether any of those offences should be abolished; and

(b) with regard to those offences which should be retained, what changes, if any, including changes to their description and definition, are desirable to make the law more readily understood and more relevant to modern condition'.

Background of Reference

The Act deals with the appointment, duties, discipline and dismissal of police officers and also with police powers (such as arrest, entry, search and seizure) and summary offences. The Act was derived from similar legislation existing in New South Wales, South Australia and England at the time of its enactment. Though it has often been amended, the drafting style of the Act remains old-fashioned and unchanged. Further, many of the offences contained within the Act are either out of date or duplicated in other legislation. A question was also raised as to whether rules regulating the police force and summary offences should properly be contained in the same statute.

The Commission engaged Mr Michael Buss, a barrister in private practice, to research and draft a discussion paper on the subject. The discussion paper was issued in June 1989 and raised over a hundred separate issues for consideration.

Nature and Extent of Consultation

The discussion paper was widely distributed and attracted responses from 38 sources, including civil liberties groups, community legal services (such as the Aboriginal Legal Service, the Women's Advisory Council and the Youth Legal Service), the Police Department and the Police Union as well as individual police officers, the Law Society, individual legal practitioners, justices of the peace, and members of the public.

In preparing the final report, the Commission worked in consultation with the Victorian Law Reform Commission which was reviewing similar offences in Victoria. It also consulted representatives of the Western Australian Police Force, the Director of Public Prosecutions and the Attorneys-General of other Australian states and territories. The final report containing the Commission's recommendations was delivered in August 1992.[1]

Recommendations

After extensive consideration of the issue, the Commission concluded that substantial reforms to the Act were required. The Commission made a total of 89 recommendations which were broadly grouped into five categories:

- Recommendations pertaining to the enactment of a separate summary offences Act drafted in contemporary form.
- Recommendations pertaining to summary offences contained in the present Act that should be retained[2] including:
  (a) offences against public order;

1 Law Reform Commission of Western Australia, *Police Act Offences*, Report No 85 (1992).
2 In many cases, the Commission recommended that offences that are to be retained should be modified in certain substantive respects.

(b) offences relating to the obstruction and hindering of police and escape from legal custody;
(c) offences against property;
(d) trespass;
(e) offences relating to the possession of crime-related property; and
(f) offences relating to solicitation and prostitution

- Recommendations pertaining to summary offences contained in the current Act that should be abolished.[3] Reasons for recommended abolition of offences included:
  (a) duplication of offences in other statutes or in the *Criminal Code 1913* (WA);
  (b) lack of relevance to contemporary society;
  (c) civil liberties implications of offences;
  (d) inconsistency with established principles of criminal law; and
  (e) the position of other Australian jurisdictions.
- Recommendations pertaining to offences that should be repealed and re-enacted in other legislation such as certain gaming offences.[4]
- Recommendations pertaining to police powers of arrest, entry, search and seizure.

A comprehensive outline of the recommendations may be found at pages 221–243 of the Commission's final report.

Legislative or Other Action Undertaken

In 1995 Parliamentary Counsel was asked to prepare a draft of various Bills to implement the recommendations contained in the Commission's final report.[5] The Bills remain at the drafting stage and are yet to be introduced into Parliament for debate.[6]

Currency of Recommendations

The Commission's recommendations remain current.

Action Required

The Commission's recommendations may be readily implemented by directing Parliamentary Counsel to finalise the draft Bills for introduction into Parliament.

Priority – High

The *Police Act 1892* (WA) remains the oldest of its kind in Australia. The incongruity of having police force regulations and summary offences contained in a single piece of legislation has been recognised by other Australian jurisdictions, most of which have reviewed and significantly reformed their equivalent legislation.[7] It is also widely acknowledged that Acts creating offences should be as clear and certain as possible. In this regard, the archaic language and outdated provisions of the current Western Australian legislation may create unnecessary confusion.

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3 For the complete list of offences recommended for abolition see the Commission's final report at pages 221–243.
4 Specifically, the Commission recommended that offences contained in ss 84C and 84D of the *Police Act 1892* (WA) should be repealed and inserted by amendment to s 41 of the *Gaming Commission Act 1987* (WA). Sections 84D–F should be repealed and similar provisions be inserted into the *Betting Control Act 1954* (WA).
5 The proposed draft Bills were the Simple Offences Bill, the Criminal Investigation and Procedure Bill, the Simple Offences and Criminal Investigation (Consequential Provisions) Bill, and the Intoxicated Persons Bill.
6 Western Australia, *Parliamentary Debates*, Legislative Council, 8 August 2000, 4 (Mr MJ Criddle).
7 For a comprehensive review of reforms in other jurisdictions the Commission's final report at pages 18–20.

86

Incitement to Racial Hatred

Terms of Reference

In November 1988 the Commission was asked to consider what changes to the law, if any, were needed to adequately deter acts that incite racial hatred.

Background of Reference

The reference arose from the problem of large-scale racist poster and graffiti campaigns inflicted upon public property in metropolitan and some rural areas. Although these activities breached certain provisions of the *Police Act 1892* (WA) and the *Litter Act 1979* (WA), authorities were often frustrated in their attempts to enforce the applicable laws. This was largely due to the scale of the activity, as well as the fact that most of the inflammatory material was being posted late at night. The issue had received a high degree of publicity and was the subject of intense public debate that evidenced concern about both the social and financial[1] costs attaching to this problem.

In May 1989 the Commission (jointly with the Equal Opportunity Commission) released an issues paper[2] that focused on the acts that comprised the campaigns. A major consideration was the effect any reform may have on the fundamental right to freedom of speech. The Commission attempted to strike a balance by confining the criminal law proposals to extremely serious occurrences of racist speech. The Commission considered that the poster campaign did constitute such a serious occurrence.

The paper suggested numerous options for legislative reform with the primary proposal addressing the creation of an incitement to racial hatred offence or offences. The paper also considered the creation of a statutory cause of action in individual civil proceedings for defamation of a group and the creation of an express ground of racial harassment in the *Equal Opportunity Act 1984* (WA).

Nature and Extent of Consultation

The Commission initiated a comprehensive public consultation programme that included the circulation of over 1300 copies of the issues paper to individuals and organizations in Western Australia, interstate and overseas. The Commission was further involved in numerous print and electronic media interviews, seminars and conferences.[3] The Commission consulted with ethnic community representatives and government agencies[4] with a special interest in the reference and was formally involved with the Commonwealth Office of Multicultural Affairs' community consultation.[5] Ongoing contact was maintained with other law reform agencies, in particular the Victorian Law Reform Commission (which had a current equal opportunity reference) and the Australian Law Reform Commission (which had a current reference on multiculturalism and the law[6]). The Commission also recognised a petition to Parliament, with 667 signatures, which urged the government to introduce legislation making these posters illegal.[7]

The Commission engaged Helen Cattalini and Associates and Mr Claudio Pierluigi to conduct two distinct community surveys posing the specific options for legislative change. Both surveys evidenced the concern

1 For instance, Perth City Council spent over $10,000 on the removal of racist poster materials between May 1987 and June 1988.
2 Law Reform Commission of Western Australia and Equal Opportunity Commission, *Legislation Against Incitement to Racial Hatred,* Occasional Report No 2 (1988).
3 Law Reform Commission of Western Australia, 'Incitement to Racial Hatred in Western Australia' (Paper presented at the Australasian Law Reform Agencies Conference, Sydney, August 1989); Law Reform Commission of Western Australia, 'Targeting Racial Hatred in Western Australia' (Paper presented at the Human Rights Congress, Melbourne, September 1989).
4 Such as the Equal Opportunity Commissioner, the Police Department and the Multicultural and Ethnic Affairs Commission.
5 As part of the Human Rights and Equal Opportunity Commission's National Inquiry into Racist Violence.
6 See Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992).
7 Western Australia, *Parliamentary Debates,* Legislative Assembly, 30 August 1989,1378.

of the community about the problem and showed considerable support for the introduction of some form of incitement to racial hatred offence.[8]

The Commission received many submissions, both before and after publication of the issues paper, including over 30 self-initiated submissions from members of the public and submissions from professional associations and ethnic communities. The final report was released in October 1989.[9]

Recommendations

The Commission recommended four amendments to the *Criminal Code Act Compilation Act 1913* (WA) ("the *Criminal Code*") to outlaw certain kinds of racially inflammatory material.

1. An amendment to the *Criminal Code* making a person who has in his possession written material which is threatening, abusive or insulting, with a view to its being published, distributed or displayed whether by himself or another, guilty of an offence if he intends hatred of any identifiable group to be stirred up or promoted thereby.
2. An amendment to the *Criminal Code* making a person who publishes, distributes or displays written material which is threatening, abusive or insulting guilty of an offence if he intends hatred of any identifiable group to be stirred up or promoted thereby
3. An amendment to the *Criminal Code* making a person who has in his possession written material which is threatening, abusive or insulting, with a view to its being displayed whether by himself or another, guilty of an offence if such display is intended or likely to cause serious harassment, alarm, fear or distress to any identifiable group.
4. An amendment to the *Criminal Code* making a person who displays written material which is threatening, abusive or insulting guilty of an offence if such display is intended or likely to cause serious harassment, alarm, fear or distress to any identifiable group.

The Commission also made recommendations as to the interpretation of and penalties for these offences.[10] The Commission recommended against the inclusion of a requirement for the Attorney-General's consent to initiate proceedings and the creation of a group defamation remedy.[11]

A comprehensive outline of recommendations may be found at pages 16–25 of the Commission's final report.

Legislative or Other Action Undertaken

The Criminal Code Amendment (Incitement to Racial Hatred) Bill ("the Bill"),[12] which sought to implement the Commission's recommendations, was introduced into the Legislative Assembly in October 1989. Its

8 The 'Melville Survey' had a sample size of 250 with 90% favouring the introduction of some form of incitement to racial hatred offence. The 'Target Survey' was aimed at people with a special interest. Of the 367 government and community organizations that were invited to participate, 113 returned the questionnaires. Of that sample, 76% favoured some form of law addressing the problem of incitement to racial hatred.

9 Law Reform Commission of Western Australia, *Incitement to Racial Hatred,* Project No 86 (1989). It should be noted that a member of the Commission, Mr George Syrota, dissented.

10 For the first two offences — on conviction on indictment a term of imprisonment not exceeding two years or a fine of up to $7,500 or both; and on conviction for a summary offence six months' imprisonment or a $2000 fine or both. For the third and fourth offences — on conviction on indictment for a term not exceeding twelve months or a $3000 fine or both; and for conviction of a summary offence, three months' imprisonment or a $1000 fine or both.

11 The creation of a group defamation remedy was considered and rejected in the Law Reform Commission of Western Australia, *Defamation,* Project No 8 (1979) and Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979). Further, it would rely on existing defamation laws for remedies, which these reports, as well as New South Wales Law Reform Commission, *Defamation*, Report No 11 (1971), had found in need of comprehensive legislative reform.

12 The name of the Bill later changed to Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Bill.

passage was marked by wide ranging debate.[13] The Bill passed the Legislative Assembly but was amended in the Legislative Council by limiting the first and second offences to 'threatening and abusive conduct' and the third and fourth offences to the causing of 'serious harassment, alarm or fear'. The Bill was referred to the Legislative Council's Standing Committee on Legislation ("the Committee"). The Committee received submissions, including submissions from Commission staff, and reported in August 1990 recommending substantial amendments to the Bill, principally by limiting the third and fourth offences to instances where it could be shown that the accused 'intended to cause serious harassment' and referred to a specific racial group rather than merely an identifiable group.

The Bill was eventually passed and the *Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Act 1990* ("the Act") received the Royal Assent on 9 October 1990. The Act now constitutes Chapter XI of the Criminal Code.

The Commission's recommendations were substantially implemented by the Act. However, the element of 'threatening, abusive or insulting' was reduced to simply 'threatening or abusive' in respect of all four enacted offences. Further, the Commission's recommendation for the third and fourth offences to include 'intended or likely to cause serious harassment, alarm, fear or distress' was limited by Parliament to 'intends any racial group to be harassed'. In view of these small but nevertheless significant changes to the nature and scope of the Commission's proposed offences, the question whether the legislation sufficiently deters acts that incite racial hatred remains.

13 See Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 December 1989, 6154–6184; Western Australia, *Parliamentary Debates*, Legislative Council, 19 June 1990, 2111–2151; Western Australia, *Parliamentary Debates*, Legislative Council, 19 September 1990, 5310–5318; Western Australia, *Parliamentary Debates*, Legislative Assembly, 27 September 1990, 5914–5938.

Evidence of Children and Other Vulnerable Witnesses

Terms of Reference

In February 1989 the Commission was given a reference to review the law and practice governing the giving of evidence by children and other vulnerable witnesses in legal proceedings.

Background of Reference

The reference resulted from a suggestion made by the Commission to the Attorney-General. It was prompted by prevailing controversy in many jurisdictions about whether there should be special procedures or rules allowing children and other vulnerable witnesses to give evidence without the necessity of physically appearing in court or confronting the accused. This was perceived to be of particular importance in cases of child sexual abuse, where the sight of the accused often had a powerful negative effect on the witness. Incentive for this review arose out of the growth in public awareness of, and concern about, the sexual abuse of children. In August 1990 a petition was tabled in the Western Australian Parliament bearing 79,567 signatures and urging the government to pass legislation to deal with sexual and other crimes against children.[1] These issues were also dealt with in 1987 in a report by the Government Task Force on Child Sexual Abuse.[2] The Commission's terms of reference, however, extended beyond children to include other vulnerable witnesses, such as the elderly, witnesses with particular disabilities and some victims of adult sexual offences.

The Commission conducted research into the law and practice in Western Australia and in other jurisdictions both in Australia and overseas. A Commissioner, while on leave in England, attended an international conference on the subject held at Selwyn College, Cambridge, in June 1989. Experts from many different countries addressed this conference and shared information about the approaches taken to address this problem in each jurisdiction.

The Commission appointed Ms Marion Dixon, formerly an officer of the Crown Law Department and a Lecturer in law at the University of Western Australia, to draft a discussion paper. The aim of the paper was to explore what changes could be made to the law and practice to both alleviate the trauma suffered by children and other vulnerable witnesses in giving evidence in legal proceedings and to improve the quality of their evidence. The paper was issued for public comment in April 1990. A number of proposals were put forward for public discussion including proposals to make it easier for children to give evidence in court. The paper also raised the question whether the proposed reforms would be appropriate in the case of other vulnerable witnesses.

Nature and Extent of Consultation

The reference was carried out amid widespread public debate. The issue was the subject of considerable media attention. Representatives of the Commission were interviewed by the press, radio and television and addressed a number of public meetings on the subject.

The Commission received submissions from a wide range of individuals and groups including government departments, academics from universities across Australia, Princess Margaret Hospital, the Law Society of Western Australia, the Australian Association of Social Workers, the College of General Practitioners and the Council for Civil Liberties in Western Australia. In addition, members and officers of the Commission had ongoing discussions and correspondence with a number of people including the Chief Justice of

1 Western Australia, *Parliamentary Debates*, Legislative Council, Petition No 50 tabled in the Legislative Council, 23 August 1990.
2 Child Sexual Abuse Task Force, *Report of the Western Australian Government Task Force on Child Sexual Abuse*, 1987.

Western Australia, the Chief Justice's Criminal Practice and Procedure Review Committee, members of the Child Abuse Unit and a number of other people with specialist knowledge or interest in the issues involved.

At the time of the reference many other jurisdictions in Australia and overseas were in the process of making amendments to their own laws in this area. The Commission therefore had the advantage of being able to learn from the experiences of those jurisdictions and to consider the merits of changes either proposed or implemented elsewhere. The Commission had the benefit of consultation with many individuals and agencies in Australia, the United Kingdom, New Zealand and Canada including a number of academics and law reform agencies in these other jurisdictions.

The final report was prepared in light of these consultations and discussions, of the comments received in response to the discussion paper and of the research carried out by the Commission. The Commission submitted the final report containing its recommendations in April 1991.[3]

Recommendations

The Commission made 28 recommendations for reform to the law and practice regarding the giving of evidence by children and other vulnerable witnesses. The principal recommendations may be summarised as follows:

- A child of any age should be able to give evidence on oath so long as the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth which is involved in taking an oath.
- Children under 12 should be able to give unsworn evidence if they are able to give an intelligible account of events which they have observed or experienced.
- The requirement that the unsworn evidence of a child under 12 must be corroborated by other evidence should be abolished. Judges should not be able to issue a warning to the jury to the effect that the witness is a child and is therefore less reliable than an adult witness.
- At a preliminary hearing, the court should be permitted to allow the child's evidence to be given in the form of a previously made statement.
- In certain cases of sexual assault or abuse on a child under 16:
  (a) statements made by children outside the courtroom, whether oral, written or electronically recorded, should be admitted in evidence provided that the child is available to be called as a witness and notice is given to the defence;
  (b) the court should have the power to permit the presentation of the child's evidence on videotape at trial, in lieu of the child presenting oral evidence-in-chief, though the child would be available for cross-examination and re-examination by counsel; and
  (c) courts should be given the power to order the use of closed-circuit television to facilitate the giving of evidence by the child; this should be a matter of routine rather than a matter to be left to the discretion of the judge.
- Programmes for the preparation of child witnesses should be established. Children should be permitted to have an adult support person with them while giving evidence. The court should have the power to appoint court interpreters to facilitate the giving of evidence by children. In any case where the accused is unrepresented, child witnesses should be asked questions through an intermediary.

3 Law Reform Commission of Western Australia, *Evidence of Children and Other Vulnerable Witnesses*, Project No 87 (1991).

- A court should be empowered to declare a witness a "special witness" in certain cases where the court is satisfied that the person would be unable to give effective evidence. Where a witness has been declared a "special witness", the court should be able to order the use of certain procedures recommended for child witnesses.

A comprehensive outline of all the recommendations may be found in chapter 12 of the Commission's final report.

Legislative or Other Action Undertaken

In 1992, Parliament passed the *Acts Amendment (Sexual Offences) Act 1992* (WA) which implemented some of the Commission's recommendations. Later that year, Parliament passed the *Acts Amendment (Evidence of Children and Others) Act 1992* (WA) which implemented the remaining recommendations in the Commission's final report.

In 1999 the Commission reviewed the legislative regime governing evidence for their comprehensive review of the criminal and civil justice system ("Project No 92").[4] As part of this project the Commission examined the Commonwealth *Evidence Act 1995* (Cth), which was implemented as a result of the Australian Law Reform Commission's review of the law of evidence. The Commission pointed to the advantages of codification and jurisdictional uniformity in matters of evidence. The Commission particularly addressed the benefits of the Commonwealth Act in contrast to the *Evidence Act 1906* (WA). The Western Australian legislation had been the subject of several piece-meal amendments but had not been systematically reviewed since its inception. The Commission did, however, acknowledge a number of specific advantages to the Western Australian legislation. In particular, the provisions relating to the evidence of children and other special witnesses which were implemented as a result of this reference. One of the principal recommendations made by the Commission in their final report for Project No 92 was that the *Evidence Act 1906* (WA) and related legislation should be redrafted in uniformity with the Commonwealth Act, but ensuring that the specific advantages concerning the evidence of children and special witnesses are included.

4 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999).

The Administration Act 1903

Terms of Reference

In 1989 the Commission was asked to review the *Administration Act 1903* (WA) ("the Act").

Background of Reference

The Act governs the rights of inheritance of property.[1] It provides a regime for the orderly winding up of a deceased person's affairs and the administration of his or her property in the interests of creditors and beneficiaries. Much of the day-to-day operation of the Act in non-contentious matters is governed by the *Non-Contentious Probate Rules 1967* (WA), which are made under the authority of the Act. The operation of the Act in contentious matters is governed by the *Rules of the Supreme Court 1971* (WA), in particular Order 73. However the Commission's terms of reference did not extend to either of these.

The Commission's preliminary review of the Act revealed that nine decades of legislative changes had resulted in a statute that was illogically arranged and featured a variety of drafting styles. Further, certain sections of the Act contained provisions that were either inconsistent or had fallen into desuetude, and were therefore misleading, at least to the non-expert reader of the Act.[2] The meaning of several provisions was also obscure, which in some cases arose from textual inadequacy, and in others, from an allusion to an obscure rule of the general law.[3]

In addition the Commission found that the title of the Act did not reflect its substance and that some sections dealt with more or less routine procedural matters that might more appropriately be contained in the Rules.

Nature and Extent of Consultation

Because of the technical nature of the subject matter, the Commission did not issue a discussion paper, however, the report was distributed in draft form to the Chief Justice, judicial officers of the Supreme Court, trustee companies, the Law Society of Western Australia, a number of solicitors and others with experience in the area. The draft report was also made available to the public and comment was sought with the aid of advertising in *The West Australian*.

The final report containing the Commission's recommendations was released in August 1990.[4] The Commission considered the content of corresponding legislation in other Australian jurisdictions, in England and in New Zealand, and was significantly influenced by the comprehensive reforms made in Queensland in 1981.[5]

Recommendations

The Commission's primary recommendation was that the Act should be repealed and that a new statute, to be entitled the *Probate and Administration Act*, should be enacted to replace it. Amongst other things, the Commission suggested that the new legislative regime should have the following features:

1 See also the *Executors Act 1830* (Imp) 11 Geo. IV & 1 Will. IV c.40 (1830) (Imp): Adopted by 6 Will. IV No. 4 (1836), which deals with undisposed residues of testator's effects.
2 Specifically ss 8, 43, 44 and 47A.
3 See for example s 3, relating to the definition of a will; ss 25, 36 and 37, which deal with entitlement to administration in cases of intestacy and with the will annexed. In both cases they fail to adequately identify the order of persons so entitled, and the conditions of their entitlement. Sections 9 and 141(2) are, for practical purposes, meaningless.
4 Law Reform Commission of Western Australia *Report on the Administration Act 1903*, Project No 88 (1990).
5 *Succession Act 1981* (Qld); see also Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978).

- The classes of persons entitled to grants of administration, both upon intestacy and with the will annexed, should be clearly set out in order of priority.
- The system of administration sureties should be abolished.
- Provision should be made for executorship by representation, subject to the right of renunciation in appropriate cases.
- The legal consequences of the revocation of a grant of representation should be defined in such a way as to be consistent with the provisions of the *Trustees' Act 1962* (WA).
- There should be a statutory regime governing testamentary gifts to unincorporated associations.
- Testamentary powers of appointment or trusts to distribute property should be deemed to be valid if they would be valid if contained in a deed inter vivos.

The Commission revisited its earlier reports on *Recognition of Interstate and Foreign Grants of Probate and Administration* and *The Administration of Assets of the Solvent Estates of Deceased Persons in the Payment of Debts and Legacies* and recommended that the reforms suggested by those reports should be implemented in the new Act.[6]

The Commission also recommended that a review of the *Non-Contentious Probate Rules* should be undertaken by a suitably qualified person, partly to determine whether an efficient system of personal applications for grants of representation could be instituted, on a court fees or economic fee-for-service basis, in cases where there are no complicating factors, but regardless of the value of the estate.

Legislative or Other Action Undertaken

The recommendations of the Commission have not been legislatively implemented.

Currency of Recommendations

The recommendations remain current.

Action Required

Implementation of the Commission's recommendations requires that the existing *Administration Act* be repealed and replaced.

Priority — Low

This area of law is currently the subject of discussions aimed at unifying the law in all Australian jurisdictions. The Uniform Succession Law Project Committee, coordinated by the Queensland Law Reform Commission, presently has representatives from every jurisdiction except Western Australia.[7] In June 1999 the Project Committee issued a discussion paper, which addresses the general area of law comprehensively.[8] The Project Committee is yet to consider the submissions made in response to the discussion paper and estimates that the final report incorporating recommendations for uniform succession laws should be released by 2003.

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6 See Law Reform Commission of Western Australia *Recognition of Interstate and Foreign Grants of Probate and Administration,* Project No 34 (IV) (1984); Law Reform Commission of Western Australia *Administration of Assets,* Project No 34(VII) (1988).

7 The Commission's Executive Officer Dr Peter Handford represented Western Australia from 1995 to 1997 until the government of the day withdrew its support.

8 Queensland Law Reform Commission, *National Committee for Uniform Succession Laws: Administration of Estates of Deceased Persons,* Discussion Paper MP 37 (1999).

89

The Sale of Goods Act 1895

Terms of Reference

The *Sale of Goods Act 1895* (WA) ("the Act") was referred to the Commission for general review in 1989.

Background of Reference

The reference arose out of recognition of the need for reform following similar developments in other Australian jurisdictions, Britain and Canada. At the time of the reference the Act was virtually identical to the English *Sale of Goods Act 1893* (UK) which was copied in virtually all common law jurisdictions in the last years of the 19th century.

The Commission engaged Ms Aviva Freilich and Mr Louis Proksch, both of the University of Western Australia, to produce discussion papers on the subject. These papers were circulated to interested parties in August and October 1995. The first discussion paper dealt with implied terms in ss 12–15 of the Act together with a number of general issues such as the relationship between the Act and the *Trade Practices Act 1974* (Cth) and the distinction between conditions and warranties. The second discussion paper was confined to the issue whether s 59(2)[1] could validly be interpreted as including principles of equity in a sale of goods context with particular reference to misrepresentation, duress, mistake, fraud and equitable interests and remedies.

Nature and Extent of Consultation

The Commission had the benefit of detailed responses to the discussion papers from experts in the area, including, Professor John Carter of Sydney University, Professor Anthony Duggan of Monash University, Professor Michael Bridge of Nottingham University and Professor Ralph Simmonds of Murdoch University. The final report containing the Commission's recommendations was delivered in June 1998.[2]

Recommendations

After extensive consideration of the issues the Commission concluded that it should recommend only minimal reforms to the Act. These reforms were of an uncontroversial nature and reflected similar reforms in other Australian jurisdictions. In summary, the Commission recommended that:

- The formal requirements in s 4 be abolished.
- The market overt exception to the rule that no one can give better title than he possesses (s 22) be abolished.
- The provisions in s 11 dealing with the passing of property in specific goods be repealed, because the interaction between this provision and the rules in s 18 dealing with when the property in such goods passes produces an unfair result for the buyer.
- The provisions of s 35, dealing with acceptance be amended to give the buyer a realistic right of examination before he is deemed to have accepted the goods.
- Further provisions be inserted in ss 59 and 35 to make it clear that equitable principles, as well as those derived from common law, have a part to play in contracts for the sale of goods.

A comprehensive list of recommendations, including full drafting instructions may be found at pages 43–44 of the final report.

1 Section 59(2) provides that '[t]he rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act … shall continue to apply to contracts for the sale of goods'.
2 Law Reform Commission of Western Australia, *The Sale of Goods Act 1895*, Project No 89 (1998).

Legislative or Other Action Undertaken

Confirmation of receipt of the final report was acknowledged by the Attorney-General during Parliamentary proceedings on 8 September 1998.[3] There has been no action to implement the Commission's recommendations.

Currency of Recommendations

The recommendations remain current and crucial to achieving a degree of uniformity with similar legislation in other Australian jurisdictions.

Action Required

Amendments to the current Act should be drafted to reflect the above recommendations. Due to the uncontroversial and modest nature of the reforms it is envisaged that the recommended amendments may be fast-tracked through Parliament.

Priority – High

This assessment is based upon the desirability of updating the legislation to achieve uniformity with other jurisdictions and remove archaic language and references. The ease of implementation of the recommended reforms was a further consideration in making this assessment.

3 Western Australia, *Parliamentary Debates,* Legislative Assembly, 8 September 1998, 759 (Mr P Foss, Attorney-General).

90

Professional Privilege for Confidential Communications

Terms of Reference

In 1990 the Commission was asked to consider what changes, if any, should be made to the law of professional privilege as regards the obligation to disclose confidential communications or records in judicial proceedings. In particular, the Commission was asked to recommend 'whether clause 109 of the draft Evidence Bill in Appendix A to the 38th Report of the Australian Law Reform Commission, or any variation thereto, should be adopted in Western Australia'.

Background of Reference

The issue was referred to the Commission following a situation where a newspaper journalist refused to disclose the source of certain relevant information in Western Australian judicial proceedings.[1] The same issue had been raised in incidents involving journalists in other jurisdictions.

The Commission had previously considered whether a professional privilege for journalists should be introduced in its 1980 report on *Privilege for Journalists*.[2] In that report, the Commission recommended that there should be no statutory privilege for journalists and that any development in this regard should be made only at common law.[3]

Although this issue was revisited in the current reference, the review was intended to cover not only the relationship between journalists and their informants, but all professional and other relationships where confidential communications are a relevant basis of the relationship.[4]

In December 1991 the Commission issued a discussion paper which considered whether particular professionals should be granted a statutory privilege to refuse to disclose in judicial proceedings confidential information obtained in the course of that professional relationship.

Nature and Extent of Consultation

In considering the primary options for reform the Commission invited a wide variety of professional and other organisations and individuals to make submissions upon the reference.[5] The reference generated debate in print and radio media and at public seminars and meetings with interested persons. The Commission's final report was submitted in May 1993.[6]

Recommendations

The Commission recommended against the creation of a privilege[7] that would allow individuals to refuse to reveal information to judicial proceedings on the basis that they were confidential communications made within a particular professional relationship. Instead, the Commission recommended:

- That Parliament enact a statutory judicial discretion allowing courts to excuse witnesses from disclosing information in breach of a confidential relationship in judicial proceedings.[8]

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1 *DPP v Luders* (unreported) Court of Petty Sessions (WA), 27 November 1989, No 27602 of 1989 (committal proceedings); *DPP v Luders* (unreported) District Court of Western Australia, 7–8 August 1990, No 177 of 1990. Both courts were exercising federal jurisdiction because the charges were under the *Crimes Act 1914* (Cth).

2 Law Reform Commission of Western Australia, *Privilege for Journalists*, Project No 53 (1980).

3 Ibid para 5.25. In Project No 90, the Commission commented that the common law relating to professional privilege had not developed as anticipated, see Law Reform Commission of Western Australia, *Professional Privilege for Confidential Communications*, Project No 90 (1993) para 1.30.

4 For instance, the relationships of doctor-patient, penitent-cleric and accountant-client as well as relationships between nurses, researchers, social workers, private investigators and private individuals.

5 Submissions received are listed at Appendix I of the Commission's final report.

6 Law Reform Commission of Western Australia, *Professional Privilege for Confidential Communications*, Project No 90 (1993).

7 "Privilege" defined as a legal right.

8 The Commission considered that the appropriate location for the proposed discretion would be the *Evidence Act 1906* (WA).

- That in exercising such a discretion the court should consider whether or not the public interest in disclosure of the evidence is outweighed, in the particular case, by the public interest in the preservation of confidences between persons in the relevant positions of the confidant and witness and the encouragement of free communication between such persons.
- That, for reasons of clarity, the statutory discretion be based upon a similar working provision in the New Zealand *Evidence Act*[9] rather than that proposed by the Australian Law Reform Commission in clause 109 of its draft Evidence Bill.[10]

Legislative or Other Action Undertaken

In 1996, the Standing Committee on Uniform Legislation and Intergovernmental Agreements tabled its *Evidence Law* report before the Legislative Assembly.[11] The report addressed the question whether Western Australia should support national uniform evidence legislation by the adoption of legislation similar to that already existing in the federal sphere. The Standing Committee agreed, in principle, that Western Australia should enact new legislation convergent with the Commonwealth *Evidence Act 1995* but incorporate current Western Australian provisions worthy of retention.[12] In respect of the creation of privileges for protection of confidential communications the Standing Committee indicated that it rejected the grant of any form of blanket privilege attaching to specific relationships.[13] Instead, the Committee expressed its preference for enactment of a general judicial discretion in matters of confidential communications.[14]

To date no legislative action has been taken to implement the Commission's recommendations.

Currency of Recommendations

The Commission's recommendations remain current. The need for legislation addressing the area of confidential communications is demonstrated by recent action in other Australian jurisdictions to create statutory privileges in relation to specific professional relationships.[15] A structured judicial discretion similar to that recommended by the Commission (though specific in the type of communication it protects) was inserted into the South Australian *Evidence Act* in 1999.[16]

Action Required

Implementation of the Commission's recommendations requires the enactment of a statutory judicial discretion that identifies the appropriate balance between the competing public interests in the protection of confidential information in the hands of professionals and the maintenance of public confidence in the

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9 *Evidence Amendment Act [No 2] 1980* (NZ) s 35.

10 Australian Law Reform Commission, *Evidence,* Report No 38 (1987) app I.

11 Western Australia, Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Evidence Law* (13 November 1996).

12 Ibid para 8.8. The Commission confirmed the desirability of uniformity of evidence legislation in its *Review of the Criminal and Civil Justice System in Western Australia,* Project No. 92 (1999) 171. In that report, the Commission commented that the existence of different federal and state evidentiary regimes in Western Australia are inefficient and unfair as the same case potentially can be prepared and conducted on the basis of the two inconsistent regimes.

13 Ibid para 5.5.

14 Ibid. The Standing Committee made specific reference to cl 109 of the draft Evidence Bill: Australian Law Reform Commission , *Evidence,* Report No 38 (1987) app I. However, there is no evidence that the Standing Committee had before it, in consideration of this question, the recommendations made by the Law Reform Commission of Western Australia in its report on Project No 90.

15 Victoria, Tasmania and the Northern Territory have created statutory privileges relating to confidential communications between doctors and patients; Victoria, Tasmania, the Northern Territory, New South Wales and the Commonwealth have created privileges relating to certain confidential communications between clerics and penitents.

16 Section 67E of the *Evidence Act 1929* (SA) provides that a communication relating to a victim or alleged victim of a sexual offence is, if made in a therapeutic context, protected from disclosure in legal proceedings by virtue of a public interest immunity. Section 67F sets out the exercise of the judicial discretion. These sections were inserted by the *Evidence (Confidential Communications) Amendment Act 1999* (SA).

justice system.[17] It is possible that this could occur as part of an initiative towards uniform evidence legislation based on the model of the Commonwealth *Evidence Act 1995*.[18]

Priority – High

Implementation of a general statutory judicial discretion enacted to protect disclosure of certain confidential communications in legal proceedings will enhance public confidence in the justice system. It will also enhance efficiency of judicial proceedings and assist in eradicating unnecessary or perceptibly unfair actions for contempt of court.

17 A detailed draft of the proposed statutory provision may be found at page 44 of the Commission's final report.
18 See Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999) chap 20.

Restrictive Covenants

Terms of Reference

In 1995, the Commission was asked to review the circumstances, if any, in which restrictive covenants should be used to restrict or regulate the subdivision, development or use of land or to preserve the amenity and aspect of land and, in particular, to consider:

(a) who can, or should, be a party to a restrictive covenant;
(b) whether local authorities should have power beyond that of a private landowner to enter into restrictive covenants with owners of land in their area to regulate or restrict the development or use of the land or to preserve the amenity and aspect of the land;
(c) whether there should be any time limit on when a restrictive covenant should be valid;
(d) the means of enforcing restrictive covenants; and
(e) who should have standing to, or be empowered to, enforce a restrictive covenant to which they are not a part.

In addition, the Commission was asked to consider whether local authorities have adequate power to regulate land in their area for the purpose of restricting or regulating the development or use of land or preserving the amenity and aspect of the land, whether permanently or for a specified period of time.

Background of Reference

At the time of the reference, there was a perception that local governments did not have adequate power to control the development or use of land. There was also some concern over conflicts arising between restrictive covenants and town planning schemes. Ministers of the relevant government portfolios requested that the Attorney-General submit the reference to the Commission for its consideration and advice.

Nature and Extent of Consultation

The Commission initiated public consultation by preparation of a discussion paper that covered a number of issues, including; whether restrictive covenants should be abolished or subject to limitations, how to resolve inconsistencies with town planning schemes and by-laws and whether local authorities required additional powers to control the development or use of land.

During preparation of the discussion paper, the Commission received preliminary submissions from numerous shires and other interested corporations. After its release in June 1995, the Commission invited submissions by the general public to be made by late September 1995. The discussion paper also received media publicity in the form of a radio interview by a Commission research officer. Consequently, the Commission received a large number of written and oral submissions from local authorities, professional associations, members of the general public, academics, legal practitioners, settlement agents, a Member of Parliament and others.

The Commission delivered its final report to the Attorney-General in June 1997.[1]

Recommendations

After a comprehensive review of the issues and the interests at stake, the Commission concluded that significant reforms were required. The Commission made 28 recommendations, including:

1 Law Reform Commission of Western Australia, *Restrictive Covenants,* Project No 91 (1997).

◀ Restrictive Covenants

- Restrictive covenants should not be abolished in general or for particular uses. The uses of restrictive covenants should not be controlled by requiring approval as a pre-requisite to registration or by limiting the duration of restrictive covenants.
- The power to extinguish or modify restrictive covenants should be liberalised and transferred from the Supreme Court to the Town Planning Appeal Tribunal. The local government power to extinguish or vary a restrictive covenant should be restricted to land involved in a guided development scheme, however, local governments should have standing to apply to the Town Planning Appeal Tribunal for the extinguishment or modification of a restrictive covenant.
- The existing means of enforcement are adequate. Local governments should not be given standing to enforce restrictive covenants on behalf of their residents but should, however, have standing, but not be under a duty, to take action to enforce any restrictive covenant.
- Vendors of land encumbered by a restrictive covenant should be required to disclose certain information to the purchaser. The Land Titles Division should be required to send a copy of every registered restrictive covenant to the relevant local government authority.

A number of other consequential recommendations were also made including recommendations pertaining to the operation and discretionary powers of the Town Planning Appeal Tribunal ("the Tribunal"). A comprehensive outline of recommendations may be found at pages 60–93 of the Commission's final report.

Legislative or Other Action Undertaken

The Attorney-General received the final report and released it on 11 July 1997 for further public comment with submissions to be made before the end of November 1997.[2] No action was taken prior to the receipt of these submissions and implementation of the recommendations was still under consideration in April 1998.[3] To date, no action has been taken to implement any of the Commission's recommendations.

Currency of Recommendations

The Commission's recommendations remain both relevant and current and are complemented by present government policy in the areas of Local Government and Planning.[4] However, uncertainty about the jurisdiction and the future role of the Tribunal may affect the implementation of some of the recommendations. For instance, the Commission's recent *Review of the Criminal and Civil Justice System* (Project No 92) recommended the establishment of a Western Australian Civil and Administrative Tribunal[5] which could incorporate the present functions of the Tribunal. There has also been some contention regarding the 'dual avenue of appeal', which has seen a number of Bills tabled in recent years.[6] Those recommendations that relate to a transfer of power from the Supreme Court to the Tribunal would need to be readdressed in the event that any changes to that jurisdiction are made.

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2 Attorney-General of Western Australia, *Release of WA Law Reform Commission Report*, Press Release No 47 (11 July 1997) 1.
3 Western Australia, *Parliamentary Debates*, Legislative Council, 1 April 1998, 1256 (Mr P Foss, Attorney-General).
4 See <http://www.alp.org.au/policy>.
5 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999) paras 33.9–33.15. This report included a recommendation to establish WACAT in order to amalgamate the adjudicative functions of existing Boards and Tribunals.
6 The 'dual avenue of appeal' refers to the ability to appeal to either the Tribunal or to the relevant Minister. The primary point of contention has been in regard to the transparency of appeal decisions. See Town Planning and Development Amendment Bill 1997 (WA); Planning Appeals Bill 1999 (WA). The Planning Appeals Amendment Bill 2001, currently before Parliament, would abolish Ministerial appeals and direct all planning appeals to the Tribunal.

Action Required

Legislative action is required to implement the recommendations of the Commission. Many of the recommended reforms are uncontroversial and it is anticipated that these recommendations may be fast-tracked through Parliament. However, those recommendations that relate to the Tribunal cannot be implemented until the role of the Tribunal, or its equivalent, is settled.

Priority – High

This assessment of priority reflects the fact that the recommended reforms are highly desirable and consistent with government policy. However, to implement the full legislative regime recommended by the Commission the initial obstacle posed by the uncertain future of the Tribunal must be overcome.

92

Review of the Criminal and Civil Justice System in Western Australia

Terms of Reference

In 1997 the Commission was given a broad reference to:

- Examine and report on the criminal and civil justice systems in Western Australia including the role of the legal profession and other dispute resolution professionals and other mechanisms for the resolution of disputes.
- Seek to identify the reasons for and processes by which the increase on the demands upon resources comes about.
- Make recommendations as to what changes are necessary or desirable to provide a more accessible legal system, a less complex and more simplified criminal and civil justice system, more efficient and cost-effective methods for resolving civil and criminal cases, prompt and inexpensive dispute resolution, reductions in the cost of litigation and the removal of unnecessary delay in and abuse of the legal system.

In its review of the criminal justice system the Commission was further asked to consider:

(a) the means of instituting criminal proceedings;

(b) preliminary hearings, pre-trial procedures and conferences and criminal discovery;

(c) the law, rules and practice governing the procedure in criminal cases and trials whether dealt with summarily or on indictment;

(d) appellate court processes;

(e) the desirability and feasibility of codifying the law and practice relating to criminal procedure;

(f) the rights of suspects and the powers of police and other investigators in relation to suspects;

(g) the law of evidence and the onus of proof; and

(h) the taking of evidence via video link arrangements.

Furthermore, in its review of the civil justice system the Commission was asked to inquire as to:

(a) the use of court-based or community alternative dispute resolution schemes;

(b) alternative forums for adjudication;

(c) the means of commencing civil proceedings;

(d) pre-trial conferences, case management and other means of supervising the progress of proceedings and the making of interlocutory orders;

(e) means of curtailing irrelevant or unduly protracted cross-examination and testimony;

(f) the advantages and disadvantages of the present adversarial system of conducting civil proceedings;

(g) the means of gathering, testing and examining evidence;

(h) appeals in civil proceedings;

(i) the desirability and feasibility of codifying the law and practice relating to civil procedure;

(j) the law of evidence and the onus of proof; and

(k) the taking of evidence on commission and via video link arrangements.[1]

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1 In carrying out this reference, the Commission was required to have regard to the work undertaken by the Australian Law Reform Commission in its project review of the adversarial system of litigation. See Australian Law Reform Commission, *Review of the Adversarial System of Litigation – ADR – Its Role in Federal Dispute Resolution*, Issues Paper No 25 (1988) and Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper No 62 (1999).

Background of Reference

The reference arose because of the increasing volume and complexity of demands on Western Australia's judicial system and, in particular, increases in the time and resources consumed by the litigation process. It was felt that the laws, procedures and practices relating to criminal trials and civil litigation ought to be examined and the standards of, and requirements for, a fair and equitable judicial system (including trials and related court proceedings) must be maintained. The Commission was required to make recommendations to provide for a more accessible, less complex, faster and less expensive justice system.

This vast and complex topic is the most far-reaching reference the Commission has received in its 30 year history. Because the Commission had a relatively short time to complete its comprehensive review it was necessary to transform both the operations of the Commission and its approach to law reform.

Nature and Extent of Consultation

In December 1997 the Commission began the consultation process by seeking submissions through press advertisements. Following a relatively poor response to these advertisements the Commission determined that a broad public outreach was required in contrast to its more traditional approach of issuing working or discussion papers to elicit comment. The Commission began by launching an internet website and publishing an issues paper. The issues paper was specifically written for the Western Australian public who were acknowledged as the users, consumers and owners of the justice system. The Commission attempted to demystify the system and welcomed submissions and suggestions for reform in the areas covered by the terms of reference.

The Commission received more than 650 submissions in response to the issues paper. These submissions were summarised by the Commission and published in a separate report.[2] The issues paper also announced a series of public meetings to be held by the Commission where the public was invited to express their views on the operation of the justice system. During the course of the review the Commission participated in ten 'Have Your Say' public meetings across Western Australia.[3] These meetings brought the Commissioners face to face with a diverse range of Western Australians, many of whom were eager to speak about their experiences with the justice system. The Commission also held a live television conference on 19 August 1998. The programme, broadcast on the Westlink Satellite Network, offered viewers a toll-free phone number that they could call in order to speak to the three Commissioners. This was done with the objective of providing Western Australians living in more remote parts of the state the opportunity to express their views.

After the public consultation process the Commission determined that it would produce drafts with proposals to be circulated for comment. Between December 1998 and June 1999 the Commission released 30 consultation drafts and background information papers to the media and key stakeholders as well as interested members of the public. The consultation drafts proposed over 400 reforms for reducing delay and making the justice system simpler, fairer and less expensive. The Commission received more than 150 detailed submissions in response to the consultation drafts.

During this extensive consultation stage there were over 50,000 visits, to the Commission's website, Commission members and staff spoke to hundreds of Western Australians at public meetings and forums and the review featured in newspaper, radio, television and magazine reports. The Commission received

2 See Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Submissions Summary, Project No 92 (1999).

3 Public meetings were held in Perth, Karratha, Kalgoorlie, Bunbury, Geraldton and Albany.

more submissions during the course of this review from the public than for any other previous reference. The Commission also made significant staffing and facility changes at the beginning of the review which enabled more people than ever before to participate in the law reform process. A total of 66 consultants, with diverse skills and experience, assisted in the production of the final report.

The Commission completed its review on 30 September 1999 with the delivery of the final report to the Attorney-General.[4] In early 2000 the Commission released the report on two compact discs containing all publications associated with the review including video clips of people making submissions during the public meetings. This was the Commission's first totally electronic publication making it the most innovative and accessible report produced in its 30 year history.

Recommendations

The Commission made a total of 447 recommendations for reform of the criminal and civil justice system. In making its recommendations the Commission sought to reduce delay, cut costs and demystify the justice system by making it faster, simpler and easier to understand. The recommendations may conveniently be summarised and categorised under broad headings as follows:

The Justice System –

- The Commission proposed a number of broad recommendations to improve the effectiveness of the justice system as a whole. In particular, the Commission recommended that:
  (a) to simplify the justice system and make it more easily understood there should be uniform rules in all courts;
  (b) plain English drafting should be implemented when revising or drafting new legislation and procedural provisions;
  (c) the proposed Magistrates' Court Act should be enacted to merge Courts of Petty Sessions and Local Courts to form a single court of general inferior jurisdiction[5] ; and
  (d) a Western Australian Civil and Administrative Tribunal (WACAT) should be established to amalgamate the adjudicative functions of existing boards and tribunals, except in industrial relations and Workcover areas.[6]

The Criminal System –

- Over 100 recommendations were made dealing specifically with criminal matters including 24 proposals to reform criminal process in the Courts of Petty Sessions and 21 recommendations to reform criminal process in the higher courts.
- It was further recommended that:
  (a) a Summary Offences Act should be enacted to include, as far as possible, all summary offences;[7] and

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4 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999).

5 The Commission reaffirmed its recommendations from earlier reports for a combined court of summary jurisdiction. See Law Reform Commission of Western Australia, *Courts of Petty Sessions: Constitution, Powers and Procedure*, Project No 55(II) (1986); *Local Courts: Jurisdiction, Procedures and Administration*, Project No 16(I) (1988).

6 The recommendations relating to WACAT prompted a further reference from the Attorney-General to the Commission on 6 September 2001. This reference, *Judicial Review of Administrative Decisions*, Project No 95, is aimed at reforming the law and procedures relevant to the review of administrative decisions on their merits. See also Law Reform Commission of Western Australia, *Review of Administrative Decisions: Appeals*, Project No 26(I) (1982).

7 This recommendation reaffirms the recommendations made by the Commission in an earlier report where it was proposed that specified offences in the *Police Act 1892* (WA) be abolished and that the surviving offences be incorporated in a Summary Offences Act. See Law Reform Commission of Western Australia, *Police Act Offences*, Project No 85 (1992).

(b) the *Criminal Code 1913* (WA) should be amended to include, as far as possible, all indictable offences, and all matters relating to criminal procedure should be removed.

- The Commission also recommended that a comprehensive code of criminal practice and procedure should be developed.
- It was recommended that preliminary hearings should be abolished.
- A total of 15 recommendations were made concerning alternative criminal charge resolution.
- In response to the concern that criminal trials take place promptly and at reasonable cost the Commission made a number of recommendations to expand the provisions relating to joinder.
- The Commission also made a number of recommendations regarding the availability and appropriate circumstances for trial by judge alone.
- Several recommendations were made with the objective of reducing costs in the criminal system. Specifically, that the:
  (a) *Official Prosecutions (Defendants' Costs) Act 1973* (WA) should be repealed;[8] and
  (b) provisions of the *Suitors' Fund Act 1964* (WA) should be amended to enable any additional costs incurred by defendants through no fault of their own after an initial criminal trial to be fully met from the Fund.[9]

The Civil System –

- Generally, the Commission considered that the civil justice system should be managed in order to be expeditious, proportionate and both procedurally and substantively just. The Commission recommended that legislation should be enacted applying this principle to all legislation impacting upon civil justice, including the Rules of Court.
- In respect of the means of commencing civil proceedings and pleadings the Commission made a total of 28 recommendations for reform to simplify procedures and reduce time and expense.
- The Commission also made a number of recommendations concerning case management and the use of alternative dispute resolution mechanisms within the civil justice system. The recommendations were aimed at promoting case management as a means of supervising the progress of proceedings and creating a more efficient civil justice system and the use of alternative dispute resolution for resolving disputes without recourse to litigation.
- A number of recommendations were made regarding the legal process of discovery. The Commission specifically recommended a focused form of discovery, to be called disclosure and that this process should be limited to documents directly relevant to the matter in issue.
- More than 60 recommendations were made to minimise delay and reduce costs within the civil justice system. This included a number of specific procedural recommendations relating to summary judgments, interlocutory injunctions, trials of preliminary issues and oral and written submissions.
- The Commission made a number of recommendations relating to the Local Courts. Primarily, the

8 This Act was introduced in response to recommendations made by the Commission in an earlier report. See Law Reform Commission of Western Australia, *Payment of Costs in Criminal Cases*, Project No 12 (1972).

9 It should be noted that these recent recommendations contradict recommendations made by the Commission in an earlier report on the operation of the *Suitors' Fund Act 1964* (WA). See Law Reform Commission of Western Australia, *The Suitors' Fund Act Part B: Criminal Proceedings*, Project No 49 (1977) where the Commission recommended that the *Suitors' Fund Act 1964* (WA) should no longer apply to criminal proceedings and instead legal costs of accused persons should be payable under the *Official Prosecutions (Defendants' Costs) Act 1973* (WA).

Commission recommended that Local Court procedures be simplified, delays reduced and dispute resolution outside of the court encouraged.

- A number of administrative and procedural recommendations were made regarding self-represented litigants. Specifically, several recommendations were made to facilitate self-representation by providing for access to information, improving court facilities and providing for a more comfortable court environment.
- The Commission also made several recommendations for the enactment of legislation to deal with malicious, or vexatious, litigants who use the justice system to abuse others.

Evidence –

- The Commission recommended the adoption of the *Evidence Act 1995* (Cth) so that the rules of evidence are standard across the federal and state courts.
- A number of recommendations were made to limit examination and cross-examination as a means of curtailing unduly protracted proceedings.
- Several recommendations focused on expert evidence. In particular, that courts should encourage parties to agree to use a single expert and that this should be reinforced in civil matters by costs ordered against parties who refuse to cooperate.
- The Commission also made recommendations regarding the 'right to silence' in criminal trials. Specifically, the Commission recommended that the law on the right to silence at trial should be amended to permit the:
  (a) jury to have regard to a defendant's silence as one of the circumstances or part of the evidence but not, in and of itself, permitting an inference of guilt, so long as the jury is first directed as to the defendant's right to be silent; and
  (b) prosecution comment upon the silence of the defendant within the same limits as those applying to a permissible direction by the judge.[10]

Special Areas of Concern –

- The Commission made 26 recommendations focused on the right of appeal in criminal and civil matters. It was recommended that laws conferring a right of appeal should clearly specify the nature of the appeal, any limitations and the procedures to be followed. Generally, these recommendations were made with the objective of simplifying appellate procedure and reducing delay and costs.
- Several recommendations were made concerning the legal profession to provide for greater flexibility and accountability by proposing:
  (a) limited contingency fee arrangements;
  (b) mandatory continuing legal education;
  (c) ethics education for law students and legal practitioners seeking to renew practice certificates;
  (d) enforcement mechanisms for ethical obligations; and
  (e) the development of best practice protocols and review of the existing professional conduct rules.
- A number of recommendations were made for the establishment of a pilot private civil courts project.

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10 The New South Wales Law Reform Commission (NSWLRC) has recently issued a comprehensive report on the right to silence in that state. The NSWLRC considered the above recommendations made by the Commission. Importantly, the NSWLRC made a similar recommendation to the Commission: that the prohibition in the NSW legislation on prosecution comment on a defendant's silence should be removed and comment should be permitted subject to the restrictions which apply to comment by the trial judge, counsel for the defendant and any co-accused. See New South Wales Law Reform Commission, *The Right to Silence*, Project No 95 (2000) recommendations 14 and 15.

- The Commission also made 40 recommendations which focused on significant improvements to the court environment and facilities and the use of technology in the justice system.

A complete record of all the Commission's recommendations may be found in chapter seven of the project summary.[11]

Legislative or Other Action Undertaken

The Attorney-General acknowledged completion of the review and tabled the final report during parliamentary proceedings on 27 October 1999.[12] Since then there has been action undertaken to implement or independently address some of the Commission's recommendations by the Ministry of Justice, the courts and the Law Society of Western Australia.

In March 2000 the Attorney-General announced the formation of a Steering Committee within the Ministry of Justice and a Reference Committee, composed of key stakeholders, to implement the Commission's recommendations as part of an overall Justice System Review. In its 1999–2000 Annual Report the Ministry of Justice indicated that several recommendations had already been progressed including:

(a) improvements to court technology;

(b) enhanced court design and facilities;

(c) the commitment of funding towards a capital works programme for the establishment of modern justice complexes; and

(d) the introduction of the Unrepresented Criminal Appellants Scheme, developed in conjunction with the University of Western Australia and the Law Society of Western Australia.

In October 2000 the Justice System Review began documenting the implementation process of specific reforms by publishing a bulletin.[13] Also, in 2000 the Ministry of Justice introduced Genisys, an advanced computerised courts management system, which has facilitated many of the Commission's recommendations regarding access to justice and the achievement of a simpler, more efficient justice system.[14] Detailed research and consultation with stakeholders also began on the Commission's recommendations to abolish the preliminary hearing and to reform the *Evidence Act 1906* (WA).[15] The Ministry of Justice also began acting on the Commission's recommendations regarding court design and overall improvements to the court environment.[16] It is also notable that, although the Family Court of Western Australia was outside of the scope of the review, the Perth Family Court has independently adopted a number of the Commission's recommendations.[17] The Justice System Review also oversaw the development of the Vexatious Proceedings Restriction Bill 2000 aimed at simplifying procedures for declaring as 'vexatious' people who litigate abusively or abuse the system.[18] This legislation adopted most

11 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project Summary, Project No 92 (1999) 45.
12 Western Australia, *Parliamentary Debates*, Legislative Council, 27 October 1999, 2642 (Mr P Foss, Attorney-General).
13 Ministry of Justice Policy and Legislation Division, *Justice System Review*, Implementation Bulletin No 1 (2000).
14 Specifically, Genisys will facilitate the implementation of recommendations 10, 198, 212, 417 and 434. See Ministry of Justice Policy and Legislation Division, *Justice System Review*, Implementation Bulletin No 1 (2000) 2.
15 Ibid 4.
16 Specifically, the Justice System Review began examining the viability of recommendations 401, 406, 409, 410, 412 and 420. See Ministry of Justice Policy and Legislation Division, *Justice System Review*, Implementation Bulletin No 1 (2000) 3.
17 In particular, recommendations relating to customer service and the court environment have been implemented. See Ministry of Justice Policy and Legislation Division, *Justice System Review*, Implementation Bulletin No 1 (2000) 5.
18 Ibid 3.

of the recommendations proposed by the Commission in relation to this matter. The Commission had recommended the use of the term 'malicious' in place of 'vexatious', but this was not adopted in the legislation.[19] The Attorney-General introduced this Bill to Parliament on 28 June 2000.[20] The Bill, however, did not progress past the second reading stage. Due to the interruption of the state election at the end of 2000 the Bill went on to the notice paper and is yet to be reintroduced to Parliament.

The Justice System Review was dissolved with the change of government following the election and the closure of the Policy and Legislation Division of the Ministry (now Department of Justice) in 2001. Implementation of the Commission's recommendations has, however, been continuing within the Court Services Division of the Department of Justice. The Department of Justice is currently in the process of preparing a formal bid for funding to accommodate the project management and implementation of the Commission's outstanding recommendations. One of the main initiatives forming part of this overall process of implementation is the plan to set up a database to keep track of the progress of the Commission's recommendations. The Department of Justice is planning to meet with representatives from the Commission in order to begin developing this database. In the meantime, the Department of Justice is continuing to progress a number of projects which have fallen out of the review. In particular, the introduction of new legislation to establish a Magistrates' Court which will combine the criminal jurisdiction of the Courts of Petty Sessions and the civil jurisdiction of the Local Courts and the establishment of WACAT. The Court Services Division of the Department of Justice is currently preparing a Cabinet submission to obtain approval to draft the Magistrates' Court Act with proclamation anticipated for 2003. This legislation will be drafted so as to incorporate as many of the Commission's recommendations as possible. Recently, the Department of Justice began the process of setting up a steering committee to oversee the development of this new legislation and to consider how best to incorporate the Commission's recommendations.

There has also been a commitment by government to establishing WACAT. Specifically, the recommendations concerning the establishment of this new tribunal resulted in a further reference ("Project No 95") to the Commission to consider the proposed reforms in greater detail.[21] A Civil and Administrative Review Tribunal Taskforce has also been established to advise and assist the government and to liaise with the Commission on the conduct of this reference. It is expected that the Commission will deliver its final report on Project No 95 in early 2002.

There has also been some action taken within the courts system regarding the implementation of the Commission's recommendations. The Chief Justice of Western Australia welcomed the release of the Commission's final report on 27 October 1999[22] and a number of the recommendations have since been acted on within the Supreme Court. Specifically, a complete review and overhaul of the *Criminal Practice Rules* has been undertaken as recommended by the Commission[23] and a lengthy and detailed review of the *Rules of the Supreme Court* is currently being addressed. Further, the Chief Justice of Western Australia has established committees to address the issue of self represented litigants in both civil and criminal matters. Recommendations regarding customer service and enhanced accessibility to court services have been, or are in the process of being, addressed by the restructuring of court services at all levels.

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19 This recommendation was not adopted because it was considered that 'malicious' conveys evil intent whilst 'vexatious' refers more broadly to litigation designed to annoy. See Ministry of Justice Policy and Legislation Division, *Justice System Review*, Implementation Bulletin No 1 (2000) 3.

20 Western Australia, *Parliamentary Debates*, Legislative Council, 28 June 2000, 8354 (Mr P Foss, Attorney-General).

21 This reference, *Judicial Review of Administrative Decisions*, Project No 95 was referred to the Commission on 6 September 2001.

22 Chief Justice of Western Australia, *Statement by the Hon David K Malcolm AC Chief Justice of Western Australia*, Press Release (27 October 1999).

23 See recommendation 16 of the Commission's final report. The drafting of the new *Criminal Procedure Rules 2000* (WA) was overseen by the Hon Justice Murray of the Supreme Court of Western Australia with the assistance of the Hon Judge Healey of the District Court of Western Australia.

There has additionally been some activity relevant to the Commission's recommendations regarding the legal profession. The Law Society is in the process of independently conducting a review of a number of issues that relate to the Commission's recommendations in this area. The Law Society has several ongoing advisory committees, a number of which deal with matters relevant to the Commission's recommendations, including the Access to Justice Committee, Costs Committee, Ethics Committee and Professional Conduct Committee. In particular, the Law Society is planning to conduct an evaluation in 2002 regarding mandatory continuing legal education and is also planning to review the professional conduct rules.[24] The Law Society is also reviewing issues relating to costs and disclosure of costs.[25] The Legal Practice Board has now also established a compulsory ethics course as part of the pre-admission Articles Training Programme for new law graduates.

Recently, the Department of Justice indicated a number of broad future directions which would effectively develop implementation plans for the Commission's recommendations.[26] The 2001–2002 Department of Justice Annual Report has identified the restructuring of the lower courts including implementation of WACAT, the improvement of access to dispute resolution in both criminal and civil jurisdictions, the restructuring of existing criminal laws and procedures and the improvement of civil procedures as high priorities. As part of a commitment to maintaining service levels and open communication, a customer service strategy has been developed to build on the initiatives undertaken in previous years. Court Services have also started to develop plans to implement the Commission's recommendations including a range of processes and structure reviews to improve access to justice and to speed up procedures. Court Services has also begun implementing a strategy to ensure compliance with the Commission's recommendation relating to the use of plain language in all forms of publications.[27]

Currency of Recommendations

The recommendations that are yet to be implemented remain current and are crucial to achieving significant reform of the Western Australian justice system. These recommendations represent the most comprehensive and recent pronouncement on the reform of the criminal and civil justice system in Western Australia. Furthermore, the recommendations have built on and reaffirmed some of the Commission's earlier references and recommendations.[28]

Action Required

Since the Commission delivered its final report in 1999 the implementation of the recommendations has been somewhat fragmented and has occurred on a project by project basis. The Department of Justice has identified a need to progress the recommendations as part of a cohesive and ongoing programme of reform. Funding is therefore required to project manage the implementation of the reforms in a strategic and coordinated fashion. One important action required for the effective implementation of the recommendations is the development of a database to assist the management of the reform programme. This would allow an overall picture of the progress of implementation to be seen and would provide an extremely useful reporting mechanism.

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24 The Law Council of Australia is also proposing a national model for professional conduct rules.

25 The Commission's recommendations regarding contingency fee arrangements were also examined in an article urging further review of the recommendations. See GiGi Visscher, 'Contingency Fees in Western Australia', (2000) 7 *E Law* <http://www.murdoch.edu.au/elaw/issues/v7n1/visscher71nf.html>.

26 Ministry of Justice, *Annual Report 2000–2001*.

27 Ibid.

28 See Law Reform Commission of Western Australia, *Review of Administrative Decisions: Appeals*, Project No 26(I) (1982); *Courts of Petty Sessions: Constitution, Powers and Procedure*, Project No 55(II) (1986); *Local Courts: Jurisdiction, Procedures and Administration*, Project No 16(I) (1988); Law Reform Commission of Western Australia, *Police Act Offences*, Project No 85 (1992) and *Enforcement of Judgments of Local Courts*, Project No 16(II) (1995).

A number of the recommendations may be effectively implemented in the short term by the enactment of legislation. This is especially important in relation to the implementation of recommendations which reaffirmed recommendations made by the Commission in earlier reports. For instance, legislative action is required to establish the Magistrates' Court recommended in Project Nos 16 and 55 and again in 92. The introduction of this new legislation will also provide the opportunity for a complete overhaul of procedures so that they may be simplified and refined according to the Commission's recommendations. Any proposed action on the implementation of the Magistrates' Court should, however, be considered alongside the WACAT recommendations, in particular, the forthcoming and more detailed recommendations of the Commission in Project No 95. Further recommendations could be implemented by the reintroduction of the Vexatious Proceedings Restriction Bill into Parliament. If approved, this legislation would substantially adopt the Commission's recommendations on this issue. Enactment of this legislation would also allow the Supreme Court Rules Committee to adopt the Commission's recommendations proposing changes to court rules and procedures in this area.[29]

Detailed consultations and review involving the participation of key stakeholders should continue in regard to the implementation of the Commission's more complex recommendations. Further consideration may need to be given to the implementation process as a whole and the interaction of the recommendations upon one another.

Priority – High

There is broad community support for these recommendations. The Western Australian public was more involved in this reference than it has ever been in any other project in the Commission's history. The community has expressed dissatisfaction and a sense of disenfranchisement with the current state of the criminal and civil justice system. This assessment is therefore influenced by the need to make the justice system more accessible, less costly and more efficient. The public support and interest in these reforms is evidenced by the thousands of hits to the Commission's website since completion of the review.

Furthermore, there is bipartisan political support for the introduction of the recommendations. Many of the recommendations are uncontroversial and could be fast-tracked through Parliament. The Government has indicated that implementation of the Commission's reforms should be given a high priority. In particular, the Government has indicated a commitment to:

(a) establishing an independent administrative appeals tribunal and to undertaking further consultation and review on this issue;

(b) speedy and fair criminal trials;

(c) a just, efficient and independent court system which is accessible to the wider community and which delivers timely and fair results;

(d) the widespread use of information technology to facilitate accessibility;

(e) support initiatives to minimise cost and delay in civil and criminal matters;

(f) making information available to consumers about the reasonable costs of legal services; and

(g) involving the community in law reform by increasing its participation.[30]

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29 See recommendations 213–219 in Law Reform Commission of Western Australia, *Review of the Civil and Criminal Justice System in Western Australia*, Project No 92 (1999).

30 See <http://www.wa.alp.org.au/policy>.

Further, the Government has recognised that a dynamic and effective programme of law reform is essential to ensure that the law reflects the values and aspirations of the community and meets the needs of our society.[31]

The Commission's recommendations are the result of the most extensive, comprehensive and expeditious review of its kind ever undertaken and completed by a law reform commission. If these recommendations continue to be implemented and adopted, the changes will establish Western Australia as a world leader in legal system reform.

31 Ibid.

Part III:
Indexes

Reference Subject Index

Administrative Law

Review of Administrative Decisions: Appeals	Project No 26(I)
Judicial Review of Administrative Decisions	Project No 26(II)
New Rights of Appeal	Project No 26(III)
Review of the Criminal and Civil Justice System	Project No 92

Contract and Consumer Law

Retention of Trust Money by Land Agents	Project No 1(II)
Motor Vehicle Insurance	Project No 10
Chattel Securities and the Bills of Sale Act	Project No 19
Innocent Misrepresentation	Project No 22
Minors' Contracts	Project No 25(II)
Unauthorised Disposal of Goods Interstate: Right to Repossession	Project No 35
Land Agents Act	Project No 37
Sale of Undivided Shares in Land	Project No 38
Section 2 of the Gaming Act	Project No 58
The Sale of Goods Act 1895	Project No 89

Courts and Civil Procedure

Local Courts: Jurisdiction, Procedures and Administration	Project No 16(I)
Enforcement of Judgments of Local Courts	Project No 16(II)
Commercial Arbitration and Commercial Causes	Project No 18
Evidence of Criminal Convictions in Civil Proceedings	Project No 20
Legal Representation of Children	Project No 23
Review of Administrative Decisions: Appeals	Project No 26(I)
Judicial Review of Administrative Decisions	Project No 26(II)
New Rights of Appeal	Project No 26(III)
Limitation and Notice of Actions: Latent Disease	Project No 36(I)
Limitation and Notice of Actions	Project No 36(II)
Production of Medical and Technical Reports in Court Proceedings	Project No 40
The Suitors' Fund Act	Project No 49
Appeals to the Privy Council	Project No 50
Privilege for Journalists	Project No 53
Enforcement of Judgment Debts	Project No 61
Small Debts Court	Project No 63
Writs and Warrants of Execution	Project No 67
Pre-Judgment Interest	Project No 70(I)
Interest on Judgments	Project No 70(II)
Retention of Court Records	Project No 72
Absconding Debtors Act 1877–1965	Project No 73
Payment of Witnesses in Civil Proceedings	Project No 83
Professional Privilege for Confidential Communications	Project No 90
Review of the Criminal and Civil Justice System	Project No 92

Criminal Law and Procedure

Committal Proceedings	Project No 4
Summary Trial of Indictable Offences	Project No 6
Payment of Costs in Criminal Cases	Project No 12
Imposition of Driving Disqualifications	Project No 15
Manslaughter or Dangerous Driving Causing Death	Project No 17
Imposition of Fines	Project No 30
Competence and Compellability of Spouses as Witnesses	Project No 31

Unrepresented Defendants	Project No 42
Compensation for Persons Detained in Custody	Project No 43
Criminal Injuries Compensation	Project No 46
Jailing of First Offenders	Project No 47
Appeals from Courts of Petty Sessions	Project No 48
The Suitors' Fund Act	Project No 49
Privilege for Journalists	Project No 53
Review of the Justices Act 1902: Appeals	Project No 55(I)
Courts of Petty Sessions: Constitution, Powers & Procedure	Project No 55(II)
Enforcement of Orders under the Justices Act 1902	Project No 55(III)
Alternatives to Cautions	Project No 60
Bail	Project No 64
Criminal Process and Persons Suffering from Mental Disorder	Project No 69
The Problem of Old Convictions	Project No 80
Police Act Offences	Project No 85
Incitement to Racial Hatred	Project No 86
Professional Privilege for Confidential Communication	Project No 90
Review of the Criminal and Civil Justice System	Project No 92

Corporations Law

Associations Incorporation Act 1895–1969	Project No 21
Prescribed Interests under the Companies Code	Project No 79

Defamation Law

Defamation: Privileged Reports	Project No 8(I)
Defamation	Project No 8(II)
Privilege for Journalists	Project No 53
Incitement to Racial Hatred	Project No 86
Professional Privilege for Confidential Communications	Project No 90

Disability

Protection of Money Awarded as Damages	Project X
Criminal Process and Persons Suffering from Mental Disorder	Project No 69
Consent to Sterilisation of Minors	Project No 77(II)

Equity and Trusts

Trustees' Powers of Investment	Project No 34(V)
Charitable Trusts	Project No 34(VI)
Protection and Remuneration of Trustees	Project No 34(VIII)

Evidence

Evidence of Criminal Convictions in Civil Proceedings	Project No 20
Admissibility in Evidence of Computer Records & Other Documentary Evidence	Project No 27(I)
Admissibility in Evidence of Reproductions	Project No 27(II)
Official Attestation of Forms and Documents	Project No 28(I)
Formalities of Oaths, Declarations and Attestation of Documents	Project No 28(II)
Competence and Compellability of Spouses as Witnesses	Project No 31
Production of Medical and Technical Reports in Court Proceedings	Project No 40
Privilege for Journalists	Project No 53
Evidence of Children and Other Vulnerable Witnesses	Project No 87
Professional Privilege for Confidential Communications	Project No 90
Review of the Criminal and Civil Justice System	Project No 92

Reference Subject Index

Family Law and Relationships

Testator's Family Maintenance Act	Project No 2
Succession Rights of Illegitimate Children	Project No 3
Affiliation Proceedings	Project No 13
Succession Rights of Adopted Children	Project No 24
Competence and Compellability of Spouses as Witnesses	Project No 31
Immunity of Suit between Spouses	Project No 32
Distribution on Intestacy	Project No 34(I)
Enforcement of Custody Orders	Project No 57
Fatal Accidents	Project No 66
Illegitimacy	Project No 68
Professional Privilege for Confidential Communications	Project No 90

Legal Profession

Professional Privilege for Confidential Communications	Project No 90
Review of the Criminal and Civil Justice System	Project No 92

Minors

Legal Representation of Children	Project No 23
Legal Capacity of Minors	Project No 25(I)
Minors' Contracts	Project No 25(II)
Fatal Accidents	Project No 66
Medical Treatment for Minors	Project No 77(I)
Consent to Sterilisation of Minors	Project No 77(II)

Property Law

Protection for Purchasers of Land	Project No 1(I)
Retention of Trust Money by Land Agents	Project No 1(II)
Protection for Purchasers of Home Units	Project No 1(III)
Disposal of Uncollected Goods	Project No 7
Chattel Securities and the Bills of Sale Act	Project No 19
Dividing Fences	Project No 33
Unauthorised Disposal of Goods Interstate: Right to Repossession	Project No 35
Land Agents Act	Project No 37
Sale of Undivided Shares in Land	Project No 38
Compensation for New Street Alignments	Project No 39
Tenancy Bonds	Project No 41
Alteration of Ground Levels	Project No 44
Mortgage Brokers	Project No 45
Unclaimed Money	Project No 51
Strata Titles Act	Project No 56
Writs and Warrants of Execution	Project No 67
Joint Tenancy and Tenancy in Common	Project No 78
Restrictive Covenants	Project No 91

Privacy

Admissibility in Evidence of Computer Records and Other Documentary Evidence	Project No 27(I)
Privilege for Journalists	Project No 53
Privacy	Project No 65(I)
Confidentiality of Medical Records and Medical Research	Project No 65(II)
The Problem of Old Convictions	Project No 80
Professional Privilege for Confidential Communications	Project No 90

Tort Law

Interim Damages in Personal Injury Claims	Project No 5
Defamation: Privileged Reports	Project No 8(I)
Defamation	Project No 8(II)
Liability For Stock Straying on to the Highway	Project No 11
Limitation and Notice of Actions: Latent Disease	Project No 36(I)
Limitation and Notice of Actions	Project No 36(II)
Liability of Highway Authorities for Non-Feasance	Project No 62
Fatal Accidents	Project No 66

Wills, Succession and Administration of Deceased Estates

Testator's Family Maintenance Act	Project No 2
Succession Rights of Illegitimate Children	Project No 3
Succession Rights of Adopted Children	Project No 24
Distribution on Intestacy	Project No 34(I)
Administration Bonds and Sureties	Project No 34(II)
Administration of Deceased Insolvent Estates	Project No 34(III)
Recognition of Interstate and Foreign Grants of Probate and Administration	Project No 34(IV)
Trustees' Powers of Investment	Project No 34(V)
Charitable Trusts	Project No 34(VI)
Administration of Assets	Project No 34(VII)
Protection and Remuneration of Trustees	Project No 34(VIII)
Wills: Substantial Compliance	Project No 76(I)
Effect of Marriage or Divorce on Wills	Project No 76(II)
Administration Act 1903	Project No 88

Other

Statute Law Revision	Project No 9
Disqualification for Membership of Parliament: Offices of Profit Under the Crown	Project No 14
Special Constables	Project No 29
Local Body Election Practices	Project No 52
Contractors' Liens	Project No 54
Audit Provisions of the Local Government Act	Project No 59
Exemption from Jury Service	Project No 71
Limited Partnerships	Project No 74
United Kingdom Statutes in Force in Western Australia	Project No 75
The Pawnbrokers Act 1860–1984	Project No 81
Financial Protection in the Building and Construction Industry	Project No 82
Medical Treatment for the Dying	Project No 84

Priority of Reform

High

Local Courts: Jurisdiction, Procedures and Administration	Project No 16(I)
Enforcement of Judgments of Local Courts	Project No 16(II)
Judicial Review of Administrative Decisions	Project No 26(II)
Limitation and Notice of Actions: Latent Disease and Injury	Project No 36(I)
Limitation and Notice of Actions	Project No 36(II)
Courts of Petty Sessions: Constitution, Powers and Procedure	Project No 55(II)
Confidentiality of Medical Records and Medical Research	Project No 65(II)
Writs and Warrants of Execution	Project No 67
Financial Protection in the Building and Construction Industry	Project No 82
Medical Treatment for the Dying	Project No 84
Police Act Offences	Project No 85
The Sale of Goods Act	Project No 89
Professional Privilege for Confidential Communications	Project No 90
Restrictive Covenants	Project No 91
Review of the Criminal and Civil Justice System	Project No 92

Medium–High

Minors' Contracts	Project No 25(II)
United Kingdom Statutes in Force in Western Australia	Project No 75
Effect of Marriage or Divorce on Wills	Project No 76(II)
Consent to Sterilisation of Minors	Project No 77(II)

Medium

Protection of Money Awarded as Damages	Project X
Defamation	Project No 8(II)
Alteration of Ground Levels	Project No 44
Privilege for Journalists	Project No 53
The Liability of Highway Authorities for Non-Feasance	Project No 62
Criminal Process and Persons Suffering from Mental Disorder	Project No 69

Low–Medium

Interim Damages in Personal Injury Claims	Project No 5
Joint Tenancy and Tenancy in Common	Project No 78

Low

Motor Vehicle Insurance	Project No 10
Evidence of Criminal Convictions in Civil Proceedings	Project No 20
Official Attestation of Forms and Documents	Project No 28(I)
Dividing Fences	Project No 33
Recognition of Interstate and Foreign Grants of Probate and Administration	Project No 34(IV)
Administration of Assets	Project No 34(VII)
The Suitors' Fund Act	Project No 49
The Strata Titles Act	Project No 56
Administration Act 1903	Project No 88

Some projects of the Commission touch upon, or grow out of, research undertaken for earlier references. Others have addressed similar areas of law at different times in the Commission's history. Project No 92, for instance, reviewed many areas of law dealt with in earlier references and reaffirmed some of the recommendations made in those earlier references. The following cross-referencing index indicates incidences where the subject matter of references intersect or where later references have drawn upon, or reconsidered, the findings of earlier references.

Project No	See also Project Nos
Project No 1(I):	1(I), 1(III)
Project No 1(II):	1(I), 1(III), 37, 45
Project No 1(III):	1(I), 1(II), 37, 56
Project No 2:	3
Project No 3:	2
Project No 4:	6
Project No 6:	4
Project No 8(I):	8(II)
Project No 8(II):	8(I), 53, 65(II), 90
Project No 12:	49, 92
Project No 16(I):	16(II), 55(II), 92
Project No 16(II):	16(I), 55(III), 67, 92
Project No 19:	35
Project No 23:	66
Project No 25(I):	25(II)
Project No 25(II):	25(I)
Project No 26(I):	26(II)–(III), 92
Project No 26(II):	26(I), 26(III), 92
Project No 26(III):	26(I)–(II), 92
Project No 27(I):	27(II), 65(I), 65(II)
Project No 27(II):	27(I)
Project No 28(I):	28(II)
Project No 28(II):	28(I)
Project No 29:	85
Project No 30:	55(II), 55(III)
Project No 31:	92
Project No 33:	44
Project No 34(I):	34(II)–(VIII), 88
Project No 34(II):	34(I), 34(III)–(VIII), 88
Project No 34(III):	34(I)–(II), 34(IV)–(VIII), 88
Project No 34(IV):	34(I)–(III), 34(V)–(VIII), 88
Project No 34 (V):	34(I)–(IV), 34(VI)–(VIII)
Project No 34(VI):	34(I)–(V), 34(VII)–(VIII)
Project No 34(VII):	34(I)–(VI), 34(VIII), 88
Project No 34(VIII):	34(I)–(VII)
Project No 35:	19
Project No 36(I):	36(II)
Project No 36(II):	36(I), 92

Project No	See also Project Nos
Project No 37:	1(II), 1(III), 45, 56
Project No 40:	92
Project No 42:	55(II)
Project No 44:	33
Project No 45:	37
Project No 48:	55(I)
Project No 49:	12, 92
Project No 53:	8(II), 90, 92
Project No 54:	82
Project No 55(I):	48
Project No 55(II):	16(I), 92
Project No 55(III):	16(II), 92
Project No 56:	1(III)
Project No 61:	63
Project No 63:	61, 92
Project No 65(I):	65(II), 80, 85, 90
Project No 65(II):	8(II), 27(I), 65(I)
Project No 66:	23, 68
Project No 67:	16(II), 55(III), 92
Project No 68:	66
Project No 70(I):	70(II)
Project No 70(II):	70(I)
Project No 75:	92
Project No 76(I):	76(II)
Project No 76(II):	76(I)
Project No 77(I):	77(II)
Project No 77(II):	77(I)
Project No 80:	65(I)
Project No 82:	54
Project No 85:	29, 65(I), 92
Project No 87:	92
Project No 88:	34(I), 34(II), 34(III), 34(IV), 34(VII)
Project No 90:	53, 65(I), 92
Project No 91:	92
Project No 92:	16(I), 16(II), 26(I), 26(II), 26(III), 36(I), 36(II), 49, 55(I), 55(II), 55(III), 85, 87