WORKING PAPER
ON
THE LOCAL COURTS ACT, 1904-1982 AND RULES

PROJECT No. 16—PART I

JURISDICTION PROCEDURES AND ADMINISTRATION

THE LAW REFORM
COMMISSION
OF WESTERN AUSTRALIA

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PROJECT NO 16: PART I -

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April 1983

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The Law Reform Commission of Western Australia was established by the Law Reform Commission Act 1972-1978.

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PREFACE

The Law Reform Commission of Western Australia has been asked to review the Local Courts Act 1904-1982 and Rules.

The Commission has divided the reference into two parts. The Commission has completed its first consideration of Part I of the reference and now issues this working paper for public comment. This working paper does not necessarily represent the final views of the Commission. The question of the enforcement of judgments has been reserved to a later working paper.

THROUGHOUT THIS WORKING PAPER THE VARIOUS CHAPTERS SET OUT A DISCUSSION OF THE ISSUES RAISED, LEAVING THE MAJOR PROPOSALS OF THE COMMISSION ON THOSE ISSUES TO BE SET OUT AT THE END OF THE RELEVANT CHAPTERS. COMMENTS, WITH REASONS WHERE APPROPRIATE, ON THE INDIVIDUAL ISSUES RAISED IN THE WORKING PAPER, ON THE WORKING PAPER AS A WHOLE, OR ON ANY OTHER MATTER COMING WITHIN THE COMMISSION'S TERMS OF REFERENCE, ARE INVITED. THE COMMISSION REQUESTS THAT THEY BE SUBMITTED TO IT BY 30 SEPTEMBER 1983 IF POSSIBLE.

Important Note: This working paper is being distributed to enable interested persons to make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission prepares its final Report. It is as important to advise the Commission that you approve any proposal as it is to advise the Commission that you object to a proposal or that you believe that it needs to be revised.

The Commission may substantially revise any proposal as a result of comments received. Hence, the proposals set out are not necessarily the recommendations which the Commission will make in its final report.

A notice has been placed in The West Australian offering to make available a copy of the working paper to anyone interested in it and inviting comments thereon.

Unless advised to the contrary, the Commission will assume that comments received on this working paper are not confidential and that commentators agree to the Commission quoting from or referring to their comments, in whole or part, and to their comments being attributed to them. The Commission emphasises, however, that any desire for confidentiality or anonymity will be respected.

This working paper is based on material available to the Commission in Perth on 30 April 1983.

The research material on which the working paper is based will, upon request, be made available at the offices of the Commission.

The Commission has had preliminary discussions with various members of the judiciary, magistracy, staff of the Crown Law Department especially including officers of the Perth Local Court, legal practitioners and private individuals in Western Australia and has received various written preliminary submissions in relation to the project. During visits to New South Wales, Victoria and South Australia the Commissioner in charge of the project visited certain courts and tribunals and discussed aspects of the reference with a number of persons including magistrates, administrators, registrars, mediators and barristers. He also attended a Court Management Workshop held in Melbourne under the auspices of the Australian Institute of Judicial Administration. The Victoria Law Foundation has kindly made available to the Commission a copy of its Preliminary Study for its Civil Justice project. Mr E J O'Grady of the New South Wales Department of the Attorney General and of Justice made available a copy of his report to the Department and to the Law Foundation on certain alternative dispute resolution systems in England and the United States and also certain printed material not otherwise readily available. The Commission has drawn upon these studies and other available literature not only for factual material but for analysis of certain concepts of major importance. The Commission expresses its gratitude to all these people who have so generously assisted it with information and their time.

PART I: INTRODUCTION

CHAPTER 1 - HISTORICAL

1.1 Following European settlement in Western Australia in 1829, when the law of England became also the law of Western Australia, civil jurisdiction in the colony was exercised by justices of the peace sitting as magistrates. On 9 December 1829 a Government Notice issued giving notice of appointment of certain persons as justices of the peace having jurisdiction throughout the colony. Not only were these justices to deal with criminal matters at Quarter Sessions and Petty Sessions but Governor James Stirling also expected them to act as arbitrators or investigators into civil claims, although he recognised that they lacked authoritative jurisdiction in civil matters.[1] In 1832 the Civil Court of Western Australia was established.[2] It was presided over by a Commissioner and had jurisdiction to deal with all claims, of whatever size, although magistrates in outlying areas probably continued to deal with simple matters. In 1836 provision was made for Small Debts Courts with jurisdiction to hear claims for the recovery of amounts up to ten pounds in areas remote from Perth.[3] In 1852 this jurisdiction was increased to fifty pounds. In 1842 Courts of Request were authorised with limited civil jurisdiction in claims up to ten pounds.[4] Such Courts of Request however only sat in Perth and, for a short time, Fremantle.

1.2 In 1863 an Ordinance for the recovery of Small Debts and Demands abolished both Courts of Requests and Small Debts Courts and established Local Courts instead. By 1864 these had been set up in the largest centres of population. They were held before specially appointed magistrates and had jurisdiction to hear claims for debt or damages not exceeding fifty pounds, together with jurisdiction to hear

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1. See Enid Russell, A History of the Law in Western Australia and its Development from 1829-1979, 20-21.

2. By the first Act passed in the colony, an Act to establish a Court of Civil Judicature, 2 Wm IV No 1, sometimes called the Court of Civil Judicature Act. This Court is the ancestor of the existing Supreme Court.

3. By an Act for the Recovery of small Debts in a summary way in Districts remote from Perth, 6 Wm IV No 2, sometimes called the Small Debts Act.

4. By an Act to establish and regulate Courts of Request, 6 Vic No 13, sometimes called the Court of Requests Act.

actions for recovery of possession of small tenements. The jurisdiction although originally limited to fifty pounds was increased to one hundred pounds in 1887.[1]

1.3 The Local Courts so established were modelled upon the County Courts established by the English County Courts Act 1846.[2]

1.4 In 1904 the 1863 Ordinance, as amended, was repealed and the present Local Courts Act[3] enacted. The intentions of the Government at the time were made clear by the Minister for Justice in his second reading speech to the Local Courts Bill when he said[4]:

> [T]he measure . . . is to regulate, and slightly alter, the law as regards Local Courts. These Local Courts are held chiefly for the purpose of deciding disputes in regard to small debts. All the States in Australia have either a measure similar to this, or

1. As to the early Western Australian legislation see Enid Russell, A History of the Law in Western Australia and its Development from 1829 to 1979, 1980, esp chapters 9 and 15, and Alex C Castles, An Australian Legal History, 1982, esp chapters 12 and 13.

2. For background see Sir William Holdsworth, A History of English Law, 7th ed, Vol 1, 190-193, and Alex C Castles, An Australian Legal History, 367-371. The English County Courts, as established in 1846, were intended to be less dilatory and expensive than existing courts. They were to sit in numerous places and to have jurisdiction to hear claims of twenty pounds or less either in contract or in tort. Courts based on this model were established throughout Australia. Their history has varied. For example, the County Courts (now County Court) of Victoria were also originally based on the 1846 English legislation with a simple procedure designed for summary hearing, no necessity for filing an appearance, no interlocutory proceedings and no legal representation in small claims. The court gradually became increasingly formal and increasingly an imitation of the Supreme Court. The jurisdiction of the court has been increased from time to time so that in personal actions the court now has jurisdiction up to $12,000, and $25,000 in personal injury claims. However, its equity jurisdiction has remained unchanged since 1952 and amounts to only $2,000, and its jurisdiction in ejectment has remained only at sums of up to $500 per annum which is even less significant. Its historical origins are important in that still no provision is made for the filing of formal particulars of defence. The County Court is now however the court of intermediate civil jurisdiction. Magistrates' Courts in Victoria exercise jurisdiction in claims not exceeding $3,000. In Western Australia on the other hand, Local Courts have remained courts of inferior civil jurisdiction and a new court of intermediate jurisdiction, the District Court of Western Australia has been created. In England, County Courts have remained the only court of general inferior civil jurisdiction and have increasingly gained both jurisdiction and status: see paras 1.6 and 5.6 below.

3. Now the Local Courts Act 1904-1982, hereinafter referred to as "the Local Courts Act".

4. West Aust Parl Deb (1904) Vol XXV, 313.

> a somewhat similar law; and all these Acts are framed on the original law that obtains in England. In the year 1888 that Act was consolidated into the Imperial County Courts Act, and since that time every State in Australia has followed suit and passed a consolidating measure on the lines of the Imperial Act. . . we intend as far as possible to go on the lines of the laws of the other States, and also to take this opportunity of making certain amendments with a view to giving extra facilities to those who have to appear in these courts.

The money jurisdiction of the court remained at one hundred pounds because, as the Minister explained, the court would be presided over by lay magistrates and justices, sitting not only in Perth but in many small settlements throughout the State. There was, however, considerable pressure from Members of Parliament to give magistrates in some outlying areas jurisdiction up to two hundred and fifty pounds.

1.5 Since its enactment the Local Courts Act has survived with very little amendment, and Local Courts have continued to function essentially in the way originally intended. The money jurisdiction of Local Courts, however, has been increased in several steps to a present jurisdiction in personal actions[1] of $6,000, fixed in 1981. Originally magistrates were appointed who had no formal legal training and who exercised their functions on an honorary and part-time basis, as justices of the peace still do in some Courts of Petty Sessions from time to time. Later, provision was made for permanent, full-time and paid stipendiary magistrates. Of these, some are now qualified legal practitioners and others have qualified by magisterial examination. Justices of the peace no longer sit in Local Court matters.[2]

1.6 In the meantime the Supreme Court of Western Australia has adopted new rules of civil procedure and the English County Courts Act and Rules and many of the corresponding Australian Acts and Rules have been substantially amended. In England, County Courts have changed from being local small claims courts to being courts of broad civil jurisdiction, including such specialised jurisdictions as probate, adoption, bankruptcy, company liquidation, testators family

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1. As to "personal actions" see chapter 5 below.

2. The definition of magistrate in s 3, however, includes both stipendiary magistrates and justices of the peace sitting in the place of a magistrate.

maintenance, and in some cases, admiralty, within various monetary limits. In Western Australia, the District Court of Western Australia has been established and exercises, as part of its jurisdiction, an intermediate tier of civil jurisdiction.

1.7 Further, since 1904 the size and distribution of the State's population and the nature of its economy have been transformed. The population has increased from about 184,000 in 1901 to about 1,300,000 of whom approximately 900,000 live in the Perth metropolitan area. Telecommunications and modern transport have arrived. Work and living patterns have been altered. Most importantly, the population has become more cosmopolitan and community expectations of social institutions much greater.

CHAPTER 2 - THE PRESENT ROLE OF LOCAL COURTS

1. COURTS EXERCISING CIVIL JURISDICTION

2.1 The courts now exercising civil jurisdiction in Western Australia are -

(a) the Supreme Court of Western Australia. The Supreme Court has unlimited original civil jurisdiction, and, by the Full Court of the Supreme Court, considerable appellate jurisdiction including jurisdiction to hear appeals from the District Court of Western Australia and thus ultimately from Local Courts.

(b) the District Court of Western Australia. The District Court has limited civil jurisdiction, except in relation to certain claims arising from the use of a motor vehicle[1] when it has unlimited money jurisdiction. The District Court also exercises certain appellate and administrative jurisdiction including jurisdiction to hear appeals from Local Courts.

(c) Local Courts. Local Courts have limited civil jurisdiction conferred by the Local Courts Act, and also exercise civil and administrative jurisdiction under a number of statutes other than the Local Courts Act.[2]

In addition, Small Claims Tribunals exercise jurisdiction in respect of consumer civil claims not involving more than $1,000. Courts of Petty Sessions which exercise general inferior jurisdiction in criminal matters, also exercise jurisdiction in some civil disputes, as for example, under the Dividing Fences Act, and in some administrative

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1. See footnote 1 to para 2.10 below.

2. This will be discussed further in chapter 8 below.

matters. Other courts and tribunals, such as the Workers Compensation Board and the Family Court of Western Australia, exercise specialised jurisdiction in some matters which might be regarded as involving civil jurisdiction.

2. LOCATION OF LOCAL COURTS

2.2 The Local Courts Act provides for the establishment of separate Local Courts, which the Act envisages will sit regularly at many places throughout the State.[1] Each Local Court[2] and each magistrate[3] has jurisdiction throughout the State although for judicial and administrative purposes magistrates exercising Local Court jurisdiction are assigned to a particular Local Court or Local Courts, and staff are similarly assigned.

2.3 At present, stipendiary magistrates sitting in Local Courts are based in Perth, Fremantle, Midland, Rockingham, Bunbury, Geraldton, Albany, Narrogin, Northam, Port Hedland, Broome, Carnarvon and Kalgoorlie. Local Court sittings in these places vary from daily sittings by up to four Local Court magistrates in Perth, to prescribed sittings on one day in each month at Broome. Only in Perth, however, are magistrates assigned responsibility primarily in Local Court matters. In all other Local Courts in Western Australia, magistrates, court facilities and staff are shared with other courts exercising inferior jurisdiction, such as Courts of Petty Sessions and Children's Courts. The stipendiary magistrates who sit in Local Courts also preside over these other courts, although in some cases these other courts are also presided over by justices of the peace from time to time.

2.4 In addition, magistrates hold Local Court sittings in more than fifty other centres throughout the State, at intervals ranging from about one day every second month to two days per month depending on anticipated work.

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1. Colloquially, these are sometimes described as if they were branches of one Local Court and for certain purposes it is convenient so to regard them. See also para 3.26 below.

2. Section 36. But see chapter 7 below.

3. Section 9. But see chapters 7 and 9 below.

2.5 In Perth, the Local Court is housed in the Central Law Courts building in St George's Terrace, Perth, where separate accommodation for Local Court hearings is provided in five courtrooms on Level 8. Administrative facilities are provided on Level 2, being shared with administrative facilities for the Perth Court of Petty Sessions. Magistrates' chambers and library facilities are on Levels 11 and 12.

2.6 The vast majority of Local Court business is conducted through the Perth Local Court. Thus, between 1968 and 1982 approximately 65 to 75 percent of claims commenced in Local Courts in Western Australia were commenced in the Perth Local Court, due no doubt to the heavy predominance of solicitors practising, and business houses carrying on business, in the central Perth area. For the same reasons, a large proportion of the balance of Local Court actions were commenced in the Midland, Armadale and Fremantle Local Courts.[1] Of course, about 70% of the population of the State resides in the area of these four courts.

3. USE OF LOCAL COURTS

(a) Description

2.7 The number of proceedings commenced in Local Courts has varied over time -

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1. The number of actions commenced in various courts in 1980, 1981 and 1982 included the following:

		1980	1981	1982
Perth	-	51,938	47,499	52,546
Midland	-	3,977	3,605	3,698
Fremantle	-	2,760	2,673	2,462
Armadale	-	3,242	2,598	3,288
Rockingham	-	819	743	629
Albany	-	810	866	669
Bunbury	-	2,460	2,047	2,018
Geraldton	-	1,408	1,034	1,082
Kalgoorlie	-	823	996	868
Port Hedland	-	524	512	379
By way of contrast:				
Mukinbudin	-	12	17	16
Marble Bar	-	17	43	3
Coolgardie	-	28	25	23
Exmouth	-	30	23	6

1968 -	57,689	
1969 -	60,854	
1970 -	64,727	
1971 -	69,026	
1972 -	71,757	
1973 -	66,193	
1974 -	68,013	
1975 -	62,561	
1976 -	56,542	(During 1976 Local Court jurisdiction was increased from $1000 to $3000)
1977 -	56,182	
1978 -	65,791	
1979 -	72,642	
1980 -	77,119	
1981 -	70,540	
1982 -	74,991	(The jurisdiction of Local Courts was increased from $3000 to $6000 from 1 February 1982)

2.8 These fluctuations seem to be related more to economic and social factors such as unemployment, credit restrictions, and changes to medical and hospital insurance cover, than to changes in jurisdiction or population growth. The numbers of cases coming before civil, as well as criminal, courts is affected by economic and social factors such as the level of debt within the community generally, the availability and cost of legal advice and representation, the complexity of social relationships and community perceptions concerning courts. In addition, of course, statutory jurisdictional limits and population changes will determine case-loads in particular courts.

(b) Comparison with other courts

2.9 The relative importance of Local Courts can be realised by comparing these figures with the equivalent figures in other courts and tribunals. The number of claims brought in Small Claims Tribunals was:

Year ending 30 June			
	1976 -	775	
	1977 -	910	(During 1977 the jurisdiction of Small Claims Tribunals was increased from $500 to $1000)
	1978 -	1,123	
	1979 -	1,221	
	1980 -	1,211	
	1981 -	1,337	
	1982 -	1,395	

Jurisdiction is generally limited to claims by consumers for or involving sums of $1,000 or less arising out of a contract for the supply of goods or services or a tenancy.

2.10 Another comparison can be drawn between Local Courts and the District Court of Western Australia. The number of writs of summons issued out of the District Court has increased from 2,205 in 1972[1] to 5,596 in 1981 and 4,795 in 1982.[2]

2.11 In Local Courts the vast preponderance of actions commenced do not proceed to a hearing or trial. In a very large number of actions judgment is entered in default of appearance by the defendant[3] or no further proceedings are taken due either to non-service of the summons, payment of the claim by the debtor or other reasons.[4] Only a small fraction of the actions commenced proceed to trial.[5] Many of these are settled by agreement between the parties before trial or otherwise resolved without hearing.

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1. When its jurisdiction in personal actions was to a maximum of $10,000. In 1972 the District Court was also given jurisdiction to hear all "personal actions making a claim for damages in respect of the death of or bodily injury to a person caused by or arising out of the use of any motor vehicle".

2. In 1976 the basic civil jurisdiction of the District Court had increased to a maximum of $20,000. This maximum figure was increased to $50,000 from 1 February 1982. There is no minimum figure below which claims may not be commenced in the District Court but claims otherwise within the jurisdiction of Local Courts would normally be commenced in or remitted to a Local Court. Thus the 1982 District Court total for 1982 is less than that for 1981 while Local Court figures increased in the same period.

3. For example, in 1980 whilst 51,938 summonses were issued by the Perth Local Court, judgment was entered by default in 21,174 actions. These figures are typical. In 1982 the figures were 52,546 and 21,050.

4. The Commission is advised that of a recent sample of 850 summonses only 34 were defended. Of the 850, 704 were claims for debt or other liquidated demands for sums of less than $1,000 and of these only 19 were defended.

5. The numbers of actions listed for trial in the Perth Local Court in the last three years for which figures are available were:

1979	-	2,683
1980	-	2,479
1981	-	2,142

These numbers are imprecise because some actions are listed more than once, for various reasons, as, for example, where actions are part-heard or adjourned on one day and re-listed on one or more other days. Precise statistics are not presently kept. The introduction of computer facilities at Perth Local Court shortly should greatly enhance the ability to keep routine statistics for court management purposes. The numbers are however as accurate as can be reasonably ascertained from the courts records. By comparison 725 civil actions were listed for trial in the Perth registry of the District Court in 1980 and 259 actually heard. These numbers are increasing. In 1979 the District Court heard 223 civil actions and in 1981, 291. Following the jurisdictional amendments which came into force on 1 February 1982 the figures for 1982 were that 955 civil actions were listed for trial and 178 actually heard.

2.12 It is clear, therefore, that Local Courts deal with a very large percentage of the civil claims brought in Western Australia but that in common with similar courts elsewhere most of these are not defended and the vast majority of actions proceed in a routine way to judgment and execution.

2.13 Nevertheless, the large number of proceedings commenced in Local Courts results in a large number of matters coming to, and being disposed of, at trial each year. These are primarily claims for debt or for damages, for breach of contract or in tort, usually in the latter case in respect of negligent damage to property, including motor vehicles. The other main category of actions listed for hearing involve proceedings for recovery of possession of land.[1]

2.14 There are no statistics available as to the median amounts of money involved in Local Court actions or as to the numbers of claims involving particular ranges of monetary sums. However, the average amount for which judgment is entered in Local Courts has gradually increased from $115 in 1968 to $539 in 1980 and in Perth Local Court in 1982 to $665. Of some 2,269 actions listed for hearing in Perth Local Court in 1980 and surveyed by the Commission, 370 or 16.3% were for amounts less than $300, 792 or 34.9% were for amounts between $300 and $1,000 and 879 or 38.7% were for amounts between $1,000 and $3,000. Of the 2,269 actions, 630 or 27.7% were actions for damages apparently arising out of motor vehicle collisions. Of these, 128 were for less than $300. 190 actions or 8.37% were for recovery of possession of land.[2]

2.15 The position is not peculiar to Western Australia, and statistics from English County Courts and elsewhere show similar

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1. Although Local Courts also exercise jurisdiction in certain administrative law matters, both of an appellate and of an original nature, the number of actual hearings in these matters is quite small. In 1980 about 27 of these matters were listed for hearing at Perth Local Court, and a check of other recent years indicates that this is typical. In its report on Review of Administrative Decisions - Appeals, (Project No 26 Part I, 1982) the Commission considered the role of Local Courts in hearing appeals of an administrative nature. That role is additional to the role of Local Courts considered in this working paper.

2. A survey by the Commission of actions listed for hearing in Perth Local Court in the first and last four-weekly periods of 1981 produced almost identical percentages.

patterns.[1] They illustrate the need for courts in which claims for relatively small sums can be expeditiously and inexpensively resolved. In chapter 3 the significance of these patterns is discussed further.

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1. In Victoria in 1981 the civil case load business was distributed between the Supreme Court 4.88%, the County Court 11.06% and the Magistrates Court 84.05%. Of 186,737 Magistrates Court civil summonses some 164,480 or 88% were default summonses and only 8,334 or 5% of these resulted in notice of defence being filed. Of that 5% some 48% (4,035) finished up being listed for hearing. In 78,244 cases or 50% of the undefended default summonses the plaintiff entered judgment. Of the 22,257 special summonses about 37% (8,157) were defended and of these some 74% (6,010) were listed for hearing. 90% of these special summons cases were for motor vehicle property damage. Of the 186,737 Magistrates Court civil summonses issued, some 2,756 special summonses and 2,022 default summonses resulted in an order following a hearing, that is, 46% and 50% respectively of the matters listed or 12% and 1% respectively of those issued, in aggregate 2.5% of the total Magistrates Courts civil summonses. The bulk of these were debt and motor car damage cases. Comparison with other courts in various years reflect similar figures, for example, the Committee on the Enforcement of Judgment Debts (the "Payne Committee") in the United Kingdom found that in 1969 most actions in the English County Courts were uncontested and were for sums of less than one hundred pounds and that between 62 and 72 per cent of the total number of actions brought were disposed of by consent or on admission or in default of appearance or of defence. The English County Court statistics show that in 1977, 943,736 judgments were entered, of which -

    4% (35,702) were after trial by a judge or registrar
    9% (84,091) were after hearing at which only one party was present
    1% (10,017) were following an arbitration of a small claim
    56% (530,987) were judgments in default of defence
    29% (270,805) were by admission or confession of debt
and 1% (12,134) were judgments by consent.

In the New South Wales Court of Petty Sessions (Civil Claims) in 1979, 236,663 actions were commenced and 88,021 judgments were entered by Registrars (being judgments in default of defence) and 8,043 by the courts. The average amounts of money involved in these judgments were $460.90 and $628.74 respectively.

CHAPTER 3 - DO WE NEED LOCAL COURTS?

1. THE DISTINCTION BETWEEN LOCAL COURTS AND OTHER EXISTING COURTS OF CIVIL JURISDICTION

3.1 Courts of the traditional common law type are probably seen by the community at large as having certain valuable characteristics. These may include impartiality and skill. Their procedures allow the parties to control or limit the issues and the evidence brought before the court. They permit settlement of issues. Their decisions are final, subject only to specified available appeal procedures, and are enforceable by clearly defined procedures.

3.2 On the other hand, courts are often criticised. Criticism is often based on cost and delay factors. Criticism is also sometimes made of the use of an adversary system or of the attitude of judges and lawyers to procedures. If public pressures for the creation of tribunals and other alternatives to courts are to be avoided, courts of inferior jurisdiction must be comparatively informal and avoid procedural complexity. The public interests requires a range of procedures appropriate to the disputes requiring determination. The division of jurisdiction between courts is usually in terms of division between serious and less serious cases judged in civil matters by the amount of money involved. This division results in differences in the background or calibre of judicial officer, and differences in court fees and lawyer costs. Costs and delays may be reduced by the use of courts of inferior jurisdiction to dispose of high volume work and by the availability of legal advice services.

3.3 As chapters 1 and 2 illustrate, the function of Local Courts in Western Australia is to provide for the simple and expeditious recovery of small claims including claims for debt, the recovery of damages, and the recovery of possession of land and goods. There has been engrafted on to this jurisdiction certain administrative and other jurisdiction, both original and appellate.

3.4 At the threshold of this review, the Commission must therefore consider first whether or not courts of the existing Local Court type are desirable or necessary, and secondly whether they should be separate from the other courts within the judicial hierarchy. Various possibilities arise. Local Courts might be merged with other courts or their jurisdiction vested in specialist tribunals or alternative means of dispute resolution. The Commission has considered each of these possibilities. As to the first of these possibilities it has decided that courts of the local court type should continue to sit as courts of inferior jurisdiction throughout the State using procedures based on an adversary method. They should not be replaced by other institutions. However, this is not to say that some jurisdiction now exercised by Local Courts could not be placed elsewhere or other jurisdiction vested in them. However, the Commission is tentatively of the view that Local Courts should be merged with Courts of Petty Sessions in a new court to be called the Magistrates Court, but, at least initially, this court should remain separate from the other courts and tribunals presently existing in Western Australia.[1]

3.5 The Commission acknowledges that there may be certain classes of disputes now dealt with by Local Courts for which resolution by other bodies or in other ways may be more appropriate. This working paper will discuss some of these possibilities. However, in the Commission's view these do not include the bulk of money and property claims which dominate Local Court proceedings.

3.6 The first justification for the existing system of Local Courts is that the procedures of the court are designed to keep to a reasonable minimum the delays and costs inherent in any system of courts, having regard to the amounts of money in dispute between the parties. This working paper will seek to further this position. Local Courts are courts in which litigants often either choose to

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1. The question of merger with Courts of Petty Sessions, together with other possibilities, is discussed later in this chapter.

represent themselves or are not able to afford legal representation. They are not courts in which legal aid has often been available. In many cases dealt with in remote centres, legal representation is difficult and expensive to obtain. In many cases the amount or matter at issue itself hardly justifies legal expertise. Local Courts therefore differ fundamentally from existing courts of higher civil jurisdiction.

3.7 Secondly, Local Courts sit in many centres, large and small, on a regular basis throughout Western Australia. This is an important factor in the reduction of the costs and delays of litigation. The problems of geographic size and population distribution require special consideration to be given to local needs and problems. Again this differentiates existing courts of inferior jurisdiction in Western Australia from existing courts of higher civil jurisdiction.

3.8 Thirdly, the procedures used in Local Court proceedings are based on the traditional adversary system of the common law. While much has been said both in praise and in criticism of this system and in comparing it with alternative systems, it is deeply entrenched in the legal system not only of this State but of all systems sharing the principles of substantive law and evidence applied in Western Australia. It is unnecessary to attempt a critique of such a basic feature of Australian court procedures, or the sorts of fundamental changes which any such critique might suggest. Suffice it to say that the Commission is satisfied that in practical terms there is no substitute for the continuation of the adversary procedure in the vast majority of disputed Local Court proceedings. This conclusion is made easier by the establishment of the Small Debts Division of Local Courts to hear claims for liquidated sums of $1,000 or less.[1] This Division will parallel the Small Claims Tribunals established to deal with claims by consumers.[2] The presiding magistrate will be required to attempt mediation and conciliation between the parties and to use investigatory or inquisitorial techniques to ascertain the facts if such attempts fail. There is to be no appeal from any determinations made and no orders for costs against a losing

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1. By the Local Courts Amendment Act 1982 substantially implementing the proposals recommended in the Commission's report on Small Debts Court (Project No 63, 1979).

2. The Commission discusses the question of the jurisdiction of these bodies and of their possible merger in paras 3.16 to 3.26 below.

party. In the case of claims involving greater amounts or of a more complex nature, that is claims for amounts up to $6,000 or involving unliquidated claims for damages or other more legally complex matters there is less room for informal attempts at conciliation and inevitably more demand for and justification of legal representation and adversary procedures. These factors militate against the establishment of new specialised tribunals to deal with such matters.

3.9 Fourthly, proposals for reform must take account both of realistic possibilities and the need for support from judges, magistrates, lawyers and administrators. Reforms will therefore usually be gradual and of limited scope and must take account of the need for the work of the judicial system to continue whilst changes are introduced.

3.10 With these basic factors in mind it is difficult to conceive either that the vast bulk of the disputes dealt with in Local Courts could satisfactorily be dealt with by other existing bodies or that Local Courts could be satisfactorily merged with other existing bodies except for other courts or tribunals of inferior jurisdiction such as Courts of Petty Sessions.

2. LOCAL COURTS AND THE DISTRICT COURT

3.11 In civil matters, perhaps the court exercising jurisdiction most akin to that exercised by Local Courts is the District Court. In its ordinary civil jurisdiction, which now lies up to $50,000, and in personal injuries claims arising out of motor vehicle accidents where its jurisdiction is unlimited, however, the District Court has adopted the Rules of the Supreme Court including scales of costs used in that Court. Its procedures are therefore more formal and more strict than are procedures in use in Local Courts and more appropriate to matters where the cost of the proceedings is not crucial to the proceedings themselves. This leads both to delay and expense which could not be justified in the resolution of much smaller claims. There are also other differences between the District Court and Local Courts. Judges of the District Court are all based in Perth and travel on circuit as the need arises. The position of the District Court is, in the Commission's view, quite different from that of Local Courts. This is not to suggest that the jurisdictional line which presently separates these Courts, $6,000 as from 1 February 1982, should be unaltered in future. The Commission suggests below that

the matter be the subject of regular review.[1] However, the Commission is tentatively of the view that such a division, at whatever monetary amount, should continue to be made and that the civil jurisdiction of the courts should remain separate. This of course is a separate issue from that of the administration of courts and the judicial system which is also mentioned later in this working paper.

3. LOCAL COURTS AND SMALL CLAIMS TRIBUNALS

3.12 The function of Local Courts should also be distinguished from that of Small Claims Tribunals.

3.13 Small Claims Tribunals have been established to assist consumers to bring small consumer claims. Their procedures and physical arrangements have been designed for that purpose although it may be desirable to adopt some of these in Local Courts.

3.14 Small Claims Tribunals in Western Australia as elsewhere have the following general characteristics -

(i) they are inexpensive,
(ii) no legal representation is permitted,
(iii) there is little delay,
(iv) hearings are in private,
(v) there is very little paperwork or preparation,
(vi) the procedures are inquisitorial with attempts for settlement being a precondition to the exercise of jurisdiction,
(vii) there are no formal rules of evidence,
(viii) proceedings may be reopened,
(ix) costs are not awarded,
(x) written reasons are not usually given,
(xi) there are no appeals, and
(xii) the atmosphere is designed to be relaxed and informal.

It should also be noted that commonly elsewhere, as in Western Australia, Small Claims Tribunals orders are ultimately enforced through Magistrates Courts or Local Courts. Hearings in the Small Debts Division of Local Courts will have a simplified procedure similar to that of Small Claims Tribunals. Many of the issues arising out of

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1. See para 5.8 below.

the creation of the Small Debts Division of Local Courts will need to be considered in a wider context in this review.[1]

3.15 Overseas experience seems to show that in some cases where a Small Claims Tribunal is established in which both consumers and traders can institute proceedings the institution tends to be dominated by the traders and that the peculiar advantages of a tribunal specifically designed for the expeditious and simple hearing of consumers' small claims are lost. On the other hand, there are some jurisdictions in which the function of Small Claims Tribunals in Western Australia are performed by special arrangements being created within the normal court system.[2] In its report on Small Debts Court the Commission foresaw the possibility that if "after a sufficient period the Small Debts Division of the Local Court is found to be operating satisfactorily, consideration could be given to the question of whether or not the present Small Claims Tribunal should be brought into the Local Court structure".[3]

4. MERGER WITH COURTS OF PETTY SESSIONS

3.16 Local Courts were established as courts of inferior jurisdiction separate from the other courts exercising inferior jurisdiction in Western Australia largely because of the historical development of separate Magistrates Courts and County Courts in England in the nineteenth century. One of the preliminary submissions made to the Commission was that Local Courts should be merged with Courts of Petty Sessions, to create new courts exercising both civil and criminal inferior jurisdiction, the basis being that the

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1. Devices in use in various Small Claims Tribunals in Australia which might be considered for use in Local Courts in Western Australia at least within the Small Debts Division include that of requiring payment of a disputed account into a court trust fund in order to avoid delay or stalling tactics, although this may seem unfair to those impoverished litigants lacking such funds; the giving of notice of third parties with a "sufficient interest" in the proceedings, which is designed to involve persons trading through a corporate structure as well as to give notice to persons who are truly third parties; the high frequency of on-site inspections and hearings; the listing of proceedings at intervals; and the posting to parties of orders made and particulars of settlements reached.

2. As with the device of arbitration by the Registrar in English County Courts: see para 3.39 below.

3. Project No 63, 1979, para 3.21.

court structure of the State should be as integrated and unfragmented as possible. Similar arrangements exist in some other Australian jurisdictions.[1]

3.17 The separate functioning of Courts of Petty Sessions, Local Courts and other courts of inferior jurisdiction in Western Australia[2] has existed for many years. However, these courts already very largely share judicial officers, staff, administrative facilities and courtrooms.[3]

3.18 Inevitably the existence of multiple court systems, operating under different Acts and with different, although shared judicial officers, staff, administrative facilities and courtrooms causes some public confusion, and may result in inflexibility, duplication or waste. Whatever the difficulty in quantifying the differences in money terms it seems clear that horizontal merger of such courts should be conducive to -

* simplicity
* economy, and
* convenience

and accordingly to the avoidance of confusion and waste. In such matters as the names of documents, titles of office bearers, office practices, office hours, hearing times, listing practices, payment and accounting procedures, staff training and advancement, and use of stationery and stores, waste and duplication can be avoided, simplicity engendered, flexibility encouraged, and review of procedural and administrative matters made easier. The alternative is a more fragmented, less co-ordinated, and more static and inward looking system. The Commission, later in this working paper, again refers to the desirability of internal consistency in the working of court systems, both in relation to the needs of the public and in

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1. For example, in Queensland and Victoria.

2. These include Children's Courts, Coroners Courts and Wardens Courts, all of which have separate distinguishing characteristics.

3. Except for the Children's Court and the Coroners Court in Perth.

relation to the efficient functioning of the judicial and administrative system.[1]

3.19 Local Courts and Courts of Petty Sessions share a number of fundamental characteristics. They are courts of inferior jurisdiction based fundamentally on common law concepts of adversary procedure. The existing division of jurisdiction between them is illogical in a number of areas.[2] They sit regularly throughout Western Australia. They are presided over, in the vast majority of cases, by stipendiary magistrates.

3.20 However, certain provisions would need to be further considered if the two sets of courts were merged. For example, separate civil and criminal procedures would be required, whether or not they were set out in one Act or set of Rules. Justices of the peace still exercise jurisdiction in Courts of Petty Sessions, especially in remote areas, but not in Local Courts.[3] Further, appeals from

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1. See esp chapter 21 below. A number of reports in various countries have suggested court rationalisation. For a recent example, the Manitoba Law Reform Commission in its report on The Structure of the Courts; Part I: Amalgamation of the Court of Queen's Bench and the County Courts of Manitoba, 1982 gave as reasons for fusion of the County Courts and Queen's Bench of that province that such fusion would encourage flexibility and efficiency of administration and staff, enabling increasing workloads to be dealt with without increasing numbers or caseloads on members of the court, eliminating duplication of forms, filings, court staffs etc, enabling caseloads to be more readily managed and monitored, allowing comprehensive and flexible scheduling of cases, matching judicial expertise to special requirements or work needs and permitting the court to respond to new demands in the judicial system. Of course only some of these factors would be relevant in any significant degree in a merger in Western Australia between Local Courts and Courts of Petty Sessions. Other principles supporting the fusion of the two courts in Manitoba were said to be the simplicity resulting from having one rather than two court systems, the recognition of a need to improve the administration of justice in rural districts, the ready feasibility of the proposal, the general support of the profession and judiciary for the proposal and the fact that there appeared to be no substantial reason against it.

2. See, for example, paras 8.3, 8.4, 8.5 and 8.8 below.

3. The Commission would not tend to favour any re-introduction of justices of the peace in Local Court matters. The Commission notes that in Victoria, for example, although the courts are fused, provision has been made that civil jurisdiction may only be exercised by a stipendiary magistrate sitting alone.

Local Courts go first to a judge of the District Court, whereas appeals from Courts of Petty Sessions go to the Supreme Court. Such matters will be considered further throughout this working paper but none of them is fatal to the concept of consolidation of the two court systems.[1]

3.21 The Commission also has a reference to consider the provisions of the Justices Act 1902-1981.[2] The Commission will also consider the question whether Courts of Petty Sessions should be merged with Local Courts or other courts of inferior jurisdiction as part of that reference.

3.22 It has been suggested that one advantage of merging the existing courts of inferior jurisdiction would be the possible adoption of the name Magistrates Court for the new court. No doubt such a name is more meaningful to the public than the names Courts of Petty Sessions and Local Courts.

3.23 The names given to courts exercising inferior civil jurisdiction in Australia, in the United Kingdom and in New Zealand varies. In England, both County Courts and Magistrates' Courts exercise inferior jurisdiction. County Courts are now courts of broad civil jurisdiction. Magistrates' Courts exercise basically inferior criminal jurisdiction but also jurisdiction of an inferior civil and administrative nature vested by certain statutes.[3] In New Zealand, following recent changes to the court structure, courts of inferior jurisdiction which were previously called Magistrates' Courts are now known as District Courts and exercise both criminal and civil jurisdiction. In South Australia and the Northern Territory inferior

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1. Another suggestion made is that there is some benefit to be derived from keeping separate the names and operation of courts exercising criminal jurisdiction and those exercising civil jurisdiction. It is argued that it is desirable to ensure that the parties and others appreciate that the proceedings in civil and criminal cases involve different standards of proof, different criteria and rules and that the defendant in a civil case is not accused of offences against the community at large. However this argument has not noticeably been raised against the existing Supreme Court and District Court systems throughout Australia.

2. Project No 55.

3. For example, dealing with recovery of certain taxes and rates, certain domestic and family law jurisdiction, jurisdiction dealing with care of aged and infirm persons and appeals in connection with various drivers and conductors licenses. They are usually presided over by lay justices of the peace, although the Magistrate's Clerk plays an important role.

courts of civil jurisdiction are called Local Courts, in Queensland and Victoria Magistrates' Courts exercise both civil and criminal inferior jurisdiction, in Tasmania the Court of Requests exercises inferior civil jurisdiction. In the Australian Capital Territory Courts of Petty Sessions exercise both civil and criminal inferior jurisdiction. However, in New South Wales although Courts of Petty Sessions exercise inferior criminal jurisdiction, Courts of Petty Sessions exercising inferior civil jurisdiction were re-named as Local Courts by the Local Courts Act, 1982.

3.24 In Western Australia the names Courts of Petty Sessions and Local Courts are long established, but the Commission is informed by experienced court staff that the public at large does not appreciate the significance of the separate names. One preliminary submission from a Crown Law officer of wide experience in Local Courts is that even after more than a century of Local Courts the public at large does "not know what the Local Courts' activities are and even if they are involved in proceedings do not usually know its name".

3.25 The Commission believes that a merger of Local Courts with Courts of Petty Sessions, the new court being known as the Magistrates Court, would lead to simplicity reducing public confusion. It would also avoid some expense caused by duplication. Creation of a single new court may also make the introduction of desirable reforms easier. It would enable a simple rationalisation of the business of the courts. The divergent procedures of civil and criminal proceedings would lend themselves to the creation of a Civil Division and of a Criminal or Offences Division of the Court. The Commission has previously recommended the establishment of Small Debts and Administrative Law Divisions of Local Courts.[1] These divisions would easily fit within such a structure. The Commission has also previously recommended that the jurisdiction vested in Courts of Petty Sessions as well as that vested in Local Courts to hear appeals from administrative decisions be dealt with by that Division. Certain original decisions of an administrative nature are also dealt with by both Local Courts and Courts of Petty Sessions. The Commission suggested also that these matters be dealt with by the same Division.

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1. See report on Small Debts Court (Project No 63, 1979) and Local Courts Amendment Act 1982 and report on Review of Administrative Decisions - Appeals (Project No 26 Part I, 1982). Also see report on The Strata Titles Act (Project No 56, 1983) in which the Commission recommends that appeals from the proposed Strata Titles Referee go to the proposed Administrative Law Division.

3.26 One further subsidiary matter might be noted. At present each Local Court and each Court of Petty Sessions is, strictly speaking, a separate court established in a particular district in the State. They are, however, administered as if the various individual courts were branches of, respectively, a Local Court and a Court of Petty Sessions. There seems to be no substantive reason why the matter should not be dealt with as in the case of the District Court by the creation of one court with power to sit at places and times to be appointed. Provision for the appointment of particular magistrates to sit at particular places could continue to be made under the Stipendiary Magistrates Act.[1]

5. ALTERNATIVE WAYS OF RESOLVING DISPUTES

3.27 Apart from the question of a re-organisation of the existing courts there is the question whether, in line with a growing tendency in overseas common law jurisdictions, alternative means of resolving, outside the traditional court systems at least, certain types of disputes now dealt with by Local Courts should be proposed.[2] The remainder of this chapter discusses some possibilities.

(a) Specialist tribunals

3.28 One possible line of reform is by the creation of specialist bodies. Tribunals[3] may be set up for a number of reasons, including a desire to avoid the ordinary courts becoming overloaded with an unmanageable number of proceedings, a desire for cheaper and more speedy forums, some other special characteristic, such as informality, or a desire to establish a tribunal with a specialised knowledge of some area of business or technical life. This latter is the case when tribunals are established to deal with particular sections of the community such as children or consumers, or some special subject matter such as town planning or industrial law. In some cases it may be thought that existing laws, procedures or personnel are unsympathetic to a particular group as in some proposals for the establishment of housing tribunals in conjunction with reforms of

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1. See also paras 9.2 and 21.12 below.

2. This matter was adverted to in para 3.4 above.

3. As to the distinction between courts and tribunals see Attorney-General v B B C [1981] AC 303.

landlord and tenant law. Other reasons for establishing special tribunals include a desire for adjudicatory methods not normally available in the ordinary courts and especially to avoid the traditional adversary procedures of the courts, or a desire to avoid what is seen as traditional judicial antipathy to new legislative initiatives.[1] The same purposes may be sought, on the other hand, by changing the limits of court jurisdiction, altering court fees and costs, or diverting cases to arbitration. On the other hand, also, certain matters are vested in the jurisdiction of ordinary courts from time to time which might seem suitable for determination by the administrative structure or by tribunals, such as jurisdiction over appeals from administrative bodies on administrative or policy matters. The demand for alternative forums to courts arises out of the costs and delays of the ordinary court system. Sometimes the solution takes the form of the grant of exclusive jurisdiction to a tribunal, sometimes merely to the grant of concurrent jurisdiction, as in the case of Small Claims Tribunals in Western Australia. The establishment of tribunals and other dispute resolving forums outside the normal court systems however also involve a cost to the community. Further, their establishment may lead to neglect of the needs of ordinary courts, especially courts of inferior jurisdiction.

3.29 Traditionally, in common law countries, adversary procedures and the use of passive and impartial judges have been regarded as the most appropriate methods of resolving disputes. Diversion of jurisdiction to tribunals may sacrifice some of the values of the existing courts without overcoming their failures. Tribunals set up to use specialist knowledge not otherwise available in courts may in fact increase the capacity of the overall system to resolve disputes. On the other hand, the failure of courts to develop variations on traditional common law techniques is said to encourage the development of alternative forums and judicial fragmentation.

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1. This has often included a belief that innovative legislation may require the use of tribunals prepared to resolve matters in accordance with conscience and equity and without regard to the strict rules of evidence and procedure. Despite statutory provisions to this effect, judicial caution and legal representation in the courts and tribunals in which such provisions have operated has tended to limit the initiatives taken in giving effect to such provisions. Also judicial officers and the public alike seek consistency and the application of equal standards and rules of law. This lack of initiative is also encouraged by the sheer demand of heavy case loads.

3.30 The Commission regards the primary need as being a system for the early settlement of small disputes by fair means rather than achievement of the high degree of precision often seen by superior courts and by lawyers as necessary to the resolution of disputes and which may tend to encourage courts of inferior jurisdiction to imitate superior courts. However, as the amount at issue or the complexity of claims increases so increasingly does the need for more exact and complex trial procedures. This tension is dealt with in a number of contexts throughout this working paper.

3.31 Two main areas in which Local Courts administer specialised jurisdiction are apparent. The first is the area of original and appellate jurisdiction in administrative matters dealt with in the Commission's report on Review of Administrative Decisions - Appeals.[1] The other area concerns landlord and tenant disputes.

3.32 In Victoria and South Australia specialist Residential Tenancies Tribunals have been created as part of a wider review of the substantive law governing landlord and tenant relationships.[2] In Victoria, at least, the Tribunal shares accommodation, staff and referees with the Small Claims Tribunal. Tribunals dealing with housing matters are also commonly found in the United Kingdom and the United States. In some Canadian provinces the office of Rentalsman has been established with exclusive jurisdiction over most landlord-tenant disputes. The Commission will consider these matters again later in this working paper when dealing with the jurisdiction of Local Courts in tenancy matters.[3]

3.33 Specialist tribunals are not necessarily limited to residential tenancy matters. The Victorian Credit Act 1981 created a Credit Tribunal comprised of a Chairman who was to be the president for the time being of the Market Court[4] and four others, one being a person

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1. Project No 26 Part I, 1982.

2. In the Northern Territory, the Tenancy Act 1981 has created a Tenancy Tribunal. Each magistrate is, by virtue of his office, a member of the tribunal and may sit alone as a tribunal.

3. See chapter 6 below. See also the Commission's report on Tenancy Bonds (Project No 41, 1975) esp at para 17.

4. The Market Court itself was established in 1978. The president was a judge of the County Court. Its function was to enquire into allegations that a trader in the course of business had repeatedly engaged in conduct unfair to consumers and to make orders prohibiting such conduct.

with business experience in credit providing, one with business experience in the supply of goods and services and two with "knowledge of the interests of natural persons who obtain or seek to obtain credit from credit providers". The functions of the Credit Tribunal include not only licensing functions but functions such as determination of claims by debtors for extension of repayment periods in case of hardship. This latter jurisdiction is exercised concurrently with Magistrates Courts. The New South Wales Consumer Credit Act 1981 also established a Credit Tribunal with a similar constitution to that of the Victorian Credit Tribunal and both with licensing functions and with functions including power to vary or avoid credit contracts that it considers harsh and unconscionable. Again this latter function is one exercised concurrently with the ordinary courts.

3.34 Proposals have also recently been made in Australia for tribunals to review the application of the terms and conditions of leases of commercial premises.

3.35 As already pointed out, Local Courts function not only as traditional courts of inferior jurisdiction under the Local Courts Act but also exercise other administrative jurisdiction and jurisdiction under other specialised legislation. In some cases such jurisdiction might alternatively have been vested in an administrative tribunal. No doubt the reasons for vesting such jurisdiction in Local Courts are those set out in paragraphs 3.6 to 3.8 above as being the advantages accruing from existing Local Court arrangements.

3.36 The Commission seeks comment as to any appropriate provisions for the creation, amalgamation or abolition of specialist tribunals in Western Australia so far as such provisions might derogate from or add to Local Court jurisdiction.

(b) Community Justice Centres

3.37 One criticism of traditional courts as dispute resolving mechanisms, especially in minor matters, is that since they are not usually concerned to locate the underlying social or psychological causes of particular disputes, and because the range of remedies available to them is limited, their proceedings may tend to aggravate tension between the parties. This is seen as unhelpful, and possibly counter-productive, where the antagonists are in a situation of long

term proximity as neighbours, relatives, workmates etc. To overcome this problem community mediation programmes have been commenced in a number of American cities[1] and in New South Wales which seek to substitute conciliation or mediation for traditional court methods.[2] The legal issues involved are usually far more narrow than the social or community issues which mediation procedures attempt to resolve.[3] However, experience shows that these forums divert relatively few disputes from the courts. Many of the disputes they resolve would have occupied limited court resources, either being settled without a hearing or having only taken a few minutes to try. On a case by case basis they may be more costly than the courts although this is far from established. Further since there are no enforcement mechanisms they offer no alternative to the courts in a wide range of matters. Community Justice Centres may have a useful role both in preventing disputes arising or continuing and in diverting from the court system long-standing or multi-faceted disputes between people in continuing social relationships, such as family, neighbourhood or work-place disputes. They would also have a limited capacity to reduce the number of matters coming before Local Courts. It appears that the New South Wales Community Justice Centres, of which there were then three, dealt with a total of 1,597 disputes in the 1981 year.[4] Of these 137 were dividing fence disputes and 841 were other

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1. Mediation is also the subject of experiment in Quebec, in the Small Claims jurisdiction in Montreal, and in Ontario. The Manitoba Law Reform Commission has suggested the introduction of a pilot mediation service in Winnepeg or another urben centre for the purpose of assessing the feasibility of a province-wide system. Its conclusions confirm that mediation is especially appropriate for claims where the relationship between parties is continuous - as with landlords and tenants - but that promotion, community awareness and the special training of mediators is required.

2. Normally, legal practitioners or lay citizens who have received training in conciliation and mediation techniques are used as mediators. The process is informal, leisurely and often non-directive. The parties are encouraged to tell the entire story, irrelevant as well as relevant, including their own subjective feelings. The mediator attempts to work out an agreement that addresses the underlying causes.

3. See Earl Johnson, Jr, Our Crowded Courts: The Paradox of Too Many Cases and Too Little Access, published in American, Australian, New Zealand Law: Parallels and Contrasts, 1980, 36 at 41-42.

4. Since 1981 the programme has expanded. The New South Wales Community Justice Centre programme now has some 190 mediators who act on a part-time basis and who now receive cases at a rate of some 3,000 per annum in five locations. Apparently agreement or resolution is being achieved in some 87% of cases.

neighbourhood disputes over matters such as noise, drainage, overhanging trees, use of incinerators, parking or use of vehicles, behaviour of children or control of pets. A further 133 cases were neighbourhood disputes involving violence. Of the balance, 304 were described as family disputes including problems relating to access to children, disputes over the existence or termination of family relationships and property and disputes involving violence, arguments and abuse. Disputes other than between neighbours or members of a family involving violence, harrassment etc accounted for a further 46 cases. The traditional Local Court claim involving money or property claims accounted for an additional 110 cases including debt claims, tenancy claims, disputes about property ownership or damage etc. Of the 1,597 disputes some 252 were already the subject of or had recently been the subject of legal proceedings. The cost of providing this service was $235,590 or $147.52 per dispute handled. This included mediators' fees paid on an hourly basis but at a relatively modest rate. It is clear that many but not all of these disputes could be dealt with by traditional courts and tribunals such as Local Courts, Courts of Petty Sessions and Small Claims Tribunals. The distinguishing feature is that in many cases the parties involved may not wish to be involved in court proceedings because of neighbourhood or family relationships, or the disputes may be long standing disputes which would extend far more widely than traditional court proceedings would countenance. Estimates of the cost of dealing with such disputes in the normal court system are very difficult to make. Further, it would seem that community justice centres should be considered as a supplement or alternative to other social agency work including police, members of parliament and social welfare agencies as well as to the courts.

(c) Compulsory arbitration

3.38 One response to the volume of litigation clogging overseas courts and the need to improve access to dispute resolving mechanisms by poor persons, especially in the case of small disputes, has been to enact compulsory arbitration statutes. In America, this approach commenced in Philadelphia and was extended to States such as New York, Ohio and California during the 1970's. Under it, a case involving less than a certain figure, commonly in the range of $10,000 - $15,000, is assigned automatically to an arbitration panel drawn at random from a list of available lawyers. The arbitrators receive limited remuneration and must hear and decide the case within

90 days. The award can be taken to the appropriate court for a new trial but the appellant must reimburse the State for the arbitrators fees. Less than 10 percent of matters heard are the subject of any subsequent court proceedings and by reason of subsequent settlements less than two percent of the cases diverted to arbitration actually require new trials in the courts.[1] A similar scheme has been announced for New South Wales based on United States experience.[2] Such schemes require the participation of substantial numbers of legal practitioners.

3.39 In the English County Courts, arbitration by a registrar,[3] must now take place in defended claims of less than five hundred pounds. This procedure is compulsory except in cases which raise difficult questions of law or extreme complexity of fact, where fraud is in issue, where both parties agree that the matter should be tried in court or where arbitration would be unreasonable having regard to the subject matter, the circumstances of the parties[4] or the interests of affected third parties. This system, which was introduced in 1973, has been extended from a more voluntary system involving claims not exceeding two hundred pounds by extension of a provision similar to section 92 of the Local Courts Act.[5] Proceedings in which the sum claimed or the amount involved does not exceed five hundred pounds sterling are referred automatically to arbitration by the registrar as soon as a defence is filed. The registrar has power to strike out pleadings and to give final judgment if the defendant fails

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1. See R J Broderick, Compulsory Arbitration: One Better Way, 1983 American Bar Association Journal 64, for a description of the procedure in the Eastern District of Pennsylvania by a United States District Judge. The Commission is grateful to Mr E J O'Grady of the New South Wales Department of the Attorney General and of Justice for information concerning United States and United Kingdom arbitration schemes discussed in Mr O'Grady's report to the Department and to the Law Foundation of New South Wales dated 14 December 1981.

2. The Australian, 4 November 1982; 15 April 1983. The scheme would involve claims up to $10,000.

3. This may be by way of informal hearing, or even on the basis of documents only.

4. In Pepper v Healey (English) Law Society's Gazette, 23 June 1982, 805 the fact that the defendant was to be legally represented at her insurer's expense was held sufficient on this ground.

5. See para 16.30 below.

to appear. No solicitor's charges are allowed between party and party except the costs which were stated on the summons or which would have been stated on the summons if the claim had been for a liquidated sum, the costs of enforcing any award and such costs as are allowed as incurred through the unreasonable conduct of the other party. The number of cases dealt with is increasing[1] and very often legal representation is not used by either side although it is permitted.[2]

(d) Voluntary arbitration

3.40 In the United Kingdom, a voluntary scheme for arbitrating various claims which would otherwise be heard in the County Courts, is sponsored by the Office of Fair Trading.[3] A scheme involving arbitration by volunteer solicitors is also under consideration.[4]

(e) Other informal agencies

3.41 Other examples of the development of dispute resolving mechanisms outside the normal court structure include the use of Ombudsmen where matters involve public administration, and consumer protection agencies in consumer claims. These forums are characterised by informal commencement of proceedings, the absence of legal representation, informal hearings, convenient hearing times and places, and the use of an inquisitorial process. Corresponding

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1. In the March quarter of 1981 4,237 cases were referred to arbitration by Registrars of County Courts in England and Wales. By 1982 this had increased to 7,689.

2. For a critical view of the English County Court provisions see, for example, George Applebey, Small Claims in England and Wales, 1978; National Consumer Council, Simple Justice, 1979; and Richard Thomas, A Code of Procedure for Small Claims, 1982, Civil Justice Quarterly, 52.

3. The scheme has been subjected to criticism on the grounds of public fears of partiality, dissatisfaction with the results of awards resulting perhaps from the lack of reasons for decisions and also on the ground that hearings often take place only on the basis of written documents. See, for example, Robert Egerton, An Alternative System of Justice, (English) Law Society's Gazette, 18 March 1981.

4. Robert Egerton, A Solicitors' Arbitration Service, (English) Law Society's Gazette, 27 April 1983.

advantages and disadvantages result. Such bodies may lack power to adjudicate the dispute in law, although, for example, the Commissioner of Consumer Affairs has certain powers of adjudication in some matters, subject to appeal.[1]

3.42 The Manitoba Law Reform Commission in looking at the adjudication of small claims recently has also categorised the options available as being -

* adjudication by a court structure of the traditional type, such as Local Courts;
* mediation;
* arbitration; or
* adjudication by an administrative tribunal.

It concluded that mediation is only available as an adjunct to an adjudicative system, since it lacks powers of enforcement and even powers of compulsory jurisdiction. This is illustrated by the New South Wales position in relation to Community Justice Centres. It concluded that arbitration and adjudication by an administrative tribunal need be no more simple, speedy or inexpensive, and therefore accessible to the general population, than adjudication by a court of inferior jurisdiction properly structured. On the other hand, courts have a high degree of authority and prestige. The Commission therefore concluded that adjudication of small claims in Manitoba should continue to be heard by a court rather than by one of the alternative structures or processes. The Commission concluded that claims should be heard by legally trained persons so as to promote the propositions that -

(i) decisions should be governed by principles of law and should be consistent between themselves; and

(ii) courts dealing with small claims should not be seen as administering lesser forms of justice than other courts.

After considering the question whether the cost of establishing a small claims court independently from the established court over-weighed the risk that a small claims court operating within an

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1. For example, under s 36A of the Hire Purchase Act 1959-1980.

existing court structure might be over-formal and tend to imitate the prestige of more established courts of greater jurisdiction, the Commission concluded that a Small Claims Court should be established by means of a separate civil division within an existing court of civil jurisdiction but one with facilities available throughout the province, and experience in speedy disposition of a high volume of cases. These conclusions reinforce this Commission's proposals as to an appropriate court structure in Western Australia.[1]

3.43 Whatever potential there may be for developing these alternatives to traditional court procedures, it is clear that there is a need for a distinct civil jurisdiction, especially in the area of debt and contract disputes and civil damages claims, which must continue to be met. As was pointed out earlier, the Commission has issued this working paper on the assumption that Local Courts will continue to exist in Western Australia with the same characteristics as courts of inferior civil jurisdiction traditionally have had. The Commission will therefore concern itself with the functioning of Local Courts in this area. Alternatives to Local Courts in some areas of dispute might be found in such existing bodies as Small Claims Tribunals and the Land Valuation Tribunal or in bodies such as the proposed Strata Titles Referee[2] as well as in novel concepts such as Community Justice Centres or the Rentalsman. The Commission however is fundamentally concerned to recommend appropriate reforms of the Local Courts Act and Rules rather than the development of possible alternative means of dispute resolution. Such alternatives however are to be kept in mind in considering proposals made throughout this working paper.

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1. Manitoba Law Reform Commission report on The Administration of the Courts; Part II - The Adjudication of Smaller Claims, 1983. To meet the exceptional circumstances in which all parties consent to a matter being dealt with in a court of superior jurisdiction, or where a set-up or counterclaim involves the jurisdiction of such a court or in other exceptional cases the Commission recommended that power to transfer proceedings to a superior court of civil jurisdiction should exist but that otherwise the jurisdiction of the civil division of the court of inferior jurisdiction should be exclusive. This matter is dealt with later in this working paper: see paras 5.47 to 5.53 and see also para 5.12.

2. See the Commission's report on The Strata Titles Act (Project No 56, 1983).

6. PROPOSALS

3.44 The Commission proposes that -

(a) Although some types of dispute now dealt with by Local Courts might be more appropriately dealt with by other tribunals, such as the existing Small Claims Tribunals or by possible new tribunals such as Community Justice Centres, Tenancy Tribunals or a 'Rentalsman', there remains a need for traditional courts of inferior jurisdiction, such as Local Courts, for the simple and expeditious resolution of civil claims especially money claims involving relatively small sums. There is a need also to avoid the proliferation of tribunals and to integrate court structures for purposes of efficiency and simplicity.

(b) To give effect to these needs, Local Courts should be merged with Courts of Petty Sessions and the newly created court named the Magistrates Court. [In the proposals which follow throughout this working paper, references to Local Courts will include any such newly created Magistrates Court.]

(c) Such a Magistrates Court should sit in Divisions including -

* a Civil Division, exercising the basic money and property jurisdiction now exercised by Local Courts,
* a Small Debts Division, being the equivalent of the newly established Small Debts Division of Local Courts,
* an Administrative Law Division, as outlined in the Commission's report on Review of Administrative Decisions: Appeals (Project No 26 Part I, 1982) to exercise administrative and regulatory jurisdiction now exercised either by Local Courts or by Courts of Petty Sessions,
* a Criminal or Offences Division, to exercise the criminal and quasi-criminal jurisdiction now exercised by Courts of Petty Sessions,

and such other divisions as may be added to the Court from time to time as it found possible to merge other existing tribunals or courts into the system so created or to meet felt community needs. Provision should be made for separate codes of procedure (including provisions dealing with costs, representation, appeals etc) for divisions where appropriate. The Civil Division should always be presided over by a stipendiary magistrate sitting alone.

Administrative efficiency and public convenience should result.

CHAPTER 4 - THE COMMISSION'S APPROACH

1. SCOPE OF THE WORKING PAPER

4.1 The Local Courts Act is divided into the following eleven Parts -

Part	
I	Preliminary, ss 1-4
II	Courts, Magistrates and Officers, ss 5-29
III	Jurisdiction, ss 30-39
IV	Procedure, ss 40-93
V	Replevin, ss 94-98
VI	Recovery of possession of land, ss 99-106
VIA	Small Debts, ss 106A-106O
VII	Appeals and Judicial Review, ss 107-119
VIII	Enforcement of judgments, ss 120-153
IX	Supplementary provisions, ss 154-163
X	Maintenance and destruction of court records, ss 164-169.

4.2 In this paper the Commission deals with all of these Parts except Parts VIA, VIII and X. The Local Courts Amendment Act 1982 added Part VIA to establish the Small Debts Division.[1] As that Division has not yet commenced practical operation the part will not be further considered. Part VIII, dealing with the enforcement of judgments, raises a number of separate issues and will be dealt with in a subsequent working paper.[2] Part X was recently enacted to give effect to certain recommendations of this Commission contained in the Commission's report on Retention of Court Records[3] and will not

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1. The provisions are designed to implement the Commission's report on Small Debts Court, (Project No 63, 1979).

2. Hereinafter referred to as "the Working Paper on the Enforcement of Judgments".

3. Project No 72, 1982.

be given further attention.[1] The present paper therefore will deal only with ordinary Local Court procedures to the point at which a judgment is entered. The Commission does not intend to review each section of the Act separately but to deal only with those provisions upon which comment is thought desirable. Since the Local Court Rules are designed to give effect to the provisions of the Local Courts Act, a review of those Rules will be dependent on conclusions reached in reviewing the Act. Many of the Rules are therefore not dealt with at all or only by inference or in passing. The necessary first step is to reach conclusions as to the major matters raised in detail in this working paper. The Commission therefore is mainly concerned with matters of principle. However, certain points of detail which have been drawn to the attention of the Commission by way of preliminary submissions or seem to the Commission to require attention and to be readily capable of rectification will be dealt with.

4.3 The Commission also has before it two other references dealing with matters relevant to its review of the Local Courts Act and Rules -

(a) Interest on claims and judgments. This reference requires the Commission to consider, among other matters, claims for interest as a component of the sum or damages claimed and interest on judgments. In its report on Pre-judgment Interest[2] recommending enactment of more liberal provisions enabling courts to order the payment of pre-judgment interest, implemented by the Supreme Court Amendment Act (No 2), 1982, the Commission said that the question of both pre-judgment interest and interest on judgments in respect of Local Court proceedings would be considered again in the course of this review. This paper will therefore deal with the question of interest in Local Court proceedings;[3]

(b) Execution against land.[4] This reference requires the Commission to consider the priority of writs of execution,

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1. Local Courts Act Amendment Act 1981 giving effect to certain of the recommendations in the Commission's report on Retention of Court Records (Project No 73, 1980).

2. Project No 70 Part I, 1981.

3. See chapter 18 below.

4. Project No 67. These matters will also overlap with those matters to be dealt with in the Working Paper on the Enforcement of Judgments.

including Local Court warrants of execution, issued against land registered under the Transfer of Land Act 1893-1978. The Commission will therefore not deal with those matters in this paper.

2. APPROPRIATE CRITERIA

4.4 The Report of the New Zealand Royal Commission on the Courts, published in 1978, suggested that a court structure should be evaluated in the light of the following seven criteria -

(i) suitability to conditions
(ii) economic feasibility
(iii) service to the public
(iv) preservation of the independence of the judiciary
(v) best use of judicial and legal talent
(vi) simplicity
(vii) efficient administration

The comments of the Royal Commission on each of these seven criteria are set out in Appendix I.[1] They are all applicable in Western Australia. The Royal Commission tested all its proposals against these criteria "bearing in mind that while there should be no change for the sake of change, we should firmly recommend whatever improvements we are satisfied are required".[2] The Commission has adopted a similar approach and has borne these factors in mind when considering the issues raised in this paper,[3] although recognising the

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1. Appendix I also contains an extract from the Report dealing with the position of ethnic minorities.

2. Royal Commission on the Courts, New Zealand, 1978, para 254.

3. Earlier the English Royal Commission on Assizes and Quarter Sessions 1966-1969 (the Beeching Report) had reported that:

> "If judicial integrity is taken for granted, the following are the features which a good court system should provide.
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> | | | |
> |---|---|---|
> | Convenience | (a) | Ease of physical access. |
> | | (b) | An early hearing. |
> | | (c) | The assurance of trial on a date of which reasonable notice has been given. |
> | Quality | (d) | Suitable accommodation. |
> | | (e) | Judicial expertise. |
> | | (f) | Adequate and dependable legal representation. |
> | Economy | (g) | Efficient use of all manpower. |
> | | (h) | Optimum use of buildings. |

potential for tensions between these various aims. The Commission seeks comment on whether other criteria should also be adopted and on the order of importance to be given to particular criteria.

3. REGULAR REVIEW

4.5 The Commission is of the view that there should be regular or periodic review of the jurisdiction, administration and procedures of Local Courts, conducted by persons with a range of relevant knowledge and interest. This would help to ensure that any procedural changes introduced have the support of the judicial and administrative officers of the court, the legal practitioners, litigants, and witnesses. In chapter 20 below the paper discusses a means of establishing a procedure for such review.

4.6 The approach of the Commission is also guided by the fact that its terms of reference are limited to a review of the Local Courts Act and Rules and do not include a review of either the jurisdiction procedures or administration of the Supreme Court or the District Court, or of the various other courts of inferior jurisdiction. The Commission recognises that there is value in maintaining, as far as possible, consistency between the practice and procedures of the various courts in the State. There seems to be a growing recognition that court systems should be treated as an integrated and flexible whole. The Commission also recognises, however, that because the matters coming before courts differ, the priorities to be given to

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> Everyone who is concerned with the courts, whether by choice or because he has been drawn there by events, will weigh these factors differently according to his own circumstances, but the overall requirement of a good system must be to make high quality justice conveniently available at low cost."

However the Report also noted that:

> "It is fairly easy to set out the characteristics which are wanted in a court system, but it is much harder to decide how best to provide them in practice. Some of them, indeed, are incompatible with one another."

See Cmnd 4153 paras 111-112.

See also the Manitoba Law Reform Commission report on The Structure of the Courts; Part I: Amalgamation of the Court of Queen's Bench and the County Courts of Manitoba, 1982.

different aspects of court procedures, such as the need to simplify procedure, avoid delay and minimise the cost of litigation will vary between the different courts.

4.7 The Rules of the Supreme Court, which are used also in District Court proceedings, are designed to regulate more complex matters than those likely to arise in Local Court proceedings. Forms, fees and scales of costs reflect this. It must also be borne in mind that a very large number of Local Court proceedings are not the subject of any real dispute and lead only to administrative action by way of default judgment and enforcement proceedings. This is much less the case, for example, in Supreme Court proceedings. For these reasons the Commission rejects, for instance, certain preliminary submissions made to it that Local Courts should merely adopt the Rules of the Supreme Court, as the District Court has done.[1] On the other hand, where there are no grounds for difference, no difference should be created or continue. As suggested above, even where some criticism might be made of existing Supreme Court Rules there is virtue in consistency because of the simplicity and lack of confusion resulting from uniform rules. If anything, the recent increase in the money jurisdiction of Local Courts increases the need to consider the application of the Rules of the Supreme Court in Local Court procedure.[2]

4.8 Review, with the objective of assimilating Local Court and Supreme Court procedures in respect to some matters and Local Court and Small Claims Tribunals procedures in respect to other matters, is clearly desirable.

4. STRUCTURE OF THE ACT AND RULES - GENERAL PRINCIPLES

4.9 The present structure of the Local Courts Act and Rules is broadly that the Act -

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1. Special rules will in any event be required in the Small Debts Division, and also in any Administrative Law Division which is established following the Commission's earlier recommendations: see paras 8.8 and 8.10 below.

2. Suggestions are made later in this working paper as to the filing of formal pleadings in appropriate cases as if the proceedings were being conducted in the Supreme Court or District Court: see para 12.3 below.

(a) constitutes Local Courts, and provides for the appointment and functions of magistrates, clerks, bailiffs and officers and for the representation of parties by legal practitioners;

(b) vests jurisdiction;

(c) sets out certain rules of procedure and evidence;

(d) provides for appeals and review; and

(e) provides certain methods of enforcement of judgments and orders.

The Rules provide the detailed rules to give effect to these provisions and prescribe costs, fees and forms. The Act may, of course, be amended only by Parliament. The Rules are made by the Governor and take effect one month after publication in the Government Gazette.[1] The present Act and Rules assume, in a number of ways, that Local Courts form part of a larger structure of traditional courts based on adversary procedures.

4.10 The Commission is of the view that in any revision of the Act and Rules, care should be taken to ensure that matters of principle,[2] which are properly the subject of legislation, are dealt with in the Act, and that matters of administrative or procedural detail should be the subject of the Rules rather than the Act. Any change of principle should be made by Parliament specifically giving approval to amendment of the Act itself. Matters of procedure should be able to be more readily amended, by inclusion in the Rules. Certain matters now found in the Act should be dealt with by Rules of Court. If so, they would hopefully be more easily amended and kept up-to-date, at least if some regular method of review were adopted.

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1. By s 158 of the Local Courts Act, the Governor is given certain powers to prescribe Rules of Court. The present Rules are the Local Court Rules 1961 (as amended) (hereinafter "the Local Court Rules"). The Commission notes that s 88 of the District Court of Western Australia Act 1969-1978 giving rule-creating powers to the Judges of the District Court is expressed in much wider terms than is s 158 of the Local Courts Act.

2. These would include matters of jurisdiction and venue, and provisions creating power to make procedural rules and establishing modes of enforcement of judgments.

4.11 The Commission is also of the view that words used in the Act and Rules should bear the same meaning in each, and if possible should bear the same meanings as those words used in kindred statutes such as the District Court of Western Australia Act 1969-1978,[1] the Supreme Court Act 1935-1979,[2] the Small Claims Tribunals Act 1974-1981[3] and the Stipendiary Magistrates Act 1957-1979.[4]

4.12 There is no provision in the Local Courts Act or Rules at present to deal with the situation where a matter is not provided for in the Act or Rules. It is not clear what the position is when such a situation arises. A number of alternatives might be suggested. First, provision might be made that where the Local Courts Act and Rules are silent, the Rules of the Supreme Court should apply in Local Court proceedings.[5] However, such a provision does not extend necessarily to all questions of practice. Secondly, and additionally therefore, provision could be made that except as expressly provided in the Local Courts Act and Rules the practice and procedure of the Supreme Court should apply in Local Court proceedings.[6] Alternatively to the second of these, consideration could be given to a provision that a magistrate have power to give such directions as to practice and procedure as he thinks necessary

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1. Hereinafter "the District Court Act".

2. Hereinafter "the Supreme Court Act".

3. Hereinafter "the Small Claims Tribunals Act".

4. Hereinafter "the Stipendiary Magistrates Act".

5. This is the position in the District Court: see District Court Act, s 87. The Commission has been informed by magistrates that some legal practitioners think this to be a consequence of the provisions of s 35 of the Local Courts Act but this is clearly not so: see para 5.40 below.

6. This is also the position in the District Court Act: see District Court Act, s 52. Similar provisions exist in a number of other jurisdictions, for example, (Tas) Local Courts Act, s 138. The difference between "practice" and "procedure" is difficult to define but must be borne in mind: see, for example, Felix v Shiva [1982] 3 WLR 444. In re-drawing the English County Court Rules in 1981 the Rules Committee decided to omit many of the previous County Court rules in reliance upon s 103 of the County Courts Act 1959 which provides that:

> "In any case not expressly provided for by or in pursuance of this Act, the general principles of practice in the High Court may be adopted and applied to proceedings in a County Court".

to further the administration of justice in the particular case, giving weight to the practice and procedure adopted in other courts of civil jurisdiction. Such a provision would seem desirable, for example, in proceedings in the Small Debts Division. Section 36 of the Small Claims Tribunals Act provides that:

> Except to the extent that the procedure. . .is prescribed, every tribunal shall have control of its own procedures and in the exercise thereof shall have regard to natural justice.

In other matters such a provision may tend to uncertainty and inconsistency.[1]

4.13 The Commission also notes that in the English County Court Rules 1981 provision is made for practice directions to be issued by the Lord Chancellor.[2] The practice directions of the Supreme Court are of little relevance to Local Courts at present. The Commission seeks comment on whether practice directions are necessary in Local Courts and, if so, by whom they should be promulgated.

5. PROPOSALS

4.14 The Commission proposes that -

(a) The Local Courts Act and Rules and the operation of Local Courts should be evaluated in the light of the seven criteria listed in New Zealand by the Royal Commission on the Courts, namely -

(i) suitability to conditions,
(ii) economic feasibility,
(iii) service to the public,
(iv) preservation of the independence of the judiciary,
(v) the best use of available judicial and legal talent,

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1. Section 26 of the New South Wales Local Courts Act, 1982 provides:

> ". . . that if the manner or form of procedure for taking any step in any proceedings is not prescribed by statute or other law under which the step is to be taken or by the practice of courts, a court on application made to it in such manner as it considers appropriate, may direct what manner or form of procedure is to be followed, and any step taken in accordance with the directions so given shall, for the purposes of the proceedings, be regular and sufficient."

2. Order 50 rule 1.

(vi) simplicity, and
(vii) efficient administration.

(b) Because most Local Court proceedings involve relatively small sums of money, Local Court procedures should emphasise simplicity, in order to ensure both that costs and delays are kept within reasonable bounds and that persons not represented by legal practitioners are able to conduct proceedings. These factors apply not only to matters within the Small Debts Division but in all Local Court proceedings. As a result, Local Courts - unlike the District Court - should not simply adopt the Rules of the Supreme Court in force from time to time, but should adopt rules designed to simplify procedure and to minimise the cost of litigation.

(c) However, where a matter is complex and the amount of money involved relatively large, the practices and procedures in use in the Supreme Court in proceedings of a like nature should be available. This should not, of course, apply to the Small Debts Division. More detailed proposals are spelled out individually later in this working paper, as is the question of control of the practices and procedures of Local Courts.

(d) There should be regular review of the jurisdiction, administration and procedures of Local Courts, as of other courts, by persons with a wide range of relevant knowledge and interest. This is also dealt with in more detail later in this working paper.

(e) Matters of principle should be dealt with in the Local Courts Act itself. Matters of administrative or procedural detail should be dealt with in the Rules so as to be more readily amended. Such ready amendments will be facilitated by regular review of the type proposed in this working paper.

(f) Subject to the foregoing, provision should be made in the Local Courts Act that except as otherwise provided in the Local Courts Act and Rules, and as far as is possible consistently therewith, the Rules of the Supreme Court and the practice and procedure of the Supreme Court should apply in Local Courts. These provisions should not, however, apply in the Small Debts Division. In that Division, provision should be made that the

magistrate should have control of his own procedures having regard to natural justice.[1]

(g) Where possible, words used in the Local Courts Act and Rules should bear the same meaning in each. They should, if possible, also bear the same meaning in kindred statutes such as the Supreme Court Act, the District Court of Western Australia Act, the Small Claims Tribunals Act and the Stipendiary Magistrates Act.

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1. Certain matters as to which the Local Court Rules should be the same as those of the Supreme Court are discussed in later chapters, especially chapter 16.

PART II: JURISDICTION

CHAPTER 5 - JURISDICTION AND POWERS AS TO SUBJECT MATTER

1. BASIC JURISDICTION

5.1 The role of Local Courts in providing a simple, inexpensive and expeditious means for the resolution of relatively small claims is expressed by the vesting in Local Courts of jurisdiction to determine personal actions in which the amount claimed is not more than (at present) $6,000 and by excluding from that jurisdiction certain more complex matters such as actions in ejectment,[1] or in which the title to land, or the validity of a devise, bequest, or limitation under a will

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1. Section 30. However, this is subject to ss 99-103 which give Local Courts jurisdiction in certain cases of recovery of possession of land. This is by way of exception to the exclusion of ejectment proceedings from Local Court jurisdiction expressed in s 30. See paras 6.5 to 6.9 below.

or settlement, is in question, for libel, slander, seduction or breach of promise of marriage.[1] Additionally, however, jurisdiction has been vested in Local Courts by certain other statutes.[2]

5.2 Court systems, whether of civil or criminal jurisdiction, may be divided either vertically or horizontally, that is according to the seriousness or amount of money involved in the proceedings or according to the nature of the subject matter or even geographically. From time to time Parliament may have changed the boundaries of jurisdiction between various courts because of case load problems somewhere in the system, usually in courts higher in the system. The result has been that some jurisdiction vested in some courts may be inappropriate to them or be vested in such a way that the choice of court is unclear or be vested in more than one court.

5.3 The Commission assumes that in determining the limits of the jurisdiction and powers of Local Courts, regard should be had to the fundamental criteria which justify establishing courts of inferior jurisdiction to deal with civil claims of a relatively small size. Local Courts exist to provide a simple, inexpensive, convenient and expeditious means of resolving small civil claims. If their jurisdiction is enlarged it becomes necessary to consider the adoption of rules and procedures similar to, if not identical with, those of the superior courts of civil jurisdiction. Greater attention must be given to administrative needs such as libraries and transcription facilities. The wider the jurisdiction exercised by Local Courts the greater will be the need to ensure that claims involving relatively small sums and small issues are not disadvantaged by cost factors and delays in proceedings. Local Courts enjoy some inherent advantages over courts of superior jurisdiction in the resolution of many disputes. They are geographically dispersed throughout the State. The costs and delays involved in resolving disputes by Local Court proceedings are substantially less than those in the Supreme Court and the District Court. There is therefore a tension inherent in the desire to extend these advantages to a wider range of disputes and the likely result of so doing. This paper will endeavour to reconcile these two contradictory demands.

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1. Section 30.

2. See paras 8.1 to 8.8 below.

2. MONEY LIMIT

5.4 Subject to the exceptions mentioned above, Local Courts have jurisdiction in respect of "all personal actions in which the amount claimed is not more than six thousand dollars whether on a balance of account or after an admitted set-off or otherwise".[1]

5.5 The sum of $6,000 was fixed by section 13 of the Acts Amendment (Jurisdiction of Courts) Act 1981, the figure previously having been $3,000 fixed in 1976. In all other Australian jurisdictions except South Australia and the Australian Capital Territory, the money limit to the jurisdiction of the equivalent court is presently less than that of Western Australian Local Courts. In South Australia the equivalent figure was raised in 1981 to $7,500. In the Australian Capital Territory the money jurisdiction of Courts of Petty Sessions in civil matters has recently been increased from $2,500 to $10,000. In Victoria, Magistrates' Courts presently have a jurisdictional limit of $3,000 in civil matters. In New South Wales the jurisdiction of Local Courts in civil claims was increased to $5,000 by the Court of Petty Sessions (Civil Claims) Amendment Act, 1982.

5.6 In any discussion of the comparative money jurisdiction of inferior courts, regard must be had to the overall structure of the court systems in the jurisdictions compared. In England the only courts exercising general civil jurisdiction apart from the High Court of Judicature are the County Courts. They are presided over by judicial officers trained as barristers and exercise a wide range of jurisdiction, including original civil jurisdiction in respect of amounts not exceeding five thousand pounds. English County Courts are therefore not strictly analogous to Local Courts in Western Australia, although historically Local Courts were modelled on the early English

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1. Local Courts Act, s 30. This section derives from s 56 of the English County Courts Act, 1888: see paras 5.13 to 5.17 below. It should be noted that it is the amount claimed which governs the jurisdiction, not the value of the goods or other property or subject matter of the claim. It is also apparently the case that the money actually involved in the dispute must be within the jurisdiction of the court, and not merely the amount for which the claim is brought: King v Cheshire County Court Judge (1921) 2 KB 695. See also s 39 (consent jurisdiction) and ss 59 and 60 (splitting of demands and waiver of excess).

County Courts. In New Zealand traditionally magistrates are appointed from the ranks of legal practitioners and there is no intermediate tier of courts. Following the recommendations of the Royal Commission on the Courts in 1978 the money jurisdiction of Magistrates Courts in civil matters has been increased to $12,000 and the courts renamed District Courts. In Victoria and New South Wales, on the other hand, magistrates are traditionally selected from persons who are clerks of court or other administrative personnel although they may have obtained the qualifications for, and been admitted as, barristers or solicitors. Between such courts and the Supreme Court there is the intermediate tier of County Court and District Court respectively, as in Western Australia.

(a) The importance of the money limit to jurisdiction

5.7 The jurisdictional limit fixed is important. It should mark the point at which the simplified pleadings and procedures, and lower costs, of Local Courts may justifiably be replaced by the more formal pleadings, more complex procedures, and the higher costs, of the District Court.[1] Any change in the jurisdictional limit of Local Courts will affect the work load of the District Court as well as of Local Courts.[2] This in turn may place demands upon court facilities and staff which will require further adjustments. Changes in the money limit should be made with knowledge of the capacity of these courts to cope with the adjusted volume of litigation as well as in the light of an appropriate sum above which the costs and formality of

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1. Differences between magistrates courts and superior courts in civil matters in various jurisdictions comparable to Western Australia include such features of magistrates court proceedings as -

   (i) the lack of extensive pleadings,
   (ii) in some cases leave being required to interrogate or to discover documents,
   (iii) the extensive use of default proceedings,
   (iv) sometimes the absence of a summary judgment procedure,
   (v) generally lower scales of party/party costs and sometimes the lack of party/party costs in small matters, and
   (vi) sometimes the use of affidavit evidence subject to notice and objection in ordinary civil actions.

2. Accurate assessment of these effects is difficult in any event, but is almost impossible in the absence of appropriate Local Court and District Court statistics.

District Court litigation are justified. Further, any changes in the money limits of jurisdiction must be made in the knowledge that there is a need to preserve simple procedures for large numbers of small undefended matters yet provide appropriate mechanisms for the resolution of complex problems involving significant sums of money.

(b) The need for periodic review by an expert body

5.8 There is a need for periodic review of the money jurisdictional limit especially in times of rapidly changing money values. Such a review would need to take into account the matters referred to in paragraph 5.7. The Commission's proposals for regular review of the working of Local Courts and of the Act and Rules are relevant to this, especially as the question also affects the jurisdiction and working of the District Court and affects the legal profession and the public.[1] An overall view of the matter is therefore required before any change is made to jurisdictional limits.

(c) Amendment by proclamation

5.9 Subject to the need for appropriate regular review, consideration might be given to provisions permitting the money limit to be increased by proclamation (as, for example, is the case in the English County Courts[2]) as this would enable the jurisdictional limit to be kept up to date more regularly than is likely to be the case if amendment by Parliament is required.[3]

5.10 Given the factors referred to above, and the desirability of expert and regular review in future, the Commission sees no immediate need to amend the present jurisdictional money limits. This is especially so as the jurisdictional money limit has very recently been amended by Parliament and there seems to be no good reason for

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1. See chapter 20 below.

2. (Eng) County Courts Act 1959, s 192. The restriction to increases in jurisdiction effectively prevents the County Courts being rendered of little consequence without express Parliamentary enactment by a reduction in jurisdiction by proclamation.

3. The Commission suggested this in its report on Small Debts Court (Project No 63, 1979) para 4.21 footnote 28. The New South Wales Law Reform Commission made a similar suggestion in its Working Paper on the Courts, 1976, para 11.1.2.

the Commission to recommend another figure at this time. However the Commission will reconsider the matter when submitting its final report.

(d) Relationship to the Small Debts Division

5.11 The Commission's earlier recommendation[1] that the Small Debts Division of Local Courts be given jurisdiction to determine certain claims for sums not exceeding $1,000 was intended to parallel the money limit of the Small Claims Tribunal. This figure of $1,000 may now be in need of further review. The effect of inflation has been to halve money values between 1975 and 1982.[2] The Commission recommended further that the jurisdiction of the Small Debts Division be limited to claims including, but not necessarily limited to, claims for debt or other liquidated demand.[3] At the same time it foresaw the possibility of an expansion in that jurisdiction, should experience with the Division prove satisfactory. It also made certain proposals for a magistrate to order that particular matters be dealt with as ordinary Local Court proceedings. These latter recommendations have been implemented.[4]

(e) Relationship to Small Claims Tribunals

5.12 The relationship between Local Courts and Small Claims Tribunals should also be borne in mind. Since the money jurisdiction of the Small Debts Division of Local Courts and of Small Claims Tribunals should coincide, and as one or more transactions between the same parties may lead to claims and counterclaims, some of which

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1. See the Commission's report on Small Debts Court (Project No 63, 1979) para 4.21.

2. In Victoria Small Claims Tribunals jurisdiction was increased from $1,000 to $1,500 in January 1982. In Queensland the Small Claims Tribunal jurisdiction has recently been increased from $1,000 to $1,500: (Qld) Dividing Fences Act and Another Act Amendment Act 1982. In the Australian Capital Territory Small Claims Tribunal jurisdiction has recently been increased to $2,000: Small Claims Tribunal Ordinance, 1982. In Canada the jurisdiction of Small Claims Courts is now $3,000 in New Brunswick and in metropolitan Toronto and $2,000 in Nova Scotia, Prince Edward Island and British Columbia. The Manitoba Law Reform Commission has recommended a jurisdiction of $3,000 in respect of its proposed Small Claims structure.

3. That is, plaintiffs should be permitted to add other claims to such a claim. Further there should be no limit on the nature of permitted counterclaims.

4. By s 106F of the Local Courts Amendment Act 1982.

may be for liquidated claims and others for unliquidated damages, provision should be made to enable each to remit matters to the other, if within the jurisdiction of the other, either by consent of the parties, by application of one of the parties or by the court or tribunal's own motion in appropriate cases. At present once Small Claims Tribunal proceedings are commenced the issue is not justiciable by any other court or tribunal, unless proceedings have already been commenced between the same parties on the same issue in that court or tribunal prior to the small claims proceedings being commenced.[1] There is also a power in a Small Claims Tribunal to refuse jurisdiction where the matter involves such a complex point of law as to warrant the matter being dealt with in a court.[2] Except for this last qualification matters are thus heard in the court or tribunal in which the first claim is made. This, however, may not always be the most suitable forum. In remote areas or when more than one matter is in dispute between the parties, flexibility may be desirable.

3. PERSONAL ACTIONS

5.13 The jurisdiction vested in Local Courts by section 30 is limited to "personal actions". Shortly, a "personal action" is one in which a plaintiff claims either the recovery of a debt or liquidated or unliquidated damages for some injury to his person or property, or the recovery of a chattel or damages in lieu.[3] It is distinguished

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1. Small Claims Tribunals Act, s 17(1). The Victorian Small Claims Tribunal may refuse to hear a matter due to the nature or complexity of the issues arising but there can be no transfer of proceedings to another forum. In Western Australia the Small Claims Tribunals Act appears to make no provision either for a tribunal to refuse to hear a matter or for the transfer of proceedings to another forum. In the Commission's tentative view both such provisions might usefully be adopted, although only the latter is probably within this Commission's terms of reference and then only in relation to the transfer of proceedings between Small Claims Tribunals and Local Courts. The Commission seeks comment on these possibilities.

2. Ibid, s 17(3).

3. Personal actions, historically, were actions which were in England the subject of one of the forms of action known as personal actions, that is debt, covenant, account, assumpsit, trespass, trover, case, replevin, and detinue. Detinue was a personal action since the defendant could elect to satisfy a judgment not by returning the goods but by paying their value. Blackstone in his Commentaries (3 Bl Com 117) described personal actions as being:

> "such whereby a man claims a debt, or personal duty, or damages in lieu thereof; and likewise whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon torts or wrongs."

from a "real action" which is an action claiming title to or possession of real property.

5.14 The forms of action at common law, from which the distinction between real and personal property grew, have long been abolished but the reference to "personal actions" in jurisdictional provisions relating to courts of inferior jurisdiction is one commonly found and which appears to give little difficulty. Similar phraseology is used in section 50 of the District Court Act, and in legislation in Queensland, South Australia, Victoria and elsewhere. The meaning of the phrase in the Local Courts Act is, however, obscured by the definition of "action" to include "suit"[1] which is a term usually used in respect of proceedings in equity or in divorce.

5.15 Some jurisdictions have attempted to modernise the provisions relating to the basic jurisdiction of civil courts of inferior jurisdiction. For example, English County Court jurisdiction is now defined in terms of "any action founded on contract or tort where the debt, demand or damage claimed" is within the jurisdictional limit. In New South Wales jurisdiction is given to Courts of Petty Sessions in respect of "actions for -

(a) the recovery of any debt, demand or damage, whether liquidated or unliquidated; or

(b) the detention of goods".

5.16 While the attempt to avoid the old terminology of "personal actions" has some justification, attempts to create modern categories of legal proceedings may also be open to criticism. For example, jurisdiction based on "contract or tort" seems open to difficulties in "quasi-contract" or "restitution" situations. On the other hand, any attempt to list the types of action which are to be within the jurisdiction of Local Courts in detail would involve a lengthy list yet risk omitting appropriate categories on the one hand and creating classification difficulties in individual cases on the other.[2]

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1. By s 3.

2. See, for example, the list formerly set out in (ACT) Court of Petty Sessions Ordinance 1930, ss 20 and 20A but now replaced by the (ACT) Courts of Petty Sessions (Civil Jurisdiction) Ordinance 1982, s 5 which vests jurisdiction in respect of "personal actions at law". Some jurisdictional provisions selected from English and Australian provisions are set out in Appendix II. .

5.17 The Commission is also mindful of the need to maintain a logical and clear division of jurisdiction between Local Courts and the District Court as well as between actions in the Small Debts Division and other Local Court actions and between Local Courts and Small Claims Tribunals. The Commission seeks suggestions as to the most desirable course.

4. EXCEPTIONS

5.18 As pointed out above, section 30 which vests jurisdiction in Local Courts to hear personal actions not involving claims of more than $6,000 also provides that except as otherwise provided in the Act, Local Courts are to have no jurisdiction to hear any action -

(i) in ejectment,[1]
(ii) in which the title to land is in question,[2]
(iii) in which the validity of a devise, bequest, limitation under a will or settlement is in question,
(iv) for libel or slander,
(v) for seduction, or

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1. As well as personal actions and real actions there were also at common law certain "mixed" actions, including ejectment, in which possession of real property might be demanded as well as damages for a wrong sustained. Although by s 30, Local Courts are refused jurisdiction to hear and determine actions in ejectment this is save as expressly provided by subsequent provisions of the Act. Part VI confers jurisdiction on a Local Court to hear claims for recovery of the possession of land in certain circumstances. Those provisions and certain associated questions will be considered in chapter 6 below.

2. By s 30, if the title to land incidentally comes in question in an action, the court is given power to decide the claim which it is the immediate object of the action to enforce, but the judgment of the court is not evidence of title between the parties or their privies in another action in that court or in any proceedings in any other court. Similar provisions exist in some other Australian jurisdictions. The Full Court of Western Australia in Donnelly v Day [1972] WAR 6, in which the defendant to a summons for recovery of possession of land issued under s 103 claimed to be entitled to the equitable fee simple in the land as purchaser, held that s 30 excluded jurisdiction to hear and determine the action. Whilst it is not sufficient merely to raise a bare claim of title the raising of an arguable issue of title deprives a Local Court of jurisdiction to determine the issue and in that sense "shows reasonable cause", within the meaning of s 103, why a Local Court should not issue a warrant for the recovery of possession of the land. Section 103 is one of the provisions which give to Local Courts a limited jurisdiction in actions for recovery of possession of land.

(vi) for breach of promise of marriage.[1]

5.19 The jurisdiction of comparable courts of inferior civil jurisdiction in respect of the matters excluded from the jurisdiction of Local Courts in Western Australia varies.[2]

5.20 Basically, the Commission suggests, jurisdiction should be vested in Local Courts by reference to the money amount in issue rather than to subject matter or remedy. Jurisdictional disputes are fruitless and costly and should be avoided where possible. At the same time the more costly and formal procedures of the District Court and Supreme Court should not be imposed where litigation involves

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1. Actions for damages for breach of promise of marriage were abolished by the (Cth) Marriage Amendment Act, 1976, s 23. Reference to them in the Local Courts Act should therefore be deleted. However, actions for the recovery of gifts given in contemplation of marriage were not abolished. They seem to be, and should be, within the jurisdiction of Local Courts. Such actions might well be for relatively small amounts not justifying proceedings in either the District Court or the Supreme Court.

2. For example, in New South Wales the matters excluded from the jurisdiction of Courts of Petty Sessions include cases where the validity or effect of any devise, bequest or limitation under any will or settlement, or under any document in the nature of a settlement, is disputed; actions for passing-off, wrongful arrest, false imprisonment or malicious prosecution, or for or in the nature of defamation, or for seduction or enticement, or for breach of promise of marriage; actions for infringement of letters patent or copyright; actions for the detention of goods, comprised in a hire-purchase agreement, by the owner of those goods, or any person acting on his behalf; and actions in which the title to land is in question: (NSW) Courts of Petty Sessions (Civil Claims) Act 1970-1980, s 19. In Victoria matters excluded from the jurisdiction of Magistrates Courts include actions where the matter in question relates to the taking of a duty to Her Majesty or a fee of office; for any money or thing won at or by means of a race, match, wager, raffle or any kind of game; or where the validity or effect of a devise, bequest or limitation under a will or settlement or document in the nature of a settlement is disputed; or actions for infringement of trade names or in the nature of slander of title; or illegal arrest, false imprisonment, or malicious prosecution, or for or in the nature of defamation, or for seduction, or for breach of promise of marriage: (Vic) Magistrates' Courts Act, 1971, s 51. The English County Courts have a limited jurisdiction to determine actions in which title to land comes into question, which is not possessed by Local Courts in Western Australia: (Eng) County Courts Act 1959, s 51. Canada also limits the jurisdictional powers of courts of inferior civil jurisdiction in similar forms. For instance, County Courts of Manitoba do not have jurisdiction to grant injunctions, specific performance, foreclosure or sale of mortgaged premises, ejectment or recovery of land, administration of estates or trusts or to deal with questions of the validity of the devise or bequest or limitation.

small amounts of money, except with good reason such as the specialisation of other courts or tribunals[1] or the complexity of subject matters or remedies involved. Where the amount of money involved is small and the costs of proceeding in a court of superior civil jurisdiction disproportionately high, jurisdiction should be available to Local Courts in these matters. Concurrent jurisdiction will continue to be exercised by the Supreme Court and District Court and in many appropriate cases no doubt proceedings will be commenced in one of those Courts.

5.21 Despite those general propositions, it is clear that courts of inferior jurisdiction created by statute may exercise jurisdiction only within the limits permitted by the statutory provisions and that detailed consideration must be given to categories of disputes as to which jurisdiction should be limited not only in money terms but in the range of proceedings encompassed.

5.22 The Commission tentatively considers that some of the six classes of exception to Local Court jurisdiction referred to in paragraph 5.18 can be removed.

5.23 Actions in ejectment or recovery of possession of land, are further considered in chapter 6. Actions in which title to land is in question are traditionally excluded from the jurisdiction of Australian courts of inferior civil jurisdiction, although English County Courts now have limited jurisdiction to determine such matters. While, on the one hand, it may be thought that such matters if they concern money sums otherwise within Local Court jurisdiction are unlikely to be numerous or to involve issues and amounts such as necessarily to require determination by a Supreme Court or District Court judge, it may well be that such proceedings involve rights and liabilities of third parties or conceptual issues well outside the normal range of Local Court proceedings. Similar considerations might well apply to actions in which the validity of a devise, bequest or limitation under a will or settlement is in question. If jurisdiction were conferred on Local Courts in such matters provision could be made, similar to that now found in section 30, that the judgment of the court shall not be evidence between the parties in that court or any other court. This

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1. As, for instance, with claims for damages for death or personal injuries arising out of the use of a motor vehicle discussed in para 5.24 below.

may however defeat the purpose of vesting jurisdiction in Local Courts in many cases. Actions for libel, slander, seduction or the recovery of gifts given in contemplation of marriage on the other hand raise no such issues. The Commission seeks comment as to whether, and which, of these categories of exception should continue to apply to Local Court jurisdiction. Adequate provision should, however, be made for matters of a complex or important nature to be removed for hearing in a court of superior civil jurisdiction in appropriate cases.[1]

5. PERSONAL INJURIES CLAIMS

5.24 One result of an increase in the money jurisdiction of Local Courts might be that such courts are more likely to become involved in hearing actions for damages in respect of death or personal injuries. Many - but not all - will have arisen out of motor vehicle collisions. It might be thought that such claims arising out of motor collisions constitute a specialised jurisdiction best dealt with by the District Court which has an unlimited jurisdiction in such matters. Such actions if commenced in the Supreme Court are almost always remitted to the District Court. Very few such claims are presently commenced in Local Courts.[2] No doubt there are a number of reasons for this including uncertainty as to the appropriate quantum of damages, the lower solicitors' costs available in Local Court proceedings, habit and a desire to have the claim determined by District Court judge experienced in hearing such claims rather than a magistrate. A specialised jurisdiction in relation to actions for compensation for death or personal injuries suffered in the course of employment exercised by the Workers Compensation Board has long been established. On the other hand, the comments made in paragraph 5.20 support the view that Local Courts should have general civil jurisdiction in matters involving less than the fixed money jurisdiction. Such a jurisdiction is conducive in any event to

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1. For example, under s 75 of the District Court Act. Note also ss 76 and 77 of that Act. Also note s 114 of the Local Courts Act discussed in para 17.8 below. As to removal of proceedings between superior courts and Local Courts see also paras 5.47 to 5.53 below.

2. Between 1 January 1982 and 31 July 1982, 617 District Court writs claiming damages for such injuries were brought to the attention of the Motor Vehicle Insurance Trust but only one summons involving Local Court proceedings.

attracting magistrates of high calibre. A major objection to any exclusion of Local Court jurisdiction in favour of the District Court is that litigation of the type concerned will relate to relatively small money amounts but will attract disproportionately higher costs and fees.[1]

6. JURISDICTION CONFERRED BY SECTION 31

5.25 By section 31 of the Act the jurisdiction of Local Courts is extended to the recovery of any demand not exceeding $6,000 "which is the whole or part of the unliquidated balance of a partnership account, or the amount or part of the amount of the distributive share under an intestacy or of a legacy under a will". This gives jurisdiction in claims on the unliquidated balance of partnership accounts where the partnership has already been dissolved but the accounts have not yet been finalised and thus the balance due to a particular partner is not liquidated. The Court could order the taking of the account. This is an equitable procedure. However the section gives no jurisdiction where the partnership is still on foot,[2] and the section does not carry with it the equitable jurisdiction to dissolve a partnership. A liquidated balance after dissolution may be recovered under the general jurisdiction conferred by section 30. Section 31 also gives a limited jurisdiction to recover amounts normally only recoverable in a court of equity, namely a share under an intestacy or a legacy under a will. Similar provisions are found in statutes relating to the constitution of civil courts of inferior jurisdiction in other States. By section 9 of the Acts Amendment (Jurisdiction of Courts) Act 1981 the equivalent provisions of section 50 of the District Court Act have now been clarified. The jurisdiction of the District Court is now expressed as extending to:

> "(b) an action brought to recover a sum of not more than fifty thousand dollars which is the whole or part of the unliquidated balance of a partnership account, including in any such action jurisdiction, powers and authority relating to declaration of partnership or dissolution of partnership;

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1. Any exclusion of Local Court jurisdiction in this area therefore in any event be accompanied by consideration of appropriate amendments to the scales of costs applied in the District Court, unless the complexity of the matter justifies the higher costs and fees normally appropriate to District Court proceedings.

2. See dicta of Hensman J in Marshall Bros v Weston 4 WALR 99.

(ba) an action brought to recover a sum of not more than fifty thousand dollars which is the amount or part of the amount of the distributive share under an intestacy or of a legacy under a will;

(bb) an action for specific performance of or for the rectifying, delivering up, or cancelling of any agreement whatever, where the amount in dispute or the value of the property affected is not more than fifty thousand dollars;"

The Commission tentatively takes the view that amendments in the same terms should be made to the Local Courts Act, subject only to the appropriate money difference.

5.26 By section 39, if both parties agree by a memorandum, signed by them or by their solicitors and filed when the summons is issued, that any specified Local Court shall have jurisdiction to try any civil action which might be brought in the Supreme Court, that Local Court shall have jurisdiction to try the action. The memorandum must state that the parties know that the action is not otherwise within the jurisdiction of the court. The Commission seeks comment on whether this provision is used and on its desirability. Its relationship to the general powers of Local Courts to grant remedies is not clear.[1]

7. FURTHER EQUITABLE JURISDICTION AND REMEDIES

5.27 The historic distinction between those proceedings and remedies available at common law and those available in equity poses difficulties in determining the extent to which civil jurisdiction should be vested in courts of inferior jurisdiction.

5.28 The jurisdiction of Local Courts in respect of equitable claims, apart from the provisions of section 31, is basically contained in section 32, which provides that in any case in which a person has an equitable claim or demand against another person in respect of which the only relief sought is the recovery of a sum of money or of damages, whether liquidated or unliquidated, and the amount claimed is not more than $6,000 the person seeking to enforce the claim or demand may sue for and recover it in a Local Court. This provision

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1. In South Australia, for example, the words "without any limit as to the amount of the claim" are added. It seems desirable to limit s 39 to conferring monetary jurisdiction.

permits claims such as those for money due under an express or implied trust. However, the section is limited to claims in which the only relief sought is one for money.

5.29 The following section, section 33, provides:

> A Local Court shall, as regards all causes of action within its jurisdiction, have power to grant, in any proceeding before such court, such relief, redress or remedy, and in every such proceeding to give such and the like effect to every ground of defence or counterclaim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might be done in the like case by the Supreme Court.

This section is in similar terms to section 74 of the English County Courts Act 1959, and section 55 of the District Court Act, and is again derived from old English precedents.

5.30 Academic writings have suggested that the result of these provisions is unclear and unsatisfactory and that Local Court jurisdiction in respect of both equitable jurisdiction and the granting of equitable relief should be made clear.[1] One view of these provisions is that because section 32 limits the jurisdiction of the Local Courts in equitable claims to those in which the only relief sought is the recovery of money or damages, it follows that where the claim is equitable rather than legal, ancillary equitable remedies are not available, whereas if the claim is in law, ancillary equitable remedies may be given under section 33.[2] The Commission accepts

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1. See D R Williams, Equitable Remedies in the Inferior Courts, ("Williams") a paper given at the 1977 Law Society of WA Law Summer School, and S Owen-Conway, The Equitable Jurisdiction of the Inferior Courts in Western Australia, 1979, 14 UWA Law Rev 150 ("Owen-Conway"). The similar but not identical provisions in the District Court are discussed in Elliott v Palmiero and Petrucci [1978] 1 SR (WA) 173, in Hondros and Tholet v Chesson (1981) WAR 146 and in Meagher, Gummow and Lehane's Equity - Doctrines and Remedies paras 245-247. The Commission has also been provided with a copy of an opinion given by Mr John Wickham, as he then was, on the extent of Local Court equitable jurisdiction.

2. Williams, 12-13. Mr Wickham, in the opinion referred to concluded that:

> "the Local Court has jurisdiction in declaration, injunction, specific performance and in orders of the nature of specific performance by way of specific relief including a tracing order in equity and account, but that each is limited to the case where the money claim if granted would not exceed the

that not only is the effect of the two sections on each other unclear but that on at least some views the result is unsatisfactory.

5.31 For purposes of simplicity and consistency, the Commission's tentative view is that Local Courts should have basically the same civil jurisdiction and powers as the District Court save only as to money limits. Assuming, contrary to Owen-Conway's view, that Hondros and Tholet v Chesson[1] is correctly decided, the result would be to vest in Local Courts power to give ancillary or interlocutory equitable relief in a money claim within the jurisdiction of the court but not where there is no money claim within the juridiction of the court or no money claim at all.[2]

> jurisdiction of the Court and that it is not open to a plaintiff to split claims for damages or money or to reduce a claim so as to give the Court an apparent monetary jurisdiction and thereby clothe it with an extended ancillary jurisdiction. On the other hand this ancillary jurisdiction is in no way limited by the original jurisdiction in equity conferred by Section 32, see Bourne v McDonald (1952) All ER 183 (CA) and Snell's Principles of Equity 26 ed p 23 and neither is the consent jurisdiction limited in any way providing the rules are strictly observed."

Owen-Conway, on the other hand, while acknowledging the difficulty of reconciling ss 32 and 33 disagrees with both these views as to the effect of the sections. Owen-Conway regards s 33 as not vesting power to exercise jurisdiction over equitable claims, or to administer the equitable remedies, either generally or as ancillary where a plaintiff establishes a claim for primary relief. In his view, s 33 enables a defendant to take advantage of any defence or counterclaim whether equitable or legal in as ample a manner as might be done in the Supreme Court, whereas s 32 merely enables Local Courts to entertain purely equitable claims where the only relief sought is the recovery of a sum of money or damages.

1. (1981) WAR 146.

2. One other question which arises is whether Local Courts have or should have power to make declaratory orders. In the Supreme Court Order 18 rule 16 of the Supreme Court Rules provides that:

> "No action or other proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed."

Since the Rules of the Supreme Court apply also in District Court proceedings, this provision also applies in District Court matters. Comment is sought as to whether a similar provision should be made in the Rules of the Local Court.

5.32 The Commission believes first that the jurisdiction of Local Courts should be clearly and comprehensively set out and secondly that ideally Local Courts should be given all powers necessary to deal with matters within that jurisdiction. However, it would be incongruous to vest in Local Court magistrates remedial powers not exercisable by judges of the District Court. It is beyond the Commission's terms of reference to consider whether there is a need also to reconsider the jurisdiction and powers of the District Court but this should no doubt logically be considered at the same time as any review of the position in Local Courts.[1] The Commission is concerned to set out the jurisdiction and powers of Local Courts simply and clearly while at the same time providing litigants with a sufficient range of effective remedies.

5.33 Another - and important - difficulty which would arise from any wide extension of remedies available in Local Court proceedings is that enforcement of some orders such as injunctions or accounts requires an adequate system of administrative support, not now always available in Local Courts. For example, in some matters, accounts of complexity might need to be taken. Accounts can already be ordered to be taken by the clerk by a magistrate, pursuant to section 77. The Commission has received one submission to the effect that some clerks at least are not adequately trained for this purpose. The most important equitable remedies are orders for specific performance and injunctions. Detailed bodies of law and practice have built up around these remedies. There is little use made of either of them as ancillary remedies in Local Courts at present, although jurisdiction

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1. This is not to suggest that the provisions of the District Court Act which express the jurisdiction and powers of the District Court are without difficulty. The papers by Williams and Owen-Conway referred to earlier raise certain difficulties which arise out of those provisions. However, study of alternative provisions in use in other States and Territories of Australia and of the provisions of the English County Courts Act does not suggest any better solution. Further the possibility raised by Owen-Conway that the courts of inferior civil jurisdiction be invested with the same equitable jurisdiction as the Supreme Court by the addition of the provisions of s 24 of the Supreme Court Act to the District Court Act and the Local Courts Act would effect a profound change in the range of matters which could be brought before those courts of inferior jurisdiction. Such a position has not been adopted elsewhere. In the Commission's view a preferable approach may be to make specific provision setting out those remedies and orders which it is thought appropriate for courts of inferior civil jurisdiction to exercise.

to order them exists as ancillary orders in a wide range of actions.[1] Rectification of documents is however one equitable remedy which might be called upon in a number of Local Court proceedings.

5.34 The Commission refers later in this working paper to procedures whereby matters commenced in a Local Court may be transferred to the District Court. A relatively simple and inexpensive appeal system exists from a Local Court to a judge of the District Court.[2] The Suitors Fund Act 1964-1978 section 10(2) also contains provisions which will in many cases protect litigants from the costs of appeals arising out of errors of law made by magistrates presiding in Local Court proceedings.[3] These provisions both engender confidence in vesting greater jurisdiction and wider powers in Local Courts and also seem to make it unnecessary to consider vesting in magistrates in Local Court proceedings power to state a case on a point of law or to remit a matter to the District Court or the Supreme Court for directions.[4]

8. OTHER MATTERS

(a) Counterclaims

5.35 Section 34 provides, in summary, that where a defence or counterclaim involves matters beyond the jurisdiction of a Local Court, either because it involves an amount exceeding $6,000 or involves other issues outside the court's jurisdiction, the defence or counterclaim does not affect the competence of the court to dispose of the whole matter in controversy so far as relates to the plaintiff's

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1. For example, injunctions might be useful by way of preventing further nuisances. Specific performance might be ordered in a number of building dispute actions or cases involving non-performance of contracts relating to chattels.

2. See chapter 17 below.

3. In its report on The Suitors' Fund Act: Civil Proceedings the Commission recommended amongst other matters that the Suitors' Fund Act be amended to raise the limits of compensation and to extend the compensable classes of proceedings to include appeals of fact as well as of law: Project No 49, Part A, 1976. The report has not yet been implemented.

4. A similar view was taken by the Law Reform Commission of the Australian Capital Territory in its report on Civil Procedure of the Court of Petty Sessions, 1972, para 2.38.

claim and the defence to it. Further, the jurisdiction of a Local Court, in case of a counterclaim, is not excluded merely because -

(a) where the counterclaim involves more than one cause of action, as to each of which the defendant might have maintained a separate action, each being within the jurisdiction of the court, the aggregate amount exceeds the jurisdiction; or

(b) the counterclaim is for an amount exceeding the jurisdiction provided that the plaintiff does not object in writing.

However, in no case may relief beyond that which the court has jurisdiction to administer be given upon the counterclaim.

5.36 Where a defence or counterclaim involves matters beyond the jurisdiction of Local Courts the Supreme Court may order the whole proceeding transferred to the Supreme Court.[1] The court may, on terms if necessary, either adjourn the hearing or stay execution to enable any party to apply to remove the proceedings to the Supreme Court or to enable the defendant to prosecute his counterclaim in that court. In default of such an application or action the court has jurisdiction to determine the whole matter as if all parties had consented.

5.37 The section should be amended to take account of the possibility of proceedings being removed to the District Court under section 75 of the District Court Act.[2]

5.38 The English County Courts Act also permits proceedings to be transferred to the High Court either as a whole or only in relation to the counterclaim or set-off and counterclaim.[3] Such a provision would seem desirable.

(b) Rules of law enacted by the Supreme Court Act

5.39 Section 35 of the Local Courts Act provides that "the several rules of law enacted and declared by the Supreme Court Act

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1. Section 34(1), (3).

2. As to removal of proceedings between superior courts and Local Courts generally see also paras 5.47 to 5.53 below.

3. (Eng) County Courts Act 1959, s 65.

1935-1979 shall be in force and receive effect in Local Courts, so far as the matters to which such rules relate shall be respectively cognisable by such courts". This provision is similar to that contained in section 57 of the District Court Act. It is repeated by section 34 of the Supreme Court Act and therefore seems to be unnecessarily duplicated.

5.40 Further, there seems to be room for doubt as to the precise meaning of section 35 of the Local Courts Act and section 57 of the District Court Act. The "several rules of law enacted and declared by the Supreme Court Act" include those set out in section 25 of that Act. Some of these have subsequently been repealed in that Act and replaced by provisions in the Property Law Act 1969-1979, but these are no doubt still applicable in Local Courts by virtue of section 14 of the Interpretation Act 1918-1980. Other rules of law are also, however, enacted by the Supreme Court Act.[1] It would seem preferable to set out by specific reference in either the Local Courts Act or the Supreme Court Act those provisions to which the section intends to refer.[2]

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1. For example, s 32 of the Supreme Court Act confers power on the Supreme Court to allow interest to a creditor in certain cases at trial. This section is applied in Local Court proceedings under s 35 of the Local Courts Act and also s 34 of the Supreme Court Act.

2. The Commission notes that s 49 of the English Supreme Court Act 1981 has restated the relationship between law and equity, the right to equitable relief, the question of joinder of causes of action and related matters formerly the subject of the English Supreme Court of Judicature (Consolidation) Act 1925, ss 36 to 44 in the following compact way:

> "49. Concurrent administration of law and equity
> (1) Subject to the provisions of this or any other Act, every court exercising jurisdiction in England or Wales in any civil cause or matter shall continue to administer law and equity on the basis that, wherever there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.
>
> (2) Every such court shall give the same effect as hitherto -
>
> (a) to all equitable estates, titles, rights, reliefs, defences and counterclaims, and to all equitable duties and liabilities; and
>
> (b) subject thereto, to all legal claims and demands and all estates, titles, rights, duties, obligations and liabilities existing by the common law or by any custom or created by any statute,

(c) Abandoning the excess of a claim

5.41 Section 59 permits a plaintiff to abandon the excess of a claim over $6,000 to enable a Local Court to have jurisdiction in the matter. The Local Courts Amendment Act 1982 provided that an excess of a claim over $1,000 may be abandoned where proceedings are to be dealt with in the Small Debts Division.[1]

(d) Submission to the jurisdiction of the court

5.42 One matter as to which the present Local Courts Act and Rules are silent concerns the question of submission to the jurisdiction of a Local Court. Where a defendant wishes to contest the jurisdiction of the Supreme Court[2] or does not wish to waive an irregularity in the proceedings the Rules of the Supreme Court[3] permit him to enter a conditional appearance. This both preserves the defendant's rights and prevents the plaintiff from obtaining a default judgment. The Local Courts Act and Rules make no such provision. A defendant at present is bound either to file a notice of defence or to risk a default judgment being entered by the plaintiff and then seek to set it aside. If he files notice of defence and takes any steps in the proceedings he may be taken to have waived the

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and, subject to the provisions of this or any other Act, shall so exercise its jurisdiction in every cause or matter before it as to secure that, as far as possible, all matters in dispute between the parties are completely and finally determined, and all multiplicity of legal proceedings with respect to any of those matters is avoided.

(3) Nothing in this Act shall affect the power of the Court of Appeal or the High Court to stay any proceedings before it, where it thinks fit to do so, either of its own motion or on the application of any person, whether or not a party to the proceedings.

50. Power to award damages as well as, or in substitution for, injunction or specific performance
Where the Court of Appeal or the High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance."

1. Now see Local Courts Act, s 106C.

2. For example, because the proceedings have no connection with Western Australia. The same provisions apply in the District Court.

3. Order 12 rule 6.

question of jurisdiction and any irregularities in the summons or its service.[1]

5.43 One possibility is for provision to be made in the Local Court Rules for a party to dispute the jurisdiction of the court by entering a conditional notice of defence. Alternatively provision could be made that entry of notice of defence shall not constitute submission to the jurisdiction of the court.[2] It may also be desirable to enable a defendant to apply to the Supreme Court for a declaration that the Local Court has no jurisdiction. Alternatively provision could be made that consent to the jurisdiction might only be effected affirmatively rather than by implication from the filing of notice of defence.

(e) Territorial jurisdiction

5.44 One matter not specifically referred to in the present Local Courts Act relates to the territorial jurisdiction of Local Courts in relation to matters arising outside the State.[3] In some jurisdictions the legislation relating to courts of inferior jurisdiction specifically deals with this matter. Section 68 of the Victorian Magistrates' Court Act, 1971 provides that:

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1. But see, for example, Clarke Bros v Knowles [1916-1917] All ER Rep 604.

2. A provision which would give the same result would be one similar to Order 12 rule 7 of the English Rules of the Supreme Court by which an acknowledgement of service does not constitute a submission to the jurisdiction or a waiver of any irregularity. It provides as follows:

> 7. The acknowledgement by a defendant of service of a writ or notice of a writ shall not be treated as a waiver by him of any irregularity in the writ or notice or service thereof or in any order giving leave to serve the writ or notice out of the jurisdiction or extending the validity of the writ for the purpose of service.

A similar provision is found in s 35(2) of the Australian Capital Territory Court of Petty Sessions (Civil Jurisdiction) Ordinance 1982.

3. It was held in McDougall v Nuylassy (1908) WALR 147, that the jurisdiction of Local Courts is not limited in respect of subject matter to causes of action arising in Western Australia and that Local Courts have jurisdiction over claims against defendants residing within their district, arising out of contracts made in other States. The same view seems to have been accepted elsewhere in relation to similar statutes. See, for example, National Bank of Australasia Ltd v Trout (1979) 2 NZLR 303.

A Magistrates' Court may hear. . .every complaint for a cause of action in respect of which jurisdiction is conferred upon it. . .

(a) where part of the cause of action arose outside Victoria but a material part thereof arose in Victoria; or

(b) where the whole cause of action arose outside Victoria but the defendant resided within Victoria at the time of the service of the summons upon him.

Section 17 of the New South Wales Court of Petty Sessions (Civil Claims) Act, 1970-1980 gives jurisdiction "notwithstanding that the defendant or one of two or more defendants is not within New South Wales", and "(a) whether the defendant or one of two or more defendants has or has not ever been resident or carried on business in New South Wales; and (b) whether the cause of action arose before or after the commencement of this Act."

5.45 It may however be desirable to be even more specific as to when jurisdiction should be exercised. As a guide to accepted principles of the appropriate "territorial" jurisdiction of courts notice can be taken of the Commonwealth Service and Execution of Process Act 1901-1981. Section 11 of that Act provides that where service has been effected outside the territory of the State, the proceedings may continue in certain circumstances including circumstances in which the subject matter of the suit is -

(1) land or other property within the State,

(2) shares or stock of a corporation or company having its principal place of business within the State,

(3) any deed, will, document or thing affecting any such land, shares, stock or property,

(4) any contract made or entered into within the State in respect of which relief is sought,

(5) the breach within the State of a contract wherever made,

(6) that any act or thing sought to be restrained or removed or for which damages are sought was done or is to be done or is situate within the State, or

(7) such that the defendant was within the State when liability arose.

A different but in some respects similar list is set out in Order 10 of the Rules of the Supreme Court. That Order permits service of process outside Western Australia with the leave of the court in certain listed cases. As well as other circumstances similar to those referred to in section 11 of the Service and Execution of Process Act, Order 10 refers for example to situations in which "relief is sought against a person domiciled or ordinarily resident in Western Australia" and a number of other heads involving property, residence or domicile within the jurisdiction or the performance or non-performance of acts within the jurisdiction or the application of the law of Western Australia. The Commission seeks comment as to whether, and if so what, provisions as to territorial jurisdiction should be set out in the Local Courts Act.

(f) Persons under disability

5.46 There is also the problem of approval of compromises or settlements of claims by infants and other persons under disability. There are no provisions in the Local Court Rules equivalent to those of Order 70 rules 10 to 12 of the Rules of the Supreme Court expressly dealing with approval of compromises or settlements of claims by infants and other persons under disability. Similar provisions appear, for example, in the Australian Capital Territory Court of Petty Sessions (Civil Jurisdiction) Ordinance 1982, ss 94 and 95 and the Northern Territory Local Courts Rules 1941-1979, rules 34 to 39. These provide that in proceedings for damages claimed by or on behalf of an infant or other incapable person any settlement, compromise or acceptance of money paid into court, must first be approved by the court. These provisions also deal with the payment out of those moneys to the Public Trustee or such other person as the stipendiary magistrate approves. In Reid v Nundle, District Court No 1019 of 1981 unreported, his Honour Judge O'Connor held however that the combined effects of section 30, giving Local Courts jurisdiction in all personal actions within the money jurisdiction subject to the prescribed exceptions, and section 158(1), which gives the Governor power to make rules of court prescribing the practice of the courts and the forms of proceedings therein, and of Order 3 rule 9 and rule 15, which permits infants to sue as plaintiffs by their next friend and sets out details, and also of section 49(1), which permits defendants to pay into court with or without a denial of liability, and Order 9 rule 15, which deals with the consequential procedure, Local Courts have power to compromise infants' claims, notwithstanding that

no express jurisdiction to do so is conferred as is done in the case of the Supreme Court and District Courts. Perhaps such jurisdiction in the case of infants and other persons under disability should be more clearly spelled out in similar terms to those applying in Supreme Court proceedings.

9. REMOVAL OF PROCEEDINGS TO AND FROM SUPERIOR COURTS

5.47 The problems inherent in properly limiting and defining the jurisdiction of courts exercising inferior civil jurisdiction makes it necessary to ensure that actions commenced in one tier of the court structure can be readily removed to another tier of the court structure if it is shown that the original choice was or has become inappropriate. Simple actions within the money and other jurisdiction of Local Courts should not be commenced or heard in the Supreme Court or District Court.[1] Similarly actions commenced in a Local Court may on a counterclaim or third party proceedings being filed or even on further consideration of the claim, require remedies or involve money jurisdiction or simply raise issues properly requiring consideration by a Supreme Court or District Court judge.

5.48 Section 87 and Order 34 rule 1 of the Local Court Rules deal with the removal of an action brought in the Supreme Court to a Local Court, by a Justice of the Supreme Court sitting in chambers. Section 88 enables the removal to a Local Court of an action founded in tort brought in the Supreme Court where the plaintiff has no visible means of paying the costs of the defendant if a verdict is not

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1. Section 86 provides that if an action is brought in the Supreme Court which could have been commenced in a Local Court without the consent of the defendant, the plaintiff is entitled to no greater sum by way of costs than he could have recovered had the action been brought in a Local Court, unless the judge certifies in the case of an action founded on tort that it was proper to bring the action in the Supreme Court, and in any other case that by reason of some important principle of law being involved or of the complexity of the issues the action was properly brought in the Supreme Court: See Jerinic v Metropolitan (Perth) Passenger Transport Trust [1969] WAR 132 for an example of the application of this section. In deciding whether, under s 86, the action "could have been commenced in a Local Court" the relevant amount is the amount actually recovered and not the amount claimed: see Solomon v Mulliner [1901] 1 KB 76. But "the central test is whether the applicant or plaintiff in the case, when issuing the proceedings might reasonably have expected to recover an amount in excess of the maximum of the jurisdiction of the Local Court": Vella v Ivanovski, Full Court of the Supreme Court of Western Australia, 14 March 1983, unreported, applying Jerinic.

found for the plaintiff. No such equivalent provision appears to have been enacted in relation to the District Court.

5.49 Similarly, section 4A of the Local Courts Act deals with removal by the Chairman of the Judges of the District Court, of an action brought in the District Court to a Local Court. A corresponding provision in slightly different terms is also found in section 74 of the District Court Act.[1]

5.50 In addition, by section 75 of the District Court Act, a Judge of the District Court may remit to the District Court an action brought in a Local Court that might have been brought in the District Court, or an action in which a defence or counterclaim in a Local Court action involves matter beyond the jurisdiction of a Local Court but within the jurisdiction of the District Court.

5.51 No such equivalent provision appears to have been enacted in relation to remission of actions from the Local Court to the Supreme Court. However, section 114 permits a Supreme Court judge to remove any Local Court proceedings where the amount claimed exceeds $40 to the Supreme Court by writ of certiorari if he thinks it desirable that the matter be tried in the Supreme Court.

5.52 These sections should be consolidated.[2] Further as with section 4A at present it should not be necessary for any party to apply for transfer of proceedings. The original choice of a court in which to bring proceedings may be entirely inappropriate altogether or because of some mistake or because of issues or points of law which emerge later. It is therefore necessary to have easy mechanisms for the transfer of proceedings between one forum and another. By sections 75A, 75B and 75C of the County Courts Act 1959 as amended, transfer of proceedings between the High Court and

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1. Section 4A of the Local Courts Act and s 74 of the District Court Act permit proceedings to be remitted to Local Courts without the consent of the parties, unless in the circumstances of the case the court considers it appropriate that the matter remain in the District Court. A judge of the District Court may so order of his own motion.

2. This should also incorporate the question of removal to a superior court of proceedings involving a counterclaim which is beyond the jurisdiction of a Local Court, under s 34(3): see paras 5.35 to 5.38 above.

County Courts in England are now based upon the criteria that the proceedings are within or without the limits of County Court jurisdiction including the sums of money in issue or likely to be recoverable or that the proceedings are not likely to raise any important question of law or fact and are suitable for determination by a County Court. Transfer of proceedings may be ordered either by the High Court or by the County Court. Thus County Courts may order proceedings transferred to the High Court if the County Court considers that some important question of law or fact is likely to arise or that the proceedings involve matters including the sums of money likely to be recoverable beyond its jurisdiction.

5.53 It may also be desirable to enact a provision similar to that of section 192 of the Australian Capital Territory Court of Petty Sessions (Civil Jurisdiction) Ordinance 1982, which provides that at the request of a party to proceedings, the court may state, in the form of a special case, for the opinion of the Supreme Court any question of law that arises in the proceedings.[1] Jurisdiction is vested in the Supreme Court to hear and determine such a case stated. It might also be noted that in South Australia the Local and District Criminal Courts Act, section 57, makes provision for any Local Court to reserve any question of law arising in any action other than a small claim for the decision of the Supreme Court whose decision is binding on the Local Court and which has power to award costs in respect of the reservation. However, the Commission seeks comment. The formulation of a case stated is often difficult and problems often arise. A similar comment might be made of the South Australian provision.

10. PROPOSALS

5.54 Money jurisdiction (paragraphs 5.4 to 5.12)

(i) It is important to note that increases in the money jurisdiction of a court bring increasingly complex disputes before the court and change the nature of the proceedings and of the necessary powers of the court.

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1. That is, to state the ultimate facts, requiring only the certainty of some point of law applied to those facts to determine either the whole case or some particular stage of it: see Aust Commonwealth Shipping Board v Federated Seamen's Union (1925) 36 CLR 442, 450 and B P Aust Ltd v Town of Albany [1964] WAR 40.

(ii) As the money jurisdiction of Local Courts was increased in 1981 to include claims not exceeding $6,000, the Commission intends to make no further recommendation as to the matter at this time, but will reconsider the matter when submitting its final report.

(iii) The money jurisdiction of the Small Debts Division and of Small Claims Tribunals may already need revision to a maximum of, say, $2,000.

The Commission therefore proposes that subject to the recommendations to be made in its final report as to the prescribed money jurisdiction of Local Courts -

(a) The jurisdictional money limit of Local Courts, of the Small Debts Division and of Small Claims Tribunals should be periodically reviewed by an expert committee of review as part of the functions of that committee outlined in chapter 20 below. Consideration should be given to permitting increases of these jurisdictional limits from time to time by regulation, as is the case with English County Courts and with Small Claims Tribunals under the Western Australian Small Claims Tribunals Act.

Subject matter (paragraphs 5.13 to 5.26)

(b) (i) The subject matter over which Local Courts are to have jurisdiction requires clarification. The Commission suggests that, subject to the paragraphs below, Local Courts should have jurisdiction to hear and determine all personal actions where the amount, value or damages sought to be recovered is not more than the prescribed money limit (at present $6,000). It should continue to be irrelevant whether the amount of the claim is that of the original claim or demand or a balance after allowing payment on account or the amount of any set off admitted by the plaintiff. Similarly, Local Courts should continue to have jurisdiction if a claim originally in excess of the prescribed money limit is reduced to the amount of that limit or less by abandonment of any excess.

(ii) The exceptions to this jurisdiction presently contained in section 30 should be abolished, save as to actions in which the title to land or an interest in land is in question. A Local Court therefore should in future have jurisdiction to

hear and determine actions in which the validity or effect of a devise, bequest or limitation under a will or settlement is in question and for libel, slander, seduction, and actions for recovery of gifts given in contemplation of marriage, which are at present exceptions to the jurisdiction of Local Courts.

(iii) Consistently with recent amendments to the provisions of the District Court of Western Australia Act, section 30 of the Local Courts Act should be amended to vest in Local Courts jurisdiction to hear -

A. actions brought to recover sums of not more than the prescribed money limit being the whole or part of the unliquidated balance of a partnership account, including in any such action jurisdiction, powers and authority relating to declaration of partnership or dissolution of partnership;

B. actions brought to recover sums of not more than the prescribed money limit being the amount or part of the amount of the distributive share under an intestacy or of a legacy under a will;

C. actions for specific performance of or for the rectifying, delivering up, or cancelling of any agreement whatever, where the amount in dispute or the value of the property affected is not more than the prescribed money limit.

(iv) Local Courts should also continue to exercise jurisdiction to hear actions in which the amount, value or damages sought to be recovered exceeds the prescribed money limit, but which might be brought in the Supreme Court if the parties agree by a memorandum signed by them or by their respective solicitors that the court has power to try the action and also all other actions or matters in respect of which jurisdiction is given to Local Courts by or under any other Act.

Remedies (paragraphs 5.27 to 5.34)

(c) Local Courts should be given the same powers to grant equitable relief as the District Court. Accordingly section 32 of the Local Courts Act should be repealed.

However, consideration is invited to the question of further amendments to overcome existing uncertainties in regard to the position of inferior courts of civil jurisdiction in this matter.

Counterclaims (paragraphs 5.35 to 5.38)

(d) As at present, where any defence or counterclaim involves matters beyond the jurisdiction of a Local Court, that defence or counterclaim should not affect the competence of the court to dispose of the whole matter in controversy, so far as it relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the court has jurisdiction to administer should be given to the defendant upon the counterclaim.

Rules of law enacted by the Supreme Court Act (paragraphs 5.39 and 5.40)

(e) Provisions such as section 35 of the Local Courts Act and section 57 of the District Court of Western Australia Act which apply to Local Court and District Court proceedings "the several rules of law enacted and declared by the Supreme Court Act" duplicate section 34 of the Supreme Court Act. In addition doubts as to their operation may be caused by amendments, additions and repeals of provisions in the Supreme Court Act or in other statutes. These provisions should be reworded so as to set out more precisely which provisions shall so apply.

Submission to the jurisdiction (paragraphs 5.42 and 5.43)

(f) Provision should be made in the Act or Rules making it clear that the filing of a notice of defence does not constitute a submission to the jurisdiction of the court. Alternatively, provision might be made for entry of a conditional notice of intention to defend which does not constitute submission to the jurisdiction of the court.

Territorial jurisdiction (paragraphs 5.44 and 5.45)

(g) Provision should be made dealing with the question of the extra-territorial jurisdiction of Local Courts, that is, when Local Courts may deal with persons or matters outside Western Australia.

Persons under disability (paragraph 5.46)

(h) Although Local Courts have been held to have such power, the Local Court Rules should be amended to specifically empower the court to approve compromises or settlements of claims by infants and other persons under disability. The Rules should specifically empower Local Courts to require damages awarded to an infant or other incapable person by way of settlement, compromise or acceptance of money to be paid into court and to require any order approving the same also to order the payment out of those moneys to the Public Trustee or to such other person as the court approves.

Removal of proceedings to and from superior courts (paragraphs 5.47 to 5.53)

(i) In any action a Judge of the Supreme Court or District Court should be empowered, either on the application of any party or otherwise, to order on such terms and conditions as he thinks fit that the whole action be transferred to the Supreme Court or District Court respectively. The provisions dealing with the removal of proceedings between Local Courts and superior courts now contained in sections 4A, 34, 86 to 88 and 114 of the Local Courts Act should be reviewed and re-enacted in consecutive, logically complete and mutually consistent form, making reference also to the provisions of sections 74 and 75 of the District Court of Western Australia Act. They should also be amended to permit proceedings to be transferred in part as well as in whole.

Removal of proceedings to and from Small Claims Tribunals (paragraph 5.12)

(j) The provisions of the Local Courts Act and of the Small Claims Tribunals Act should be reviewed, especially in light of the establishment of a Small Debts Division of Local Courts, to enable greater remission of actions between Local Courts and Small Claims Tribunals according to convenience, difficulty of determination or other factors, provided the action is within the jurisdiction of the court or tribunal to which remission is being considered. The Commission leaves open to question whether Small Claims Tribunals should eventually be merged in the Small Debts Division of Local Courts pending experience of the operation of that Division.

CHAPTER 6 - REPLEVIN AND RECOVERY OF POSSESSION OF LAND

1. REPLEVIN

6.1 By sections 94 to 98 of the Act, and Order 35 of the Rules, provision is made for Local Courts to exercise jurisdiction in actions of replevin. Replevin actions are brought for the recovery of chattels based on a claim that the chattels have been taken from the plaintiff's possession by an act in the nature of trespass.[1] Replevin is a "personal action" and thus the amount claimed must be within the money jurisdiction of Local Courts fixed by section 30.[2] By section 94 all actions of replevin brought in a Local Court must be commenced in the court held nearest to the place where the goods were seized. The other provisions form a statutory variation to the common law position in relation to the procedures required.

6.2 The provisions are similar to those found in successive English County Courts Acts and in some other Australian

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1. The potential plaintiff offers security that he will contest the potential defendant's right to seize chattels in court and thereupon the potential defendant is bound to surrender the goods to him pending the court's decision. If he does not do so, the sheriff has power to retain the goods. An action beginning with a demand for replevin, that is a demand that the goods be repledged pending action, became the normal mode of trying the correctness of distress or seizure of goods. As to replevin generally, see Halsbury's Laws of England, 3rd ed, Vol 12, 160 et seq. Also W J V Windeyer, Lectures on Legal History, 2nd ed, 92, and Potter's Historical Introduction to English Law, 4th ed, 403-405.

2. The District Court exercises similar jurisdiction in respect of claims not exceeding $50,000 under s 50(1)(c) of the District Court Act.

jurisdictions.[1] The main use of replevin in modern times arose from the seizure by a landlord of a tenant's goods by way of "distress" for arrears of rent and from the seizure by a landowner of the plaintiff's cattle which had trespassed and damaged his land. The right of a landlord to "distrain" for arrears of rent was abolished in Western Australia by section 2 of the Distress for Rent Abolition Act, 1936-1941. The remedy of distress against trespassing cattle is also obsolete in view of modern impounding legislation and has been abolished in some jurisdictions.[2] The prime uses of the action of replevin have therefore either been abolished or become obsolete, and the provisions are rarely used. This is no doubt also due to the availability of other, more modern, remedies for the wrongful taking of chattels, and now to the obscurity of replevin proceedings themselves.

6.3 The Law Reform Commission of British Columbia,[3] although dealing with legislation which has varied the common law position somewhat in that province, has recommended the introduction of provisions replacing jurisdiction to hear replevin actions with jurisdiction to hear "actions for the recovery of property other than land". Such a provision would be wide enough to encompass both replevin and other types of proceedings. The Commission also recommended Rules empowering courts in British Columbia:

> (a) to make orders for the detention, custody, or preservation of any property that is the subject-matter of a proceeding or as to which a question may arise,[4]
>
> (b) for the purpose of enabling such an order to be carried out, to authorise a person to enter upon any land or building,
>
> (c) where the right of a party to a specific fund is in dispute in a proceeding, to order the fund to be paid into Court or otherwise secured,
>
> (d) where property is the subject-matter of a proceeding and the Court is satisfied that it will be more than sufficient to answer all claims thereon, at any time to allow the whole or part of the income of the property to be paid, during such period as it may direct, to a party who has an interest therein or to direct that part of the personal property be delivered or transferred to a party,

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1. See, for example, the various jurisdictional provisions set out in Appendix II.

2. See New South Wales Law Reform Commission report on Civil Liability for Animals, para 28 and (NSW) Animals Act 1977, s 5. Also (Eng) Law Commission report on Civil Liability for Animals and (Eng) Animals Act 1971, s 7.

3. Report on The Replevin Act, 1978.

4. See existing Order 14 rule 3 of the Local Court Rules.

(e) where a party claims the recovery of specific property other than land, to order that the property claimed be given up to the claimant pending the outcome of the action either unconditionally or upon such terms relating to giving security, time, mode of trial or otherwise as it thinks just,

(f) where such an order is made and the claimant's action is dismissed, to award to the opposing party damages for any loss suffered or damage sustained arising out of the delivery of the property to the claimant or compliance with any other order.

6.4 The Commission seeks comment as to whether the provisions relating to replevin now found in sections 94 to 98 of the Local Courts Act and Order 35 of the Rules should be replaced with similar provisions to those recommended in British Columbia. One result would be to render the statutory provisions more comprehensible and modern.[1] The Commission tentatively favours this approach.

2. RECOVERY OF POSSESSION OF LAND

(a) Existing Local Court jurisdiction

6.5 As noted above,[2] section 30 of the Local Courts Act provides that, except as otherwise provided, Local Courts shall not have jurisdiction to hear and determine actions in "ejectment, or in which the title to land is in question". By sections 99 to 103, however, provision is made for Local Courts to exercise jurisdiction in certain actions for recovery of possession of land.[3] The rent payable, or the value of the land, must not exceed "$10,000 by the year" in any of the cases provided for.[4]

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1. In passing, the Commission notes that the money amounts referred to in ss 96 and 98 of the Local Courts Act remain unchanged from those fixed in 1904, and that s 96 makes no reference to the District Court.

2. See para 5.18 above.

3. Certain further matters arising from these provisions are discussed in paras 19.10 to 19.20 below.

4. Originally the figure was one hundred pounds per annum fixed in 1904. This was increased to five hundred pounds in 1953, to eight hundred pounds in 1964, to $5,000 in 1976 and to $10,000 in 1981. The precise meaning of the references in these provisions to "the rent payable" and to "the value of the land" is not clear. Perhaps greater certainty could be achieved by reference to the concept of "gross rental value" as defined by the Valuation of Land Act 1978. It also may be illogical that a claim for rent or mesne profits in a sum up to $10,000 can be added to a claim for recovery of possession of land under ss 99 or 100 whereas claims not so added are subject to the usual jurisdictional limit of $6,000.

6.6 The history of these provisions is outlined by Wickham J in Donnelly v Day.[1] The exclusion of "ejectment" proceedings from the jurisdiction of Local Courts was basically because such proceedings were often used to determine questions of title. The jurisdiction given to Local Courts in actions for recovery of possession of land is essentially limited to questions of entitlement to possession.

6.7 The District Court has jurisdiction, by section 50(1)(d) of the District Court Act, to hear actions "of ejectment to recover possession of any land, where the value of the land does not exceed twenty five thousand dollars by the year or where the rent exclusive of ground rent, if any, payable in respect of the land does not exceed the sum of twenty five thousand dollars by the year".[2] The Supreme Court, of course, has unlimited jurisdiction in matters of ejectment or recovery of possession of land as in other matters.

6.8 In 1980 about 190 actions for recovery of possession of land were set down for hearing in Perth Local Court alone. By contrast, the Commission understands that very few such actions are ever instituted, let alone set down for hearing, in the District Court. The increase in the jurisdiction of Local Courts as from 1 February 1982 will reinforce this position. It is therefore important that Local Courts have appropriately expressed jurisdiction and powers in relation to proceedings for recovery of possession of land.

6.9 One possibility is to vest in Local Courts jurisdiction in terms similar to that contained in section 50(1)(d) of the District Court Act save as to the money limit.[3] Such an approach could simplify and expand the existing provisions yet be combined with simple prescribed forms of summonses, as at present.[4]

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1. [1972] WAR 6.
2. There is no provision in the District Court Act denying to the Court jurisdiction to determine actions in which the title to land is in question similar to the provisions in s 30 of the Local Courts Act. As pointed out earlier, also, English County Courts also have a limited jurisdiction to hear actions involving questions of title to land.
3. The wording of s 50(1)(d) of the District Court Act and the inclusion of the phrase "exclusive of ground rent, if any" however was criticised in Fazari v Brady [1971] 1 SR (WA) 188 by Jones DCJ, as he then was, and should be modified.
4. The Commission notes also that in New South Wales, section 79 of the Supreme Court Act 1970-1979 formally abolishes the action of ejectment and replaces it with "proceedings. . .for possession of land and. . .such other relief as the nature of the case requires".

(b) Distress for Rent Abolition Act

6.10 By section 6 of the Distress for Rent Abolition Act 1936-1941 a lessor may upon seven days notice in writing to the lessee determine any tenancy or lease where any rent due has remained unpaid for a period of seven days and may at the end of such notice bring proceedings in ejectment under the Justices Act 1902-1981. This means that such proceedings would be brought in a Court of Petty Sessions. The Commission seeks comment as to whether this provision should be repealed and replaced by provisions in the Local Courts Act. It seems incongruous that civil disputes of this sort should be dealt with in Courts of Petty Sessions whose jurisdiction and procedures are primarily designed for criminal matters.

(c) Small Claims Tribunals

6.11 In addition to the jurisdiction exercised by the traditional courts of civil jurisdiction in respect of proceedings for recovery of possession of land, jurisdiction is also exercised in certain landlord and tenant disputes by Small Claims Tribunals. By section 4 of the Small Claims Tribunals Act a "small claim" includes a claim for repayment of money in an amount of $1,000 or less, or such other sum as may be prescribed, paid by way of bond or security in connection with a tenancy. Since 1981 it has also included a claim for relief from payment of a sum of $1,000 or less in connection with a tenancy. "Small claims" may only be instituted by consumers. Consumers are defined to include a person who is or was the tenant of any premises let to him for the purposes of a dwelling and otherwise than for the purposes of assigning or sub-letting or for the purposes of a trade or business. In 1976, which was the first full year of operation of Small Claims Tribunals, some 104 such claims were dealt with by Tribunals. By 1981 the number had risen to 284.[1] Small Claims Tribunals and Local Courts thus exercise parallel jurisdiction in respect of certain disputes arising out of tenancies of land. It would seem desirable that each body should have power to remit proceedings to the other, as suggested in other contexts in paragraph 5.12 above.

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1. The money jurisdiction was increased from $500 to $1,000 in 1977.

(d) Role of the Small Debts Division

6.12 In its report on Small Debts Court[1] the Commission suggested that the Small Debts Division of Local Courts should not initially have jurisdiction in respect of matters involving recovery of possession of land, but that the matter should be reconsidered after experience is gained in the working of the Division.[2]

(e) Alternative tribunals

6.13 Another question which arises is whether Western Australia should follow the precedents set in Victoria, South Australia and elsewhere and create a Residential Tenancies Tribunal. In those States the creation of such a tribunal accompanied a review of the substantive law of landlord and tenant. Such a review is beyond this Commission's terms of reference. However, with or without a review of the substantive law there may be more appropriate methods of dealing with typical residential tenancy disputes than by Local Court proceedings.

6.14 The Commission is anxious to avoid creation of new tribunals if possible. The relatively small population of Western Australia and the cost to the community of the establishment of such tribunals must be balanced against any benefits that might be expected from their creation. The Commission notes that in Victoria the Residential Tenancies Tribunal has been established in addition to the Small Claims Tribunal, but that there is a sharing of physical and staff resources. It would seem that in the smaller Western Australian community many of the functions performed by the Residential

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1. Project No 63, 1979.

2. The jurisdiction vested in the Small Claims Tribunal in 1981 to hear claims for relief from payment of tenancy bonds reduces the need to vest jurisdiction in such matters in the Small Debts Division. The Commission points out that if jurisdiction to hear proceedings for recovery of possession of land was vested in the Small Debts Division then, unless other provision were made, legal representation would not normally be available to the parties to such disputes nor would costs be awarded against the losing party. The Commission seeks comments on these aspects of the matter.

Tenancies Tribunal in Victoria could be handled either by Small Claims Tribunals or by Local Courts. One disadvantage which Small Claims Tribunals suffer compared to Local Courts is its remoteness from many country areas.[1] They are also limited to claims by tenants although in determining such claims, counterclaims and set-offs by landlords can be taken into account.

6.15 Another alternative is creation of the office of Rentalsman in the way pioneered in various Canadian provinces.[2] The functions of the Rentalsman include general advice, mediation between parties, inspection of rented premises and determination of disputes as well as liaison at policy level with other government agencies in the fields of health, housing, planning and social welfare. Typically, a complaint is lodged by telephone or letter whereupon the Rentalsman's staff contacts the other party, often by telephone, and attempts mediation. If this is ineffective, an investigative staff member looks into the matter. When a hearing takes place the Rentalsman first seeks to mediate the dispute again and only if mediation is again unsuccessful does he or she adjudicate. The Canadian Rentalsmen deal with large numbers of landlord-tenant cases and in very few of these does either party use a legal practitioner. The benefits to the parties lie in the speed, simplicity and inexpensive nature of the proceedings. At the same time the Rentalsman apparently imposes some cost to the Government greater than the proportion of the court budget formerly allocated to landlord-tenant cases.

6.16 On the other hand, the Institute of Law Research and Reform in Alberta[3] concluded that "the adjudication of landlord-tenant disputes by the Court rather than by a rentalsman is in the public interest and in the interest of landlords and tenants". Accordingly, it recommended that the Courts continue to adjudicate disputes arising

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1. The Commission notes however, Small Claims Tribunal referees make a substantial number of visits to country areas in order to determine claims. However, it is important that tenancy disputes be speedily resolved. There is also the question of the cost to the community of such special arrangements.

2. Such as Manitoba and British Columbia. See, for example British Columbia Law Reform Commission report on Landlord and Tenant Relationships: Residential Tenancies, Project 12, 1973.

3. Institute of Law Research and Reform, University of Alberta, Residential Tenancies, Report 22, 1977.

under residential tenancies in Alberta. It made "recommendations intended to assure the procedures suitable to landlord-tenant disputes are available in the Courts" which in substance were very much consistent with the practices of Small Claims Tribunals in Western Australia. Common characteristics agreed upon by all commentators in this field, whatever the final recommendations made, include the need for a simple procedure, expeditious hearing, simplified and unified jurisdiction to avoid jurisdictional disputes, and the need for some specialist expertise. Small Claims Tribunals in Western Australia can readily meet these criteria, especially with access to assistance from appropriate departmental officers.

3. PROPOSALS

6.17 The Commission proposes that -

Replevin (paragraphs 6.1 to 6.4)

(a) Sections 94 to 98 of the Act and Order 35 of the Rules (dealing with replevin actions) be repealed and replaced with general provisions for jurisdiction to hear actions for the recovery of property other than land. In such cases the existing power to make interim orders for detention and preservation of property contained in Order 14 rule 3 might be expanded by provisions empowering Local Courts -

(i) where the right of a party to a specific fund is in dispute in a proceeding, to order the fund to be paid into court or otherwise secured;

(ii) where personal property is the subject-matter of a proceeding and the court is satisfied that it will be more than sufficient to answer all claims thereon, at any time to allow the whole or part of the income of the property to be paid, during such period as it may direct, to a party who has an interest therein or to direct that part of the property be delivered or transferred to a party;

(iii) where a party claims the recovery of specific property to order that the property claimed be given up to the claimant pending the outcome of the action either unconditionally or upon such terms relating to giving security, time, mode of trial or otherwise as it thinks just;

(iv) where such an order is made and the claimant's action is dismissed, to award to the opposing party damages for any loss suffered or damage sustained arising out of the delivery of the property to the claimant or compliance with any other order.

Recovery of possession of land (paragraphs 6.5 to 6.16)

(b) Local Courts retain jurisdiction to hear actions to recover possession of any land, where the value of the land or the rent payable in respect of it does not exceed a prescribed sum (presently $10,000 per annum). However the jurisdictional provisions should be simplified and clarified.

(c) As part of that simplification, section 6 of the Distress for Rent Abolition Act 1936-1941 (which permits a lessor or landlord, upon 7 days notice in writing to determine any lease or tenancy where the rent due remains unpaid for 7 days and to bring ejectment proceedings in a Court of Petty Sessions under the Justices Act) should be repealed and replaced by appropriate provisions of the Local Courts Act.

(d) In due course consideration should be given to vesting in the Small Debts Division of Local Courts jurisdiction in respect of claims for recovery of possession of land, and claims for rent, mesne profits, damages and other matters arising out of the tenancy or occupation of land, consistent with the money jurisdiction of that Division.

(e) Consideration should also be given to vesting in the referees of Small Claims Tribunals the functions of the office of 'Rentalsman' to deal on the spot with tenancy disputes as is now the practice in a number of Canadian Provinces.

CHAPTER 7 - JURISDICTION AS TO LOCALITY

1. THE EXISTING POSITION

7.1 One problem which often confronts any court system, and which is especially of concern to a court system designed to reduce the costs of litigation to a minimum, is the question of where the hearing of proceedings should take place. These proceedings include not only the trial itself but also interlocutory matters. Problems of course arise where parties, witnesses or legal practitioners live or work in different areas or where the cause of action arose in a place remote from one or more of these. It is important in such circumstances to avoid undue costs and delays.

7.2 As explained earlier, every Local Court has jurisdiction throughout the State.[1] Further, section 36A provides that a person desirous of bringing an action in a Local Court, shall be permitted to commence the action in any court, and in the absence of any objection to the jurisdiction shall be deemed to have selected a proper court.

7.3 However, a defendant sued in a court which is not the nearest to his place of residence[2] may object to the jurisdiction of the court in which the action has been commenced and may request that the action be transferred to the court nearest to his place of residence. On receipt of the objection the clerk of courts is required

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1. By s 36: see para 2.2 above.

2. This provision obviously applies only where the defendant's residence is within the State. If it is outside the State the defendant seems to be left no alternative but to accept the plaintiff's choice of court within Western Australia or to apply under one of the provisions mentioned in para 7.4 below. This is a separate question to that of Local Court territorial jurisdiction discussed in paras 5.44 and 5.45 above.

to allow the plaintiff the same time as is allowed to a defendant to give notice of defence to file an affidavit justifying the choice of court or to discontinue the action. Failing either the filing of the affidavit or discontinuance, the clerk is obliged to transfer the action to the court nearest the defendant's place of residence. If the plaintiff does file an affidavit of justification the clerk must decide whether the action has been commenced "in a proper Court, and so ought to continue in his Court or not". It is at this point that section 36 becomes decisive. Section 36 provides that "except as [t]hereinafter provided", every action shall be commenced -

(a) in the court held nearest to the place where the defendant, or one of the defendants, resides or carries on business; or

(b) in the court held nearest to the place where the defendant, or one of the defendants, resided or carried on business at any time within six months next before the entry of the plaint; or

(c) in the court held nearest to the place where the cause of action or claim wholly or in part arose.

If the clerk decides that the action is brought in a "proper court", within the meaning of section 36, and therefore ought to continue in his court he then gives notice of trial. If not, he transfers the proceedings in accordance with the defendant's notice.[1] If there is

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1. By s 36A(8) the magistrate may exercise these powers or discretions or direct the clerk as to their exercise. By s 36A(9), the decision of the clerk or magistrate as to the due filing or as to default in filing of the affidavit, and as to whether the action ought to continue in his court or be transferred, is final. By s 36A(2), the jurisdiction of the court chosen by the plaintiff, provided the action is as regards subject matter within the jurisdiction of a Local Court, shall not be questioned by any person or by the Supreme Court or any other court save as provided in s 36A itself. In addition, s 154 provides that if objection is taken to the jurisdiction of the court in a case where the action is for replevin and the court is not that nearest where the goods were seized, or if the action is for the recovery of land and the court is not that nearest where the land is situated, the determination of the magistrate on the question of jurisdiction is final and conclusive. Section 154 goes on to provide as follows:

> The distance shall be calculated by the nearest public thoroughfare; and no such objection shall be allowed unless it is shown to the satisfaction of the magistrate that another court is held nearer to such place by a distance of eight kilometres at least.

That provision seems however to apply only to s 154 and not to the provisions of s 36A.

more than one defendant to the action each defendant is given the opportunity to file notice of objection.

7.4 Section 38A provides that if it appears to a judge of the Supreme Court that it is just or expedient that any action or matter in a Local Court should be tried or determined or proceed in another Local Court the Supreme Court Judge may order the whole action or matter transferred to such other court, upon such terms (if any) as to payment of costs, or security for costs or otherwise, as he thinks fit. The decision of the Supreme Court Judge is declared to be final. In the same context, section 61(1) should also be borne in mind. If the magistrate is satisfied by either party to an action or matter pending in a court assigned to him that such action or matter can be more conveniently or fairly tried or heard in another court he may so order.[1] Further, by section 70(3) the magistrate at trial may sit and take evidence at any convenient place and may adjourn any trial from place to place for that purpose.

7.5 It might also be noticed that Order 14 rule 9 permits a defendant whose residence as well as whose place of business (if any) is more than 32 kilometres from the court selected by the plaintiff to file with his notice of defence an affidavit disclosing a good defence on the merits. On this happening the clerk of courts is required to call upon the plaintiff to deposit with the court "a reasonable and sufficient sum" having regard to the circumstances. If the deposit is not made the action must be struck out. The rule also applies to third parties as against defendants.

2. CRITICISMS

(a) Inconsistency and lack of coherence

7.6 The provisions referred to in paragraphs 7.1 to 7.4 are scattered through the Act and do not form a coherent pattern. It seems unreasonable, for instance, that the defendant should only be able to object to jurisdiction on the basis that the court selected by

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1. Section 61 is apparently limited to an order as to the place of trial of a matter. Under the English County Courts Rules, 1981 express provision is made permitting pre-trial review or any interlocutory application to be heard in another court, proceedings for the enforcement of a judgment or order to be taken in another court or payments under a judgment or order to be made into another court.

the plaintiff is not that nearest to the defendant's residence. It also seems unreasonable that the defendant can only ask that the action be transferred to the jurisdiction nearest his residence. There may be various reasons why a defendant would wish to, and be able to justify an application for, transfer of the action to another court altogether, such as the cost of bringing legal representation and witnesses to a remote court. If a firm or company is a defendant it should have the right to request that the venue be that of the court nearest to its registered office or principal place of business. Similarly if a defendant successfully objects to the plaintiff's choice of venue the clerk should have power to transfer the action to the court in which the action should most appropriately have been commenced which may not necessarily be that nearest to the defendant's then place of residence. Further, sections 36A(2) to (9) are not easy to reconcile with section 38A.[1]

(b) The procedure for making and determining an objection

7.7 In a preliminary submission the Law Society of Western Australia has criticised section 36A on the ground that a defendant may be prejudiced because he is not given the opportunity to sight, or reply to, a plaintiff's affidavit of justification. The Society proposes that the plaintiff should be required to serve a copy of his affidavit of justification on the defendant, whereupon the defendant should have a period of time in which to file and serve an answering affidavit. Upon the defendant filing an answering affidavit the objection to jurisdiction should be heard and determined by the magistrate. The magistrate should have power to make such order as seems to him just having regard to the matters contained in the affidavit and the Local Courts Act and Rules. This procedure would however appear to be unduly complicated.

7.8 In New South Wales, although every court in the State has jurisdiction under the Act, where an action is commenced in a court which is not an appropriate court, the defendant or any one of them may file a notice stating that he intends to defend the action and that he elects that the action be transferred to an appropriate court specified in the notice. An "appropriate court" is a court for any district in which -

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1. However, when s 38A was introduced into the Act in 1912 the Colonial Secretary described it as giving power "to a Judge to remove an action from one court to another. That gives the power of appeal to a Judge all the time".

(a) the defendant had, at the time the cause of action arose, his place of abode;
(b) the defendant had, at that time, his place of business;
(c) the defendant had, at that time, his place of employment;
(d) the defendant has, at the time the action is commenced, his place of abode;
(e) the defendant has, at the time the action is commenced, his place of business;
(f) the defendant has, at the time the action is commenced, his place of employment;
(g) the cause of action arose.

The State is divided into a number of metropolitan and country districts in each of which there may be several courts. It is not possible to object to the jurisdiction of one court in a district in favour of another within the same district.[1] Where the defendant elects to transfer the hearing to another court of petty sessions the registrar is required by section 16(3) to forward the documents to the registrar of the court named by the defendant in his notice. The registrar is not required by the Act to investigate the jurisdiction of the transferee court, although in many cases the defendant's address will give some indication. Should a defendant succeed in having the action transferred to a court which does not have jurisdiction and the plaintiff be able to satisfy the transferee court of that fact, section 16(4) requires the court at the commencement of the hearing to transfer the action to an appropriate court, and to allow the plantiff costs.[2]

(c) The criteria for determining venue

7.9 In most Australian jurisdictions the plaintiff may choose to bring an action either in the court nearest the defendant's place of residence or in the court nearest the place where the cause of action

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1. Such a system may be desirable in Western Australia. In the Perth metropolitan area it is very often as convenient for parties to travel to Perth Local Court as it is to travel to another court which may be geographically closer to their place of residence or employment. A defendant in Bassendean may well find it more convenient to travel to Perth than to Midland, or a defendant in Mosman Park to Fremantle.

2. These provisions seem to work in New South Wales but one can imagine great inconvenience in some cases. The Western Australian system of requiring the defendant to justify his choice at the beginning seems preferable.

arose.[1] The Australian Law Reform Commission however has tentatively recommended that "the debtor should be allowed to apply to the court to change the venue should the one chosen by the plaintiff impose unnecessary hardship on him. It should no longer be possible to bring action as a matter of course in the place where the cause of action arose or the place where the plaintiff himself resided at the time the contract was entered into."[2]

7.10 On the other hand the United Kingdom Committee on the Enforcement of Judgment Debts (the Payne Committee)[3] after discussing the advantages and disadvantages of commencement of proceedings in the defendant's home court decided on balance not to recommend that the venue always be the court nearest the defendant's place of residence, since most claims were not defended and further it was difficult even in defended cases to justify requiring the plaintiff always to attend at the defendant's home court.

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1. See A P Moore, Repayment of Debts, Creditor Enforcement and Debtor Protection, Part 1, Aust Bus L Rev, April 1980, 81 at 85. Basically, also, this is the position under the English County Court Rules, 1981, Order 4. As to New South Wales, see para 7.8 above.

2. DP No 6, para 22. See also D St L Kelly, Debt Recovery in Australia, 1977, 155-156, a report to the Australian Government Commission of Inquiry into Poverty where Professor Kelly recommended that -

> First, every court should be required, proprio motu, to investigate venue, and to satisfy itself that the plaintiff has complied with the rules. In no case should judgment be entered in default without enquiry first being made to establish that the defendant's absence may not be attributable to an unfair selection by the plaintiff of a forum in which to bring his action. This function could be adequately performed administratively rather than at a formal hearing provided that the plaintiff was obliged to state on the summons where the cause of action arose and to set out the facts on which his conclusion was based. Second, the appropriateness of venue should in all cases be determined independently of a contractual clause incorporating a submission to the jurisdiction of the given court. Third, the allocation of the venue should not be made dependent on the place where the cause of action may technically have arisen. If protection of the creditor's interests is deemed necessary it should be effected in such a way as to ensure that the consumer is neither unduly or unexpectedly inconvenienced.

Similar views to those of the Australian Law Reform Commission have been expressed by John Willis: see, for example, the articles cited in footnote 2 to para 11.3 below.

3. Cmnd 3909, 40-41.

7.11 Arguments can be put both ways. Evidence was given to the Australian Law Reform Commission's public hearings on Debt Recovery and Insolvency[1] to the effect that a plaintiff should be able to select the venue, subject to the present right of objection. Perth, it was said, is nearly always a convenient venue as people in Western Australia from time to time always have business there. Further there are very few legal practitioners practising in remote areas of the State. For these reasons the fact that plaintiffs would elect to commence proceedings in Perth would not cause injustices. It was argued that objection to the jurisdiction was often taken for spurious reasons. The Commission accepts that from time to time defendants may object to jurisdiction where the defendant's place of residence, or his legal practitioner's place of business, is distant from the plaintiff's choice of court simply in an endeavour to cause the proceedings to be transferred and thereby to induce the plaintiff to desist from further proceedings. This should be avoided if possible.

7.12 The difficulty with giving the choice as of right to the plaintiff or, alternatively, of forcing the plaintiff to select a venue which might be thought fair to the defendant, as for example the court nearest his residence, is that there are a number of factors which may alter the balance of fairness or convenience. The place where the cause of action arose may also be quite irrelevant, as where a motor vehicle collision occurs in a remote country location between cars driven by two Perth residents.

7.13 Factors which might be relevant beyond merely those of the plaintiff's convenience, the defendant's residence and the place where the cause of action arose might include -

(a) the convenience of witnesses;
(b) the availability of counsel;
(c) the location of courts;
or a combination of these various factors.

For example, the cost of travelling time of witnesses and legal practitioners involved may be as relevant to the parties as the inconvenience to which they might be put if a matter is listed in, say, a remote court rather than a more central one.

7.14 An independent decision based on the balance of convenience and supported by adequate scales of allowances for witnesses is perhaps the only just solution.

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1. In Perth on 13 November 1978 by Mr E M Heenan Jnr.

(d) Other criticisms

7.15 It may be desirable to require a defendant who objects to the jurisdiction to verify the merits of his defence at the same time. Elsewhere in this working paper the Commission suggests that some particulars of the defendant's grounds of defence should be filed in the notice of defence.[1] A question arises as to whether where an objection to jurisdiction is lodged, an affidavit verifying the defendant's belief that he has a good defence should not also be required. The Commission seeks comment. Such an affidavit of merits is required in South Australia.[2]

7.16 Another question which arises is whether the summons should state the connection between either the parties or the cause of action and the court out of which the summons is issued, at least if that is not obvious from the face of the summons itself. This would assist to ground the jurisdiction of the court as to venue and may reduce the number of objections to jurisdiction or assist the clerk in disposing thereof. However, it may be thought that such a provision is an unnecessary feature which can be overcome on a case by case basis rather than being made compulsory in the vast majority of cases in which venue is not challenged.[3] Section 81 of the South Australian Local and District Criminal Courts Act provides that if a claim filed in a Local Court does not show that the Local Court has jurisdiction and has been brought in the nearest Local Court as required by other provisions of the Act, there shall be added to such claim "a statement that such Local Court has jurisdiction and the ground or grounds on which it has jurisdiction or that the defendant has consented to such local court having jurisdiction". This apparently applies whether the question of jurisdiction is in respect of subject matter, amount or territoriality.

7.17 It may also become obvious after a matter has been set down for hearing that an action should be transferred to another court. Such a situation might arise for example, if the defendant

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1. Para 12.3 below.

2. Local and District Criminal Courts Act, s 115.

3. The Commission has evidence that at least in some Australian jurisdictions some solicitors choose venue because of reduced delays in filing and processing times at particular courts rather than by reference to the parties or other factors referred to in para 7.13.

were transferred in his employment from one place to another closer to that which would be desired in any event by the plaintiff. Provisions such as section 61(1) or section 70(3) are therefore clearly necessary. The magistrate may sit at any convenient place if it appears desirable to do so and may adjourn a trial from place to place for that purpose. It may occasionally be convenient in remote areas also to have a provision similar to section 38 of the New South Wales Act 1973, so that where in any proceedings a magistrate reserves his judgment or his decision on any question of fact or law he may give his judgment or decision in court or may draw up in writing his judgment or decision, sign it and forward it to the clerk of courts who shall, after giving notice to the parties, read the judgment or decision at a convenient time and place.

7.18 It has also been suggested to the Commission that section 36A should be redrafted to make it clear that any notice of objection to jurisdiction may be filed separately[1] from the filing of the notice of defence, perhaps within, say, ten days of it.

3. PROPOSALS

7.19 The Commission proposes that -

(a) The provisions of the Local Courts Act (sections 36, 36A, 38A, 61(1), 70(3) and 154, Order 8 rules 3 to 7 and Order 14 rule 9) dealing with jurisdiction of Local Courts as to the venue or locality of the court in which a matter is to be commenced and in which the hearing, if any, is to be conducted should be consolidated and rationalised, to give effect to the following principles -

(i) A plaintiff should remain at liberty to commence proceedings in any Local Court of his choice.

(ii) A defendant should be able to object to the plaintiff's choice of court but such objection should be based upon hardship or inconvenience to the defendant or his witnesses and should set out the relevant facts. The defendant should be at liberty to request transfer of the proceedings to any Local Court, giving reasons for that choice. The plaintiff should be at liberty to answer the objection.

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1. At present the section talks of objection to jurisdiction being "added" to the notice of defence.

(iii) The right to challenge venue should be brought to the attention of the defendant in simple English.

(iv) The decision on any objection as to venue should be made initially by the clerk of courts subject to review by a magistrate upon simple application. There should be no right of appeal from that review.

(v) A magistrate should have power to transfer an action to another court at any time upon simple application by a party. The guiding criterion should be the balance of convenience.

(vi) A magistrate of a Local Court should be expressly empowered to pronounce judgment or to make any relevant order at any convenient place being a place at which the court is empowered to sit.

(vii) A magistrate who reserves his judgment or his decision on any question of fact or law should be empowered to give his judgment or decision either in court himself or by the clerk reading or delivering the written judgment or decision to the parties at a convenient time and place. This may be valuable in remote areas.

CHAPTER 8 - JURISDICTION ADDITIONAL TO THAT EXPRESSLY PROVIDED BY THE LOCAL COURTS ACT

1. CIVIL JURISDICTION

8.1 In addition to the jurisdiction referred to in previous chapters, certain further original jurisdiction is vested in Local Courts.

8.2 The Broome Local Court Admiralty Jurisdiction Act 1917 vests in the Local Court at Broome admiralty jurisdiction in respect of claims for seamen's wages and claims for Master's wages and for his disbursement on account of the ship. By section 3, the jurisdiction of the court does not extend to cases in which -

(i) the ship in respect of which the claim is made exceeds 150 tonnes burden; or
(ii) the amount of the claim exceeds 100 pounds.[1]

No action may be maintained unless the ship is at the time of the commencement of the action within Western Australia or its territorial waters and north of the Tropic of Capricorn.[2] There appears to be no reason why the provisions of the Broome Local Court Admiralty Jurisdiction Act, 1917, should not be adopted into the provisions of any amended Local Courts Act. The Commission notes that the Australian Law Reform Commission has recently received a reference to consider the question of admiralty jurisdiction in Australia.

8.3 Under the Dividing Fences Act 1961-1969, jurisdiction in relation to dividing fences disputes is primarily vested in Courts of Petty Sessions. However, section 18 provides that a person required

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1. This amount clearly illustrates the need for regular review of statutory provisions. It could now be increased to $6,000.

2. This Act is apparently the only enactment expressly granting limited admiralty jurisdiction to inferior courts in Australia: see Alex C Castles, An Australian Legal History, 364-365 and also see Enid Russell, A History of the Law in Western Australia and its Development from 1829 to 1979, 166.

or liable to pay monies pursuant to the Act may be sued for those monies in a court of competent jurisdiction. In most cases this will be a Local Court. Thus, jurisdiction in respect of dividing fences disputes tends to be divided between Courts of Petty Sessions and Local Courts. In its report on Dividing Fences[1] the Commission recommended that Local Courts (in place of Courts of Petty Sessions) be granted jurisdiction in all dividing fences disputes, irrespective of the amount involved and that an appeal should lie from the decision of Local Courts in all cases to the District Court but not further. The Commission sees no reason to vary this recommendation.[2]

8.4 Under the Noise Abatement Act 1972-1981, jurisdiction is vested in a Local Court to hear complaints by a local authority or by three or more aggrieved occupiers that a nuisance by noise is likely to recur notwithstanding the service of an abatement notice. The court may require a defendant to comply with the abatement notice or to abate the nuisance or to prohibit recurrence of the nuisance and may require the defendant to execute works necessary for that purpose. The court is given power to impose fines and to order a defendant to meet the local authority's expenses. The jurisdiction clearly seems to be one which should be vested in Courts of Petty Sessions. The Commission understands that jurisdiction has been exercised (apparently without objection) by Courts of Petty Sessions in respect of complaints under section 7 of the Act alleging noise or vibration in a particular case to be a nuisance. The Act is silent as to the appropriate court to hear such a complaint and presumably jurisdiction was exercised pursuant to the general provision in section 20 of the Justices Act 1902-1980. This strengthens the case for all jurisdiction under the Act to be vested in Courts of Petty Sessions.

8.5 An example of jurisdiction being vested in Courts of Petty Sessions which might more properly be vested in Local Courts arises under the provisions of the Disposal of Uncollected Goods Act, 1970. Jurisdiction is, by section 4, vested in Courts of Petty Sessions constituted by a magistrate sitting alone. By section 22 such a court may make orders including orders authorising applicants to the court

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1. Report on Dividing Fences, (Project No 33, 1975) para 56(15) and (16).

2. In Queensland jurisdiction in respect of dividing fences has been vested in Small Claims Tribunals concurrently with Magistrates' Courts: (Qld) Dividing Fences Act and Another Act Amendment Act 1982.

to sell or otherwise dispose of certain uncollected goods in certain circumstances if necessary in accordance with certain conditions.

8.6 There are other statutes which vest jurisdiction in Local Courts. For example -

(a) Section 7 of the Warehousemen's Liens Act 1952-1954 allows Local Courts to make orders staying proceedings under section 7 of the Act whatever the value of the goods or the interest therein may be.

(b) By sections 8 to 11 of the Debt Collectors Licensing Act 1964-1966 the power to grant or renew a licence or to cancel a debt collectors licence, or order that a licensee be disqualified from holding such a licence is vested in a Local Court with a right of appeal to the Supreme Court.

(c) By section 99 of the Western Australian Marine Act 1946-1979 a proclaimed Local Court is a Court of Marine Inquiry with jurisdiction to hear and determine inquiries under that Act.

(d) By section 43(3) of the Aboriginal Heritage Act 1972-1980, if the Trustees of the Museum wish to purchase Aboriginal cultural material and are of the opinion that the price asked is excessive they may apply to the Local Court at Perth for determination of a reasonable price.

(e) By various provisions of the Hire-Purchase Act 1959-1980, Local Courts may make orders under that Act in relation to the rights and liabilities of parties to hire purchase agreements. Some of these provisions deal with appeals from decisions of the Commissioner for Consumer Affairs.

There may well be other legislation which has the effect of vesting original jurisdiction in Local Courts or in stipendiary magistrates sitting as Local Courts. The Commission seeks advice as to any such jurisdiction.[1]

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1. In its Working Paper on Legal Capacity of Minors the Commission suggested that Local Courts might be given jurisdiction to grant capacity to a minor to enter into certain contracts or categories of contracts or generally, at least within the ordinary limits of money jurisdiction. See Working Paper No 2 on Legal Capacity of Minors, Project No 25, 1972, paras 59-62.

8.7 The Commission seeks comment on whether or not jurisdiction is appropriately vested in Local Courts in the cases outlined above and as to any difficulties arising from the legislation concerned. In considering that question, regard should be had to the fact that Local Courts are readily accessible throughout the large geographical extent of Western Australia, that they are manned by stipendiary magistrates and that representation in Local Courts is open either to a party in person or to any legal practitioner.

2. ADMINISTRATIVE LAW JURISDICTION

8.8 Local Courts exercise certain administrative law jurisdiction both original and appellate. In its Report on Review of Administrative Decisions - Appeals,[1] the Commission made recommendations for the creation of an Administrative Law Division of Local Courts and suggested that certain rights of appeal to Local Courts be conferred in respect of various administrative decisions. The Commission also recommended appropriate procedures and rules in these matters.

3. PROBLEMS ARISING

8.9 Certain problems arise in relation to the vesting of some of these jurisdictions in Local Courts primarily designed for other purposes. These include the need for appropriate provisions in relation to -

(a) The procedures by which the jurisdiction is to be exercised by the court;[2]

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1. Project No 26, Part I.

2. See, for example, R v Syme, Reynolds and Williams [1970] WAR 153 where the Full Court held that a rehearing under s 106 of the Western Australian Marine Act 1946-1979 is in the nature of a new trial. See also Re Ryan [1979] WAR 23, Heah v Iddison and Builders' Registration Board Appeal No 1483 of 1981 (unreported) and O'Dea v Builders' Registration Board and Sandison Appeal No 1597 of 1982 (unreported) on the provisions of the Builders' Registration Act 1939-1980. These cases illustrate the need for appropriate provisions applying Local Court procedures to the needs of the legislation vesting jurisdiction in Local Courts. The Commission notes also that the Land Valuation Tribunals Regulations make use of the Local Courts Act and Rules for procedural purposes but only so far as not inconsistent with the Land Valuation Tribunals Act and Regulations.

(b) The position concerning orders for costs and where appropriate the scales upon which the same are to be fixed;

(c) Rights of appeal, if appropriate.[1]

These problems are not adequately addressed either in the Local Courts Act and Rules nor in some of the other statutes by which additional jurisdiction is vested in Local Courts. They should be considered especially when jurisdiction is being vested in Local Courts.[2]

4. PROPOSALS

8.10 The Commission proposes that -

(a) Attention should be given to problems arising from jurisdiction vested in Local Courts by other legislation, especially with regard to -

(i) procedures for the exercise of such jurisdiction;

(ii) provisions in relation to awards of costs, and where appropriate provision of scales of costs; and

(iii) rights of appeal from Local Court decisions.

Such attention needs to be given to problems arising in a number of existing statutes, such as the Builders' Registration Act, and also when consideration is being given to vesting new jurisdiction in Local Courts.

The Commission drew attention to these matters in its report on Review of Administrative Decisions: Appeals (Project No 26 Part I, 1982) in which it suggested -

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1. See, for example, Las Vegas Motors v McClements (1979) WAR 60 as to whether an appeal lay from an order of a magistrate exercising appellate Local Court jurisdiction under the Motor Vehicle Dealers Act, 1973.

2. In its report on Review of Administrative Decisions - Appeals (Project No 26 Part I, 1982) the Commission recommended the establishment of a body in Western Australia to perform a function analogous to that of the Commonwealth Administrative Review Council. Such a body could consider these matters.

(i) the creation of an Administrative Law Division of Local Courts;
(ii) the rationalisation of certain administrative law jurisdictions, both original and appellate;
(iii) appropriate procedures and rules;
(iv) establishment of an ongoing administrative review body to review appeal processes and rights of appeal.

(b) The Commission also re-affirms the recommendation in its report on Dividing Fences (Project No 33, 1975) that Local Courts - being courts of inferior civil jurisdiction - be granted jurisdiction in all dividing fences disputes in place of Courts of Petty Sessions, subject only to appeal to the District Court and no further. Consideration should also be given to vesting concurrent jurisdiction in such matters in Small Claims Tribunals.

(c) Other jurisdiction vested in courts of inferior jurisdiction might also be usefully rationalised. For example, jurisdiction to deal with complaints under the Noise Abatement Act 1972-1981 should be vested in Courts of Petty Sessions - being courts of inferior criminal and quasi-criminal jurisdiction - and not Local Courts. On the other hand jurisdiction should be vested in Local Courts under the Disposal of Uncollected Goods Act 1970 instead of in Courts of Petty Sessions. Creation of one Magistrates Court would enable such matters to be attended to administratively.

(d) The Broome Local Court Admiralty Jurisdiction Act 1917, which vests very limited admiralty jurisdiction in the Local Court at Broome and remains unamended since 1917, should be repealed and, subject to any general review of admiralty jurisdiction, its provisions, in a modern form, incorporated into the Local Courts Act. This example illustrates the need for regular review of legislation and procedure.

PART III: PROCEDURES

CHAPTER 9 - MAGISTRATES, CLERKS, BAILIFFS AND LEGAL PRACTITIONERS

9.1 The provisions of Part II of the Local Courts Act concerning magistrates, clerks, bailiffs and legal practitioners cannot be read as a code. The provisions must be read together with the provisions of the Rules, certain principles of common law, and certain statutory provisions found in the Local Courts Act and elsewhere. By contrast, the South Australian Local and District Criminal Courts Act and the Victorian Magistrates' Courts Act set out the powers and duties of magistrates, clerks and bailiffs and also the penalties for disobedience to their orders in considerably more detail than does the Local Courts Act in Western Australia. The Commission seeks comment on the existing provisions and on whether or not it would be desirable to set out these matters in more detail. This chapter will deal with the existing provisions.[1]

9.2 It might be noted that by section 5 the Governor may, by proclamation, order that Local Courts are to be held at certain places and may alter those places or orders that the holding of any court be discontinued. By section 8 the Governor may appoint magistrates of Local Courts and assign magistrates to such courts as he thinks fit but every magistrate is a justice of the peace for the State and by section 9 is appointed for the whole State and empowered to act in any Local Court in the State. By section 13 the Governor may appoint a clerk and assistant clerks to each court and by section 16 the Minister shall appoint one or more bailiffs for every court. The Local Courts Act and Rules do not refer to magisterial districts. As was pointed out in chapter 7, in the event that an objection is made to the jurisdiction of a particular Local Court in a particular matter that objection is required to be based upon the distance of the

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1. Sections 8 to 29.

relevant courts from the defendant's residence or place of business rather than upon the boundaries of a magisterial district created under the Magisterial Districts Act, 1886. By contrast, under the Justices Act 1902-1982, section 24 provides that the Governor may, subject to the provisions of the Magisterial Districts Act, 1886, appoint magisterial districts for the purposes of Courts of Petty Sessions. By section 25 the districts appointed to be magisterial districts are deemed to be districts for the purposes of Courts of Petty Sessions and deemed to have been appointed under the Justices Act. By section 25A the Minister may appoint one or more persons as clerks of petty sessions for a magisterial district. The question whether the concept of magisterial districts remains necessary will be discussed by the Commission in its review of the Justices Act, 1902-1982. However, in the event that Local Courts and Courts of Petty Sessions were merged to form a new Magistrates Court such differences could be avoided.

1. MAGISTRATES

9.3 Local Court hearings are held before stipendiary magistrates. Certain provisions relating to the appointment, jurisdiction, powers and duties of stipendiary magistrates are dealt with in the Stipendiary Magistrates Act. The question arises whether certain provisions presently found in the Local Courts Act should be transferred to that Act. As pointed out above, section 8 gives the Governor power to appoint magistrates of Local Courts,[1] and to assign magistrates to certain courts. Section 8 also provides that the jurisdiction of such a magistrate is not deemed limited to the courts assigned to him and that every magistrate shall by virtue of his office be a justice of the peace for the State. Section 9 provides that every magistrate is appointed for the whole State and empowered to act in any Local Court. These various provisions are now duplicated by sections 4 and 9 of the Stipendiary Magistrates Act, and could be removed from the Local Courts Act. Section 10, which provides for the fixing of the place and time of Local Court sittings could in like manner be replaced by the provisions of section 10 of the Stipendiary

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1. Local Court magistrates were originally appointed separately from police or resident magistrates. However, this distinction has long been abolished. Section 6 of the Stipendiary Magistrates Act has confirmed this. Section 12, dealing with deputy magistrates in cases of illness, absence or conflict of interest, reflects this distinction and can also be amended or placed in the Stipendiary Magistrates Act.

Magistrates Act. If the courts were merged, as suggested earlier in this working paper, this would obviously be desirable.

2. CLERKS

9.4 By section 14, the clerk is required to "sign and issue summonses and warrants" as well as to carry out certain other duties. The requirement that the clerk sign all summonses is, the Commission is informed, one which imposes an obligation which is onerous only in the sense that it requires many hours of the working time of clerks of court, who are senior administrative officers, and which is therefore expensive of time but purely routine of its nature. In fact, the signature is in many cases made by affixing a facsimile rubber signature stamp. Nevertheless, the process is extremely laborious, as many thousands of summonses and warrants issued each year. It is also incompatible with the inevitable and increasing trend to the use of word processing equipment. The Commission sees no reason why, assuming other suitable endorsements are able to be printed or stamped on court forms, this requirement should be retained, and seeks comments.

9.5 More generally, the question arises as to whether more use might be made of clerks of court to perform minor judicial tasks. In the English County Courts most interlocutory applications are made to the registrar. There is a right of appeal from the registrar to the judge. It may be that there is room for clerks of courts to deal with certain interlocutory applications in Local Courts, but it must be pointed out that in English County Courts the registrars, as well as the judges, are legal practitioners. Section 76 already permits a clerk, with consent of the parties and leave of the magistrate to hear matters not involving more than $10, a sum fixed in 1904. Section 77 permits a magistrate to refer to the clerk matters of account in dispute between the parties. These provisions are further discussed in paragraphs 16.6 and 16.7 below. Clerks of Local Courts also fulfil the functions of taxing bills of costs and, often, of hearing judgment summons applications under section 130. There may well be other functions of an interlocutory or minor nature which clerks of courts might exercise especially in situations in which a magistrate is not immediately available. In paragraph 12.15, for example, the Commission suggests that clerks of court might be given power to stay execution of judgments in certain circumstances. The Commission seeks comment.

3. BAILIFFS

9.6 By section 16, every Local Court is required to have one or more bailiffs, appointed by the Minister. By section 18, a bailiff is required to serve all summonses and execute all warrants issued out of the court and to conform to the rules of court and to the order and direction of the magistrate of the court for which he is appointed, although summonses or other process issued out of any court may be transmitted to the bailiff of another court. The duties of bailiffs may therefore be divided into -

(1) The service of summonses and other process
(2) The enforcement of warrants and orders.

As the Commission has deferred to the later working paper on the Enforcement of Judgments, the question of bailiffs' powers and duties in enforcing judgment and orders, the discussion set out below will be concerned with bailiffs in their capacity as servers of process.

9.7 A bailiff may be appointed for one or more courts. At present there are 125 bailiffs, of whom 117 are police officers. Civilian bailiffs are located at Perth, Fremantle, Midland, Rockingham, Maddington, Bunbury, Geraldton and Albany. Traditionally, police officers have carried out the duties of bailiffs in most country centres where the volume of Local Court work could not justify the appointment of a full time bailiff. As the volume of work increases, bailiff work becomes a burden to police officers as they are expected to perform such work outside their normal police hours of duty.[1] Civilian bailiffs are recruited as required to fill vacancies.[2] They are remunerated on a contract basis for services performed, and, unlike clerks of court and other court officials, are not salaried officers. Bailiffs are however officers of the court subject to the discipline of the court, and responsible to the magistrate of the court for which they are appointed. The Commission notes however that -

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1. Country bailiffs also execute processes issued out of the superior courts subject to direction from the Sheriff.

2. Vacancies are advertised in the press. Clerks of Local Courts inspect bailiffs' records on a regular basis (usually quarterly) to ensure that bailiffs' duties are carried out in accordance with the Act. The Crown Law Department believes this to maintain an adequate monitor of the bailiffs' performance.

(i) there is no test or qualification for appointment to a bailiff's position;

(ii) the position requires a general legal background and an ability to interpret statutes. For example, there is a need for bailiffs to know of legislation such as that limiting hours of execution and certain legal rules concerning the powers and duties of bailiffs;

(iii) there is a need to avoid any conflict of interest between the public duties of each bailiff and his private interests;

(iv) overseas and in other Australian jurisdictions concern has been expressed at malpractice in the service of summonses and the swearing of affidavits of service.

Perhaps consideration could be given to a manual of instructions or a limited course of instruction in such matters.

9.8 Later in this working paper the Commission considers whether certain court process now served personally should be served by mail. This would substantially affect the income of bailiffs and bailiffs' officers and the two matters need to be considered together.[1]

9.9 It should be noted that bailiffs' incomes are related to the fees payable to them for process served or executed.[2] One of the difficulties in fixing fees for bailiffs' services is that bailiffs have very different volumes of work. Further, the distribution of bailiffs' work in one year can be quite different to that in the next. A system of salaried bailiffs whose income was linked to the number of processes dealt with and based on promotion might be one possible alternative to the present system. In the United Kingdom and Victoria however there has been criticism of the system of salaried bailiffs. The Commission seeks comment on the need for training and the appropriate method of engagement of bailiffs.

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1. As mentioned earlier, the role of bailiffs in enforcing judgments will be considered in the Commission's Working Paper on the Enforcement of Judgments.

2. Although s 20 allows wide flexibility in this matter. The questions raised are really ones requiring administrative rather than legislative attention.

9.10 An ancillary question which has been raised with the Commission concerns the question of alternate means of effecting personal service of court process other than through the bailiffs' offices. Whilst bailiffs are entitled to effect personal service of Local Court summonses and other process, such service can be effected equally by the parties or their privately engaged servants or agents. It has been suggested to the Commission that it is inappropriate for court process to be served by persons who are untrained and neither licensed or registered by any official body. Licensed debt collectors in Western Australia have suggested to the Commission that process should only be able to be served by appropriately qualified persons, such as bailiffs, legal practitioners, licensed debt collectors and their licensed employers. Cases of the making of false certificates of service and, more often, cases in which service is not properly effected within the Rules already occur. In some other jurisdictions process servers are licensed in the same way that debt collectors are licensed in Western Australia. The Commission seeks comment and notes that licensing legislation in some States provides for the licensing of private process servers. In South Australia, for example, the legislation authorises cancellation of the licence of a process server in a wide range of circumstances including those in which he has been guilty of unfair or improper harassment, fraudulent, dishonest or discreditable conduct or any neglect of duty.[1] The Act provides for the licensing and regulation of a number of separate categories of activity including "process servers". It would appear to the Commission that the provisions of the Debt Collectors Licensing Act 1964 of Western Australia do not extend to encompass the licensing of process servers as such.[2]

9.11 It is apparent that often suburban and country regional development outpaces the development of new court buildings so that adjustments are necessary from time to time in the areas to be serviced by bailiffs. Provisions which are based upon servicing of courts by bailiffs by reference to distance from a court take no account of transport routes, the growth of new suburban and country centres and other connecting factors of a social type. The allocation of areas to be serviced by bailiffs should be one determined administratively from time to time according to administrative convenience, growth or decline of bailiffs' work and other social

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1. Commercial and Private Agents Act 1972, s 41.

2. See also para 11.3 below.

needs and not by reference to distances from courts constructed many years before. The present situation has led to the fact that bailiffs service areas which are not nearest to the court to which the bailiff is appointed and to which he is responsible. This would seem to be wrong in principle as well as inconvenient. At present, sections 16 and 18 provide that for every court there should be one or more bailiffs, and that those bailiffs shall serve all summonses and execute all warrants issued out of the court. However, in the metropolitan area the territorial areas of responsibility of bailiffs have been varied so as to redistribute responsibilities among the various bailiffs and their areas of responsibility no longer coincide with metropolitan court districts. Administratively it is desirable that bailiffs be required to operate within boundaries which can be easily reviewed. It may be therefore desirable for bailiffs to be appointed in respect of geographical areas rather than by reference to particular courts and for provision to be made for the review of such areas from time to time. A system of administrative control of bailiffs would still be required.

9.12 The Commission notes that the money penalties provisions in sections 23 and 24 relating to misbehaviour by bailiffs and other court officers remain the same today as in 1904. The Commission also notes that there is no provision in the Local Courts Act equivalent to the provisions of sections 37 and 38 of the District Court Act imposing time limitations on actions against bailiffs or officers. A provision similar to that now contained in section 37 of the District Court Act was originally contained in section 27 of the Local Courts Act but repealed in 1954. These anomalies show clearly the need for regular review of legislation.

9.13 The Commission seeks comment on these various matters.

4. LEGAL PRACTITIONERS

9.14 One question which has given rise to considerable debate in regard to the disposition of small claims concerns the representation of parties by legal practitioners and others. Section 32 of the Small Claims Tribunals Act provides that each party to a proceeding before a tribunal shall have the carriage of his own case and that a party shall not be entitled to be represented by an agent unless it appears to the tribunal that an agent should be permitted as a matter of necessity. In no case may a tribunal approve of the appearance in a proceeding of an agent who has a legal qualification or who is of the

nature of a professional advocate, unless all parties to the proceedings agree and the tribunal is satisfied that the parties, other than the party applying for approval of an agent, or any of them shall not be thereby unfairly disadvantaged. Similar provision has been made by section 106L of the Local Courts Act in respect of claims in the Small Debts Division.

9.15 In this working paper, however, the Commission is concerned with claims other than those brought in the Small Debts Division and which therefore may involve amounts of money not exceeding $6,000, together with any amounts the subject of counterclaims. Representation of parties by lawyers may be said to have the advantages of testing the opponents case, marshalling and presenting evidence and bringing out legal and factual points in favour in situations when the person concerned is a litigant who would lack the competence or confidence to do so himself. Legal representation, however, can disadvantage unrepresented or economically weak litigants by the increased costs necessarily involved thereby and by inequalities in testing and presenting evidence and points of law. On the other hand, the denial of rights of legal representation may cause more harm than benefit to many unsophisticated litigants who are unable by themselves to adequately present their case.

9.16 At present, section 29 of the Local Courts Act provides that, subject to rules of court and the orders of the magistrate for the orderly transaction of business, a legal practitioner retained by or on behalf of a party, or any person allowed by special leave of the magistrate in any case, may appear instead of the party to address the court and examine and cross-examine witnesses.[1] It should be noted also that the English Court of Appeal has held that any person, whether a professional legal practitioner or not, may attend a trial as a friend of either party, may take notes, and may quietly make suggestions and give advice to that party,[2] since as such he is not acting as an advocate.

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1. The section contains a proviso that on the hearing of an application by a judgment creditor for the committal of a judgment debtor, the judgment creditor shall be entitled to be represented by any clerk or servant in the employ, or subject to the control or direction, of the judgment creditor or his solicitor. This will be dealt with in the Working Paper on the Enforcement of Judgments.

2. McKenzie v McKenzie [1970] 3 All ER 1034.

9.17 There may, however, be a need to clarify the circumstances in which a body corporate or other association may appear by a representative other than a legal practitioner, and also the circumstances in which a party may appear by a spouse or other family member or a friend or social worker. At present section 29 merely reserves to the magistrate power to give special leave to appear in any case. In Victoria a party may appear "by any person in the exclusive employment of the party who is duly authorised in writing to appear on his behalf".[1] In New South Wales a party to a civil action in a Local Court may appear by "his spouse or employee authorised by him in writing in that behalf".[2] Authority is obviously necessary but a requirement of written authority is one which seems likely to be overlooked by unrepresented parties unless drawn specifically to their attention. Therefore, a provision allowing for special leave as an alternative in all cases seems desirable.

5. ARTICLED CLERKS AND OTHER LAW CLERKS

9.18 A preliminary submission made to the Commission is that articled law clerks and other law clerks should have a right of audience in Local Courts. There is no doubt that many matters coming before Local Courts notwithstanding the creation of the Small Debts Division will involve quite small sums of money. Equally there is no doubt that appearance in such matters may provide a valuable training ground for young lawyers. In fact, articled law clerks and other law clerks at present commonly appear in Local Court chamber matters and on the hearing of judgment summonses and summonses in aid of execution without difficulty. Creation of such a right of appearance may assist in the process of keeping costs in such matters within realistic limits.[3] In South Australia by section 135 of the Local and District Criminal Courts Act articled law clerks acting on the instructions of their principals are entitled to appear in Local Courts of limited jurisdiction, which now have civil jurisdiction involving money sums in excess of that exercised by Western Australian Local Courts.

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1. Magistrates (Summary Proceedings) Act, 1975, s 95.

2. Court of Petty Sessions (Civil Claims) Act, 1970-1980, s 11.

3. Special scales of costs would need to be provided for this purpose.

9.19 However, the Commission is tentatively of the view that articled law clerks and other law clerks should not be given a right of audience in matters beyond the provisions presently appearing in section 29. This view is reinforced by the increased jurisdiction recently given to Local Courts. As pointed out above these claims will range up to $6,000, may well involve complex defences and counterclaims and may be either liquidated or unliquidated in nature.

9.20 The Commission seeks comment on the matters raised in this chapter.

6. PROPOSALS

9.21 The Commission proposes that -

(a) All provisions relating to the appointment and assignment of magistrates should be removed from the Local Courts Act and placed in the Stipendiary Magistrates Act.

(b) Clerks of Local Courts should no longer be required to "sign" summonses but should continue to sign orders and warrants.

(c) The question of the organisation and remuneration of bailiffs services is more appropriately a matter for review not by the Commission but by an expert committee. However, the Commission seeks comment on the need for training and the appropriate method of remuneration of bailiffs, and allocation of bailiff districts.

(d) The Debt Collectors Licensing Act 1964, or other legislation, should make provision for the licensing of process servers to the intent that court documents should only be served by bailiffs, legal practitioners, licensed debt collectors and the licensed employees of such persons.

(e) The only persons entitled to a right of audience in Local Courts should be -

(i) the parties to the proceedings and,
(ii) other than in the Small Debts Division, legal practitioners appointed by them,

SAVE THAT

(iii) where a party is a corporation it may be represented by a director or employee, and

(iv) a magistrate should be empowered, as at present, to permit a party to be assisted by a relative, friend or social worker in appropriate circumstances.

However the present provisions should be clarified in this regard and in the light of judicial decisions, such as that in McKenzie v McKenzie, as to the rights of litigants in court to assistance.

CHAPTER 10 - COMMENCING PROCEEDINGS

1. EXISTING PROVISIONS AND PRACTICE

10.1 This working paper now turns to the provisions of the Act and Rules relating to the conduct of Local Court proceedings. A chart dealing with the sequence of proceedings contemplated by the existing Rules is appended to the working paper. In the discussion which follows the Commission deals with ordinary actions for debt or damages unless otherwise specified. The particular requirements of the Small Debts Division and of a possible Administrative Law Division of Local Courts suggested earlier are not discussed.

10.2 The provisions of the Local Courts Act in respect of the commencement of proceedings are contained in sections 40 and 41. Sections 40 and 41 were originally based on English County Court procedure but the procedure has long since been altered in practice in Western Australia.[1] The practice adopted in the Court for many years, is simply that a person intending to bring an action prepares, either by himself or by his solicitor, a summons in the prescribed form which he presents at the court registry. The court then endorses the summons form with the appropriate number, collects the fees, retains the original copy as the court record, returns one copy to the plaintiff or his solicitor and the others either to the bailiff or the plaintiff to enable service upon the defendant or defendants. The question of service will be dealt with in the next chapter.

2. GENERAL PRINCIPLES

10.3 Apart from the fact that the provisions do not reflect current practice, the Commission draws attention to the need for -

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1. The sections provide for a person who wishes to bring proceedings to inform the clerk of certain matters, and for the clerk then to enter a plaint in a book and to issue a summons. A form of plaint is still prescribed although never used.

* the simplification of court forms
* their expression in simple English
* available translations for major foreign languages
* the provision of other necessary information to the defendant, either by endorsement on the summons form itself or otherwise, at the time of service of the summons and
* the need to prescribe and design forms so as to enable use by solicitors, debt collectors and other plaintiffs of modern word processing equipment.

These important matters are dealt with generally in chapter 22 below. Appendix III shows two recently designed summons forms in use in English County Courts and Victorian Magistrates' Courts.

3. PARTICULARS

10.4 How much detail of the plaintiff's claim should be provided to defendants in Local Court summonses? The existing provision, section 41(2), requires the summons to set out "concisely the cause of action alleged, and the amount or value of the money or property claimed, and the nature of any other relief claimed". Similar provisions are found elsewhere, including, for example, the English County Court Rules, 1981 which require the summons to "state briefly the material facts" on which the plaintiff relies.[1] Section 41(2) and Order 5 rules 15 and 20 make it plain that full particulars of claim need only be provided on request or after court order.[2]

10.5 The Australian Law Reform Commission[3] has recommended that a creditor be required to append to the summons a detailed

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1. Order 6 rule 1. It has been suggested to the Commission that the small sums allowed by way of solicitors' costs for preparation of claims, and the time allowed for compliance with an order for particulars under Order 5 rule 20, are consistent only with the supply of "one or two details the defendant wishes amplified". The questions of scales of costs and time limits are proper matters for the regular review suggested later in this working paper.

2. Using different terminology to s 41(2), Order 5 rule 15 provides that the plaintiff shall indorse "such particulars as shall be reasonably sufficient to inform the defendant of the demand intended to be made against him". Note Order 5 rule (2a) dealing with claims for interest which comes into force on 20 June 1983.

3. Debt Recovery and Insolvency, DP No 6, para 25.

statement of the basis on which the sum claimed has been arrived at. The amount of detail for particular types of claim should, it said, be settled by regulation or rules of court. The Commission was especially concerned with the need for detailed particulars of unliquidated claims, such as those involving credit accounts, or claims for interest. The Commission was mainly concerned to ensure that defendants are supplied with sufficient detail to enable them to assess properly the claim made against them. The English County Court Rules, 1981 provide for specified particulars in certain classes of action, such as actions for recovery of land, mortgagee actions, hire purchase claims and claims for account. In some cases the provisions of other statutes already, in Western Australia, require certain particulars to be supplied before action is commenced.[1] This Commission accepts that it is necessary to provide detailed particulars in legible and easily comprehensible form where the information is not already known to the defendant. It must be recognised, however, that in many cases there is no dispute as to liability and that providing such particulars tends to increase the costs of litigation. Where liability is not admitted particulars of claim are, and should be, obtainable upon request.[2]

10.6 There is however another aspect to any discussion of the details a plaintiff should be required to provide about the claim being made. If the claim is denied and proceeds to trial it is important that the presiding magistrate also be able clearly to discern the issues between the parties so as to be able to adjudicate upon them. The Local Court Rules do not at present require formal pleadings. The question is whether a court in which the limit of money jurisdiction is $6,000 should not be one which requires some particularity in statements of claim. Perhaps one solution might be to require detailed particulars of claim to be filed before any matter is set down for trial or, alternatively, in case of claims involving more than $1,000. On the other hand the Small Claims Tribunal whilst not

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1. For example, the Hire-Purchase Act 1959.

2. It should be noted that Order 5 rule 20 permits a defendant to give notice requiring further particulars of claim and requiring the plaintiff to file "full particulars of his claim, and of the relief or remedy to which he claims to be entitled". If the plaintiff fails to comply or complies inadequately, the magistrate may order the plaintiff to file "full particulars". This provision does not address itself however to the question which arises when the defendant requires "further and better" particulars of a particular matter rather than full particulars. Order 5 rule 20 should be amended accordingly.

requiring formal pleadings requires details of claim in all matters however small. The Commission seeks comment.[1]

4. USE OF "FIXED DATE" SUMMONSES

10.7 Save in proceedings for the recovery of possession of land under Part VI, the Local Courts Act provides only for the use of one form of summons. The default summons procedure is used in Western Australia for Local Court debt claims. After service of the summons, if the defendant fails to file notice of defence the plaintiff is entitled to file a notice or entry of judgment and then to issue execution on the judgment.[2] In the case of unliquidated claims[3] if a defendant fails to file notice of defence, the plaintiff may obtain an order for judgment for damages to be assessed and must prove his claim before obtaining final judgment for a specific sum, although by section 46(2) default judgment may be entered even to unliquidated claims not exceeding $500 in the case of claims for damages to a motor vehicle or $300 in other matters.

10.8 In most other States of Australia and in England provision is made for use of different forms of summonses depending on questions such as whether the proceedings are for liquidated claims or for unliquidated claims.[4] By Order 3 rule 2 of the English

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1. The question of pleadings in defended proceedings is further dealt with in paras 12.3 and 12.26 and in chapter 15 below.

2. In some States the procedure is complicated by a requirement that the plaintiff must file an affidavit of debt in support of an application for judgment.

3. Unliquidated claims are differentiated by an additional endorsement added to the summons.

4. Various names are given to the different forms of summonses in different jurisdictions, but the form of summons used for liquidated claims is usually known as a default summons and the form of summons used for unliquidated claims is usually known as either a special summons or an ordinary summons. New South Wales uses three form of summons known as the default summons, the ordinary summons and the special summons. In the case of an ordinary summons the date of hearing is fixed by the court in issuing the summons itself and failing notice by the defendant that he admits the claim the plaintiff must prove his claim on the return date. Theoretically, this provides an expeditious method of bringing matters before the court. In practice it has led to considerable difficulties because the plaintiff in many cases does not know whether the defendant intends to defend the claim or whether the Court will have time to hear the action on the first hearing date. As a result the ordinary summons is little used. The special summons was introduced in order to avoid this by not fixing a hearing date on

County Court Rules, 1981 actions in which claims are made for relief other than the payment of money are "fixed date" actions and all other actions are default actions. By Order 1 rule 10 a claim in an action for the cost of repairs to a vehicle or property in, on or abutting a highway in consequence of damage sustained in an accident due to negligence, unless the court otherwise orders, is treated as a liquidated demand for the purposes of the rules.[1] The default action, previously limited to debt claims, has now been extended to cover debts and all damages claims except Admiralty actions and rent actions. It is not permissible to bring a default action for proceedings in which some relief is claimed other than the recovery of money since, in these cases (for example, claims for injunction, specific performance, possession of land, return of goods) the court usually has some discretion as to the making of an order or the fixing of a date for possession and thus a return day is necessary.[2] For these cases the "fixed date action" applies. If, in a default action, the plaintiff later amends his particulars to raise a claim other than for the recovery of money the action will continue as if it has been commenced as a fixed date action.

10.9 The Commission does not see any significant advantages in adopting either a fixed date summons procedure or a form of special summons similar to that used elsewhere. The fixed date summons has been abolished in Victoria, is little used in New South Wales and is in England now reserved for claims other than for the payment of money. The special summons procedure for unliquidated claims is accommodated in Western Australia by the use of a special endorsement.

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the summons. It still requires an application for judgment followed by proof of the claim, either in person or by affidavit depending on the circumstances. In Victoria, failure by the defendant to file notice of defence to a special summons does have the effect that the complainant may file an affidavit verifying his cause of action and he need not attend either personally or otherwise or prove his claim. Although this avoids the need for an appearance it is not as expeditious as entry of default judgment.

1. A claim for loss of use of the vehicle however is an unliquidated claim.

2. The return date shown on a fixed date summons is a date for pre-trial review of the action.

5. SUMMONSES IN SMALL CLAIMS

10.10 The question of whether a common form of summons or complaint can be devised to operate in both the Small Claims Tribunal system and the Local Court system equivalent in Victoria has been raised in a Victorian context.[1] Such a suggestion would require the introduction however of a common default judgment system in Small Claims Tribunals unless the system was to be abolished in Local Courts and other consequential changes. Such a commonality of summons or complaint might however be developed as between Small Claims Tribunals and the Small Debts Division of Local Courts. This would however have the disadvantage that Local Courts would then be required to deal with yet another form of originating process.

6. PROPOSALS

10.11 The Commission proposes that -

(a) The provisions of the Local Courts Act and Rules dealing with the issue of summonses should be redrafted in terms of current practice, by deleting reference to the commencement of actions by the entry of a plaint and simply referring to the issue of a summons.

(b) The Local Court summons form should be redesigned in simple form, with notes for guidance of the defendant. An informational pamphlet in simple English should be made available at little or no cost.

(c) Local Court summonses should continue to contain a short statement of particulars of claim, sufficient to enable the defendant to be informed of the demand or claim made against him.

(d) As at present, the defendant should be able to obtain detailed particulars of claim upon request. The summons or pamphlet should make this clear.

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1. A Robbins, Can We Improve The System?, Legal Service Bulletin, December 1982, 280 and February 1983, 29.

CHAPTER 11 - SERVICE AND LODGMENT OF DOCUMENTS

1. THE PRESENT POSITION

11.1 Section 42 of the Local Courts Act requires that every summons shall be served personally, except where a different method of service is prescribed, or is ordered or allowed by the magistrate or clerk. Where the magistrate or clerk is satisfied that to effect personal service would involve undue expense, he may allow service by post, which is done by the clerk sending the summons by post as a prepaid registered letter addressed to the party to be served at his place of residence or business. Service of a summons in this way is usually effected in respect of defendants residing in remote areas. Section 43 provides for service to be waived by the magistrate subject to such conditions as the magistrate thinks fit provided reasonable efforts to effect personal service have been made. Section 44 makes provision for special methods of service in special cases to be provided by rules of court and for the provisions relating to service of summonses to be extended by rules of court to any other process. Pursuant to section 44 Order 6 of the Rules provides for service on various special categories of defendants including infants, insane persons or patients, persons on ships, soldiers, marines, airmen, prisoners or other persons in custody, miners, and persons employed in a public asylum or prison.[1] Order 6 rule 4 provides that if a summons in a personal action is delivered to some person of the apparent age of sixteen years, at the place of abode or business[2] of the party to be served, then the summons is deemed to have been duly served on the party.

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1. Other statutes also make provisions as to service in particular cases, for example the Companies (Western Australia) Code 1981.

2. For the purpose of this rule, a place of business is not deemed the defendant's place of business unless he is the master or one of the masters thereof.

11.2 These provisions are different from the Rules of the Supreme Court. Those Rules require that, subject to the provisions of any Act and the Rules, a writ must be served personally on each defendant by the plaintiff or his agent. Personal service is, usually, effected by leaving a copy of the document with the person to be served, and if so requested by him, showing him the original.[1] Where personal service of a document is required and it appears to the Court that personal service on a person required to be served is impracticable, the Court may order that the document be served by substituted service.

2. CRITICISMS AND THE POSITION ELSEWHERE

11.3 It has been suggested to the Commission in a preliminary submission that service should only be effected by personal service upon the defendant and that Order 6 rule 4 should be amended accordingly. This would equate the Local Court position to that in the Supreme Court and the District Court. Criticism of provisions similar to those operating in Local Courts has been voiced in legal literature elsewhere in Australia and overseas.[2] The duty to serve process personally and to effect service on persons other than the party concerned may be criticised as being conducive to the making of false affidavits of service and as being invasive of privacy. It should also be noted that process servers are not licensed or registered in Western Australia. This is unlike the position in some other jurisdictions. Such a situation has also been criticised in the legal literature in other jurisdictions and similar comments have been made to the Commission by mercantile agents.

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1. Supreme Court Rules, Order 72 rule 2.

2. For further discussion, see John Willis, Of Process Service, Default Summonses and the Judicial Process, [1975] 10 Melb Uni Law Rev, 247, and The Default Summons - Streamlined for Creditor Convenience and Abuse, (1976) 50 Law Inst of Vic Jo 368. An American commentator dealing with the question has commented as follows:

> . . . service by mail has been established as equally or more reliable, far less costly, and probably less prone to the corruption often involved in service of process.

See Whitford, A Critique of the Consumer Credit Collection System, 1979 Wisconsin Law Rev 1906. Also California Law Revision Commission, Recommendations Relating to Wage Garnishment and Related Matters, 112-113 and Shuchman, Travel Costs for Service of Civil Process, 5 Connecticut Law Rev 458.

11.4 On the other hand there has been a substantial growth in the use of service by post in various jurisdictions of recent years. Service of English County Court summonses is usually effected by first class post at the election of the plaintiff although personal service on the defendant or on a person apparently not less than sixteen years old at the residence or place of business of the defendant is permitted.[1] Apparently the number of applications to set aside judgments did not show any significant increase after the introduction of postal service. In 1979 the Rules of the Supreme Court of England and Wales were also amended to provide for service of writs of summons or other originating process by post.[2]

11.5 In the Northern Territory, Local Court summonses can now be served within the Northern Territory by pre-paid certified mail posted to the defendant at his last known or usual place of residence or business or in the case of a body corporate to the registered office or last known address of that body corporate.

11.6 In Tasmania, service of documents issued by the Court of Requests is effected by certified mail outside Hobart and Launceston. Figures supplied to the Commission show that between 70% and 80% of summonses so issued are served. Those processes which are returned unclaimed or refused are automatically re-issued to the bailiff for personal service, with no additional fee being payable. About 65% to 75% of these are then served by the bailiff. Less than half of one percent of judgments entered in the Court of Requests are set aside on the grounds of non-receipt of the summons.

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1. County Court Rules 1981, Order 7.

2. By Order 10 rule 2 these Rules now provide as an alternative to personal service that a defendant who is within the jurisdiction may be served by sending a copy of the writ, sealed with the court's seal and accompanied by a form of acknowledgement of service, by ordinary first-class post to the defendant at his usual or last known address, or if there is a letterbox for that address, by inserting through the letterbox a copy of the writ enclosed in a sealed envelope addressed to the defendant. These methods however must be adhered to strictly so that posting by registered or recorded delivery post, or handing the writ to a person who answers the door at the defendant's premises do not constitute effective service. The date of service is, unless the contrary is shown, deemed to be the seventh day after the date on which the writ was sent or inserted through the letterbox including holidays and Sundays. A partnership or firm may be served by personal service or by post, under rule 3, but not by insertion of the writ through the letterbox. By rule 4, a solicitor may endorse acceptance of service on behalf of the defendant on the writ and that is also deemed due service.

11.7 Service of summonses issued out of the Australian Capital Territory Court of Petty Sessions in civil matters is also now permitted by post. If the plaintiff applies for postal service, the clerk may send the summons by post to the defendant's address within the Australian Capital Territory shown on the summons. The clerk completes a certificate of postal service.

11.8 The use of postal service is also common practice in small claims tribunals in Western Australia and elsewhere. In its report on Small Debts Court[1] the Commission recommended as follows:

> . . . service by post. . . the method usually used in the Small Claims Tribunal is less expensive than personal service by the bailiff. The Commission recommends. . . that any subsequent documents which need to be served in the course of the action should be served by post. In due course consideration could be given to the introduction of service by post in the Local Court.

11.9 By section 56A of the Justices Act 1902-1981, complaints relating to simple offences against the Road Traffic Act 1974-1981, other prescribed Acts and certain regulations, are presently served by "pre-paid registered post" in Western Australia. The Commission is not aware of any particular difficulties which have arisen in respect of this practice. If Local Courts were merged with Courts of Petty Sessions consistency of practice in such matters would seem desirable.

11.10 The Australian Law Reform Commission[2] has commented that while personal service is most effective in ensuring that the summons is brought to the defendant's notice, it adds considerably to the costs of legal proceedings. An adequate system of service might be provided at less cost and with less danger of invasion of the debtor's privacy, making primary use of the mail. That Commission added:

> Neither registered nor certified mail should be required. . . First, neither is left at the postal address when nobody is at home. Secondly, some people refuse to accept mail of this type in case the communication may be unwelcome. Use of the ordinary post avoids each of these problems. It lacks, of course, the main benefit of registered or certified mail, proof of receipt. . . This. . . is not critical, since both registered mail and certified mail may be, and are, left with persons other than the addressees themselves. The system must be one under which the fact of posting can be certified. The summons form should be filed in court, and court officials alone should be authorised to post the summons. The creditor himself should not

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1. Project No 63, 1979, para 5.6.

2. Debt Recovery and Insolvency, DP No 6, para 27.

be prevented from serving the summons personally on the debtor. Mercantile agents have impressed on us the value in many cases of making personal contact with the debtor. The creditor's rights in this regard should, however, be limited to personal service in the strict sense. A creditor should not be entitled to serve the summons on anyone other than the debtor himself.

11.11 The problems which are usually seen as arising out of the use of postal service are that the debtor may never receive the summons and therefore not file notice of intention to defend.[1] This problem is to some extent overcome by rules which provide that if the envelope containing the summons is returned to the court within a fixed time service is not effected. In view of the large geographical area of Western Australia, staggered times may be necessary but for simplicity of administration a standard time is much preferable.[2] There remains, however, the problem of transient parties whose mail is collected or allowed to remain at a previous address by other persons and is not returned to the court. Provisions can be made for the setting aside of judgments by such parties in appropriate circumstances. Further, the Commission later in this working paper suggests that notice of judgment should always be sent by the Local Court concerned to the defendant, which is not the present practice.[3] This would help alert defendants to the position before enforcement proceedings were too far advanced. However, it might be noted that the use of postal service in England has not resulted in increased numbers of applications to set aside default judgments, or complaints as to non-service of summonses.

11.12 Administrative expenditure and therefore the costs to the parties could be reduced by the use of ordinary post rather than

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1. The New South Wales Privacy Committee has also considered service of process by post as a possible remedy for privacy infringements arising from service under New South Wales provisions similar to those in Order 6 rule 4: Privacy Committee, Privacy Aspects of Debt Collection, BP 49, 1978, para 10.1. There may also remain a need for special provisions for service in some cases, as for example, in the cases now dealt with by Order 6.

2. See also para 12.6 below.

3. See para 19.21 below.

certified post, as has been done in the United Kingdom.[1] The use of ordinary post should ensure that a high percentage of defendants receive the summons at first posting. The offsetting disadvantage is that no direct proof of service is obtained. This may have the potential to disadvantage defendants but this in reality should occur in few cases. In such cases courts should readily set judgments entered by default aside.[2] The use of certified mail has the

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1. Present postage rates within Western Australia are:

Ordinary mail:	27¢
Certified mail:	75¢ plus 27¢ postage plus 60¢ for acknowledgement of delivery, a total of $1.62.
Registered mail:	$3.00 plus 27¢ postage plus 60¢ acknowledgement of delivery, a total of $3.87.

At present bailiff service fees on summonses are $4.60 plus additional fees for any one unsuccessful attempted service and kilometreage fees outside certain areas.

2. In the Australian Capital Territory s 29 of the Court of Petty Sessions (Civil Jurisdiction) Ordinance 1982 provides for cases of doubtful service as follows:

> Where the court is satisfied that -
>
> (i) the document did not come to the knowledge of the party served within a reasonable time; or
>
> (ii) doubt exists whether the document came to the knowledge of the party served within a reasonable time,
>
> the court, on application by the clerk or a party to the proceedings or of its own motion, shall not allow any fresh step in the proceedings to be taken against the party served, and the court shall -
>
> (c) strike out or adjourn the proceedings; or
>
> (d) order that such a document be re-served on that party in such manner (if any) as is specified in the order,
>
> as the court thinks just, and the court may make such other orders and give such directions as it thinks just.
>
> Where the court is satisfied that -
>
> (a) it has been impracticable for any reason to effect service of any document in proceedings on a party; and
>
> (b) reasonable steps have been taken for the purpose of bringing the document to the notice of the party,
>
> the court may, by order, direct that for the purpose of the proceedings service of that document shall be taken to have been effected on that party on a specified date.

advantage that the summons is signed for by the recipient. However, no doubt a number of persons will not accept service of process by certified mail. Where a plaintiff prefers to effect personal service a request for postal service to be dispensed with could be filed. Postal service would effect a substantial aggregate saving to plaintiffs. This would be passed on to defendants, in cases where judgment is obtained, in the form of lower fees.

11.13 One approach might be to require plaintiffs to elect between postal service and personal service. Another would be to assume that postal service is required unless a request has been made on the summons at the plaintiff's election that it be dispensed with, possibly supported by a short statement of reasons. Another matter which may require attention is the question whether a plaintiff should in filing a summons and electing postal service, be required to certify as to a belief that the address for postal service shown on the summons is the last known residential or business address of the defendant. In the absence of such a certification what is to stop a plaintiff deliberately showing a wrong address as the address for service in the knowledge that the summons will not reach the defendant and hopefully, for him, will not be returned to the court. Perhaps the simple response is that this certificate would add yet another procedural complication and has not been found necessary in those jurisdiction, such as Small Claims Tribunals, or in the English County Court, in which the device of postal service has been used.

3. PROOF OF SERVICE

11.14 Section 44(1) provides that proof of service may be given in the prescribed manner by the certificate of a bailiff or police officer or the affidavit of any other person. The prescribed forms have the effect that the certificate of a bailiff or police officer need not be witnessed, whereas the affidavit of other persons must be appropriately sworn before a qualified person. Subsection (2) then provides that any false statement in any "such certificate" renders the person making the same liable on summary conviction to imprisonment for six months. Presumably the rationale behind the creation of two different methods of proving service is that bailiffs and police officers are likely to be reliable persons whose signatures are easily proven and for whom the need to have large numbers of documents witnessed is burdensome. The Commission seeks comment however whether the same provision cannot be extended to all persons effecting service. Provision for a monetary penalty as well as the

existing provision of subsection (2) would act as a deterrent to false certification. Provision may be made by the Rules for special methods of proving service in special cases and may be extended to other process.

4. LODGMENT BY POST

11.15 It has also been suggested to the Commission in a preliminary submission that provision should be made for the lodgment of documents by post. At present Order 38 rule 8 of the Local Court Rules merely requires all documents to be "filed with the clerk" and this is taken to refer to filing by personal attendance at the court.[1] Arrangements for postal lodgment have been put into effect in various ways in respect of a number of court jurisdictions. Lodgment of probate documents at the Supreme Court Registry by post in certain circumstances has been allowed. In England the County Court Rules 1981 provide that any act that may be done by attendance at the court office may be done by pre-paid post, provided that the party sends to the court -

(a) such documents as he would have been required to produce at the court office if he had attended, and

(b) any court fees which are payable and any money which is to be paid or tendered to a witness or judgment debtor, and

(c) a self-addressed envelope.

However, because of the large numbers of documents involved and the large numbers of unrepresented litigants, such an innovation would probably require, and would certainly best be implemented following a general review designed to effect a significant simplication of relevant forms and of the scales of costs and fees. It may, however, also involve a loss of administrative time in checking and rejecting documents. The Commission seeks comment.

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1. The Act and Rules are silent as to whether documents or payments to be filed or made at a Local Court can be filed or made at another Local Court. The practice is for other Local Courts to accept such documents and payments but for the time of filing and payment to be treated as the time of receipt by the Local Court in which the proceedings are being conducted.

5. PROPOSALS

11.16 The Commission proposes that -

Service (paragraphs 11.1 to 11.14)

(a) Local Court summonses should be served within Western Australia either by mail or by bailiff or other personal service at the election of the plaintiff.

(b) A summons should be served by postal service unless the plaintiff otherwise elects. Postal service should be effected by the clerk of courts who should keep a daily record of all postings. The cost of postal service should be recovered by the court by the addition of a small fee charged to the plaintiff on the issue of the summons, and be recoverable by the plaintiff from an unsuccessful defendant, in the same way as a fee is presently payable for bailiff or other personal service. The fee should however be less. A summons served by post should be deemed to have been served if not returned to the court within a fixed period.

(c) Provision should be made for service to be effected by either bailiff service or other personal service where postal service results in the summons being returned unclaimed to the court.

(d) Such a return to court of a summons not otherwise served, after any judgment has been entered, should act as a stay of execution pending further service or order, and notification thereof should be given to the plaintiff.

(e) Proof of personal service be simplified so as to be by certificate in all cases, rather than as at present in some cases by affidavit, subject to provision of adequate monetary penalties for the making of false certificates.

(f) The rules should contain liberal provision for the setting aside of judgments entered in default of notice of defence where the defendant has not, in fact, received the service copy of the summons.

Lodgment (paragraph 11.15)

(g) The Local Court Rules be amended to permit lodgment of documents by post.

CHAPTER 12 - DEFENCES AND COUNTERCLAIMS

1. NOTICE OF DEFENCE

12.1 By section 45 a defendant is permitted to give notice that he intends to defend an action within the time limited for that purpose in the summons or at any time before a proceeding in default has been taken. However, the notice does not require the defendant to include in the notice any particulars or grounds of defence.[1]

12.2 In England the filing of a notice of defence or of an appearance to a writ has been abolished in Supreme Court proceedings. Instead a defendant who wishes to contest proceedings must complete and return a form of Acknowledgement of Service received with the writ, stating whether or not he intends to defend the action or to apply for stay of execution or to transfer the action to another court and must give an address for service. The acknowledgement must be signed either by the defendant or his solicitor. Unless returned either by post or by hand within a prescribed time, usually fourteen days from service, judgment in default may be entered except in certain cases such as where the

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1. Section 45 calls the notice a "Notice of Defence" and the form is so described on the back of the summons form. The form, Form 50, however, is headed "Notice of Intention to Defend" and some sections, such as s 47B, so refer to it. As matters now stand, the latter is more accurate. The existing provisions are silent as to the method and place of giving notice that the defendant intends to defend an action, save that Order 10 rule 1 prescribes the form and fee and fixes the time within which notice is to be given. Order 10 rule 3 permits notice of defence to be given or served by post or telegram or personal delivery. Since Local Courts are each separate entities notice of defence must be so given at the particular Local Court from which the summons was issued.

defendant is a minor or patient, in actions in tort between husband and wife and under the State Immunity Act.

(a) Particulars

12.3 One preliminary submission made to the Commission is that a defendant who wishes to defend proceedings should be required by the rules to file a document setting out particulars of the grounds of his defence without any request for them from the plaintiff or even that he should be required to file such a document after swearing the same upon affidavit or statutory declaration.[1] The Commission's tentative view is that in order to maintain the expedition and relatively inexpensive nature of Local Court proceedings, particulars of both claim and of defence should be required in Local Court proceedings but that initially these should be given in as concise and simple a form as the nature of the case permits. The Commission is of the view that the plaintiff should be given some such particulars of defence in the notice of defence itself, without the necessity to specifically seek such particulars. The Commission recognises that in some cases the defendant may need to obtain further particulars of claim before filing even concise particulars of defence. This should continue to be possible.[2] Alternatively the plaintiff or the defendant may take the view that the action is one in which formal pleadings of the type required under the Rules of the Supreme Court are appropriate. It appears desirable that any such party should be enabled to apply for an order to that effect at any time after the commencement of proceedings.

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1. In New South Wales the provisions of the District Court Act 1973 and the Court of Petty Sessions (Civil Claims) Act 1970-1980 provide that a defendant shall support his Notice of Grounds of Defence to a liquidated claim with an affidavit in support of the grounds which are set out in the Notice: District Court Act, 1973 s 56 and Court of Petty Sessions (Civil Claims) Act, 1970-1980 s 25. However the Commission notes that the plaintiff is not required to verify his claim before issuing a summons. In Victoria a defendant to civil proceedings under the Magistrates (Summary Proceedings) Act 1975 is obliged to provide the material facts on which his defence relies but not to verify them: s 9A(4).

2. Another question which arises is whether there is need for express provision in the Local Court Rules to enable particulars of defence to be sought against a third party in third party proceedings. This power however seems to be implicit in Order 13 rule 5 dealing with applications for directions in third party proceedings.

(b) Fees

12.4 No doubt there are occasions upon which defendants file Notices of Defence to Local Court proceedings merely as a means of delaying the proceedings. It must also be recognised that provision of court services costs the State a considerable sum annually. Recently the Local Court Rules have been amended to require a fee of $10 to be paid upon filing of notice of defence.[1] However, at present no particulars of defence need be filed at that point. One question which arises is whether a defendant who wishes to defend proceedings brought against him should always be required to pay a filing fee. This practice is not required in other inferior courts but is required in the Supreme Court and District Court. Two difficulties arise. First, some defendants have great difficulty in paying the fee. Secondly, if the defendant has a good defence, for example because the debt has been paid previously, there should be a simple means of recovering the fee from the plaintiff. The Commission seeks comment. It may be preferable to impose no fee in respect of claims below a certain amount, say $1,000, being the jurisdictional limit of the Small Debts Division, or possibly a sliding scale of fees.

(c) Form of notice

12.5 In its report on Small Debts Court[2] the Commission noted that the need for improved information and documentation to be supplied in Local Court proceedings could be partly met by the use of more appropriate forms for the filing of defences. The question of the design of forms is dealt with later in this working paper.[3] The Notice of Defence form which is used in Queensland is reproduced in Appendix IV to this working paper. The Appendix also reproduces the form prescribed in Victoria under the Magistrates (Summary Proceedings) Act which is somewhat simpler. The existing form is capable of considerable improvement.[4]

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1. This is the same fee as on filing a summons.

2. Project No 63, 1979, para 5.10

3. See paras 22.4 to 22.8 below.

4. A number of minor suggestions for improvement to the existing Local Court provisions in relation to notices of defence suggest themselves. First, see footnote 1 to para 12.1 above. Secondly, Form 50 provides for the defendant or his solicitor not only to sign and date the notice but also to give a place of residence or place of business. It is not clear from the rules

(d) Time for response by defendant

12.6 Another matter which must be considered is the time response to be required of a defendant by the summons. The Local Court Rules require defendants to file any notice of defence within prescribed periods after service of the summons. These periods are fixed by reference to the distance from the court to the place of service and range from 10 days to 30 days. In view of modern communications one standard period might now apply. In New South Wales a standard period of 14 days, applies. Air mail, telephones and telegram services make such periods appear anachronistic.

2. SETTING DOWN FOR TRIAL

12.7 After a defendant has given notice of defence, the clerk of the court may, on application being made to him by one of the parties, list an action for trial.[1]

12.8 It has been suggested to the Commission that listing difficulties have been caused by parties or solicitors listing actions for hearing before they are ready to proceed with the hearing and that this causes a waste of court time and of the time of litigants and

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whether failure to insert the defendant's place of residence or place of business invalidates the notice. Failure to lodge a valid notice leaves the plaintiff in a position to enter judgment. Thirdly, the form does not make clear that if a defendant wishes to confess a debt in part, but to defend the action as to the balance, he must complete and file not only the confession of debt form provided on the reverse side of the summons, but also the Notice of Defence form in relation to the balance. Fourthly, Notices of Defence should be printed on separate stationery and not on the reverse side of the summons. This seems desirable in order to bring the matter to the defendant's attention. It will probably be necessary if particulars of defence are to be included in the notice. The printing of the Notice of Defence form on the side of the defendant's copy of the summons also means that a defendant who completes the copy and files the same at the Court is then left without a copy of the summons. Finally, the wording of the endorsements positioned below the signature section of the form should be simplified into basic English, printed in large type and made available in pamphlet form.

1. Section 46. Notice of trial is posted by the court to the plaintiff and the defendant. If there is more than one defendant, notice of trial is not given until notice of defence has been received from all defendants or the time for giving of such notices has expired, unless the magistrate otherwise orders. Where a defendant has not given notice of defence to a claim for pecuniary damages and the plaintiff sets the matter down for such assessment notice of assessment of damages is given to the parties in the same way.

witnesses. It is suggested that litigants should be required to file a certificate of readiness together with the application to list for hearing. Such a procedure is in use in the Supreme Court and District Court.

12.9 The Commission is sympathetic to the need for information to be supplied to Local Court clerks in order that listings for trial be made upon the basis of sufficient information so that the time of the court, litigants, witnesses, and of parties to other matters, is reduced to a minimum. The need is greater because of the increase in Local Court jurisdiction. The information, which might be required on the application to list for trial,[1] could include not merely an estimated duration of hearing time but reference to the number of witnesses to be called, the nature and complexity of the issues, the name of counsel, the dates when counsel is not available and even possibly comments as to the likelihood of resolution prior to hearing. This might reduce the number of applications for adjournments which should only be given for good reason and not because of mere convenience of one party or overlisting of court time.[2] The Commission seeks comment.

12.10 When notice is given to a defendant that an action has been listed or relisted for trial or for assessment of damages, the form of notification might include not merely the date, time and place of hearing as at present, but might also advise the defendant that he is entitled to appear to present his case[3] and that he should arrange for the attendance of any witnesses and for the production on his behalf of any documents that might be necessary for the proper disposal of the matter and further that if the case is not presented the issue in

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1. This is usually but not always filed by the plaintiff.

2. In Victorian Magistrates Courts after a defence is filed the court sends out a request for information. The parties must advise the court of the number of witnesses to be called, estimate the time for evidence in chief and other factors relevant to the length of hearing and advise on the possibility of settlements, adjournments etc. In South Australia, the Adelaide Local Court has adopted the practice of its own motion of fixing hearing dates some fixed period after the filing of the summons. Notices of hearing vary according to whether parties are unrepresented and as to whether claims are "small claims". The listing of actions also varies: see paras 22.14 to 22.29 below.

3. In the case of matters within the jurisdiction of the Small Debts Division legal representation would not generally be available.

dispute will be resolved by the court on such evidence as is adduced to it. Such a form is used by Small Claims Tribunals.

12.11 The Commission also notes that, pursuant to section 25 of the Small Claims Tribunals Act, Small Claims Tribunals give notice of hearing to persons appearing from the claim to have a sufficient interest in the resolution of the dispute. The Commission seeks comment as to whether such provision should be made at least in the Small Debts Division of Local Courts.

12.12 By Order 10 rule 3 notices of trial, and of defence, may be given by post or telegram or by personal delivery. Notices of trial should perhaps be served on the parties or their solicitors by the clerk of court by certified mail with the court keeping a record of the mailing, and appropriate fees being charged to the parties to meet the costs thereof.[1] Where the claim is unliquidated and the defendant files no defence, notice of assessment of damages and all other documents intended for the defendant may, in lieu of being served on or given to him, be screened or exhibited for the prescribed time in the office of the court. This practice seems undesirable. It is most unlikely that the other party will see a notice so screened. The provision seems to be a relic of the time when the population of the State was much smaller, and should be replaced by provision for postal service of notices by the clerk of courts to be prima facie good service thereof.

3. DEFAULT JUDGMENTS

12.13 By section 46(2) if a defendant does not file notice of defence and the time limited for that purpose expires, then insofar as the claim is for a debt or liquidated demand[2] in money or for delivery of goods, the plaintiff may apply for and obtain final judgment for

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1. Proof of the service of the notice of trial or notice of assessment of damages or other notices could be effected by providing that endorsement as to posting of a copy of the notice, in the hand of the clerk of the court or his authorised deputy, should be prima facie evidence of a notice having been sent in accordance with the Rules.

2. The meaning of "liquidated demand" is not simple: see, for example, Alexander v Ajax Insurance Co Ltd [1956] VLR 436, Spain v Union Steamship Co of New Zealand Ltd (1923) 32 CLR 138, Lombard Australia Ltd v Smeaton [1966] VR 271 and Huebel and anor v Holt and anor [1969] VR 462.

the amount claimed or for the delivery of the goods and for costs.[1]

12.14 If the claim is for pecuniary damages he may only set the case down for assessment of such damages by the court and be entitled to final judgment for the amount of such assessment, although if the claim is for pecuniary damages not exceeding $500 in the case of a claim in respect of damage to a motor vehicle or $300 in the case of other claims he may, however, apply for and obtain final judgment against the defendant for the amount not exceeding $500 or $300 as the case may be, as if the claim were for a liquidated demand. This provision was amended in 1981[2] from a figure of $50 fixed in 1957. The Commission seeks comment on the operation of the provisions of section 46(2), and whether it is necessary or desirable to permit entry of judgment by default in unliquidated claims for even higher amounts.

12.15 Section 47 provides that any default judgment may be set aside by the magistrate upon such terms as to costs or mode or time of trial or otherwise as the magistrate may see fit. It has been suggested to the Commission that the section should expressly require such a judgment not to be set aside unless the defendant shows an arguable defence on the merits. It would seem, on the basis of authority and principle, that this requirement is implicit in the provision.[3] In a recent decision the Full Court of South Australia has held[4] that an application to set aside a judgment entered by

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1. Under the English County Court Rules, 1981, leave is necessary before a default judgment can be entered in the case of certain types of defendant. These include the Crown, foreign states, persons under disability, tort actions between husband and wife, and actions for money secured by a mortgage.

2. Acts Amendment (Jurisdiction of Courts) Act 1981, s 16.

3. The exercise of the discretion to set aside a default judgment is discussed in Evans v Bartlam [1937] AC 473, in which Lord Atkin points out that the discretionary power to set aside default judgment is in terms unconditional but that the applicant must produce evidence that he has a prima facie defence. On the other hand, it was held that the applicant need not satisfy te court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like, although obviously the reason for allowing judgment and thereafter applying to set it aside is one of the matters to which the court would have regard in exercising its discretion. The principle was said to be that unless and until the court has pronounced a judgment upn the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure.

4. Fairclough v Strathmont Haulage Pty Ltd [1981] 28 SASR 456.

default in a Local Court should normally be granted where a defence on the merits is adequately deposed to, and where no prejudice which cannot be made good by an order for costs has been caused to the plaintiff by the failure to enter an appearance or by any delay in applying to set aside the judgment. However, the Commission seeks comment. It has also been suggested that where no magistrate is immediately available, as might occur in areas outside Perth, the clerk of courts might be given power to order a stay of execution pending hearing of an application to set aside the judgment. This power might also be given if power is given to set aside a summary judgment.

12.16 Occasionally at a judgment summons examination hearing, a defendant attempts to raise a defence to the claim the subject of the judgment. It has been suggested that upon this happening an application to set aside the judgment should be able to be heard forthwith on the basis of oral evidence.[1] At present the Rules require a separate application supported by affidavit. No doubt this procedure acts as a substantial deterrent to unrepresented, and often impoverished, defendants.

4. SUMMARY RELIEF

12.17 By section 47A, when the claim in an action is for a debt or liquidated money demand and the defendant has given notice of defence, the plaintiff may, on affidavit made by himself or by any other person who can swear positively to the facts verifying the claim and stating that in the deponent's belief there is no defence to the action, apply for judgment for the amount claimed and costs. The magistrate may thereon, unless the defendant by affidavit or otherwise[2] satisfies him that he has a good defence to the action on

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1. See T G Ison, Small Claims, 1972 35 Modern Law Rev 18 at 22.

2. The form of summons prescribed in the 3rd Schedule to the Act calls upon the defendant to attend the court. Section 47A requires the defendant to satisfy the magistrate "by affidavit or otherwise" that he has a good defence or ought for any reason to be allowed to defend. This may all be misleading to defendants as it is not clearly provided that they should usually both file an affidavit and attend the hearing of the application. Indeed it is not clear whether a defendant can satisfy the magistrate by giving sworn oral evidence at the hearing of the application. The authorities however support this in exceptional circumstances.

the merits or ought for any reason to be allowed to defend, give judgment for the plaintiff.[1]

12.18 It has been held[2] that a judgment given by way of summary relief in the event of non-appearance by the defendant, pursuant to the English equivalent section, is not a default judgment under section 47 and thus may not be set aside under section 47.[3] That position has been varied by amendments to the English County Court Rules and in some Australian jurisdictions. It seems desirable that a judgment obtained pursuant to section 47A should be capable of being set aside by simple application. There may be a number of reasons why a defendant may fail successfully to oppose an application under section 47A. These include failure to attend the court on the hearing of the application by reason of illness or inadvertence, and failure to appreciate the need to provide evidence in opposition to the application. No doubt any such application would require to be appropriately verified. The English Rules have been amended, however, only to allow such a judgment to be set aside where the party does not appear at the hearing. Order 34 rule 3 of the Rules of the Supreme Court of Western Australia make similar provision.[4]

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1. If it appears that the defence applies to a part only of the claim or that part of the claim is admitted, the plaintiff is entitled to judgment for the part of the claim to which the defence does not apply or which is admitted. Subject to such terms as the magistrate may see fit to impose, the defendant is then allowed to defend as to the residue of the claim.

2. Spira v Spira [1939] 3 All ER 924.

3. It is however possible to appeal from such a judgment under the provisions of s 107. It may be possible to obtain a new hearing under s 90 which provides that the magistrate may in any case order or permit a new trial. If a "trial" includes an application under s 47A presumably a new trial can be ordered in appropriate cases. Section 90 is discussed later in this working paper. Further, s 73 permits a judgment entered or given at a hearing date but in the absence of a defendant to be set aside.

4. Section 47A(4) talks in terms of the defendant being allowed to defend the proceedings. The Commission agrees with the New South Wales Law Reform Commission that "there seems. . .to be an incongruity in the idea that, where the plaintiff's application for judgment on the basis that the defendant had no defence has failed, the defendant should need leave to defend the proceedings, with the connotation that he stands in some way at the mercy of the Court": report on Supreme Court Procedure, 1969, para 61. The New South Wales procedures have been redrafted to eliminate that concept.

12.19 Section 47A(6) provides that there shall be no appeal against an order giving unconditional leave to defend or on the part of the plaintiff against any order giving leave to defend on terms. The Commission seeks comment as to whether there should be a right of appeal from the dismissal, either absolutely or on terms, of an application for summary judgment. There is no appeal provided in Supreme Court or District Court proceedings. Such a right might merely increase costs and delays. The same factors apply in respect to the question of any terms imposed as a condition for leave to defend.

12.20 Further there is no provision in the Local Courts Act or Rules for an application to be made for summary dismissal of a plaintiff's claim. Nor is there apparent authority either for summary judgment on a counterclaim or against a third party. Order 16 rule 1 of the Rules of the Supreme Court makes provision for an application to have a claim dismissed as frivolous or vexatious, or because the defendant has a good defence on the merits or because the action should be disposed of summarily or without pleadings. Order 20 rule 19 of the same Rules permit the Court to enter judgment for the defendant if the statement of claim discloses no cause of action or is frivolous or an abuse of process. The Commission seeks comment as to whether similar provisions should be added to the Local Court Rules, although it seems that there may be inherent jurisdiction to strike out actions on these grounds.[1]

12.21 Section 47A only applies to claims for debt or liquidated demand in money. It has been put to the Commission in a preliminary submission that it should be possible to claim summary judgment in respect of unliquidated claims. Such an application may be made under the Rules of the Supreme Court.[2] The Commission seeks comment.

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1. See Burton v Shire of Bairnsdale (1908) 7 CLR 76 and Dey v Victorian Railways (1948) 78 CLR 62.

2. Order 14 esp rules 2 and 3. On the other hand, the Rules of the Supreme Court do not permit applications for summary judgment in respect of claims based on allegations of fraud, or in respect of claims for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage.

5. PARTICULARS OF DEFENCE

12.22 By section 47B, where a defendant has given notice of intention to defend an action,[1] the plaintiff may by written notice served on the defendant, require particulars of the defence in writing and in case of failure to supply these may apply for an order that they be provided. Should the defendant, without reasonable cause, neglect to supply particulars, he is "liable to pay the plaintiff's costs of the proceedings in any event". The defendant may at any time before judgment amend his grounds of defence upon such terms as to costs or otherwise as the magistrate may order.

12.23 This section is unsatisfactory in certain respects. First the section does not make it clear whether the defendant is liable to pay the plaintiff's costs of the proceedings only after an order to that effect has been made. Secondly, the section does not permit the court any discretion as to costs. This is inconsistent with the general position under the Act and Rules. Thirdly, the section does not provide any mechanism for the striking out of a defence if particulars of defence are not furnished. The Rules of the Supreme Court so allow, and by Order 5 rule 20 of the Local Court Rules, if a plaintiff fails to deliver further particulars after being ordered so to do, his claim may be struck out.

6. SPECIAL DEFENCES AND COUNTERCLAIMS

12.24 Section 48 provides that subject to the power of amendment provided by section 89, a defendant shall not be allowed to set off or set up by way of counterclaim any debt or demand against the plaintiff nor set up a defence by way of infancy, coverture,[2] the Statute of Frauds,[3] any Statute of Limitations or his discharge or release under any statute relating to bankruptcy or insolvency without the consent of the plaintiff unless the prescribed notice is given.

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1. The marginal note to s 47B is in error in that it suggests that the section is limited to claims for unliquidated demands.

2. The condition of being a married woman. As a defence it is now of no significance. Also see para 19.6 below.

3. Reference to the "Statute of Frauds" and to any "Statute of Limitations" includes reference to the statutory re-enactments of the provisions thereof: Interpretation Act 1918-1975, s 14.

12.25 By contrast Order 20 rule 9 of the Supreme Court Rules requires that a party must in any pleading subsequent to a statement of claim, plead specifically any matter which he alleges makes any claim or defence of the opposite party not maintainable or which if not specifically pleaded might take the opposite party by surprise or which raises issues of fact not arising out of the preceding pleading. Matters such as performance, release, any relevant Statute of Limitation or Fraud or any fact showing illegality are merely examples of these categories of pleading. In addition under Order 20 Rule 9(2) defendants must plead specifically every ground of defence on which they rely. Every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words -

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and

(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

A plea that they are in possession of the land by themselves or their tenant, is not sufficient. A claim for exemplary damages or a claim for aggravated damages must be specifically pleaded, together with the facts on which the party pleading relies. Such a provision is, it is suggested, much preferable to the existing Local Courts provision since the Local Courts provision is unnecessarily limited and any attempt to limit it or the matters to which it relates to specific categories is bound to fail.

12.26 The likelihood of parties being unrepresented and the need for swift and relatively simple proceedings consistent with the amount at issue however may justify differences between the Rules of the Supreme Court and the Local Court Rules in this area. However, except in the Small Debts Division, the general rule should perhaps be that such particulars should be required in Local Court proceedings. In any event the Commission considers that in Local Court proceedings there should be a dispensing power. Local Courts have power to grant adjournments either unconditionally or with costs

and to make other appropriate orders in relation to costs, and these may be sufficient to deal with matters raised by surprise. The fundamental question is therefore again one of whether Local Courts should or should not be courts of formal pleading. One approach which could be adopted would be to permit a magistrate either upon application by one of the parties, or upon his own motion to order that the Rules of the Supreme Court might apply or at least that formal pleadings be ordered.

7. PROPOSALS

12.27 Subject to the need for special provisions in the Small Debts Division, and also in the proposed Administrative Law Division, the Commission proposes that -

Notices of Defence (paragraphs 12.1 and 12.2)

(a) The defendant should be required to supply concise particulars of defence as part of the notice of defence.

(b) A small fee should still be payable for the filing of a notice of defence, except that no fee should be payable in respect of claims of less than $1,000 or such other sum as constitutes the limit of money jurisdiction of the Small Debts Division and of Small Claims Tribunals from time to time.

(c) Defendants be permitted a period of 14 days after service of the summons in which to file notice of defence, that period to apply whatever the distance between the court and the place of service of the defendant.

(d) A new form of Notice of Defence should be prescribed to embody these proposals and the proposals in respect to Acknowledgments of Debt or Claim set out in the next chapter.

Particulars of defence (paragraphs 12.3 and 12.24 to 12.26)

(e) Section 47B dealing with orders to supply particulars of defence should be redrafted so as to -

(i) permit a notice of defence to be struck out if particulars of defence are not supplied following an order of the court to do so; and

(ii) provide the court with a discretion as to liability for the costs of obtaining particulars and in particular to require a positive order before costs are payable.

These provisions should, like many other procedural provisions, be placed in the Rules rather than in the Act.

(f) In lieu of the existing provisions of section 48 of the Local Courts Act as to the specific pleading of certain special defences and of counterclaims, Order 20 rule 9 of the Rules of the Supreme Court should apply in Local Court proceedings, other than in the Small Debts Division. The court should however be authorised to waive these provisions in appropriate cases, subject to appropriate orders for costs or adjournment.

Pleadings generally (paragraph 12.3)

(g) Provision should be made in proceedings other than those in the Small Debts Division for either party to apply to a magistrate for an order that pleadings be filed as if the action had been commenced in the Supreme Court.

(h) Further, the court have power so to order of its own motion.

(i) Where such an order is made, the plaintiff should be required to file and serve detailed particulars of claim before the action is listed for trial. Failure by a defendant then to file and serve detailed particulars for defence should not prevent the listing of a matter for trial but should be grounds for an application to set aside the notice of defence, and for judgment accordingly.

Setting actions down for trial (paragraphs 12.7 to 12.12)

(j) In applying to set an action down for trial a party should be required to supply information to the clerk of court not only concerning the estimated duration of hearing time but also estimating the number of witnesses to be called, the nature and complexity of the issues, the name of counsel and a list of unsuitable dates.

(k) The notice given by the court to the parties advising that an action has been listed for hearing or for assessment of damages should advise the parties that -

(i) they are entitled to present their case in person or with legal representation (save in the latter case when the matter is listed in the Small Debts Division);

(ii) they should arrange for the attendance of necessary witnesses and the production of necessary documents; and

(iii) the action will be determined on such evidence as is actually produced.

Notices of proceedings (paragraph 12.12)

(l) All notices of proceedings should be served by the clerk of court by certified post, prima facie proof of service being by the clerk's record of posting.

Default judgments (paragraphs 12.13 to 12.16)

(m) The principle that a judgment entered in default of notice of defence should be set aside only if the judgment debtor shows a prima facie defence on the merits should be expressly stated in the Rules.

(n) However an application to set such a default judgment aside should be able to be made by sworn verbal evidence at the time appointed for the hearing of a judgment summons, as well as upon summons supported by affidavit.

Summary relief (paragraphs 12.17 to 12.21)

(o) Express provision should be made in the Local Court Rules enabling applications for summary judgment to be made against a plaintiff on a counterclaim and against a third party, and for summary dismissal of a frivolous or vexatious claim.

(p) Provision should be made for summary judgment to be set aside upon sufficient cause being shown and verified.

CHAPTER 13 - PAYMENT INTO COURT AND ACKNOWLEDGMENT OF DEBT OR CLAIM

1. PAYMENT INTO COURT

13.1 By section 49 of the Local Courts Act, provision is made for a procedure known as "payment into court". The concept is well known in many jurisdictions. Shortly put, the section provides that if the defendant pays a sum of money into the court prior to trial, either with or without denial of liability, together with the costs incurred by the plaintiff up to the time of payment as sanctioned by the applicable scale of costs, the plaintiff may accept the amount paid in as satisfaction of the claim. If he does not do so, and if at trial the plaintiff recovers judgment for no more than the amount paid into court the plaintiff is required to pay the costs of the action after the date of payment.[1]

13.2 There seems to be a considerable virtue in the Local Courts Act and Rules in such a matter being consistent with those of the Supreme Court and District Court. This, of course, is not to suggest that the Rules of the Supreme Court on the matter are ideal. In fact the Local Court provisions differ from those used in the Supreme Court and the District Court in a number of respects. For example, Order 24 rule 6 of the Rules of the Supreme Court which permits a party to admit liability but dispute the amount and to offer to consent to judgment in a particular amount is not found in the Local Court Rules.[2]

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1. See also Order 9 rule 8 and Forms 46 and 47.

2. On its face s 49 may appear to be a complete code of Local Court provisions relating to payment into court. However in Hulbert v Oxford Spares Pty Ltd [1978] 1 SR (WA) 169, Heenan DCJ expressed the "tentative opinion" that "section 49 provides for one method, but not the only method, by which a payment into court can be made. If that method is adopted, and the relevant provisions of the section and of rule 8 are complied with, then, if the plaintiff does not recover a further sum in the action than is paid into court, the magistrate seems to have no discretion as to which party should pay the costs: Stevenson and Another v Tompkins (1909) 11 WALR 46. On the other hand, if that method is not adopted or if the relevant provisions are not complied with, then the magistrate is required to exercise his

13.3 On the other hand the existing Local Court provisions have the advantage, useful in a court of inferior civil jurisdiction, that a matter can conveniently be concluded without the bother of taxation of an application for costs. The Commission seeks comment.[1]

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discretion in the matter. In Sykes v Wesleyan and General Assurance Society (1907) 76 LJ (KB) 626, A T Lawrence J said that in such a case, under the County Courts Act (Eng) 1888, the onus was changed so that it rested then on the defendant 'to show good cause why the plaintiff should not have the costs'." Heenan DCJ explained "that section 49 of the Act provides a convenient means of concluding an action without the bother of taxation or even of seeking an order as to costs. The matter can be finished off, as it were, with one blow. But the section itself does not expressly prohibit payment into court other than in strict compliance with its provisions and Order 9 rule 8(4) actually contemplates such payment. Further, rule 9 provides the means by which the plaintiff may apply for fees and costs beyond those, if any, paid into court by the defendant". The position outlined by Heenan DCJ certainly leads to a more just position than would be reached by treating s 49 as exhaustive. Clearly a party should have the option of paying into court an amount in respect of the claim only leaving costs in the discretion of the court, upon application.

1. A preliminary submission to the Commission also suggests that Order 9 rule 8(5) is difficult to reconcile with rule 8(1). Rule 8(1) provides, in part, that -

> Every. . . payment [pursuant to section 49] shall be taken to admit pro tanto the claim or cause of action in respect of which the payment is made, unless it is made with notice of defence and is accompanied by a notice in accordance with. . .Form 47. (Notice of Payment into Court with denial of liability)

By rule 8(5), wherever money is paid into court pursuant to s 49 a person shall not, except in an action to which a defence of tender is pleaded, disclose the fact of that payment in the pleadings concerned, or to the court at the trial or hearing until all questions or issues of liability and of the amount of debt or damages have been decided, but the court shall, in exercising its discretion as to costs, take into account the fact and the amount of payment. It has been suggested that a court might dismiss a plaintiff's claim notwithstanding an admission of liability effected by the defendant's payment in. It is true that the possibility would not arise where the payment in is made with denial of liability (Form 47), and also that where liability is admitted s 46(2) permits interlocutory judgment in pecuniary damages claims. In other cases also, the pleadings or parties or counsel will ensure that the court is aware that only quantum is in issue. The slight possibility still exists however that rule 8(5) might result in inconsistency with rule 8(1). The inconsistency should be resolved by amendment to rule 8(1).

2. ACKNOWLEDGMENT OF DEBT OR CLAIM

13.4 By section 50, provision is made for a defendant to sign a statement "confessing" to a debt or demand,[1] and for a plaintiff and defendant to sign a statement of an agreement as to the amount and terms upon which a summons is to be satisfied. By section 51(1), the clerk sends notice of any such confession to the plaintiff. It is not necessary for the plaintiff otherwise to prove the claim confessed, or agreed upon. The clerk enters up judgment for the plaintiff for the debt or demand confessed, or for the part confessed if the plaintiff is willing to accept that part in satisfaction of his claim, or for the amount and terms agreed upon, as if it had been a judgment of the court.

13.5 The Commission has drawn attention to the need to clarify the position where a claim is admitted in part, but no notice of defence is filed as to the balance.[2] The notice of defence should make clear that a defendant may indicate his defence to the whole of the claim or defend it only as to part, and in the same form provide for the defendant to specify that part of the claim to be defended.[3] Where a defendant files a part confession but not a notice of defence as to the balance the presumption should be that the defendant intends to defend the balance of the claim. However it has been suggested to the Commission that to overcome these confusions the provisions as to confession of debt should only apply where the defendant acknowledges the whole of the claim to be owing. This seems acceptable.

13.6 Where a defendant confesses a debt either in whole or in part the plaintiff is at liberty to reject any offer by the defendant as to payment of that amount and to enforce the debt without notice to the defendant. The Commission believes that, as in New South Wales, the defendant should be given notice of rejection of any offer for payment and be at liberty to apply for examination upon a judgment summons. The filing of an acknowledgment of debt and an offer to pay should act, as in that State, as an automatic stay of execution pending resolution of the question whether the offer is acceptable.

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1. The Commission would prefer the term to be "acknowledge" and this chapter is so headed.

2. See footnote 4 to para 12.5 above.

3. In either event a filing fee would at present be payable.

This would have the advantage of requiring the plaintiff to consider the matter and advise the court before taking any further steps and would also mean that the defendant would be advised of the position before execution issued. Neither of these steps necessarily follows under the present provisions.

13.7 In England, by Order 13 rule 8 of the Supreme Court Rules, where judgment for a debt or liquidated demand is entered against a defendant who has returned the Acknowledgment of Service form which is served with the writ stating that although he does not intend to contest the proceedings he intends to apply for a stay of execution of the judgment, execution is stayed for a period of fourteen days from Acknowledgment of Service during which time the defendant may issue a summons supported by an affidavit describing his financial circumstances and giving his proposals for payment of the judgment debt by instalments. If he does so the stay will continue until the summons is heard. Order 9 rule 2 of the English County Court Rules, 1981 permits a defendant who desires time for payment of any sum admitted by him to make application accordingly. It also permits a defendant who admits liability for the whole or part of the plaintiff's claim to amend or withdraw an admission made by him on such terms as the court considers just. If the defendant delivers an admission of the whole or part of the claim together with a request for time for payment, the plaintiff is notified and given time within which to accept the amount admitted and any proposal as to the time of payment. If he does not, then a date is fixed, upon which the time of payment is to be determined and judgment entered. Alternatively, the court may fix a day for pre-trial review in appropriate cases where only part of the claim is admitted and the plaintiff does not accept that amount.[1]

13.8 In New South Wales, if a defendant files a confession of debt for the whole amount and offers to pay by instalments then the Registrar is obliged to order that payment be in terms of those instalments unless the plaintiff, within fourteen days or such longer period as the Registrar shall order on the application of the plaintiff, objects to the terms of payment offered by the defendant. The

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1. An admission of the plaintiff's right to recover possession of land may be made at any time before the return date and has the effect that no costs incurred after the receipt of the notice in respect of the proof of any matter which the admission renders unnecessary to prove shall be allowed against the defendant making the admission.

Registrar is not empowered to alter the defendant's offer as to the manner of payment, of his own motion. Unless the plaintiff objects to the instalments offered by the defendant, the Registrar must order that the judgment debt be paid by instalments. This acts as a stay of enforcement of the judgment for so long as the defendant complies with the terms of the order. Where the plaintiff refuses the terms of payment offered, the Registrar is required to set down for hearing that part of the proceeding relating to the offer to pay by instalments, giving notice by post to each party. At the hearing evidence is normally restricted to ascertaining the defendant's financial circumstances and the defendant may be required to produce appropriate documentary evidence. The Court has power to confirm, vary or vacate the instalments offered. An instalment order in terms of the defendant's original offer remains in force until such time as the court so confirms, varies or vacates the order and any payments made by the defendant prior to that time are accepted and paid to the plaintiff. Where the defendant confesses only part of the claim a similar position arises if the plaintiff accepts the confession as to part of the claim but rejects the instalments offered.

13.9 In addition, in New South Wales, a form of "agreement as to claim" is prescribed which may be filed with the Registrar. Once judgment is entered up in terms of the agreement it acts as a stay of execution until default in payment as agreed.

13.10 It would reduce the cost of, and delays in, obtaining and enforcing judgment if on receipt of a summons, a defendant was also served with a questionnaire as to his property and means, to be completed by him if he admits the plaintiff's claim. The questionnaire would ask such a defendant to set out his assets, liabilities, income and outgoings. This might form the basis of an immediate order for payment. As an alternative the defendant could be put at liberty to attend at the court for examination by appointment. The Commission seeks comments on these suggestions. The Commission will return to this in its Working Paper on the Enforcement of Judgments.

3. PROPOSALS

13.11 The Commission proposes that -

Payment into court (paragraphs 13.1 to 13.3)

(a) The Local Courts Act and Rules should adopt the same provisions as apply in the Supreme Court in relation to payment

into court and offer to consent to judgment, except in the Small Debts Division.

Acknowledgment of Debt or Claim (paragraphs 13.4 to 13.10)

(b) A new form of "Acknowledgment of Debt or Claim" should be prescribed. The form should set out a clearly worded acknowledgment that the whole of the debt or claim is owed and should include a simple form of affidavit of means and any offer to pay the debt or claim whether by instalments or otherwise. If only part of a debt or claim is acknowledged to be owing the defendant should be required to file only a notice of defence. The notice should specify that part of the debt or claim which is acknowledged. The defendant should be at liberty at the same time to file an affidavit of means and offer to pay.

(c) Upon a defendant filing an Acknowledgment of Debt or Claim which includes an offer to pay by instalments the amount acknowledged, such offer should act as an order for payment and a stay of execution so long as the offer to pay by instalments is complied with or until the order is varied either upon the application of the plaintiff or of the defendant.

CHAPTER 14 - PARTIES, JOINING AND SEPARATING CLAIMS, WITNESSES AND INTERLOCUTORY MATTERS

1. PARTIES

14.1 Sections 53 to 57 of the Local Courts Act deal with the following questions in relation to parties to proceedings -

(a) the effect of bankruptcy of the plaintiff upon an action brought by him;
(b) the question of liability of two or more persons jointly answerable where one or more is served but not all; and
(c) the liability of partners, executors or administrators, and infants to sue and be sued.

Orders 3 and 19 also contain substantial provisions dealing with associated matters.

14.2 Section 53 deals with the effect of the bankruptcy of the plaintiff. Such a bankruptcy does not cause the action to abate provided the trustee elects to continue the action. Order 19 rule 1 is in wide terms and deals not only with the bankruptcy of the plantiff but with the position in the case of the marriage, bankruptcy or death of any party. Similar provision is found, but in different form, in Order 18 rule 7 of the Rules of the Supreme Court. Sections 60 and 61 of the (Cth) Bankruptcy Act 1966-1980 also deal with some of the same matters. To the extent of any inconsistency the Commonwealth Bankruptcy Act provisions take priority by reason of section 109 of the Commonwealth Constitution. It would seem preferable that the provisions of both the Local Court Rules and the Rules of the Supreme Court be consistent and expressed in like terms and follow the substantive provisions of the Bankruptcy Act.

14.3 Section 54 provides that where the plaintiff has a demand recoverable against two or more persons jointly it is sufficient if any one or more of them is served. Judgment may be obtained and

execution issued against the person or persons so served, notwithstanding that others jointly liable are not served or sued, or are not within the jurisdiction of the court. Every person against whom judgment is so obtained and who has satisfied the whole or part of the judgment is entitled to demand and recover contribution from any other person jointly liable with him. Order 18 rule 4(3) of the Rules of the Supreme Court deals with the same matter in different words. Such provisions would appear more suitably placed in the Rules than in the Act. Similarly, section 55 which deals with the rights of partners to sue or be sued is consistent with, but not in the same terms as, Order 71 of the Rules of the Supreme Court.

14.4 Section 56 deals with the rights of executors to sue and be sued, and to make and be the subject of execution. The position is expressly assimilated to that in the Supreme Court.

14.5 There seems to be little reason why different provisions should apply in Local Courts in such matters to those applicable in the Supreme Court and the District Court.

14.6 Section 57 provides that persons under the age of eighteen may sue and defend proceedings by a next friend or a guardian ad litem respectively but adds a special proviso that an infant may sue in his own name for "wages or piecework or for work or services as a clerk, servant, mechanic or labourer, in the same manner as if he were of full age". This latter provision does not apply in Supreme Court and District Court proceedings, however, similar provisions appear in other jurisdictions although sometimes in more modern language. The Commission accepts the usefulness of such a provision in Local Court proceedings subject to the use of more contemporary statutory language.

14.7 In each case a question also arises whether the provision should be placed not in the Act but in the Rules. Orders 3 and 19 of the Local Court Rules deal additionally with these matters but in considerably more detail.

2. JOINING AND SEPARATING CLAIMS

14.8 By section 58, two or more causes of action between the same parties may be joined in the same action unless the magistrate is of the opinion that this would be inexpedient or inconvenient, in which case he may order separate trials. In the Supreme Court and

the District Court, by virtue of Order 18 rule 1 of the Rules of the Supreme Court the position is expressed in somewhat different terms. Order 4 of the Local Court Rules deals with certain more specific aspects of the question of joining claims. It also is in somewhat different terms to the provisions of Order 18 of the Rules of the Supreme Court. As with the question of parties to an action, the question arises whether the provision should more properly be found in the Rules rather than in the Act and further whether there is any good reason why the Local Court Rules should differ from the Rules of the Supreme Court. The Commission seeks comment.

3. WITNESSES

14.9 Section 63 provides for the summoning of persons as witnesses in Local Court proceedings. It is supplemented by Order 37 rules 38 to 44. The Local Courts Amendment Act 1982 slightly amended section 63 by making it a condition of the summoning of any person as a witness in a Local Court that his "reasonable expenses" be paid or tendered at the time of the service of the summons. By Order 20 rule 4 the witness may require the payment to be fixed by a magistrate and paid or secured before giving evidence. By Part III of the Appendix to the Local Court Rules, maximum allowances to various categories of witnesses are fixed but the taxing officer is directed to have regard to the salary or wages actually lost by a witness. A witness residing at a distance from the place of trial or hearing may be allowed reasonable travelling expenses actually paid, excluding any charges for maintenance or sustenance. In the metropolitan area, apart from the daily allowance which is intended to recompense actual loss of wages or income caused by the attendance at court, either in whole or in part, other expenses of a witness will be minimal. Travelling expenses for example will rarely exceed one or two dollars. In country areas it is frequently difficult to compute travelling expenses with accuracy. The Commission seeks comment as to the most appropriate method of compensating witnesses for loss of income and for expenses. The Commission does not intend to direct specific recommendations to the actual amounts of allowances or expenses since any such recommendations would be rapidly rendered inadequate by changes in money values and the matter is therefore one for regular review.

14.10 Section 63 also provides that any person who fails to attend court after being properly summoned may be fined a sum not exceeding $100, the whole or part of which is applicable to the party

injured by the failure. This provision is rarely used. Rather than being fined, perhaps the defaulting witness should be liable to pay all or part of the costs thrown away by his default. Further, whilst section 63 provides that the fine may only be imposed where the non-attendance is "without sufficient cause" it is not clear whether the court is obliged to make an appropriate inquiry as to the cause or whether the onus is on the defaulting witness to bring the cause to the attention of the court.[1] In practice section 64 is utilised rather than section 63.

14.11 Section 64 provides that instead of fining a person failing to appear to a summons the magistrate may, if good cause is not shown for the non-appearance, cause the person to be arrested and brought before the magistrate to give evidence. The onus seems to be on the witness to show good cause for his non-appearance, but no specific mechanism is provided. The section provides that the defaulting person should be brought to the court, "at a time and place to be therein mentioned before the magistrate" to testify as to his knowledge of the matters concerned in the action. The Commission has been advised that the requirement to name the time and place and the magistrate before whom the witness must testify is one which causes difficulties in practical terms. It could lead to arrest and detention where this may seem unnecessary. In practice the Commission understands that the defaulting witness is brought to the court at a time convenient to the parties and the court shortly following the apprehension or location of the defaulting witness. Sections 130 and 144, dealing with judgment debtors who fail to appear in response to judgment summonses and summonses for examination as to garnishment of debts, have recently been amended to permit the debtor to be brought before the magistrate for examination on the day on which he is apprehended or as soon as is practicable thereafter. The provisions of sections 64, 130 and 144 also give rise to the question whether bail to arrested witnesses should be available in suitable cases. The Commission is aware of allegations that arrested witnesses, in at least one case a lady with young children, have been held in overnight detention without the possibility of bail being granted, notwithstanding that no inquiry had apparently been made as to the cause of non-attendance. As to

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1. On excuses for non-attendance see McLaurin v Hall (1913) 13 SR (NSW) 114 and Pascoe v Nominal Defendant (Q) (No 2) [1964] Qd R 373.

sureties and bail for witnesses, the provisions of the Justices Act 1902-1981, sections 89, 90 and 124, might be noted. These provisions allow witnesses or persons to be made a witness to be discharged upon recognisance with or without surety. Part VI of the Bail Act 1982 might also be applied with appropriate amendments to witnesses in Local Court proceedings.

4. INTERLOCUTORY MATTERS

14.12 Sections 65 to 69, and the Rules giving effect thereto, deal with notices to admit facts, discovery of documents, inspection of documents, the enforcement of discovery and examination of a witness de bene esse.[1] These provisions are, in the case of the Supreme Court and District Court, found not in the relevant Act but in the Rules of the Supreme Court. The question again arises whether such provisions should be placed in the Local Court Rules and whether there is any substantial reason why the Local Court Rules should differ from the Rules of the Supreme Court.[2] A similar comment might be made in respect to such matters as interrogatories and interpleader proceedings which are dealt with solely in the Rules.

14.13 In these interlocutory matters regard must be had to the need to ensure a balance between the costs involved and the amounts at issue.[3] The costs of litigation may be affected by reducing the number of pre-trial procedures. Pre-trial procedures vary according to the nature of the proceedings involved. In many cases they may

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1. In anticipation of the evidence being used on a future occasion, that is where it is not convenient for the evidence of the witness to be taken at trial.

2. It has been put to the Commission, for instance, that examination of witnesses de bene esse is anachronistically done by written recording of oral evidence, and that provision should be made for tape recording such evidence. It has also been suggested that the existing provisions and the Rules of the Supreme Court in relation to discovery of documents are unnecessarily complicated for matters such as simple debt or motor vehicle property damage claims. Provision of a simple form listing documents relevant to the matter and signed by the party or his solicitor as a true list, subject to penalties by way of costs for material falsehoods and with rules requiring automatic exchange of lists have been suggested.

3. The position in the Small Debts Division of Local Courts will be different to that in other actions as legal representation will not be permitted and there will be no orders for costs.

be inappropriate, but provision for appropriate procedures must be made in suitable cases. In small claims parties should not be forced to resolution of disputes through external pressures of costs, delays or other factors extrinsic to the merits of the dispute concerned such as complicated pre-trial procedures might involve. The Commission accordingly adopts the view expressed by the Law Reform Commission of the Australian Capital Territory[1] that use of unnecessarily elaborate procedures should be severely discouraged in cases where the amount at stake does not warrant them. The Rules should provide that in making orders as to costs the court should particularly have regard to any unreasonable costs that may have been incurred by the use of procedures which could reasonably have been avoided having regard to the amount at stake. However as Local Court jurisdiction now extends to claim for sums of $6,000, and to counterclaims which may be as high or higher, appropriate interlocutory procedures must be available for the proper conduct of disputed proceedings. The primary need is to distinguish those claims more appropriately dealt with by informal "small claims" procedures and those where the procedures of the Supreme Court and District Court are appropriate. It is not within the Commission's terms of reference to consider proposals which might suggest amendments to the Rules of the Supreme Court. The Commission however recognises the desirability of consistency between Rules applying in Local Courts and these applying in both the Supreme Court and the District Court.

14.14 One suggestion that might be suitable for adoption peculiarly in Local Court actions, however, is that in interlocutory matters, if either party seeks an order, he might apply by letter, with a copy to the other parties who would be able either to agree or object by letter, giving grounds. At present, Order 12 rule 7 requires grounds in support of an interlocutory application to be stated in an affidavit filed before issue of the process. It is suggested that this is not necessary in many cases and may be repealed. Rules 3(2) requiring affidavits only when so ordered would then apply. At present there is an apparent inconsistency between these rules. Supporting affidavits should only be required in cases either listed by the Rules or upon order of the magistrate. An order

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1. Report on Civil Procedure of the Court of Petty Sessions, 1972, para 2.7.

could be made by letter giving details to the parties.[1] It should be possible to arrange for adjournments of both interlocutory matters and hearings, settlements of orders, agreement of costs and like matters by correspondence. Elsewhere in this working paper the Commission considers the question of court listings. This suggestion is not intended to derogate from the need for courts firmly to control the listing and hearing of actions. Any provision permitting adjournments of hearings by agreement by correspondence should require notice to be given to the court sufficiently in advance of the hearing date to enable other matters to be listed for hearing where appropriate. The Commission seeks comment as to the extent to which solicitors, clerks of court and magistrates should be encouraged by the rules to utilise mail and telephone services especially for the conduct of uncontested interlocutory and administrative matters.

14.15 It would appear that the Local Court Rules are silent as to the question whether interlocutory proceedings may be conducted after a matter has been listed for trial. A suggestion has been made that magisterial practice as to the issue may vary. By Order 33 rule 10 of the Supreme Court Rules, provision is made that where a matter has been entered for trial no further interlocutory applications shall be made for amendment of pleadings or filing of further pleadings, joinder or substitution of parties, particulars, interrogatories, discovery or inspection or the disclosure or non-disclosure of expert evidence or the examiner or on commission, without the leave of the court. Comment is sought as to whether such a rule would be appropriate in Local Court proceedings.

5. PROPOSALS

14.16 The Commission proposes that -

(a) The provisions dealing with -

(i) parties to proceedings (sections 53 to 57);

(ii) joining and separating claims (section 58);

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1. Such a suggestion was made in the Report issued by "Justice" entitled Going to Law, A Critique of English Civil Procedure in 1974, and supported by J D Davies, QC, in Updating Civil Court Procedures for the 1980's, (1975) 49 ALJ 380, 382.

(iii) admission of facts, discovery and inspection of documents (sections 65 to 68); and

(iv) examination of witnesses for future use (section 69)

and the Local Court Rules giving effect thereto should be repealed.

Subject to the next succeeding paragraphs provisions should be added to the Local Court Rules in lieu thereof in the same terms as similar provisions of the Rules of the Supreme Court except where some clear need for variation is perceived. The usefulness of the existing proviso to section 57 permitting minors to sue for wages and like monies in Local Court proceedings in their own name is one such example.

(b) Provision should be made for interlocutory orders to be sought, answered and obtained by correspondence, except by order upon the application with cause of another party to the proceedings. Comment is sought as to the extent to which solicitors, clerks of court and magistrates should be encouraged by the Rules to utilise mail and telephone services especially for the conduct of uncontested interlocutory and administrative matters.

(c) Supporting affidavits should only be required in respect of matters where verification of the facts concerned is ordered upon the application with cause of another party.

(d) Unnecessary and unnecessarily elaborate use of pre-trial procedures should be discouraged by orders for costs against offending parties.

(e) The Local Court Rules should also make clear that interlocutory applications may be made and dealt with after a matter has been listed for trial, subject to any appropriate orders as to costs and adjournments.

(f) The provisions dealing with witnesses who fail to attend a hearing (sections 63 and 64) should be repealed and replaced with a provision similar to section 64 but avoiding the administrative difficulties caused by the requirement that the witness be brought before the court at a fixed time and date. The section should also provide clearly as to the means by which cause for non-attendance is established and the person upon whom the onus to show cause is placed. Provision should also be made for application to be made for bail by arrested witnesses in appropriate cases.

CHAPTER 15 - DIRECTIONS HEARINGS AND PRE-TRIAL CONFERENCES

1. DIRECTIONS HEARINGS AND PRE-TRIAL CONFERENCES

15.1 The traditional adversary trial procedure has been frequently criticised on the basis that too much information is hidden from the other parties until the actual trial hearing. Various suggestions have been made to overcome this in order to reduce the element of surprise, to reduce costs and delays and to encourage pre-trial settlement of disputes. The rate at which civil disputes are settled before trial is crucial in determining the delay in obtaining dates for hearing after a matter is set down for hearing. The point at which settlement can be achieved is important since it allows the court to list other matters for hearing during the time which the settled matter would have occupied. A great deal of discussion has therefore centred on proposals for more intervention by judicial officers in the conduct of litigation, and in particular on proposals for directions hearings and pre-trial conferences.

15.2 Two separate concepts are involved. A directions hearing is generally thought of as a device to enable procedural matters, such as the giving of particulars, to be considered, with a view to ensuring that the trial is fixed for an appropriate time and length of hearing and that it proceeds as smoothly as possible. A pre-trial conference is generally thought of as a substantial discussion of the merits of the cases of the contending parties with a view to conciliation or negotiation of an appropriate settlement of the matter. Directions hearings and pre-trial conferences may, especially if administered imaginatively by appropriately trained personnel and not as a matter of routine, increase the rate of settlement of cases.

15.3 Directions hearings and pre-trial conferences may be seen as a means to encourage agreement as to facts, the making of admissions, the admission of proof by affidavit, the exchange of technical and expert reports and the agreement of the parties as to

admissibility or inadmissibility of evidence. One suggestion made to the Commission has been that in building and engineering cases a schedule of items in dispute and of the parties positions in respect of them should be provided to the court. Such a requirement may be best dealt with by a pre-trial directions hearing although it may be thought necessary to make such a requirement compulsory in all cases.

15.4 English County Courts extensively use pre-trial review procedures. A date is fixed for pre-trial review in default actions as soon as the defence is delivered. In the case of a fixed date summons, that is where the plaintiff seeks an order other than for the payment of money, the return day stated will be the date for a pre-trial review unless the court otherwise directs. Applications for summary judgment are normally dealt with on the date for pre-trial review. Actions for the recovery of land will normally proceed directly to trial and will have a pre-trial review only in exceptional circumstances, such as if the plaintiff claims a remedy such as damages for breach of repair covenants, in addition to the usual order for possession, arrears of rent, mesne profits and the like. Order 13 rule 2 of the English County Court Rules, 1981 permits the court at any time either on application or of its own motion to give such directions as it thinks proper with regard to any matter arising from the course of the proceedings. This includes power, in particular, to order any party to deliver pleadings to give particulars which the court thinks necessary for defining the issues and to order either that the action be dismissed or that the defendant be debarred from defending or the pleadings be struck out unless an order is obeyed on the terms required by the court. The procedures are designed so that if the defendant does not appear the plaintiff may obtain judgment either after proof of claim, or without proof if the Registrar thinks fit and the defendant has not delivered an admission of claim or a defence. If the defendant does appear then the Registrar is required to "consider the course of the proceedings and give all such directions as appear to be necessary or desirable for securing the just, expeditious and economical disposal of the action or matter" and to "endeavour to secure that the parties make all such admissions and agreements as ought reasonably to be made by them in relation to the proceedings" and to record any such admissions or agreements or refusal to make any admission or agreement. If on or before the pre-trial review the defendant admits the plaintiff's claim or any part thereof which the plaintiff accepts in satisfaction, the Registrar may give judgment or make such order as he things just.

Where on a summary judgment application the defendant is given leave to defend, the pre-trial review may be then dealt with at the same time. The same provisions apply in cases which under the Rules are to be heard by a registrar, by way of arbitration.[1] In "fixed date" matters[2] the first hearing date is treated as a pre-trial review. Broadly the Registrar gives necessary directions, deals with amendments to the pleadings, particulars, production of documents, agreement on the costs of repairs, plans etc, and fixes the date of hearing. He is required to see that all relevant particulars have been provided, documents discovered, appropriate parties joined and the length of the hearing adequately considered. It has been suggested[3] that County Court Registrars have been too little inclined to assist unrepresented defendants to any substantial degree on such pre-trial reviews. However, pre-trial reviews have reduced the number of matters set down for hearing and solicitors have been encouraged to have cases ready earlier. Registrars have an opportunity to explain to litigants the procedures involved and in some cases to discuss with them methods of paying a judgment debt. It has resulted in more settlements. A survey[4] of the use made of pre-trial review procedures in English County Courts found a division of opinion among Registrars as to their usefulness. Favourable comments related to the possibility of settlements, the increased ability to list cases for suitable lengths of time, the better preparation of litigants for trial and the reduction in trial time. Overall the main reason given by Registrars against pre-trial review was to save parties from having to come to court twice.

15.5 The system introduced into English County Courts seems to be a hybrid of the directions hearing procedure and the concept of a pre-trial conference, and to have been a partial, although limited, success.[5]

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1. See para 3.39 above.

2. See para 10.7 above.

3. J Neville Turner, Small Claims in England: Some Recent Developments, 48 ALJ 345.

4. G Applebey, Small Claims in England and Wales, 1978 cited in National Consumer Council, Simple Justice, 1979.

5. An experiment conducted in Ontario in 1977 suggested that pre-trial settlement conferences could reduce the number of completed trials by about one-half. The Ontario Rules Committee

15.6 Pre-trial conferences aimed at settlement are well tried in the Family Court of Western Australia.[1] The Commission is advised that they are regarded as highly successful and that they greatly reduce the amount of judicial time spent in hearing defended actions. Preliminary conferences have also been used to advantage in the Administrative Appeals Tribunal established by the Commonwealth to hear appeals from administrative decisions. The Commission appreciates that there may be thought to be less opportunity for such conferences to be successful in civil litigation. Further, in districts outside Perth where only one magistrate is available such conferences would necessarily involve the same magistrate as would later be likely to hear the action at trial.

15.7 In the context of Local Courts in Western Australia the Commission seeks comment as to whether the concept of directions hearing or that of a pre-trial conference should be adopted. It is important to ensure that if an attempt is made to save trial time this is not offset by an increase in time and cost in pre-trial procedures. The introduction of pre-trial review in Local Court actions would add a further step to the proceedings thus involving some additional cost. The advantages would be better preparation of actions prior to trial and increased consideration of the possibilities for compromise. To make such review compulsory would in many Local Court actions seem to add unnecessary costs without real justification.

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subsequently adopted rules requiring that when an action, cause or matter has been set down for hearing, the court upon the application of a party or upon its own motion, may direct the solicitors or any party to appear for a conference to consider the simplification of the issues, the possibility of obtaining admissions which might facilitate the hearing, the quantum of damages, estimating the duration of the trial, fixing a date for hearing, or any other matters that may aid in the disposition of the action, or the attainment of justice. Following the conference, the court may make an order reciting the results and giving such directions as the court considers necessary or advisable. All documents which may be of assistance in achieving the purposes of the pre-trial conference, such as medical reports and reports of experts, must be made available to the judge presiding at the pre-trial conference.

1. By regulation 96 of the Family Law Regulations, where the court or a registrar is of the opinion that it may be advantageous or advisable to do so, it or he may order the parties to confer and make a bona fide endeavour to reach agreement on matters in issue between them.

2. PROPOSALS

15.8 The Commission proposes that -

(a) Upon a matter being listed for hearing, any party to Local Court proceedings should be able to file a summons for pre-trial review including directions as to the future conduct of the proceedings. Such directions could include not only directions as to interlocutory steps such as the filing of further particulars in third party proceedings already made possible by Order 13 rule 5, or the preparation of a "Scott schedule" in building cases, but directions as to the actual conduct of the hearing. The matters the subject of the summons should also include the possibility of the holding of a pre-trial conference as proposed in (b) and (c) below.

(b) Upon the hearing of a summons for pre-trial review, the magistrate should have power to direct the parties to give consideration to the possibility of a negotiated settlement of the proceedings or the agreement of particular issues, documents or reports.

(c) In any event, where a magistrate is of the opinion that it may be advantageous or desirable in the interests of justice between the parties to do so he should be empowered to order the parties to confer in an endeavour to reach agreement on matters in issue between them.

CHAPTER 16 - TRIALS

1. OPEN COURT AND CHAMBERS

16.1 By section 70, all actions heard in a Local Court must be heard and determined in open court by a magistrate. This is subject to any other express provision such as that contained in section 11 which permits a magistrate to sit in chambers at any time and to exercise in chambers any jurisdiction of the court except the trial of actions and the hearing of applications for new trials. The provisions should be combined. A preliminary submission received by the Commission suggested that it should be possible for applications for new trials to be heard in chambers. However, it seems to the Commission to be desirable in principle that all Local Court proceedings be open to the public and press. The Commission is satisfied that closed court proceedings or the exclusion of the public or the press should only be permitted on pressing grounds. Public confidence in the judicial system, and the proper operation of the judicial system are mutually supported by the ability of the public and press to view and comment upon judicial proceedings.[1] The Commission sees no reason why all Local Court proceedings should not be in open court subject to the court having a power to exclude the public or specific persons where the presence of the public or those persons would be contrary to the interests of justice between the parties. On the other hand the use of "chambers" may enable much

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1. The Central Law Court Building in Perth is so designed that all Local Court chamber matters will be heard in open court.

non-contentious, administrative, or purely legal business to be despatched quickly and informally. The Commission seeks comment as to whether the concept of chambers creates benefits or has caused any difficulty in Local Court practice.[1]

2. SUMMARY HEARING

16.2 A provision which permits the court to hear and determine a summons in a summary way where the defendant does not usually reside in the State and is about to leave the State without paying the debt or satisfying the claim, may be useful.[2] Such a provision is found, for example, in section 67 of the Victorian Magistrates' Court Act 1971. In such a case or in a matter of great urgency there might be power to adjudicate a matter without pleadings and to allow the magistrate to require admissions of facts and immediate discovery and to make other interlocutory orders so as to define the issues.

3. NON-APPEARANCE

16.3 Section 71 provides that if on the hearing date the plaintiff and defendant appear the magistrate shall proceed to try the action and give judgment without further pleading or formal joinder of issue. By section 72, if a plaintiff does not appear on a hearing day and the defendant does appear the plaintiff is nonsuited.[3] If on the other

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1. Further, the question arises whether the concept of "chambers" should be abandoned. The New South Wales Law Reform Commission so recommended in its [First] report on Supreme Court Procedure, saying:

> This distinction is bound up with the ancient concept that the Court always sat as a bench of all Judges of the Court, and certain powers of the Court were delegated to Judges sitting alone when the whole Court was not sitting. The preservation of the old system leads to needless technicality, and often involves considerable research. The abolition of the distinction will simplify matters by eliminating the various differences that have been held to exist under the present system.

The concept of chambers in judicial practice may enable minor matters to be dealt with outside the court as for example at the home or office of the judicial officer in order to expedite proceedings. That concept is largely irrelevant to Local Court practice but may have some purpose.

2. The provision contemplates an urgent hearing. Such a provision would complement the provisions of the Absconding Debtors Act 1877-1965 or any legislation amending that Act as recommended by the Commission in its report on that Act (Project No 73, 1981).

3. That is, the claim is dismissed. The plaintiff can bring another action on the same or a similar cause of action.

hand the defendant appears and admits the claim and pays any fees payable by the plaintiff the magistrate may give judgment against the defendant.[1] If neither party appears the action may be struck out.[2] Order 22, especially rules 4 to 7, deal with the consequences. The magistrate may on application in either case restore the matter to the list for hearing and revoke any order for costs.

16.4 The position where the defendant does not appear at trial is dealt with by section 73. If the defendant to a claim for debt or liquidated money demand does not appear at trial then, upon proof of service of the summons, judgment may be entered for the plaintiff for the amount claimed and costs. In the case of unliquidated claims the magistrate may, on such proof of service, proceed to trial on the part of the plaintiff only and then to judgment. Any such judgment of either type may be set aside subsequently and a new trial upon such terms as to costs, security or otherwise as the magistrate thinks fit may be ordered. This procedural difference arising from the distinction between liquidated and unliquidated claims is also made in the Rules of the Supreme Court and in other States and overseas. The Commission tentatively does not favour its abolition.[3] However, these matters might all be dealt with by the Rules.

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1. Section 76 also provides that where a defendant appearing at the hearing, either in person or by someone on his behalf, admits the claim the clerk may, by leave of the magistrate or in the case of the magistrate's absence, settle the terms and conditions upon which the claim is to be paid and enter up judgment accordingly. It should also perhaps be sufficient for a consent judgment in terms signed by the parties or their representatives and filed wth the court to be treated as the basis of a judgment and for judgment to be entered up accordingly. This may already be the case. Section 50(1) permits the parties to sign a statement of agreement upon an amount of debt or demand and the terms and conditions upon which the same is to be paid or satisfied. Section 50(2) requires the magistrate or clerk to accept such a document as an admission and s 51 requires the clerk to enter up a judgment for the amount confessed or the part confessed if a plaintiff is willing to accept that part or for the amount and terms and conditions agreed upon as the case may be. Such a judgment is to all intents and purposes to be the same as if it had been a judgment of the court. Those provisions should be extended to cover the position after a matter has been set down for trial in case it does not already so extend.

2. That is, no judgment is given in favour of any party.

3. Default judgment is of course permitted in unliquidated claims where the amount claimed is within the limits provided from time to time by s 46(2).

16.5 The Commission has also received preliminary suggestions that positive provision is necessary to prevent the listing or hearing of actions for trial when one of the parties is unable because of other commitments or circumstances to attend any hearing. Such a provision might enable a magistrate, on the written and signed application of a party, to endorse the file with an order that the action not be heard before a certain date in order to overcome the situation which apparently arises from time to time when litigants, especially those acting in person, become sick or are forced to travel, and seek to ensure that actions are not listed during their absence. Such an order could be made without any appearance subject to notice, of course, being given to other parties and a power to revoke the order. These matters are appropriate for the Rules.

4. HEARINGS BEFORE A CLERK OF COURTS

16.6 Section 76 provides that, subject to the Rules, the clerk may, on application of the parties, by leave of the magistrate, hear and determine any disputed claim where the sum claimed or the amount involved does not exceed $10. The Commission notes that the sum has not been increased since 1904. If the provision is to remain, clearly the figure must be increased to one which is presently meaningful. Perhaps an appropriate equivalent might now be $200. Some reason for the retention of the provision notwithstanding the creation of a Small Debts Division might be found in its use in remote areas. It might be noted that in remote areas the clerk of court may be the local policeman. An alternative, similar to section 7 of the Queensland Magistrates Court Act 1921, would be to vest limited jurisdiction in justices of the peace. However, in the Commission's view, such jurisdiction should require the consent of the parties and be in respect of limited money sums. The Commission seeks comment.

16.7 By section 77 a magistrate may, after deciding or reserving any question of liability, refer to the clerk any matter merely of account which is in dispute between the parties and, after deciding the question of liability, may give judgment on the clerk's report.[1] The provision appears to be one which might usefully be retained, although it would seem to be rarely used.

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1. The practice to be adopted was the subject of a practice note in Trandos v Boskovich (1954) WALR 50.

5. EVIDENCE

16.8 By section 78, the rules of evidence observed in the Supreme Court are to be observed in Local Courts. This raises fundamental issues. These rules have often been criticised as being unduly technical, unrealistic and often ignored. Many recommendations for particular and general reforms have been made. Most commonly it is suggested that the rules derive from times when trial, both of criminal and civil matters, was usually by jury. The jurors themselves were often illiterate and uneducated. Rules appropriate for such circumstances are said to be inappropriate to trial by literate, well-educated judicial officers sitting as tribunals of both fact and law. Additionally, it is sometimes suggested that the traditional rules of evidence are unfair to unrepresented litigants and not conducive to the exposure of the truth.

16.9 The Commission notes that by section 33(3) of the Small Claims Tribunals Act, a Small Claims Tribunal is not bound by rules or practice as to evidence but may inform itself on any matter in such a manner as it thinks fit. By section 106K of the Local Courts Act the same provision applies to the hearing of an action for a small debt in the Small Debts Division.[1] As to hearings in Local Courts other than those in the Small Debts Division, however, there is clearly a strong case for rules of evidence applicable in the Supreme Court to continue to apply, especially bearing in mind the increase in Local Courts jurisdiction up to claims of $6,000. This working paper has been written on the basic assumption that Local Courts will continue to operate as traditional courts of inferior civil jurisdiction exercised by adversary procedures. It is therefore not intended to review the rules of evidence individually or generally in this working paper.[2] These rules of evidence may, of course, change from time to time. However, there is considerable virtue in consistency between the practices of Local Courts and those of the Supreme Court and District Court unless good reason to the contrary is established.[3]

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1. See generally as to such provisions, Enid Campbell, Principles of Evidence and Administrative Tribunals, in Campbell and Waller (eds), Well and Truly Tried, (1982) 36-87.

2. The Commonwealth Government has referred to the Australian Law Reform Commission a general inquiry into the rules of evidence in use in federal and territory courts.

3. It should also be noted that a proclaimed Local Court may sit as a Court of Marine Inquiry under the Western Australian Marine Act 1946-1979: see para 8.6(c) and footnote 2 to para 8.9 above.

16.10 Nevertheless there may be room for provisions such as those contained in section 69 of the New South Wales District Court Act which provides:

> (1) The court may at any stage of any action -
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> (a) Dispense with the rules of evidence for proving any matter which is not bona fide in dispute, and with such rules as might cause expense and delay arising from any commission to take evidence or arising otherwise; and, without limiting the generality of this power, dispense with the proof of handwriting, documents, the identity of parties or parcels, or of authority; and
>
> (b) require any party to the action, not being a minor or person of unsound mind, to make admissions with respect to any document or to any question of fact; and in case of refusal or neglect to make the admissions may, unless the Court is of the opinion that the refusal or neglect is reasonable, order that the costs of proof occasioned by the refusal or neglect shall be paid by that party.
>
> (2) An admission made as required by the Court under subsection (1)(b) -
>
> (a) shall be for the purpose of the action in which it is made and or no other purpose;
>
> (b) shall be subject to all just exceptions; and
>
> (c) may, with the leave of the Court, given on terms, be amended or withdrawn.

A more limited form of these provisions is contained in section 200 of the Australian Capital Territory Court of Petty Sessions Ordinance 1982. The Commission seeks comment as to the usefulness of such provisions.[1]

6. USE OF EXPERTS

16.11 A provision which the Commission considers might be of considerable assistance in Local Courts is the use of independent experts to assist the court in the determination of disputes. Such provision is made in Order 40 and Order 59 rule 6 of the Rules of the Supreme Court. In the Small Claims Tribunals experts employed in the State Public Service are used frequently to assist in the

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1. The procedures already available both in Local Courts (s 65) and in the Supreme Court and District Court for notice to be given to admit facts is little used, apparently because the only sanction is in costs.

determination of disputes. The Commission notes that provision has been made in the English County Court Rules 1981[1] for the Registrar as arbitrator of claims for amounts not exceeding five hundred pounds, with the consent of the parties and at any time before giving his decision, to "consult any expert or to call for an expert report on any matter in dispute or invite any expert to attend the hearing as an assessor". The costs are in the arbitrator's discretion. The use of such expert assistance should be left to the discretion of the magistrate handling the action who no doubt would take notice of the amount in issue, the nature of the dispute and the means of the parties. It should be open for parties prior to the hearing itself to request that such assistance be sought by the court. The Commission thinks it very likely that parties of small means or little understanding sometimes are greatly disadvantaged by the lack of expert evidence, especially where the cost of such evidence, privately gathered, is disproportionate to the amount in issue. Such procedures might involve necessary administrative arrangements from time to time.[2]

7. AFFIDAVIT EVIDENCE

16.12 In a large number of the claims for unliquidated damages which go to trial for assessment of damages only, and in a significant number of other cases, the defendant does not attend the hearing. This means that in many cases the plaintiff attends, sometimes with one or more witnesses, to give evidence which is in fact not disputed. This is inconvenient to the party attending court and his witnesses, costly and a waste of court time. In very few such cases is the plaintiff's claim not accepted in full.

16.13 Order 20 of the Local Court Rules provides for the use of affidavit evidence at trial. A party desiring to give evidence on affidavit is required to give notice, with a copy of the affidavit annexed, to the party against whom the affidavit is to be used. The party against whom the affidavit is to be used may give notice

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1. Order 19 rule 7.

2. As to the possibility of a judge or magistrate calling a witness as a court witness, see Mr Justice I F Sheppard, Court Witnesses - A Desirable or Undesirable Encroachment on the Adversary System?, 1982 56 ALJ 234.

objecting to the use of the affidavit evidence. Otherwise consent is inferred unless the magistrate otherwise orders.

16.14 The New South Wales Court of Petty Sessions (Civil Claims) Act 1970-1980, section 25A provides that in respect of claims for damage to a motor vehicle, either with or without a claim in respect of damage to personal effects or for loss of income or other expenses arising out of the same matter, if a defendant fails to give notice that he intends to defend the claim as to liability or as to amount, the plaintiff is required to give his evidence by affidavit, and the assessment as to liability is made in the absence of the defendant who is not entitled to appear. Similar provisions apply to special summons actions in Victoria although use of affidavit evidence is made optional rather than compulsory.[1] In the Australian Capital Territory the Court of Petty Sessions (Civil Jurisdiction) Ordinance 1982, section 194 provides that the court may, in its discretion and on such terms as it thinks just, order that any evidence in proceedings may be given by affidavit. Evidence in proceedings may, with the consent of all parties to the proceedings, be given by affidavit. Further, evidence in proceedings may be given by affidavit on an assessment of the amount to be recovered by a plaintiff after interlocutory judgment has been entered -

(a) as regards the identity of any motor vehicle, the damage sustained by a motor vehicle in a collision and the reasonable cost of repairing that damage; and

(b) as regards such other items of special damage as the Chief Magistrate from time to time directs.

These provisions are intended to free the courts and the parties of the time spent in hearing oral evidence and avoiding the need to call

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1. Magistrates' (Summary Proceedings) Act s 9C. The suggestion has also been made in Victoria that in undefended motor vehicle damage claims the affidavit evidence of the repairer should be dispensed with if a copy of the quotation from the repairer or the report of the assessor is:

   (a) included in the particulars of demand as served upon the defendant; and
   (b) appended as an exhibit to the complainant's affidavit, and

   the stipendiary magistrate is satisfied as to the loss or damage suffered by the complainant. If the magistrate is not so satisfied, he may adjourn the case into open court.

witnesses, such as panel beaters whose evidence is usually uncontested.

16.15 The Commission is aware of the difficulties and cost involved in obtaining the attendance of repairers and others at hearings involving relatively small amounts of money and of the wasted time in many cases in which the defendant does not in fact dispute the claim. The Commission seeks comment as to whether, as in Victoria, in claims for unliquidated damages arising out of motor vehicle collisions, the plaintiff should be permitted to give affidavit evidence without notice or service on the defendant in cases where the defendant has not given notice of defence either as to liability or amount. If so, the defendant would, however, be at liberty to apply to set aside any orders made on the basis of such evidence. The defendant would also have the right to file an affidavit of his own evidence and to submit to assessment on affidavit evidence. Such a system could be introduced on a trial basis, in a limited class of cases, and expanded as desirable if successful.

8. MEDICAL AND OTHER TECHNICAL REPORTS

16.16 Preliminary submissions have been made to the Commission that the Local Court Rules should provide for compulsory exchange of medical and other technical reports as provided in Order 36A of the Rules of the Supreme Court in relation to actions in respect of personal injuries or death. Following the Commission's report on Production of Medical and Technical Reports in Court Proceedings,[1] the Local Courts Act was amended in 1976 to permit the Local Court Rules to make provisions in relation to expert evidence including the exchange of reports. In this as in other areas of procedure there seems to be a significant case for uniform or consistent rules of procedure applicable in the Supreme Court, District Court and Local Courts at least when they are exercising jurisdiction in matters involving substantial sums and when the parties have legal representation.

9. MEDICAL EXAMINATION

16.17 It has been suggested to the Commission that the Local Court Rules should contain provisions similar to those of Order 28 of

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1. Project No 40, 1975.

the Rules of the Supreme Court. These provide that where it becomes material in a matter before the court to consider the question of the physical or mental condition of any party, any opposing party may serve notice requiring the other party to submit for examination by a medical practitioner provided and paid by the party requiring the examination. A medical adviser chosen by the party to be examined is entitled to be present. If the party receiving the notice objects to complying or fails to agree or if any other matter arises in relation to the examination, either party may apply to the court for an order. Provision is made as to costs, the provision by the examining medical practitioner of a written report, and other matters. With the increase in the jurisdiction of Local Courts to $6,000 there is a need to review the Local Court Rules in such matters.

10. SECURITY FOR COSTS

16.18 It has been suggested to the Commission (in a preliminary submission) that the Local Court Rules in relation to security for costs of a defended action are inadequate. Order 5 rules 12 and 13 permit a magistrate to order a plaintiff to deposit money or other security for costs where the plaintiff is not resident in the Commonwealth of Australia. The Rules also apply to a defendant counterclaiming by way of defence. A person ordinarily resident out of the Commonwealth may be the subject of such an order though temporarily resident in Australia. As noted in paragraph 7.5 above, Order 14 rule 9 permits the clerk of court, upon receipt of a notice of defence together with an affidavit disclosing a good defence upon the merits of the action from a defendant, to order a plaintiff to give security for costs where the residence, as well as the place of business, if any, of the defendant is more than 32 kilometres from the court in which the plaint is issued and the court is not the nearest court to the defendant's residence or place of business. This rule also applies in favour of a third party as against a defendant. It has been suggested that the rules should contain express provision for a magistrate to order either party to give security for costs of a defended action in a suitable case. The Commission doubts whether in principle defendants should be made liable to give security for costs in any event, or at least merely because they are impecunious. There are, of course, provisions in the Local Courts Act and Rules, as there are in the Rules of the Supreme Court, to enable a plaintiff to seek summary judgment where the plaintiff argues that the defendant has no defence on the merits. If such a defendant is given leave to defend then such leave may be given on terms, which

terms might include the payment of moneys into court. In a sense such provisions are the counterpart, in the case of defendants, to the provisions in respect of security for costs in the case of plaintiffs. Further it should be noted that section 533 of the Companies (Western Australia) Code permits a court to order a plaintiff which is a corporation to give security for costs if there is reason to believe it will be unable to pay costs awarded against it. Consequently, the Commission believes that the matter should perhaps be left untouched.

16.19 The Commission also notes that Order 25 of the Rules of the Supreme Court only permits security for costs to be ordered against a plaintiff. The grounds for ordering security for costs are, however, considerably wider than those permitted in the Local Court Rules. The Commission tentatively takes the view that this area is one in which there is no basis for difference between Local Courts on the one hand and the Supreme Court and District Court on the other.

11. INTERPLEADER MATTERS

16.20 It has been suggested to the Commission that the Rules of the Supreme Court are preferable to those of the Local Court in relation to interpleader matters. The Local Court Rules are limited to bailiff's interpleader proceedings in respect of conflicting claims to goods taken in execution and to actions where a defendant has notice of conflicting claims in an action brought by the assignee of a debt or chose in action and the assignor disputes the assignment. Order 17 of the Rules of the Supreme Court on the other hand extends to interpleader proceedings where the applicant is under liability -

(i) to yield up or give possession of any land;
(ii) to perform a contract;
(iii) for any debt or money; or
(iv) to yield up goods or chattels or any document, muniment of title, or security,

in respect of which he is or expects to be sued by two or more claimants making adverse claims. The Commission seeks comment as to the need for wider interpleader provisions in Local Court proceedings.

12. JUDGMENTS AND ORDERS

16.21 Another matter is the suggestion to the Commission that the Local Court Rules should provide for the terms of all judgments or orders, whether final or otherwise, to be sent in writing to the parties, signed by the magistrate or clerk. In this regard, a Small Claims Tribunal procedure which commends itself to the Commission is that by which the Tribunal sends a notice to the parties following the determination of any claim setting out information as to the names of the parties and the claim number, the date of hearing, the place of hearing, the nature of the issue in dispute and the terms of the order.

13. COSTS

16.22 Section 81 provides that subject to the Act and Rules, the costs of any action or matter should be paid by or apportioned between the parties in such a manner as the magistrate directs, that in default of a special direction costs shall abide the event, and that costs may be recovered in like manner to a judgment debt.[1] Similar provision is found in section 64 of the District Court Act.[2]

16.23 The first question which arises is should costs be awarded at all. Since this paper assumes that Local Courts will continue to perform their traditional role as courts of inferior civil jurisdiction the answer would, prima facie, be that the normal rule should continue other than in special cases. Again consistency with the position in the Supreme Court and the District Court seems desirable.

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1. The Full Court laid down certain principles as to the exercise of the power to award costs in Godden v Alford [1960] WAR 235. Order 37 of the Rules also deals with questions of the fees, costs, and allowances to witnesses. The provisions of s 81 do not apply in proceedings in the Small Debts Division. In that Division only court fees, service fees and costs of execution are recoverable: s 106M.

2. Save that there is no provision requiring costs to abide the event, that is, to be awarded to the winner of the proceedings, in default of a special direction. However, that is the normal rule applied in courts of both superior and inferior jurisdictions: Project No 63, para 5.23. The Commission has also recommended in its report on Review of Administrative Decisions - Appeals (Project No 26 Part I, 1982) that, for other reasons, costs should not be awarded in cases of appeals from administrative decisions. This would include appeals to the proposed Administrative Law Division of Local Courts: see paras 5.21 and 5.22 of that report.

Costs scales should be designed so as not to encourage unnecessary work, but to remunerate necessary or essential work fully, to avoid anomalies and to be as simple as possible. The scales of solicitors' costs are an important element in determining how litigation is conducted and to the success of any innovations in court procedures. It is important to understand that unless the solicitors involved are suitably remunerated in the use of particular court procedures, those procedures will tend not to be used or to be used in a way not intended by the innovator. Thus where solicitors are involved the scales of costs should properly remunerate their services. The answer to the problem of costs in courts of inferior jurisdiction must lie in simple procedures, avoiding unnecessary steps in litigation, and avoiding waste of time. Authority to fix scales of costs as between party and party in Local Court proceedings is vested in the Governor in Executive Council. It would appear that these costs rules have in the past been amended from time to time without any considerable consultation with the legal profession, who are the persons most affected by them, and largely upon recommendations emanating administratively from Crown Law Department officers. The introduction of a system of rule-making based upon regular review by a committee of wide-ranging expertise such as is proposed in this working paper would enable wider consultation to be effected.

16.24 The next question concerns the method by which costs should be fixed in particular cases. At present section 82 provides that except as provided by the Act and Rules, all costs and charges between the parties shall be taxed by the clerk of courts, subject to review by the magistrate on the application of either party. Order 37 rule 7 permits the magistrate to fix the costs without taxation but only by consent of the parties. Costs or charges allowed must be sanctioned by the scale of costs in force for the time being. Section 83 provides that fees to be allowed to legal practitioners, and expenses to be paid to witnesses, be in accordance with the scale prescribed by the Rules. Similar provision is found in sections 66 and 67 of the District Court Act. This position is typical of courts of inferior civil jurisdiction elsewhere. However, where small amounts are involved there is virtue in a simple method of cost-fixing. In a preliminary submission the Commission has been urged to recommend that costs should be fixed at the conclusion of a trial by the

magistrate, according to a simple overall scale enabling them to be fixed without taxation.[1]

16.25 Another preliminary submission to the Commission urged that costs in respect of interlocutory proceedings be required to be stood over to the discretion of the magistrate following trial. The Commission seeks comment.

16.26 Section 120 of the South Australian Local and District Criminal Courts Act grants to the court power to award costs and to enforce payment of the same notwithstanding the court has no jurisdiction to try a particular action. This overcomes the common law rule to the contrary and is perhaps worthy of adoption.

14. PAYMENT BY INSTALMENTS

16.27 By section 91, when judgment is obtained for a sum not exceeding $100, excluding costs, the magistrate may order the judgment and costs to be paid by instalments.[2] The amount of $100 has not been altered since 1958. In other cases the magistrate must order the full amount of judgment to be paid, either forthwith or within 14 days, unless the plaintiff consents to being paid by instalments, in which case the magistrate must order the judgment to be paid at the times and by the instalments agreed.[3]

16.28 The position in other jurisdictions varies. The New South Wales District Court may, whether on the application of any party to an action or not, when giving judgment, order the judgment debt to be paid by instalments.[4] The Australian Capital Territory Court of

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1. Under the English County Court Rules, 1981 costs are not taxed but fixed by assessment in respect of claims where the judgment amount does not exceed one hundred pounds sterling. It may be that such a system should be generally used, or even made compulsory, in respect of Local Court proceedings not involving sums exceeding, say, $1,000. The Commission seeks comment.

2. The question of payment by instalments has also been discussed in the context of undefended claims, at paragraphs 13.4 to 13.10 above.

3. These provisions of course may be varied by the subsequent making of an order under s 130 on a judgment summons.

4. (NSW) District Court Act 1973, s 87.

Petty Sessions on the other hand may order that a judgment debt be paid by instalments only on the application of the defendant.[1]

16.29 It appears to the Commission that, in a considerable number of cases, the parties could be saved considerable time, convenience and money if an examination of a defendant were held immediately upon judgment being ordered, resulting in the making of an appropriate order for payment. This would avoid the need for the subsequent issue by the judgment creditor of a further summons or warrant, such as a summons in aid of execution, a judgment summons or a warrant of execution, making the proceedings simple, quicker, less expensive and more comprehensible to unrepresented litigants. However, to avoid embarrassment and unnecessary applications such an order should be made only on the application of or with the consent of the judgment debtor. Such an order should operate as a stay of execution on the judgment unless default is made in payments under the order. Taxation of costs and rights of appeal should not be affected. The Commission invites comment.

15. ARBITRATION

16.30 By sections 92 and 93, and Order 21 of the Local Court Rules, power is given to a magistrate, with the consent of both parties, to order that the matter be referred to arbitration, with or without other matters in dispute between the parties, within the jurisdiction of the court. The Commission understands that the provisions are rarely used, and seeks comment on the usefulness of retaining the provisions within the legislation.[2] In England the equivalent provisions of the County Courts Act have been extended in the manner set out in paragraph 3.39 above. The establishment of the Small Debts Division in Local Courts will provide a similar mechanism in Western Australia.

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1. (ACT) Court of Petty Sessions (Civil Jurisdiction) Ordinance 1982, s 229.

2. Provisions for arbitration with the consent of the parties are little used in Victoria as elsewhere. Similarly provisions for the appointment of referees with consent of the parties are little used. The County Court of Victoria Act s 48 provides that the court or a Judge may in any civil case with the consent of the parties refer any action or matter or any question arising therein to a referee for enquiry and report and may direct how such reference shall be conducted and may remit any report for any further enquiry and report and may on consideration of any report or further report give such judgment or make such order as may be just, subject to appeal.

16. NEW TRIALS

16.31 By section 90 every judgment and order of a Local Court is, subject to the Act, final and conclusive between the parties. However, the magistrate may in any case order or permit a new trial to be had upon such terms as he thinks reasonable, and in the meantime stay the proceedings.[1]

16.32 The Full Court of the Supreme Court of Western Australia held in Smith v McCashney[2] that the magistrate had a "very wide discretion" on an application for a new trial under section 90. Where the Full Court would have ordered a new trial, because of the unsatisfactory conduct of the first trial, the magistrate was also entitled to grant a new one. In Wyatt v Tetlow[3] the Full Court held that a magistrate considering such an application was bound by the rules binding upon the Supreme Court and that a litigant is not to be deprived of his judgment without "very solid grounds". In Wyatt v Tetlow the ground was the alleged discovery of new evidence and the court held that such evidence must at least be such as is presumably to be believed and, if believed, to be conclusive. In that case, the fresh evidence if believed would not necessarily have altered the decision and therefore the magistrate's order for a new trial was overruled. It should be noted that under section 111, on the hearing of an appeal from the Local Court, a new trial may be ordered. To give a magistrate a general power to order a new trial would in effect duplicate the appeal system. Any order made for a new trial would itself be subject to appeal. It was held in Turpin v Clayton Investments Pty Ltd, Perth Local Court Plaint No 6098/81 by Mr I G Martin, SM that the failure of a defendant on an application by the plaintiff under section 47A for summary judgment was not a basis for a subsequent application for a "new trial" under section 90, even if section 47A proceedings constitute a trial. His Worship held they did not. Further his Worship held that section 90 required the application to be made "at the trial or at the closure thereof".

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1. Section 90 also provides that a magistrate may nonsuit the plaintiff if in any case proof is not given entitling him to judgment. This provision was considered in Dyson v Fletcher's Delivery Service (1930) 33 WALR 74.

2. (1925) 27 WALR 118.

3. (1925) 28 WALR 49.

Otherwise the only available remedy was an appeal. His Worship took the view that section 90, since it does not speak of setting a judgment aside and since it is impossible to make an order for a new trial without setting any existing judgment aside recognises that no judgment has at that point been made.

16.33 No power to order a new trial is vested in the trial judge of a civil hearing in the Supreme Court or the District Court. It has been suggested to the Commission in a preliminary submission that the power to order or permit a new trial should be limited.

16.34 A new trial has been granted under similar provisions in a wide range of cases in various English, Australian and New Zealand jurisdictions, for example where -

(a) a substantial wrong or miscarriage was occasioned by misdirection or improper admission or rejection of evidence;

(b) a miscarriage of justice was caused by a mistake or an act of misconduct by an officer of the court;

(c) there was no appearance by or on behalf of a defendant and judgment had been given against him in default;

(d) one side had been taken by surprise by a fraudulent trick on the part of the other side and an adjournment was refused;

(e) new evidence was discovered even though the party seeking the new trial had not been remiss in producing all possible evidence at trial;

(f) a witness on whose evidence the verdict was obtained was subsequently convicted of perjury;

(g) a magistrate improperly declined jurisdiction through a misconception of the law;

(h) a magistrate upon further consideration of the evidence came to the conclusion that he had misdirected himself;

(i) there were contradictory verdicts in cross-actions separately tried which involved the same questions of law and fact, and the evidence at each trial was fairly balanced.

In some of these cases appeal would seem to be an appropriate avenue of redress.[1] In other cases a new hearing is more appropriate.[2]

16.35 Section 90 originated in section 93 of the English County Courts Act 1888. In the English County Court Rules 1981,[3] the wide power to order a new trial is replaced by power to order a rehearing, rather than a new trial, in cases in which "no error of the court at the hearing is alleged". This is a convenient and economical procedure for correcting technical or procedural slips made by the parties. It leaves errors to be dealt with by appeal. In the Australian Capital Territory, section 220 of the Court of Petty Sessions (Civil Jurisdiction) Ordinance 1982 permits judgments and orders to be set aside if given, entered or made "irregularly, illegally or against good faith".

16.36 The Commission seeks comment as to whether section 90 should be limited. Section 90 provides a cheaper method of obtaining a rehearing than an appeal does. The provision is extremely wide but is a method of providing an inexpensive, simple and convenient rehearing. Its danger lies in its potential for misuse and in its vague terms. The Commission seeks comment as to whether it should be restricted, and if so, in what way. Perhaps, in the demographic circumstances of Western Australia and especially in the case of quite small claims there is a need for a reasonably liberal approach.

17. PROPOSALS

16.37 The Commission proposes that -

Open court (paragraph 16.1)

(a) All Local Court proceedings should be held in open court, save where the court considers it necessary to exclude the public or specific persons in the interests of justice between the parties. There should be no restrictions on the reporting of Local Court proceedings except by order made for the same reasons.

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1. For example, (a), (e) and (g).
2. For example, (c).
3. Order 37.

Summary hearing (paragraph 16.2)

(b) A Local Court should be enabled to hear and determine a summons in a summary way where a defendant does not usually reside in Western Australia and is about to leave Western Australia without paying the debt or satisfying the claim or the matter is otherwise one of urgency.

Non-appearance by parties (paragraphs 16.3 to 16.5)

(c) A magistrate, should also be specifically empowered, on the written and signed application of a party, to order that an action not be listed for hearing before a certain date or between certain dates. This is designed to overcome problems caused by the inability by reason of sickness or other good cause of a party to attend a hearing before or between certain dates. Notice should be given to the other parties to the proceedings and such orders should be revocable.

Hearings before clerks of courts (paragraphs 16.6 and 16.7)

(d) Upon application of the parties and by leave of the magistrate a clerk of a Local Court should be empowered to hear and determine claims where the sum claimed does not exceed $200, that sum being in lieu of the sum of $10 fixed in 1904 by section 76. Such a provision may be valuable in remote areas.

Evidence (paragraphs 16.8 to 16.10)

(e) Provisions dealing with the procedural conduct of trials and with questions of evidence, now contained in sections 71 to 80 of the Act, should be dealt with in the Local Court Rules rather than by the Act itself.

(f) A magistrate should be empowered at any stage of any action to dispense with -

(i) the rules of evidence for proving any matter which is not bona fide in dispute;

(ii) such rules as might cause expense and delay arising from any commission to take evidence or arising otherwise;

(iii) the proof of handwriting, documents, the identity of parties or parcels, or of authority,

and to require any party to the action other than a minor or person of unsound mind to make admissions with respect to any document or to any question of fact. The costs of proof occasioned by any refusal or neglect should be paid by that party. Such an admission should be for no other purpose than the purpose of the action for which it is made and, with the leave of the court, should be able to be amended or withdrawn.

Use of experts (paragraph 16.11)

(g) A magistrate should be at liberty, either upon the application of a party or of his own motion, to consult any expert or to call for the report of any expert or to invite any expert to sit as an assessor. Any cost incurred thereby should be fixed at the time of giving judgment and borne in such proportions and by such party as the magistrate considers just. It is envisaged that such a power would be used only rarely and in cases involving an unrepresented party or parties apparently unable to properly conduct the proceedings without assistance.

Affidavit evidence (paragraphs 16.12 to 16.15)

(h) In unliquidated claims for damages arising out of motor vehicle collisions, the plaintiff should be permitted to give affidavit evidence, without notice or service on the defendant, in cases where the defendant has not given notice of defence either as to liability or amount, subject to the right of the defendant to file an affidavit of his own evidence and to submit to assessment on affidavit evidence, and to the right of the court to refer the matter to open court and to set aside any orders made on the basis of such evidence.

Medical and other technical reports (paragraph 16.16)

(i) Compulsory exchange of medical and other technical reports in certain cases should be introduced into the Local Court Rules in terms similar to those contained in the Rules of the Supreme Court.

Medical examinations (paragraph 16.17)

(j) The Local Court Rules should be amended to contain provisions similar to those of Order 28 of the Rules of the Supreme Court dealing with the requirement by notice for the physical or mental examination of a party.

Security for costs (paragraph 16.18)

(k) The Local Court Rules should be amended so as to be consistent with the Rules of the Supreme Court in relation to security for costs.

Interpleader proceedings (paragraph 16.20)

(l) The Local Court Rules as to interpleader proceedings should be made consistent with those set out in the Rules of the Supreme Court.

Judgments and orders (paragraph 16.21)

(m) The terms of any judgment or order, whether final or otherwise, should be signed by or on behalf of the magistrate or clerk, and sent to the parties.

Costs (paragraphs 16.22 to 16.26)

(n) The practice of Local Courts in relation to costs, in matters other than those heard in the Small Debts Division and in the proposed Administrative Law Division, should continue to be consistent with the practice in the superior courts exercising civil jurisdiction.

(o) Appropriate scales of costs should be formulated from time to time by the committee of review referred to in this working paper, in as simple a form as possible.

Payment by instalments (paragraphs 16.27 to 16.29)

(p) Upon the conclusion of a trial or other hearing leading to judgment the magistrate upon the application of, or with the consent of, the judgment debtor should be required to hold a hearing into the means of the judgment debtor to pay the judgment, and to make appropriate orders on the basis of such examination.

New trials (paragraphs 16.31 to 16.36)

(q) The discretion of a magistrate to order a new trial, at present contained in section 90, should be retained but should be restricted to cases in which a substantial wrong or miscarriage of justice has been occasioned other than by an error of law. The provision should also clarify the time at which such an application can be made.

CHAPTER 17 - APPEALS AND PREROGATIVE WRITS

17.1 Part VII of the Local Courts Act deals with appeals from decisions of Local Courts[1] and with judicial review by way of prerogative writs.

1. APPEALS

17.2 By section 107 a party to an action or matter dealt with in a Local Court who is dissatisfied may appeal from a final judgment to the District Court without leave.[2] From a judgment that is not a final judgment a party may appeal to the District Court with leave of that Court. In either case, this is so notwithstanding that the action or matter may have been brought in the Local Court by consent. Sections 108 to 112 make supplementary provision. On the hearing of an appeal, the District Court has power to affirm, reverse or modify the judgment or order appealed from, and to substitute its own order or to order a new trial.[3] The District Court (Appeal) Rules 1977,

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1. As to rights of appeal which arise in cases where jurisdiction is vested in Local Courts by statutes other than the Local Courts Act itself see chapter 8 above.

2. There is however no right of appeal from judgments given in the Small Debts Division of Local Courts: s 106N.

3. In Martin Lawrence Pty Ltd v O'Donnell Griffin Pty Ltd, District Court Appeal No 19 of 1978 unreported, his Honour Judge Heenan described the effect of s 111 and of rule 3 of the District Court (Appeal) Rules, 1977 made pursuant to s 107(2) of the Act which provides that unless the parties otherwise agree the appeal shall be by way of re-hearing, as not meaning that the appeal is a complete re-hearing as a new trial is. It means, his Honour said, that:

> "This court is to consider for itself the issues the learned magistrate had to determine and the effect of the evidence he heard as appearing in the record of proceedings before him, but applying the law as it is when the appeal is heard, not as it was when the trial occurred."

Accordingly, on an appeal further evidence may not be received unless it comes within the well recognised exceptions of its being evidence not available to be called at the trial: see, for example, Lake v Taggart [1979] 1 SR (WA) 89, another case concerning an appeal from a Local Court to the District Court under s 111.

prescribe the time and manner within which appeals may be made and contain provisions in respect of security for costs of the appeal. In 1979 there were 42 appeals to the Perth registry of the District Court from Local Courts, in 1980 39, in 1981 39 and in 1982 37. A party dissatisfied with a judgment of the District Court on the appeal may, by leave of the Supreme Court or a Judge thereof, appeal to the Full Court of the Supreme Court, in the time and manner prescribed by the Rules of the Supreme Court. When an appeal to the District Court is pending, the Supreme Court, or a Judge thereof, may for good cause remove the appeal to the Full Court, again in conformity with the Rules of the Supreme Court.[1]

17.3 Appeals in civil matters have generally been thought necessary for the purpose of clarification of the substantive law, the avoidance of inconsistent decisions, to overcome errors, and to provide finality. On the other hand, appeals on questions of fact may help to cause overloading of work in the appellate court, or the bringing of appeals in an effort to force a financially weaker or impatient opponent to settlement. The Commission has not been informed of any problems arising out of the existing machinery of appeals from Local Courts to the District Court pursuant to the District Court (Appeal) Rules 1977. One advantage of the procedure established by those Rules is that appeal books need not be prepared. Filing of the notice of appeal causes the relevant Local Court to remit the file and a certified copy of the notes of evidence and reasons for judgment to the District Court. No doubt the appellate procedure is facilitated if evidence has been adequately recorded at the original hearing in the Local Court, and if the reasons for judgment have been explained in sufficient detail.[2] The Commission seeks comment as to whether there is any room for improvement in the appeal procedure.

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1. With these provisions should also be read Order 33 of the Local Court Rules. That order should be amended to reflect the fact that appeals are now made to the District Court instead of the Supreme Court.

2. In Australian Timber Workers' Union v Monaro Sawmills Pty Ltd (1980) 42 FLR 369, the Federal Court of Australia reaffirmed the duty of a tribunal, from which an appeal may lie, to state the facts found and the reasons for the decision given. It is not enough for such a tribunal of first instance merely to state its conclusions. Sweeney and Evatt JJ cited the judgment of Jordan CJ in Carlson v King (1947) 64 WN (NSW) 65, at 66:

> "It has long been established that it is the duty of a Court of first instance, from which an appeal lies to a higher Court, to make, or cause to be made, a note of everything necessary to enable the case to be laid properly and sufficiently before the appellate Court if there should be an appeal. This includes not only the evidence, and the decision arrived at, but also the reasons for arriving at the decision."

17.4 The question arises however whether appeals in respect of all claims involving sums of $1,000 or less, or such other sum as represents the money jurisdiction from time to time of Small Claims Tribunals or the Small Debts Division should be barred, because of the expense inevitably involved.

2. PREROGATIVE WRITS

17.5 The right to appeal may be contrasted with the power of the Supreme Court to review decisions or actions by use of the prerogative writs. This form of review, referred to as judicial review, is concerned only with whether or not a decision or action was done lawfully or within jurisdiction, and not with the merits of the decision or action. Unlike the power of an appellate court to hear appeals, the power of the Supreme Court to review a decision or action of an inferior court is an inherent power and is not created by statute. The power is exercised by means of a number of remedies including the prerogative writs of certiorari, prohibition and mandamus. On such a review, the Supreme Court does not have the power to substitute its decision on the merits for that of the court below, but only to quash any unlawful decision, or to order a magistrate or officer to perform a public duty, or to require a Local Court not to deal with a matter outside its jurisdiction or, if within jurisdiction, to deal with the matter in accordance with the law.

17.6 Sections 113 to 119 relate to the use of such prerogative writs in respect of Local Court proceedings. Section 113 provides that judgments shall not be removed by appeal, motion, writ of error, or certiorari, or otherwise, into another court save in accordance with the Act. Section 115 makes provision for a Supreme Court Judge to issue a rule or summons in lieu of a writ of mandamus. By section 116, provision is made in respect of writs of prohibition. Sections 117 to 119 are machinery provisions. These various provisions are in almost identical terms to sections 80 to 85 of the District Court Act.

17.7 The Commission has recently reviewed the operation of the prerogative writs in Western Australia in relation to administrative decisions,[1] some of which are made by Local Courts as an appellate

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1. Working Paper on The Judicial Review of Administrative Decisions, Project No 26 Part II, 1981.

body.[1] During that review the Commission dealt shortly with the provisions of sections 113 to 119[2] and also with the similar provisions contained in the District Court Act and like provisions in the Justices Act 1902-1981 and other legislation. The Commission does not therefore intend to deal with the matter further in this working paper. Little use is made of the provisions of sections 113 to 119. The availability of extensive appeal rights reduces the need for prerogative review of Local Court proceedings.

17.8 There is one provision in this group of provisions however which goes beyond judicial review in its normal sense. By section 114, if a Supreme Court Judge thinks it desirable that any action, matter or proceeding pending in a Local Court should be tried in the Supreme Court he may issue a writ of certiorari. The amount claimed must however exceed $40, that figure having been fixed in 1904. This provision is similar to section 115 of the English County Courts Act 1959 which originated in a provision of the 1846 English legislation. It has been held that the section gives an absolute discretion.[3] The section is therefore best considered in conjunction with the other provisions referred to in paragraphs 5.35 to 5.38 and 5.47 to 5.53 above.

3. PROPOSALS

17.9 The Commission proposes that -

(a) Except in respect of proceedings heard in the Small Debts Division and in the proposed Administrative Law Division, appeals from Local Courts should continue to lie to the District Court under the District Court (Appeal) Rules 1977 by way of 'rehearing' on the papers.

(b) The provisions of the Local Courts Act dealing with judicial review by way of prerogative writs (sections 113 to 119) should be reviewed in the Commission's report on The Judicial Review of Administrative Decisions.[4] Pending such review the provisions can be retained.

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1. See para 8.8 above.

2. See esp footnote 1 to para 3.7 and para 4.3 of the Working Paper on The Judicial Review of Administrative Decisions, Project No 26 Part II, 1981.

3. Challis v Watson [1913] 1 KB 547.

4. Project No 26 Part II.

CHAPTER 18 - INTEREST

18.1 As was pointed out in paragraph 4.3 above, the Commission has a reference to review the law relating to the payment of interest on money owed, or recovered in legal proceedings, taking into account the effects of inflation.[1] These terms of reference require the Commission to consider such matters as -

(a) whether and in what circumstances interest should be payable on sums of money recovered in legal proceedings in respect of a period prior to judgment ("pre-judgment interest"); and

(b) the payment of interest on sums of money awarded in legal proceedings for the period between the time judgment is entered and the time it is satisfied (interest on judgment debts).

1. PRE-JUDGMENT INTEREST

18.2 In its report on Pre-judgment Interest[2] the Commission recommended that courts in Western Australia be given a general power to award pre-judgment interest in cases in which a debt is recovered or damages are awarded. By the Supreme Court Amendment Act (No 2) 1982 that recommendation was adopted.[3] Section 32 of the Supreme Court Act now provides that:

> "(1) In any proceedings for the recovery of any money (including any debt or damages or the value of any goods), the Court may order that there shall be included, in the sum for which judgment is given, interest at such rate as it thinks fit on the whole or any part of the money for the whole or any part of the period between the date when the cause of action arose and the date when the judgment takes effect.
>
> (2) This section does not -
>
> (a) authorise the giving of interest upon interest;

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1. Project No 70.

2. Project No 70 Part I, 1981.

3. The Act has been proclaimed since this working paper was written and will come into force on 20 June 1983.

(b) apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(c) affect the damages recoverable for the dishonour of a bill of exchange."

As a result of section 34 of the Supreme Court Act and section 35 of the Local Courts Act, the provisions of section 32 of the Supreme Court Act apply also in Local Courts. Such a provision gives Local Courts a discretion concerning -

* whether interest is to be awarded at all;
* the rate of interest;
* the parts of the award to carry interest;
* the period for which interest is payable between the date when the cause of action arose and the date when judgment takes effect.

18.3 However, by subsection (3) the provision only applies to Local Court proceedings where the sum for which judgment is given exceeds $750. In its report on Pre-Judgment Interest the Commission pointed out that Local Court judgment debts only bear post-judgment interest where the judgment exceeds $750.[1] The Commission took the view that for the sake of consistency, pre-judgment interest should only be recoverable in Local Courts in cases in which the sum for which judgment is entered exceeds $750. Otherwise, a plaintiff could successfully claim interest up to the moment of judgment but would not be entitled to interest during any period for which the judgment remained unsatisfied. The Commission advised that it would reconsider these limits as part of this reference. If the figure at which Local Court judgments commence to bear interest is varied in the future, the sum below which pre-judgment interest is to be irrecoverable in Local Court proceedings should be varied accordingly. The Commission therefore now wishes to consider whether pre-judgment interest should be allowable in respect of all Local Court judgments or restricted to only some judgments and if so, which.

18.4 The Law Society has suggested to the Commission that pre-judgment interest should be recoverable irrespective of the size of the judgment. If this position were adopted it would be consistent

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1. See paras 18.8 to 18.10 below.

with the recommendations of the Commission in relation to the Supreme Court and District Court. There would also then be an additional deterrent to persons who may be tempted to delay paying their debts, at the expense of their creditors.

18.5 The Commission notes however that interest is not recoverable in proceedings brought in Small Claims Tribunals. Special circumstances may apply to small consumer claims which might explain this.

18.6 There are however three important factors which militate against the award of pre-judgment interest in respect of all small claims. First, the amounts involved will inevitably be small and in many cases will be so small as to be almost negligible. Secondly, even small amounts will impose a burden on many persons who become unable to meet debts as a result of illness, unemployment or other misfortune. Thirdly, there is the administrative burden which computation of small amounts of interest in large numbers of claims will impose on court staff.

18.7 In its report on Pre-judgment Interest the Commission also recommended that interest should be recoverable where judgment is obtained in default.[1] The Commission recommended that this should be upon simple application to the magistrate.[2] Where the debtor has been unable to meet the claim by reason of financial hardship, such a circumstance may in some cases merit rejection of the application. The necessity for even such an application, however, will prevent

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1. In Local Courts this was to apply only where the amount for which judgment is entered exceeded $750: paras 5.4 and 5.9.

2. Even this may not be necessary. Alex Lawrie Factors Ltd v Modern Injection Moulds Ltd [1981] 3 All ER 658 held that proceedings which ended in a default judgment were proceedings which had been "tried" and that this default judgment could include interest to be assessed. Another proposal subsequently made by the New South Wales Law Reform Commission in its report on Interest on Certain Debts, 1983 is to allow a default judgment to be obtained where there is a claim for interest together with a claim for a liquidated demand. The plaintiff would be required to specify in the claim the portion of the claim on which interest is claimed, the date from which it is claimed, and the rate claimed. The plaintiff would include in an affidavit any facts relied upon in support. A defendant wishing to oppose the award of interest would be able to give notice of dispute and file an affidavit containing particulars of any facts relied upon. The amount payable for interest would be assessed by the Registrar at the time when the default judgment is filed or processed, and save, in special circumstances, would be at the rate fixed from time to time by practice direction. Amendments clarifying the position under the Local Court Rules in Western Australia seem desirable.

applications where the interest involved would be trivial. The Commission also recommended that the plaintiff's claim should state that an award of interest will be sought and that interest should be included in the calculation when costs are being considered. In relation to these supplementary recommendations attention would need to be given to appropriate Local Court Rules. In that regard the Commission can see no reason why the rules applicable in Local Courts should differ from those in the Supreme Court. The Commission's attention has also been drawn to the need to ensure that interest included in a judgment is stated in the judgment as a liquidated amount to facilitate execution especially by way of the judgment summons procedure.

2. POST-JUDGMENT INTEREST

18.8 Section 142 of the Supreme Court Act provides that:

> 142. (1) Every judgment debt shall carry interest at such rate[1] for every hundred dollars by the year as the Treasurer from time to time by notice published in the Government Gazette determines from the time of entering up the judgment until the judgment is satisfied, and the interest may be levied under a writ or warrant of execution on the judgment.
>
> (2) This section applies to a judgment in a Local Court, except where the amount of the debt, claim or demand allowed by the judgment does not exceed seven hundred and fifty dollars.

The Commission wishes to consider whether section 142(2) of the Supreme Court Act should be repealed or amended.

18.9 There should be some consistency between the position in relation to pre-judgment interest and that in relation to interest on judgments. It would be incongruous for interest to be recoverable up to the point of judgment yet not recoverable on the judgment debt after judgment. The Commission therefore seeks comment on whether -

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1. At present the rate prescribed under subsection (1) is 10%: Government Gazette, 10 January 1975, p 55. The Commission notes that this rate is low compared to rates now applying in some other jurisdictions. The Commission also notes that in Victoria judgment debts bear interest "at the maximum rate approved by the Australian Loan Council at the time judgment is entered or the order made for long-term borrowing for new public securities issued by semi-government authorities". Such a formula might be both more flexible and more currently appropriate than the system of fixing a rate by regulation. On the other hand it may also be thought to raise unnecessary complications.

(a) Local Courts should only have power to award interest as a component of a judgment where the judgment sum is, or exceeds, $1,000, and

(b) Section 142(2) of the Supreme Court Act should be amended to permit post-judgment interest on all Local Court judgments, of, or exceeding, $1,000,

rather than $750 as at present in each case.

18.10 The Commission will consider the question of enforcement of post-judgment interest separately in the later Working Paper on the Enforcement of Judgments. Post-judgment interest leads to difficulties of computation and enforcement especially where debts or claims are met by a large number of instalments. This matter is presently receiving consideration in respect of English County Courts.

3. PROPOSALS

18.11 The Commission proposes that in order to maintain consistency with the situation in the Small Debts Division and in Small Claims Tribunals -

(a) section 32(3) of the Supreme Court Act in respect of pre-judgment interest should apply to proceedings in Local Courts only where the amount of the judgment including interest exceeds $1,000 or any other sum equal to the money jurisdiction limit of the Small Debts Division and of Small Claims Tribunals from time to time, rather than $750 as at present; and

(b) section 142(2) of the Supreme Court Act should be amended to permit post-judgment interest only on Local Court judgments in a similar manner, that is where the amount of the judgment exceeds $1,000 or any other sum equal to the money jurisdiction limit of the Small Debts Division and of Small Claims Tribunals from time to time, rather than $750 as at present.

CHAPTER 19 - SUPPLEMENTARY PROVISIONS

19.1 Part IX (sections 154 to 163) of the Local Courts Act contains certain supplementary provisions. The Commission seeks comment on these provisions and on certain other incidental matters raised in this chapter.

1. PENALTIES

19.2 Section 156 empowers a magistrate to commit to prison for a term not exceeding fourteen days any person who wilfully insults, interferes with or obstructs a magistrate or officer of a Local Court or to impose on him a fine not exceeding $20. This sum was first fixed in 1904 and remains unchanged. The equivalent penalty contained in the District Court Act is fixed at $100 or imprisonment for a period not exceeding one month. In Courts of Petty Sessions the equivalent maximum penalty is either imprisonment for seven days or a fine of $10. These provisions should be made consistent.

2. FEES

19.3 Sections 159 and 160 and Order 37 relate to fees. The Commission has already in paragraph 12.4 above discussed the fee for filing notice of defence. Local Court fees have recently been simplified. The Commission does not intend to make any other specific recommendations save as to the need for regular review of such matters. Court administration is financed both from general community revenues raised through taxation and charges and by specific court fees. It needs to be both adequate and rational.

Court fees are often selected without apparent regard to consistency between various courts and without any specific criteria in mind but rather to act merely as an indirect form of taxation. Court fees are paid in different ways in different States. In Victoria, for example, court fees are paid by way of stamp duty affixed to documents prior to lodging by the parties or solicitors. The main criticism that has been levelled at this system is that there are too many fees of too small amount and that a single composite fee would be best. Court fees in South Australia and Western Australia, as in other jurisdictions, have recently been substantially simplified. A single composite fee system is used firstly to the point of filing of the original summons and then at the point of issuing execution. Such a system is undoubtedly efficient administratively and simple for the parties. There may be room for further simplication. In South Australia as in Western Australia, the court fee system however is operated through the court office itself.

3. VACATION

19.4 The Local Courts Amendment Act 1982 has repealed section 161 which provided that a vacation shall be observed in the sittings of every Local Court from 20 December to 18 January (both inclusive) of each year. The amendment was designed to speed up the flow of Local Court work. The old provision was anachronistic and not found in other jurisdictions.

4. FORMS

19.5 The Second and Third Schedules prescribe forms for objection to jurisdiction, summons, and interlocutory summons for judgment. There seems no reason why those forms should not be prescribed by the Rules.

5. MARITAL STATUS

19.6 At present the marital status of a female litigant is made relevant to Local Court proceedings, and is therefore required to be shown on Local Court documents, by the following provisions:

(1) Section 130 provides that a married woman may be committed to a term of imprisonment for non-payment of an instalment order made by the court;

(2) Order 3 rule 18 provides that married women may sue and be sued as provided by the Married Women's Property Act 1892-1962;

(3) Order 5 rule 8 requires the marital status of a female defendant to be shown on the summons;

(4) Order 23 rule 3 makes provision for a judgment for costs against a married woman who is a plaintiff;

(5) Order 25(1) rule 3 makes provision in respect of the costs of a married woman sued only in her own name;

(6) Form 105 makes provision for a notice to the bailiff when a warrant of execution is issued against a married woman.

The Married Women's Property Act 1892-1962 does not assimilate the position of a married woman to that of a single woman in relation to all matters. It is beyond the terms of the Commission's reference to consider revision of the Married Women's Property Act 1892-1962.[1] So long as that Act retains its present form the question of execution against married women will raise distinct problems from those applying in respect of single women. This is reflected in the Rules of the Supreme Court also.[2] The Act should be reviewed. The question of enforcement of judgments against married women will be further considered in the Working Paper on the Enforcement of Judgments.

6. TIME LIMITS ON ISSUE OR SERVICE OF DOCUMENTS

19.7 The attention of the Commission has been drawn to the fact that Order 5 rule 20 of the Local Court Rules, which provides time limits in respect of notices for further particulars of claim, requires a plaintiff to file further particulars of claim within three days of service of a notice requesting the same.[3] That time is unnecessarily short. Unnecessarily short time limits force applications to be made for leave to extend time. As a result solicitors may tend to ignore time limits or extend them by consent. This tendency is also apparently widespread in jurisdictions elsewhere.

19.8 The prescribed time limits governing various stages in the procedures of Local Courts and the conduct of Local Court actions

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1. For a discussion of the differing existing Australian provisions in relation to contracts see Cheshire and Fifoot, The Law of Contract, 4th Aust ed, 1981, 444-447 and generally the Law Reform Commission of Saskatchewan, Proposals for an Equality of Status of Married Persons Act (1982).

2. See Form 33.

3. This rule is further discussed in paras 10.4 to 10.6 above.

should be reviewed in the light of changes in communications, both by transport and by telecommunications, the pressures of modern business and professional life, the desirability of consistency between the Local Court Rules and the Rules of the Supreme Court, and the role of pleadings and other procedures in Local Court proceedings. Time limits must be practicable and must be consistent with the desire for a simple and expeditious Local Court procedure.

7. ENLARGEMENT AND ABRIDGEMENT OF TIME

19.9 It has been suggested to the Commission that there is a conflict between Order 38 rule 7 and Order 6 rule 29. Order 38 rule 7 provides that the times fixed by the rules for serving process or taking any step, filing any document, giving any notice or for any other purpose in any action or matter may be enlarged or abridged by order of the magistrate, or by consent of the parties. The rule then provides that an order may be made under the rule, although the application for the order is not made until after the expiration of the time allowed or appointed, on such terms as to costs and otherwise as the magistrate may direct. Order 6 rule 29 provides that the time within which a summons may be served shall, unless extended within the currency of a period of twelve months from the issue of the summons, or successively re-extended within any further period, be limited to a period of twelve months from the issue of the summons. Either Order 6 rule 29 should be repealed or, at least, the relationship of Order 6 rule 29 and Order 38 rule 7 should be clarified. The English County Court Rules 1981 have elected for the approach found in Order 38 rule 7.

8. RECOVERY OF POSSESSION OF LAND

19.10 The Commission does not consider its terms of reference to include a review of the substantive laws governing landlord and tenant relationships generally. However, the existing provisions of sections 99 to 106 require consideration.

19.11 Sections 99 to 106 deal with a number of different situations. Section 99 provides for cases in which a tenancy expires

or is determined by notice to quit and the tenant or another person claiming under him fails to give up possession.[1]

19.12 Section 100 provides that where the rent of land is in arrears for certain specified periods[2] and the landlord has a right by law to re-enter for the non-payment of rent, the landlord may without formal demand for re-entry bring an action for recovery of possession.[3]

19.13 Section 101 permits the addition of a claim for rent or mesne profits,[4] or both, down to the day of hearing in an action under either section 99 or section 100 provided the claim does not exceed $10,000.[5]

19.14 Section 102 requires a sub-tenant served with a summons and being an occupier of the whole or part of the land the subject of the summons to give notice forthwith to his immediate landlord, upon penalty of forfeiting to the landlord three years rent. This provision is one which has also been enacted in successive English County Courts Acts.

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1. The landlord may bring an action to recover possession either against the tenant or against the other person. The plaintiff must prove certain matters to the satisfaction of the court, and thereupon, if the defendant either does not appear or does not show good cause to the contrary, the magistrate may order that possession be given to the plaintiff either forthwith or on such day as the magistrate appoints. No guidance is given by the Act as to the exercise of this discretion.

2. The periods specified are -

   (i) in the case of a weekly tenancy - 10 days
   (ii) in the case of a monthly tenancy - 21 days
   (iii) in the case of any longer tenancy - 42 days

3. If the tenant pays the rent in arrear, and the costs, into court five days before the hearing day the action is stayed. If not, the magistrate may order that possession be given to the plaintiff on a certain date not less than 14 days from the hearing date unless within that time all the rent in arrear and costs are paid into court.

4. Mesne profits are the profits derived from land whilst the possession of it has been improperly withheld: that is, the rental value of the premises.

5. By Order 4 rule 1, no other cause of action may, except by leave of the magistrate, be joined with an action for the recovery of possession of land, except for claims for damages for breach of any contract under which the premises are held, or for any wrong or injury to the premises claimed.

19.15 Whereas sections 99 to 102 deal with situations in which a claim for possession of land is being made against a tenant or sub-tenant, section 103 provides for the owner or person entitled to immediate possession of land to sue to recover possession from any person in possession of the land without right, title or licence.[1]

19.16 The present provisions are not limited to the investing of jurisdiction. The proceedings must be brought in the Local Court nearest the land. The various forms of summons prescribed for use under these provisions require a hearing date to be fixed upon the issue of the summons and not upon a subsequent application. A formal hearing is held whether or not the claim is admitted and certain matters must be proved at the hearing before an order can be made. The filing of a notice of defence is not required. Failure to obey an order gives the plaintiff the right to issue a warrant of possession requiring the bailiff to obtain possession of the land. Section 102 provides a substantial penalty, payment of three years rent, payable by a sub-tenant who fails to bring the service of a summons to the attention of his immediate landlord. The Commission seeks comment on these various provisions and especially the latter.

19.17 Section 99 creates a discretion in the court, in cases of expiry or determination of a tenancy by notice to quit, to order possession to be delivered up on a future date. Perhaps some guideline as to the exercise of that discretion would be appropriate. Similar comment applies to section 100 in cases where a tenant's payment of rent is in arrear.

19.18 On the other hand no discretion to allow time is given by section 103 in cases of persons in possession without right, title or licence. As this provision would include not only actions against trespassers in the usual sense but, for example, persons admitted to possession by a prior tenant albeit totally without authority, some discretion to allow time for possession may therefore be appropriate. In McPhail v Persons Unknown[2] Lord Denning pointed out that at common law the owner can use self-help forcibly to evict a trespasser and thus a court has no jurisdiction to allow time to such a

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1. The owner, if he has given notice to the person in occupation to quit, may also claim an amount not exceeding $10,000 for damages for occupation subsequent to the service of the notice.

2. [1973] Ch 447.

defendant. The Commission seeks comment as to whether this should be altered by statute. In New South Wales for instance a writ of possession may only be issued with leave and this may be granted on terms.

19.19 Order 24 of the English County Court Rules 1981 provides a special procedure which can be used to enable the eviction of "squatters" who might otherwise be unable to be identified and who may in fact change in identity rapidly so as in either case to make it difficult for the plaintiff to identify and serve the correct defendant or defendants.[1] Basically, the plaintiff swears an affidavit stating his interest in the land, the circumstances in which the land has been occupied without license or consent and in which the claim to possession arises and the fact that he does not know the name of any person occupying the land who is not named in the proceedings. Special provisions are made as to service and permitting persons not named in the proceedings to be made a party and heard. Such provisions may be desirable in Western Australia.

19.20 Preliminary submissions to the Commission also suggest that provision should be included in the Local Courts Act similar to that contained in the English County Courts Act Order 9 rule 2 for confessions to be filed in recovery proceedings. That rule provides -

> 2. (1) A defendant in an action for the recovery of land who admits the plaintiff's right to recover possession of the land may at any time before the return day deliver at the court office an admission thereof.
>
> (2) The registrar shall . . . send notice thereof to the plaintiff and no costs incurred after the receipt of such notice in respect of the proof of any matters admitted therein shall be allowed against the defendant who has made the admission.

The Commission seeks comment.

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1. Its scope is however narrowly confined and it does not apply where the person in occupation is a tenant holding over after the termination of the tenancy. It has been held, however, to apply against an unlawful sub-tenant when the sub-tenancy has been granted in breach of an absolute prohibition against sub-letting and without the landlord's knowledge or consent: Moore Properties (Ilford) Ltd v McKeon [1976] 1 WLR 1278. The operation of these provisions is described in D B Casson and I H Dennis, Modern Developments in the Law of Civil Procedure, pages 32-34. Comparable procedure exists by Order 113 of the English Supreme Court Rules.

9. SERVICE AND EXECUTION OF LOCAL COURT JUDGMENTS OUTSIDE WESTERN AUSTRALIA

19.21 The question of service and execution of civil process outside Western Australia is not dealt with by the existing Local Courts Act and Rules, but is dealt with by the Commonwealth Service and Execution of Process Act, the Foreign Judgments (Reciprocal and Enforcement) Act 1963 and the Rules of the Supreme Court. The Commission has therefore not addressed the matter in this working paper. The Commission also notes however that the Australian Law Reform Commission has received a reference to enquire into the adequacy of the law relating to the service and execution throughout the Commonwealth of civil and criminal process and the judgments of the courts of the States and Territories including reference to the desirability of facilitating service and execution on an Australia-wide basis of legal process and judgments in litigation dealing with matters requiring service and execution in more than one State and Territory. The Commission therefore does not intend to address that matter further in the course of this project.

10. OTHER MATTERS

19.22 It is not practicably possible in this working paper to canvass all matters which might be altered or otherwise dealt with in a review of the Local Courts Act and Rules. The Commission however seeks comment on any aspect of the reference. A number of other matters have been raised with the Commission. One such matter concerns liability for the costs of entering up judgment and very often also of issuing execution where payment of the amount of the claim and of the costs of the summons are paid to the plaintiff on the same day as judgment is entered and possibility execution issued. A rule to deal with the matter expressly may be required.

19.23 On many issues the final form of Local Court Rules and practices should await decisions on matters of jurisdiction and philosophy underpinning the Local Court structure. The many matters discussed in this and other chapters however suggest two primary needs -

* First, that there should be consistency between the Rules of the Supreme Court and the Local Court Rules, save where the needs of expedition, simplicity and the avoidance of expense require otherwise, and

* Secondly, that there should be regular review in these matters by an appropriately expert committee. This matter will be further considered in the next chapter.

11. PROPOSALS

19.24

Penalties, fees, costs and allowances (paragraphs 19.2 and 19.3)

(a) The Commission proposes that a number of matters the subject of the Local Courts Act and Rules should especially be reviewed regularly so as to be kept consistent with the provisions of other statutes and where appropriate to take account of the effect of inflation on money values. These include -

(i) All penalties and other money sums referred to in the Local Courts Act and Rules.

(ii) All Local Court fees, costs and allowances.

Marital status (paragraph 19.6)

(b) All requirements that the status of a female be stated in Local Court proceedings should be repealed, save only such as are necessary to satisfy differences in status remaining since the enactment of the Married Women's Property Act 1892-1962.

(c) The Married Women's Property Act 1892-1962 should be reviewed to bring it into line with modern concepts of sexual equality.

Time limits on issue or service of documents (paragraph 19.7)

(d) There should be a general review of time limits contained in the Local Courts Act and Rules with a view to making the same consistent with the Rules of the Supreme Court and with modern conditions.

Enlargement and abridgement of time (paragraph 19.9)

(e) Order 6 rule 29, preventing an application for the extension of time for the service of a summons being brought more than twelve months after the issue of the summons, should be repealed.

Recovery of possession of land (paragraphs 19.10 to 19.20)

(f) In exercising jurisdiction in actions to recover possession of land, magistrates should be empowered to order that possession be given to the plaintiff either forthwith or on such day, being not more than forty-two days from the date of the order, as the magistrate appoints.

(g) Section 102 which provides that a sub-tenant who fails to bring notice of a summons for recovery of possession of land to the attention of the landlord shall pay a penalty of three years rent of the land should be amended. The Commission seeks comment as to the direction that amendment should take.

(h) Provision should be made for defendants to actions for recovery of possession of land to file admissions to the claim, such admissions to have the effect of limiting costs payable to the plaintiff.

(i) Amendments should be made to the Local Court Rules to provide a special proceeding which can be used to enable the eviction of "squatters" who might otherwise be unable to be identified.

PART IV: REVIEW AND ADMINISTRATION

CHAPTER 20 - THE NEED FOR REGULAR REVIEW

1. THE NEED FOR REGULAR REVIEW

20.1 There is a need for a complete modernisation and simplification of the Local Court Rules including the prescribed forms, as has recently occurred in England with the promulgation of the County Court Rules, 1981.[1] There has been no major systematic review of the Local Court Rules since they were first promulgated.[2]

20.2 By virtue of section 158 of the Local Courts Act in Western Australia, the Local Court Rules are made by the Governor ,and are therefore an executive and administrative act. At present matters concerned with the Local Courts Act and Rules including the administration of Local Courts themselves are dealt with by officers of the Crown Law Department. Historically, review of the Act and Rules including questions of forms, fees and costs have occurred in an ad

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1. The English County Court Rules, 1981 have been modelled upon current English practice and are drafted in shorter, clearer and more modern language than previously. Many changes are based upon practice in the English High Court. These deal with such matters as pleadings, interlocutory applications, interim orders concerning property the subject of proceedings, discovery, directions concerning hearsay evidence, expert evidence, and the rules concerning security for costs. A short discussion of the most important recent developments in English civil procedure is contained in D B Casson and I H Dennis, Modern Developments in the Law of Civil Procedure, Sweet and Maxwell, 1982. These include amendments in England in relation to issue and service of writs, acknowledgment of service and notice of intention to defend, a discussion of the recent judicial developments in the field of Mareva injunctions, and Anton Piller orders, developments in the fields of consent judgments and charging orders. The work also contains a discussion of the changes made in England by the Supreme Court Act 1981. Some, but not all of these matters, are touched on in this working paper.

2. It would be inappropriate for that review to be carried out, however, before the final report of this Commission on the general matters raised in this working paper, and the appropriate decisions as to the implementation of those recommendations.

hoc and unsystematic manner and apparently without reference to changes in the Rules of the Supreme Court.

20.3 It may be thought that rules of court that essentially deal with procedural matters, forms and costs should be a matter for exercise of judicial power. For example, in South Australia the senior judge of the Local and District Criminal Courts has been given power to make rules of court to give effect to the Local and District Criminal Courts Act 1926-1981.[1] Applied in Western Australia this might mean that the Chief Stipendiary Magistrate should have power to make amendments to the rules. No doubt he would consult his brother magistrates or at least the senior ones of them dealing with Local Court matters. The existing system seems to be both inappropriate and to lead to inadequate attention being given to review.

20.4 No single revision of the Local Courts Act and Rules can produce reforms that will remain satisfactory indefinitely. Changes in economic and social conditions and community expectations will place new and different demands upon Local Courts which will make further revision of court practice and procedure necessary. The history of the many English committees and commissions which have considered aspects of practice and procedure in courts of civil jurisdiction shows clearly that many procedural reforms need adjustment from time to time.[2]

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1. The Joint Select Committee on the Family Law Act has supported a recommendation of the Family Law Council that a similar committee make proposals for amendments to regulations under the Family Law Act, the rule-making power being vested in the Judges of the Court. In addition, Mr Justice Blackburn has expressed the view that "civil procedure is the responsibility of the courts and the profession. Its reform is a matter for amendment of Rules of Court - calling for activity on the part of judges, Rules Committees or whatever is the responsible body . . . To allow the control of the procedure to fall into the hands of the Executive is a threat to the independence of the courts." See, Updating Civil Procedures for the 1980's, 49 ALJ 374, 379.

2. These committees and commissions include, in post-war England alone -

   (a) The Committee on County Court Procedure, 1949, (the Austen Jones Committee)

   (b) The Committee on Supreme Court Practice and Procedure, 1953, (the Evershed Committee), which was set up to review amongst other things the earlier reports made by the Hanworth Committee on the Business of the Courts, and the Report of the Royal Commission on the Despatch of Business at Common Law, 1934-1936

20.5 In 1979, the English Royal Commission on Legal Services (the "Benson Commission") recommended that "a single standing body . . . be given the responsibility of considering whether changes are desirable not merely in the rules [of court] themselves, but in the structure and jurisdiction of the courts, in order to reduce the cost and duration of litigation without detriment to the quality of justice".[1] The Commission reported that:

> A certain amount of expense will inevitably be incurred in setting up a body to review procedures. If it succeeds in the task of reducing the complexity, duration and cost of proceedings, the savings achieved both in money and manpower would be out of all proportion to this expense; they would benefit the administration of the courts, the use of judicial time and in particular litigants . . . Apart from direct economies of this kind, simplification of legal procedures should reduce delay - a source of discontent that is clearly apparent from the evidence submitted to us.[2]

20.6 Enquiries in Australia and elsewhere support the same conclusion. The Commission therefore tentatively suggests that a review committee be established to monitor the operation of Local Courts on a regular basis and to make recommendations for change from time to time. The Commission notes that a recommendation for the establishment of such a committee was made in the working paper on the Courts issued in 1976 by the Law Reform Commission of New South Wales.[3] In that working paper the Law Reform Commission of New South Wales said:

(c) The Committee on Personal Injuries Litigation, 1968, (the Winn Committee)

(d) The Committee on the Enforcement of Judgment Debts, 1969, (the Payne Committee)

(e) The Working Party on Personal Injuries Litigation Procedure, (the Cantley Report)

(f) The Report of Justice, the British Section of the International Commission of Jurists, entitled Going to Law - A Critique of English Civil Procedure, 1974

(g) The Royal Commission on Legal Services, 1979, (the Benson Commission)

and others.

1. Para 43.4.

2. Since then the establishment of a Supreme Court Procedure Committee has been announced.

3. Para 6.22.

From time to time ad hoc committees or individuals assigned to the task, consider and recommend new rules and variations of existing rules. In our view this is inadequate. It is desirable that rules of procedure be kept continually under review by a body specifically charged with that task.

20.7 Such arrangements need not be limited to review of the Act and Rules. By section 27 of the Local Courts Act 1982 of New South Wales the Chief Magistrate is required to submit to the Minister, at such times and in respect of such periods as he directs, and subject to any such direction, at such times and in respect of such periods as the Chief Magistrates considers appropriate, reports setting forth -

(a) particulars of -

(i) the incidence of delays in courts;
(ii) arrangements which have been made for the sittings of courts; and
(iii) any matters relating to discipline which have arisen and which may have affected or may affect the availability of magistrates or the disposal of business by courts;

(b) particulars of projected workloads in courts and an assessment of the number of magistrates which will, in the opinion of the Chief Magistrate, be available to meet those workloads; and

(c) comments upon any other matters relating to courts or magistrates about which, in the opinion of the Chief Magistrate, the minister should be advised or about which the minister has requested to be advised by the Chief Magistrate.

By section 28 the Governor is empowered to make regulations including regulations providing for the establishment of committees to advise the Chief Magistrate in relation to any matter arising out of the exercise by magistrates of their functions or the administration of courts. Similarly, section 198 of the New South Wales District Court Act 1973 provides that -

(1) The Judges shall assemble at least once in every 6 months for the purpose of -

(a) considering the operation of this Act and the rules; and

(b) inquiring into and examining any defects which appear to exist in the system of procedure or the administration of justice in the Court.

(2) The Judges shall at least once in every 6 months furnish a report to the Attorney General as to what (if any) legislation or rules, regulations, by-laws or ordinances it would, in their judgment, be expedient to enact or make for the better administration of justice in the Court.

20.8 A provision could be inserted into the Local Courts Act to ensure a regular review of the Act and Rules and the operation generally of Local Courts. The operation of the Act and Rules should be regularly measured against fixed criteria.

20.9 Such review might be conducted by a committee which might include in its membership -

(a) a Chairman to be appointed by the Attorney General,

(b) the Chairman of Judges of the District Court or another Judge of the District Court nominated by him,

(c) the Chief Stipendiary Magistrate,

(d) the Under Secretary for Law,

(e) a stipendiary magistrate selected from those sitting regularly at Perth Local Court and a magistrate selected from those sitting in a suburban or country court,

(f) two representatives of the legal profession nominated by the Law Society of Western Australia,

(g) a person nominated by the Commissioner for Consumer Affairs, and

(h) a referee of the Small Claims Tribunal.

It would, however, be necessary for administrative support to be provided for the committee. It should report periodically and its reports should be tabled in Parliament. The constitution of such a committee would need to be amended if Courts of Petty Sessions were merged with Local Courts into a new Magistrates Court sitting in divisions as proposed by the Commission earlier in this working paper, but this could be readily achieved.

20.10 The committee could also consider the implementation of the matters raised in this working paper and in reports of the Commission relevant to Local Courts administration.

2. PROPOSALS

20.11 The Commission proposes that -

(a) A committee should be established to review the operation of Local Courts on a regular basis, to make recommendations for changes to the Local Courts Act and Rules and to the practice and procedures of Local Courts. This proposal is made also in the light of the Commission's suggestion that Local Courts and Courts of Petty Sessions be merged to form a unified Magistrates Court. In the event of such a merger, the composition of the committee referred to below would be suitable for reviews of the Civil Division and of the Small Debts Division. Any review of other Divisions would require variations to the composition of the committee.

(b) Such a committee might include -

(i) a Chairman to be appointed by the Attorney General,

(ii) the Chairman of the Judges of the District Court or another Judge of the District Court nominated by him,

(iii) the Chief Stipendiary Magistrate,

(iv) the Under Secretary for Law,

(v) a stipendiary magistrate selected from those sitting regularly at the Perth Local Court and a stipendiary magistrate selected from those sitting regularly at a suburban or country court,

(vi) two representatives of the legal profession nominated by the Law Society of Western Australia,

(vii) a person nominated by the Commissioner for Consumer Affairs, and

(viii) a referee of the Small Claims Tribunal.

(c) Administrative support should be provided to the committee.

(d) The committee should report periodically and its reports should be tabled in Parliament.

CHAPTER 21 - ADMINISTRATION

1. ADMINISTRATION OF COURTS

21.1 By section 11(4) of the Law Reform Commission Act 1972-1978 the Commission is required, upon any review of any area of law referred to it, to report "if appropriate, whether new or more effective methods for the administration of that law should be developed". Court administration and management have increasingly come to be recognised as an important element in the proper functioning of any court system. This has been recognised in recent years by the Ontario Law Reform Commission in its review of the administration of Ontario courts[1] and in the subsequent Government White Paper, by the New South Wales Law Reform Commission in its 1976 Working Paper,[2] by the New Zealand Royal Commission on the Courts,[3] and by other inquiries. The recent development of the Australian Institute of Judicial Administration Inc, and the decision of the Victoria Law Foundation to institute a study of the Victorian civil justice system, reflect this recognition. The importance of this subject is also reflected by the appointment of specialist full-time court administrators in various jurisdictions. The Commission therefore considers it both necessary and desirable to consider the administration of Local Courts as part of this review.

21.2 The Commission has tentatively suggested that a committee be established which would have, amongst other functions, that of promoting efficient court administration.[4] However, other administrative measures to establish a unified and efficient court structure have also been found to be necessary by the various inquiries referred to above and by various commentators.

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1. A summary of its relevant recommendations is contained in Appendix VI.
2. See para 21.4 and Appendix VII below.
3. See para 21.5.
4. See Chapter 20 above.

21.3 In an address given to the American Bar Association meeting at Sydney on 11 August 1980 the Hon Mr Justice Beattie, the Chairman of the New Zealand Royal Commission on the Courts, said:[1]

> Before any government is asked for more money to run the courts, it must be demonstrated not only that the sum presently allocated is matched by value of the service provided, but that future, higher allocations would be justified. Modern management techniques should be applied. . .[A]ppropriate research and planning facilities should be provided to monitor the capacity and serviceability of existing resources and procedures, and to assess developmental trends and future demands. . .[T]o maintain the quality of justice it would be essential to develop court administration as a specialist area of management.

21.4 The New South Wales Law Reform Commission has noted[2] that lack of proper management systems in respect of court structures may result in -

(a) absence of authority where it is needed;
(b) inconsistency of operation;
(c) lack of co-ordination;
(d) rigidity of facilities;
(e) lack of promotional opportunities for staff;
(f) insufficient use of special skills and studies;
(g) lack of proper research and experimentation;
(h) lack of forward planning;
(i) lack of efficient court listing of matters for hearing.

It suggested the establishment of independent standing committees to monitor court jurisdiction, administration and rules of procedure and the appointment of a State Court Administrator whose duties should include -

(a) responsibility for the provision of all support services to enable the courts to function efficiently. Amongst these would be accommodation, court reporting (including sound and mechanical reporting services), service of process,

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1. The Hon Mr Justice Beattie, Our Crowded Courts: Causes Consequences and Cures, published in American, Australian, New Zealand Law: Parallels and Contrasts, 1980, 55-56.

2. Working Paper on the Courts, 1976, Part 8.

provision of juries, security of premises and personnel, court interpreters and translating services, and library and research facilities;

(b) maintenance of a close liaison with the judiciary;

(c) submission of reports and recommendations to a Jurisdiction Committee and to a Courts Administration Committee on matters relevant to the functions of those Committees; and

(d) submission of reports to Rule Committees of the Supreme Court, the District Court, and the Courts of Petty Sessions with regard to -

(i) efficient court administration; and
(ii) promotion of the efficiency of the court system by standardising forms and practice.[1]

21.5 The New Zealand Royal Commission on the Courts recommended the appointment of court administrators able to co-ordinate the organisation of sittings and administrative services, provide a service to all participants, assist lawyers to avoid conflicts in schedules and unnecessary adjournments, without interfering in the operations of individual courts. The specific functions suggested for such administrators were -

(a) consulting with the list judges for the region on the allocation of work to the judges in the region;
(b) controlling the allocation of fixtures and courtrooms;
(c) caseload evaluation;
(d) improving co-ordination between the main and the provincial court centres;
(e) reducing backlog and delay;
(f) relieving judges, where possible, of administrative chores;
(g) carrying out training schemes;
(h) deploying staff to meet sudden or pressing needs;

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1. A summary of the relevant recommendations of the New South Wales Law Reform Commission's Working Paper on the Courts and a summary of the functions envisaged by that Commission for the State Court Administrator are set out in Appendix VII. No final report has yet been issued and the proposals have not yet been implemented.

(i) watching over the general level of efficiency of the court offices in the area;

(j) maintaining relationships with the legal profession, the public, the police and other groups concerned with the court process;

(k) dealing with Government agencies;

(l) keeping under review accommodation needs and the provision of services;

(m) collecting statistics and, where computers are installed, supervising data processing.[1]

21.6 In South Australia a separate Courts Department has been created with a view to greater co-ordination and unification of the judicial system. The separation of the responsibility for State legal services such as prosecutions, government conveyancing, parliamentary drafting and government legal advice from responsibility for the administrative support for the judicial system is thought to direct specialist attention to an area of administration which might otherwise lack priority.[2]

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1. See para 753 of the Report of the Royal Commission.

2. The Department has six Divisions. The Supreme Court Division is headed by the Registrar of the Supreme Court who is responsible in legal matters to the Chief Justice and in certain matters to the Director of Courts Department for the administration of the Supreme Court. The Supreme Court Division provides administrative and clerical facilities for members of the Court and library facilities for all courts in the State. The Subordinate Jurisdictions Division is responsible for the administration of all Courts and Tribunals other than the Supreme Court; including the District Court, Local Courts and other Courts of Summary Jurisdiction, Children's Court, Coroners Court, Appeal Tribunals, and Wardens Court. Each Local Court is headed by a Clerk of Court. The Clerk of Court is responsible for the day to day administration of his court, and is responsible ultimately to the head of the Division. The Magistrates Division is headed by the Senior Magistrate and is comprised of Stipendiary Magistrates. Judicial activities of Magistrates are not subject to the administrative direction of the Department and are protected under the principle of judicial independence. Magistrates are supported by Magistrates' Clerks who provide a reporting and secretarial service. The Support Services Division is comprised of three branches; Finance, Administration and Management Services. The functions of the Finance Branch are the payment of salaries and accounts, preparation of budgets, monitoring of expenditure, and provision of financial management information systems. The Administration Branch is responsible for ordering of goods and services, accommodation, stationery and travel arrangements. The Management Services Branch is responsible for personnel management, systems reviews, staff development, classification and organisational matters, and reviews of efficiency and effectiveness. The Sheriff's Division is headed by

21.7 Of course, there is a need to ensure that the courts themselves have adequate control of the resources, facilities and staff necessary to carry out their functions. Those functions are concerned with making decisions which affect the delay and cost of dispute resolution within the courts. There is a need to consider the administrative and budgetary autonomy of the courts and the relationships between the judiciary and the relevant executive and legislative authority. This is not inconsistent with the need for a defined person or body to be accountable for the financing of the court system, the preparation of budgets, and the responsibility for expenditure, treating the courts as a system and not as isolated units.

21.8 Consideration should be given to the need for an administrative structure designed to unify, co-ordinate and modernise court administration generally and in particular Local Court administration. Whether this is best approached through the appointment of a Court Administrator, through the creation of a Courts Department separated from Crown Law Department although probably subject to the same Minister, through the appointment of an ongoing committee of review, or whether existing administrative arrangements in Western Australia are sufficient, is an important question, but one which goes beyond the scope of this paper. It is important however to ensure that the various component parts of the court and tribunal structure in the State are co-ordinated as far as possible to produce -

* the most efficient use of facilities and staff
* the most rational simplification of procedures, rules and systems possible, and consequently,
* the least public confusion and inconvenience.

2. SOME PARTICULAR MATTERS

21.9 Certain inadequacies in the Local Courts Act and Rules and in Local Court administration which appear to the Commission to be

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the Sheriff, and is responsible for summoning and attendance of jurors, payment of witnesses, attendance of prisoners, recording orders of the court, and maintenance of order in court in respect of criminal sittings of the Supreme and District Courts, service and execution of process, being the enforcement of orders and judgments of the Supreme Court, and providing bailiffs for service and execution of civil process, and as the marshall in admiralty dealing with execution of warrants against ships and their cargo. The Court Reporting Division is responsible for providing verbatim reports of proceedings in all courts and tribunals, and on occasions, for committees and other statutory bodies.

evident seem to be the result of past failure to establish co-ordinated and imaginative management and review systems.

21.10 The Act and Rules have not been kept in touch with modern requirements and the administration of Local Courts has tended to be passive. A clear chain of command directed specifically to the needs of particular court systems and imaginative consideration of new developments in other court systems both within Western Australia and elsewhere is required. The matters which are discussed in this and the following chapter are some matters which require positive administrative attention.

21.11 Confusion, error, cost and delay both within court systems and to the public can result from unco-ordinated administrative practices. There is a need for regular administrative review so that as between various systems of courts and tribunals differences are eliminated wherever possible. As discussed in Chapter 3 the consolidation or merger of courts and tribunals may well make it easier to avoid the use of different names for similar documents, different titles for persons occupying similar functions, different forms to achieve similar objectives and differences in administrative practices such as court office hours, hearing hours, payment of monies and other matters.

21.12 As was pointed out in paragraph 3.26 above Local Courts (and Courts of Petty Sessions) in Western Australia are statutorily separate courts. However for demographic reasons Perth Local Court handles the overwhelming majority of Local Court proceedings. A number of other Local Courts handle substantial quantities of Local Court matters. On the other hand a large number of Local Courts are involved in very small numbers of proceedings. Officers of smaller courts tend to rely on officers in larger courts for administrative advice. The Commission is informed that despite attempts to unify administrative and judicial practices differences in fact occur. It may be that replacement of Local Courts by a single Local Court would encourage unification of practice. It may also be that administratively steps should be taken to require administrative practices adopted at Perth Local Court to become precedents in other Local Courts. This also raises the question whether there is a need to consider reducing the total number of courts and court registries, and limiting the number of courts with authority to issue and determine civil process to larger regional courts. This again is an administrative matter, however. The Commission seeks comment.

21.13 As Mr Justice Beattie pointed out in the address referred to in paragraph 21.3 above and as has been pointed out elsewhere,[1] in all jurisdictions in which a concentrated attempt has been made to improve the performance of the court system, one of the first steps has been to improve the quality of the information available concerning caseflow. Data collection is important in making decisions as to judicial and non-judicial manpower, appropriate buildings, furniture and office equipment, and structural and procedural reforms. In Western Australia few statistics are at present available, either in respect of Local Courts as a whole, or in respect to individual courts. One problem with assessing the effectiveness in terms of speed and costs of Local Court proceedings at present or of comparing them with proceedings in other courts and tribunals is the lack of statistics. Statistics are not kept for instance on the length of time between filing or setting down for trial and final disposition after hearing. Nor are statistics kept in relation to the numbers of plaints issued in the different areas of jurisdiction, the number of matters going to trial or their nature, the amounts of money involved, the number of cases resolved by settlement, the number of warrants of execution, judgment summonses and orders of commitment issued, orders of commitment in force, applications to vary judgment summons orders, objections to jurisdiction or other important matters. These deficiencies make consideration of questions involved in the review of court jurisdiction, administration and procedures difficult. Modern technology could make this kind of information available as a matter of course and at little cost. Computer facilities now being considered for Perth Local Court will greatly facilitate the use of such statistics in the planning of future developments.[2] Amendments to court rules, forms and proceedings can only meaningfully be undertaken in the long term when proper case flow management statistics of this type are available.

21.14 In the interests of justice to litigants as well as to efficient court administration it is also necessary that courts be equipped with

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1. I R Scott, Court Administration, 50 ALJ 30 at 34.

2. A description of the proposed justice information system in Western Australia including material describing its application to Local Courts and other court and instrumentalities is briefly contained in K R Smith, the Justice Information System in Western Australia, published in Information Processing In The Western Australian Public Sector, papers given at the 53rd ANZAAS Congress, Perth 1983.

adequate means of conducting their business. These requirements include such matters as -

* proper library facilities for magistrates,
* proper facilities for recording of evidence,
* properly trained and available administrative and secretarial staff, and
* up-to-date equipment and systems for such matters as the receiving and disbursement of monies and the keeping of accounting and clerical records, and the proper indexing and retrieval of files.

21.15 The Commission seeks comment, insofar as Local Courts are concerned, on these matters generally.

3. CONCLUSION

21.16 Local Courts administration should be treated as part of a unified system of administration of all courts in the State and a systematic attempt on an ongoing basis should be made to unify, co-ordinate and modernise the administration of Local Courts. The needs of courts for adequate library facilities, staff and equipment resources must be recognised. The precise details however are matters for administrative decision.

CHAPTER 22 - SERVICES TO THE PUBLIC

22.1 One criterion suggested for assessing the functioning of courts within a judicial system is that of service to the public. In this regard the New Zealand Royal Commission on the Courts specifically considered, amongst other issues, the following -

* information for the public;
* service to the public by way of advice;
* the system of appointments by which persons are called to appear at court and the length of time people are kept waiting at court;
* the possibility of court hearings at night or at other times outside normal business hours;
* court office hours;
* interpreters.

The recommendations of the Royal Commission in relation to these matters, insofar as they are relevant to Local Courts in Western Australia, are set out in Appendix VIII.

1. INFORMATION FOR THE PUBLIC

22.2 Although most of the documents filed at Local Courts are filed by persons who are familiar with the procedures and requirements of the court, such as solicitors and officers of credit houses, a substantial number are filed by persons who are not. Even more importantly, many defendants to whom processes are addressed respond personally. It is important that they have access to information and advice in their dealings with the court and with other parties and witnesses. This can be provided effectively without unreasonable expense.

(a) Explanatory pamphlets

22.3 The provision of a booklet or pamphlet advising litigants in simple terms of basic court procedures and methods of obtaining advice or resolving particular difficulties is one example. Pamphlets dealing with simple legal matters produced by the Small Claims Tribunal, the Family Court of Western Australia, the Legal Aid Commission of Western Australia, the Parliamentary Commissioner for Administrative Investigations and others are already available. In the English County Courts a booklet, including simple forms of pleading, is available to litigants who wish to sue or defend without a solicitor. Similar pamphlets should be available free of charge or at minimal cost at the counter of each Local Court. The Commission has already so recommended in respect of the Small Debts Division.[1] The operation of the system of execution of judgments should be dealt with, and the availability of advisory and aid services should also be mentioned. Mention should be made of the desirability of early settlement or resolution of matters in dispute and the method of payment of admitted debts or other claims.

(b) Court forms

22.4 Court forms should be simple and expressed in clear English wherever possible so as to be intelligible to those to whom they are addressed.[2] The Commission of Inquiry into Poverty[3] was of the view that this requires both that non-English translations be readily available at little cost and also that the forms use English which is readily understood by people whose language although English is not sophisticated.

22.5 The Commission of Inquiry into Poverty also was of the opinion that either court forms or accompanying booklets should provide information concerning important matters about which

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1. Report on Small Debts Court, Project No 63, 1979, para 5.13.

2. The need has been documented in G Lyons and J Tanner, Legal Documents: Can Anyone Understand Them? (1977) 2 Legal Service Bulletin 283 and by the Australian Government Commission of Inquiry Into Poverty as well as by the Australian Law Reform Commission.

3. Second Main Report, 159 and D St L Kelly, Debt Recovery in Australia, 146 to 154.

defendants and plaintiffs might be ignorant and be unlikely to seek advice. These included the availability of legal aid or advice, debt counselling and the means or desirability of making arrangements with the other party, defending the action or seeking discharge by bankruptcy.

22.6 The Australian Law Reform Commission[1] has also drawn attention to the need for summons forms to set out not only sufficient particulars of the claim and of the location and time of hearings but information enabling the recipient to make an adequate response. To this end the Australian Law Reform Commission also suggested that the recipient be advised of appropriate sources of advice and information and of the possibility of offering to meet any admitted claim, if necessary by appropriate instalments.

22.7 The Commission has been impressed by the simple forms used at the Small Claims Tribunal. Whilst appreciating that there are limits beyond which court documentation cannot be simplified, the Commission is of the view that much can be achieved. Examples of attempts to simplify court forms are the English County Court form of summons and the Victorian Magistrates' Court form of default summons reproduced in Appendix III. The need to use simple court forms[2] and to supply litigants with basic information can perhaps best be achieved by a combination of simple court forms and an accompanying explanatory pamphlet.

22.8 A separate review of the forms used in Local Courts in Western Australia is overdue, since many of the parties concerned in Local Court litigation, especially defendants, are unrepresented by legal practitioners and many of them are not fluent in written or even spoken English. This review should attempt to avoid the unnecessary use of technical terms and obscure language, to refer where possible to appropriate sources of advice and assistance, including translations, and to set out the alternative responses available. Some of the endorsements which appear on the reverse side of the existing Local Court summons form in very fine print are, for example, in

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1. Debt Recovery and Insolvency, DP 6, paras 30 to 32.

2. Further, court documents should be given in as simple, clear and consistent names and descriptions as possible. The use of terms such as 'praecipe', 'de bene esse' or 'jurat' should be avoided especially in the Small Debts Division.

language far beyond those to whom summonses are directed. Other endorsements are unnecessarily complex. Many important matters, on the other hand, are not stated clearly or at all. Many Local Court documents in Western Australia do not carry the precise address of the court concerned, but merely a general description such as "the Local Court at Fremantle". All court process should carry the precise address and telephone number of the issuing court. The Commission is aware of steps being taken to design court forms consistent both with modern concepts and community expectations of form design and with the needs of word processing technology. It is important that the needs of the courts and those who use its facilities are in harmony. An attempt should also be made to reduce the number of forms which it is necessary to use to reach a certain objective. For example, reference has already been made to the disappearance in practice of the prescribed form of plaint.[1] Another innovation might be to adopt the South Australian practice of combining the praecipe for entry of judgment with the praecipe for judgment summons, the praecipe for warrant of execution and the praecipe for certified copy of judgment, order or other proceedings, making provision for the applicant to strike out whichever is inapplicable.[2] At the same time use of words such as 'praecipe' should be abolished in favour of simple English equivalents such as 'request'.

(c) Staff assistance

22.9 The Commission also notes the provision in section 24(2) of the Small Claims Tribunals Act, that "it is the duty of the registrar and of every clerk of the court to give his assistance to a claimant who seeks it in completing the prescribed claim form". In New South Wales the registrars of Courts of Petty Sessions[3] are available to give advice by interview on a wide range of matters. This service is widely known and in excess of 150,000 interviews are given per annum. The service is available between 6 pm and 8 pm one night each week at a number of centres and, in a recent innovation, operates at one centre from shop-front accommodation rather than

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1. See footnote 1 to para 10.2 above.

2. The introduction of such a minor formal change would of itself reduce the number of documents filed by about 15,000 per annum by avoiding the necessity to file two separate forms on each action where judgment by default and enforcement is required and replacing this by the use of a single form.

3. Known there as 'chamber magistrates'.

from within a courthouse. In Victoria each Magistrates' Court summons contains a statement that "If you do not have a solicitor and you are unsure of your rights or the procedures to follow, the Clerk of any Magistrates' Court will assist you", and clerks of court do give advice and assistance to the public. The Commission notes the comment by the Senior Referee of the Small Claims Tribunal that the Registrar of that Tribunal:[1]

> gives a great deal of help and assistance not only to the Referees but also to the consumers and traders who come before the Tribunal. It is through his efforts . . . that many cases get settled without a hearing, and many persons that do come are better able to adequately represent themselves. He goes to great lengths to ensure that parties understand what they are to do and is of great assistance in . . . 'the follow-up area', where the orders have to be enforced or explained.

22.10 In its report on Small Debts Court[2] the Commission suggested that the Clerk of each Local Court should be obliged to assist parties with, for example, the completion of the summons form or advice as to enforcement. The Commission believes that independent and informal advice should be available to unrepresented defendants and that a similar provision to that in the Small Claims Tribunals Act should be inserted into the Local Courts Act.

22.11 The Commission has in mind that there are two stages of court proceedings in particular at which parties to litigation of the type conducted in a Local Court, and especially unrepresented defendants, may usefully be given advice -

(a) at a stage early in the proceedings when -

(i) elementary advice as to the procedures of the court might be necessary;

(ii) the desirability of applying for legal aid or obtaining legal representation might be explained in appropriate cases;

(iii) the desirability of approaching other parties to the litigation with a view to settling and paying by instalments or otherwise of admitted debts or claims might be usefully pursued, or the resolution of issues otherwise in dispute, such as the quantum of small damages claims etc, might be negotiated.

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1. Annual Report of the Department of Labour and Industry for the year ending 30 June 1980, p 97.
2. Project No 63, 1979, paras 5.11 to 5.14.

(b) the post-judgment stage at which advice might relate to -

(i) the effect of orders made;

(ii) the procedures available by way of enforcement of judgment creditors;

(iii) the negotiation of instalment payments to avoid judgment summons or commitment procedures;

(iv) the availability of applications to vary orders for instalment payments under judgment summonses;

(v) the availability of bankruptcy and other similar procedures.

Thus the advice which the Commission contemplates is of a procedural and administrative type rather than of the nature of legal advice. Local Courts are a community service provided for the reconciliation or resolution of disputes. The Commission understands that court staff and bailiffs already give some advice. Where appropriate, this should be encouraged within an established system. The provision of advisory services in respect of pre-trial and post-judgment matters by selected court staff should not add to and may even reduce the costs of court administration. Although costs would be associated with the provision of advice this advice can be expected to reduce court hearing times by reducing the number of occasions upon which hearings are conducted, or reducing the length of such hearings, by reducing the issues in dispute and by persuading the parties to negotiate settlements either as to the amounts claimed or the methods of payment. It has also been suggested that such advice reduces the number of occasions on which proceedings are adjourned to give a defendant an opportunity to obtain advice. This in turn will reduce expense as fewer judicial officers and support staff will be needed.[1] Such advice could be available to people regardless of whether or not legal proceedings have been taken or are being contemplated. It would be highly desirable if people approached the court to discuss difficulties and possible solutions prior to legal proceedings being initiated.

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1. Similar reasoning has been expressed in relation to family law matters by Justice Elizabeth Evatt in her Garran Memorial Oration: see The Administration of Family Law, 15 November 1978, 20-21, referred to in the Report of the Joint Select Committee on the Family Law Act: Family Law in Australia, Vol 1, 1980, 166.

22.12 The Commission is aware of the need to avoid placing court staff in an embarrassing or even invidious position in relation to giving advice. Some members of the public undoubtedly attempt to obtain from such staff information or advice which should not be given or which should be given only on a conditional or tentative basis. Firm guidelines should be established to avoid such problems. There is, of course, also a need to consider other demands on staff resources. These recommendations would not involve more than the provision of advisory facilities and the engagement of sufficient staff to give advice in the areas referred to.

22.13 Perhaps in due course the duty counsel scheme operated in Courts of Petty Sessions and the Family Court of Western Australia could also be operated at specified times in Local Courts to give advice on legal matters and to represent otherwise unrepresented parties in such matters as applications for adjournments, consents to judgment, and judgment summons hearings. Such schemes operate for example in some English County Courts. This would operate not only to the benefit of litigants but would probably assist the presiding magistrate to deal fairly and expeditiously with matters before them. The Commission seeks comment.

2. HEARING TIMES AND HEARING DATES

22.14 The practice in courts of inferior jurisdiction, and especially in Local Courts, is generally for matters listed for hearing to be fixed for hearing at 10.00 am on the day in question, except in the case of matters to be dealt with in chambers. To avoid long delays in obtaining hearing dates and to avoid waste of magistrates time when matters are adjourned or settled or otherwise quickly dealt with, several matters are listed before each magistrate each day. This results in litigants, their solicitors and witnesses waiting in turn for matters to be called on. The cost of waiting time including lost wages and additional solicitors' costs would be reduced if this waiting time could be reduced. The cost of waiting time is eventually borne by the parties.[1]

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1. The system of appointments basically used in Western Australian Local Courts and in other Western Australian courts is one about which complaints have been made in other jurisdictions: see, for example, Alec Samuels', Appointments or Stagger System in the Magistrates' Courts, (English) Law Society's Gazette, 9 February 1983, 345-6 and the articles complaining of listing arrangements and delays in courts in England set out as a bibliography to that paper.

22.15 The dates selected for hearing of particular matters are fixed by the clerk of courts following an application for listing for hearing by one of the parties. In the case of an application to list for trial this date may be fixed several months ahead. The exact time lag in obtaining a hearing date will depend on the length of trial time estimated by the party applying for a date to be fixed and the particular Local Court involved.

22.16 Unfortunately apart from the question of waiting time mentioned in paragraph 22.14 there is often further waiting time involved because matters listed for hearing on particular days are adjourned because a party, witness or legal practitioner is not available, or the matter has not been prepared for trial for some other reason or alternatively because errors in estimating length of hearing time or delay in commencing a hearing on a particular day result in the matter not being concluded within the allotted time and being adjourned for completion at a later date, often months removed.[1] The result is to cause further delays in obtaining hearing times and often to waste the time of magistrates and court staff as well as of other parties, witnesses and legal practitioners.

22.17 There are therefore two separate questions for discussion. First, how to avoid unnecessary delays on a particular day when several matters are fixed for hearing. Secondly, how to avoid long delays in obtaining dates for hearing of matters. These will be dealt with in turn below.

(a) Hearing times

22.18 The Commission does not under estimate the difficulty of listing matters for hearing. Difficulty arises both because in estimating the length of time of hearing of actions,[2] and because

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1. Part heard actions lead to considerable difficulties in that counsel, parties and witnesses have to make additional appearances at the court beyond those which should be necessary; and there are difficulties of recall of evidence previously given to all concerned, including magistrates. The problem often arises either because matters are not set down for appropriate lengths of hearing time or for other reasons. The answer might be in either a certificate of readiness or in a call-over system or in amendments to the listing system, all of which possibilities might be considered separately or in combination.

2. It is important that the legal profession co-operate in any listing procedure which is devised.

matters may either be adjourned or settled without trial, often too late to enable the court to substitute other matters for hearing. From time to time attempts to improve the system are tried.

22.19 The Commission is aware that complaints are sometimes made that listed matters are not reached either at all or for some time. Similar complaints were made to the New Zealand Royal Commission on the Courts particularly in relation to Magistrates' Courts. The Royal Commission commented that "having everyone arrive at 10.00 am causes overcrowded courts, and some litigants and witnesses are kept waiting for hours for their case to be heard. It is a system wasteful of time and money for counsel, litigants and witnesses". The Royal Commission agreed that the problem is common to many countries including Australia. The Royal Commission concluded:

> Generally, we consider a system of appointments is desirable in the interests of all those who use the Courts: there may be merit in distinguishing between certain classes of litigation as more or less susceptible to appointments at set times, or otherwise. We therefore recommend that, where the practice is to call everyone to Court at 10.00 am, strenuous efforts should be made to devise a flexible system to more fully accommodate public needs. In implementing an appointment system, the various problems and difficulties in different classes of litigation. . .should be borne in mind. We would expect scheduling to be carried out. . .by court administrators, after consultation with the list judges and, of course, representatives of. . .law societies.

22.20 One suggestion therefore is to list for hearing at different times in the day matters which will involve only short hearing times. There should also be no bar to hearings being fixed for a time earlier than 10.00 am or continuing after 4.00 pm if failure to do so will mean that the matter will not be completed within the time set down for hearing.

22.21 From information provided to the Commission it would appear that in 1980, for example, of a total of 705 sitting days in which magistrates sat[1] at Perth Local Court, hearings were concluded by 1.00 pm on 449 sitting days, or 63.69%. In 1981 the figure was 427 out of 662 (64.5%) and in 1982 380 out of 690 (55.07%). These days include time spent on chamber hearings but not those spent by

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1. Sittings were held on 228 of the 366 days in 1980, on 233 days in 1981 and on 232 in 1982. Hearings are not held on weekends or public holidays or, in past years, during the statutory court vacation prescribed by s 161. That vacation was abolished by the Local Courts Amendment Act 1982.

clerks as magisterial delegates hearing judgment summons examinations. It is thus possible that an efficient system could be established whereby short matters, such as actions for recovery of possession of land or for recovery of motor vehicle damages, as well as the hearing of judgment summonses, chamber matters and other short proceedings could be listed for hearing by appointment throughout the day including times after 2.00 pm with safety.[1]

22.22 Listing methods can be of various types. Matters can be listed in a continuous, or running, list. Matters can be listed by special appointment. Individual judges can be given lists or lists can apply to all judicial officers generally. The listing practice in the Supreme Court of Western Australia varies depending on the nature of the matter involved. However, normally civil hearings are listed monthly at a call-over at which matters are set down for the following month. In the District Court, hearings are listed by personal appointment with the Deputy Registrar and are set down for hearing some months ahead. As in Local Courts, civil actions in the District Court are listed so that more than one matter is listed before the judicial officer on each hearing day.

22.23 In South Australia, the Adelaide Local Court has a similar volume of hearings to that in Perth Local Court.[2] The listing practice which has been developed with some success is that claims involving less than $1,000 are listed during a particular week of each month. This week is usually selected so as to interfere as little as possible with the normal trial of civil hearings in which solicitors are involved.[3] Where only one party to a dispute is represented but the

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1. The Commission is aware that already chamber matters are listed by appointment including some afternoons and also that magistrates have other duties including, for example, the preparation of judgments. There is also an administrative arrangement whereby magistrates free of duties in Perth Court of Petty Sessions assist at Perth Local Court and vice versa.

2. There are some differences however in that, for example, Adelaide Local Court deals with matters which would in Western Australia be dealt with at a Small Claims Tribunal and also with a range of matters involving driver's licences and gun licences which in Western Australia would be dealt with by Courts of Petty Sessions.

3. For example in weeks close to Christmas in December and to the New Year in January or to Easter or other holidays so as to reduce the chances of matters not being disposed of within the week.

matter involves more than $1,000 the matters are listed for hearing on the Monday of weeks other than small claims weeks. Where both parties are represented by solicitors, matters are listed for hearing on the Tuesday of a week other than small claims week. Other matters such as chamber or interlocutory hearings, examinations of debtors and other special matters are listed for hearing on Fridays of weeks other than small claims weeks.

22.24 In the week before the week listed for hearing a call-over is held of all matters for hearing on the following week at 3.30 pm on Thursday afternoon. Solicitors are expected to attend and to know whether actions are to proceed. If no parties appear in respect of a given matter the action is listed for hearing in the Friday list of the following list. At that call-over matters expected to last at least one day are listed for hearing on the following Tuesday, shorter matters for later in the week. Matters are not listed for particular court rooms or particular magistrates.

22.25 At 9.45 am on each hearing day there is a further call-over of matters listed for hearing on that day at which cases are allocated to particular court rooms and particular magistrates for hearing that day.

22.26 It should be mentioned also that all matters in respect of which a notice of appearance has been filed but no further action taken are automatically set down for hearing by the court staff three weeks after the notice of appearance is filed. If no parties appear on a matter listed for hearing in the Friday list the action is struck out. This has the effect of substantially reducing the number of pending files in the court registry at any time.

22.27 The Commission is advised that using this technique, waiting times in Adelaide Local Court have been reduced, since the introduction of the technique, from fourteen months to eleven weeks. The jurisdiction of Local Courts in South Australia has been increased with an increased number of cases being listed for hearing as a result but the listing time has not been extended. Further, the technique is said virtually to avoid matters not being reached on the day listed for hearing and to avoid matters having to be adjourned part heard due to lack of time. Matters the hearing of which is not completed on the first day of hearing are listed for completion of hearing later in the same week as a result.

22.28 The matter is essentially one requiring administrative action. It is important that information on systems used elsewhere, as well as in other Western Australian courts as interstate and overseas, be monitored and experiments undertaken with a view to improvement from time to time. However, no system will succeed without a conscious effort by judicial officers, administrators and the legal profession to make it succeed.

22.29 The New Zealand Royal Commission on the Courts heard a number of submissions calling for court hearings to be held at night to avoid loss of earnings and more fully utilise present court buildings. A New South Wales experiment with evening courts was not as successful as anticipated and has been discontinued. On the other hand night courts have apparently proven to be very popular in Nova Scotia and exist also in Toronto in Canada. The Manitoba Law Reform Commission has recommended consideration be given to having court sittings on some Saturdays and weekday evenings in that province. The New Zealand Royal Commission was not persuaded to recommend a change but recommended that the matter be kept under review. This Commission tentatively adopts the same position.

(b) Delays in obtaining hearing dates

22.30 One of the common and widespread complaints about court systems worldwide concerns the question of delay in obtaining a hearing date once a matter is ready and set down for trial. Traditionally this problem has been kept within control in Western Australia. However, one can assume that the problem will continue to require attention both in Local Courts and in other courts and both in Perth and elsewhere. In any event, delays in litigation extend to periods before the proceedings are listed for hearing and indeed to execution proceedings after hearing.

22.31 There is a period, perhaps of about six weeks, which may be regarded as the optimum minimum period in order to allow parties and solicitors to organise themselves and witnesses for trial after the matter becomes ready for hearing. In Melbourne Magistrates' Court delays of up to ten weeks in listing for trial are said to be regarded as insignificant and cases are listed some three to six months ahead. In Adelaide Local Court cases are presently listed some eleven or so weeks after being set down for hearing. These figures are comparable with figures in Perth Local Court. In many courts overseas and interstate the periods are much longer. Delay is structurally

inherent in court proceedings and must therefore be managed rather than eliminated. The Commission is therefore not alarmed at the position in Western Australia. However there is room for improvement.

22.32 The minimisation of delay in its wider sense requires appropriately good communications between the parties involved, realistic court time limits, appropriate data systems and managerial techniques within courts, and awareness of the informal and non-structural causes of delay which add to the procedural or structural causes.

22.33 Measures to reduce court delays which are suggested from time to time include such changes as a reduction in pre-trial appearances, the use of lesser judicial officers, the exchange of proofs of evidence or mandatory settlement conferences. Procedural devices such as compulsory arbitration and mandatory settlement conferences have in other jurisdictions, however, have tended to give way to managerial solutions. Crude statistics such as the number of cases commenced, set down for trial etc, have been replaced with sophisticated data routinely made available in combination with goals or targets against which proper delay can be measured.

22.34 Delay reduction programmes require expenditure of initial resources in establishing suitable statistical systems and continuing expenditure in monitoring the position regularly. The costs must be set off against the improved image of the courts and the improved quality of justice. Case delay reduction seems to require a case-flow management system going beyond mere listing practices. The accumulation of small delays throughout the conduct of an action should be reduced. Case-flow management has been said to involve five basic concepts -

(a) early judicial control and monitoring of cases;
(b) continuous judicial control to require cases to meet time standards;
(c) short-scheduling techniques so that shortly before a procedure is to be performed by the parties to a case the parties are provoked into doing that which is expected of them so that the event accomplishes its objectives;
(d) wariness in not permitting the solicitors for parties to proceedings to accommodate one another to the prejudice of court efficiency or to one or more of the parties whilst nevertheless permitting reasonable accommodations; and

(e) the creation of an expectation that events will occur when scheduled even if this means that not all court resources are continually being used (known as the "principle of the dark courtroom").[1]

Delay is not caused wholly by lawyers or by courts or by parties but some delays are induced by one or other of these groups. It is necessary for courts to make realistic assessments of backlog problems and to plan resources and use resources efficiently to overcome delays. Goals must be set, information routinely collected and monitored continually. Commitment to proper control over proceedings and the installation of proper court information and monitoring systems is necessary.

22.35 Significant changes can also be effected in the rate of disposition of cases by the use where necessary and appropriate of specially appointed part-time judges and magistrates, the use of registrars and clerks of court for minor judicial functions, alterations to vacation structures, sitting hours and listing systems, reductions in the number of adjournments and by factors such as the quality of practitioners appearing in the courts, the availability of statutes, text books and other legal source materials, the availability of secretarial and library resources, the use of standard forms in correspondence and court documents, the proper indexing and presentation of court files etc. Proper organisation of courts and tribunals requires analysis of existing case-loads and the meeting of presently unsatisfied but existing needs.

22.36 These are all essentially administrative matters. Their impact on the public who use the courts is, however, very great. The Commission seeks comment on the matters raised.

3. OFFICE PRACTICES

22.37 Since Local Courts share facilities with other courts, court office hours, hearing hours and office practices should be uniform for each of the courts in order to minimise public confusion and inconvenience. This should apply, if possible, also to courts and tribunals which do not share facilities. It is important also that court office practices be as convenient as possible. This is a matter for ongoing review.

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1. See I R Scott, Is Court Control the Key to Delay Reduction?, 1983, 57 ALJ 30.

22.38 The New Zealand Royal Commission suggested that in larger centres provision be made for a cashier to be on duty at the court one evening each week to receive payment of monies owing. Such a recommendation, if implemented in Perth at least, might coincide also with late shopping facilities on Thursday evening. The advisory service suggested above might operate at the same place and time. The Commission seeks comment on this proposal.

4. INTERPRETERS

22.39 One matter which a court system should provide in an increasingly heterogeneous population is a pool of trained and approved court interpreters in a wide range of languages available in all, except remote, courts. No such system presently exists. Parties requiring interpreters presently arrange to have available in court someone thought to be able to interpret for them. In many cases this is simply an untrained friend. A system for the accreditation of willing and able interpreters by an appropriate body would not only enables parties unable to speak English readily to give evidence more easily but would expedite court proceedings and remove difficulties caused by voluntary interpreters not properly understanding the duties and functions of a court interpreter.[1] Impartiality would more readily be seen to exist in interpreter services and court hearings would operate more efficiently. Appropriate costs could be fixed by the rules of court and paid in the same way as other court costs that is, be recoverable from the losing party if the presiding magistrate so ordered.

5. TECHNOLOGY

22.40 Modern technology makes it possible to reduce the cost of, and delays in, the conduct of Local Court litigation. This may be achieved through the use of word processing equipment which can quickly handle large volumes of standard court documents especially in debt recovery actions. The use of modern computer technology in the performance of routine debt collection practices, for which Local

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1. The Commission notes that the Joint Select Committee on the Family Law Act recommended in July 1980 that accredited interpreter services be made available to parties who so require them in Family Courts and further that a range of explanatory documents in the major language groupings be prepared in all areas of the courts' operations: Report of the Joint Select Committee on the Family Law Act, Family Law in Australia, Vol 1, 1980, paras 7.40 and 7.47.

Courts are overwhelmingly used, will enable the cost to all parties to be kept to a minimum.

22.41 Thus in England, County Court forms have been redesigned in word processor compatible form and are made available to court offices in both continuous stationery and single sheet form. As a result, the activities of solicitors engaged in debt collection services can be streamlined and made more efficient without detriment to other parties. Use of such procedures will require planning by an appropriate body, among other things, to ensure that forms so produced comply with the Rules. Forms for use in Local Courts are at present provided free of charge by court offices and this system could continue. Rules of Court, court forms and administrative directions should be prepared with the implementation of such modern technology in mind.

22.42 One simple procedural or administrative change which has been recommended to the Commission by a legal practitioner, and which might over a period of time effect a considerable saving, is the adoption of a system whereby forms and documents are so designed, printed and filed that back sheet endorsements are avoided. Of course, Local Courts already use a flat file system and no separate backing sheets are required but the necessity to type endorsements on the back sheet side of many documents, much of which is repetitious of the information such as headings, file numbers etc found on the reverse side of the same page, constitutes a considerable loss of efficiency. The Commission seeks comment.

22.43 Some of these matters will require administrative or legislative attention. They are only examples of the need for ongoing imaginative and systematic administrative review.

6. PROPOSALS

22.44 The Commission proposes that -

Information (paragraphs 22.2 and 22.3)

(a) A booklet or pamphlet advising litigants in simple terms of basic court procedures including the availability of advisory and aid services, methods of resolving particular difficulties and the methods of enforcement of judgments, should be made available at Local Court offices free of charge or at minimal cost.

Court forms (paragraphs 22.4 to 22.8)

(b) A systematic review of Local Court forms should be undertaken with a view to avoiding the unnecessary use of technical terms and obscure language and setting out the alternative responses available. All court forms sent to, or served on, the public should bear the exact address and telephone number of the court. Unnecessary court forms should be abolished.

Advice and assistance (paragraphs 22.9 to 22.13)

(c) A system of court advisory services should be introduced both in respect of pre-trial and post-judgment matters, analogous to that presently operating in New South Wales and in Small Claims Tribunals in Western Australia.

Hearing times and dates (paragraphs 22.14 to 22.36)

(d) Attention should be given to the need as far as possible to fix court hearing times at appointed hours rather than by listing all trials for hearing at 10.00 am.

(e) Administrative attention should be redirected to the possibility of re-arranging listing practices including the possibility of weekly or daily call-overs to arrange the hearing times for the following week or for the day involved.

Office practices (paragraphs 22.37 and 22.38)

(f) Court hearing times, office hours and office practices should, if inconsistent, be made consistent at least between all courts using shared facilities and staff.

(g) The possibility of keeping the Perth Local Court office open on one evening in each week, coinciding with evening shopping, for the purpose of operating the advisory service, the lodgment of process and the payment of monies, should be investigated.

Interpreters (paragraph 22.39)

(h) An integrated system of accredited court interpreters should be introduced.

Modern technology (paragraphs 22.40 to 22.43)

(i) Provision should be made for the introduction of court forms and documents which are compatible with modern word processing technology. This may involve the avoidance of other than pre-printed material on the reverse side of documents.

PART V: SUMMARY OF ISSUES AND PROPOSALS

THE COMMISSION SEES THE MAIN QUESTIONS AT ISSUE AS BEING -

(1) WHETHER LOCAL COURTS SHOULD BE MERGED WITH ANY OTHER COURT OR TRIBUNAL OR REMAIN A DISTINCT PART OF THE JUDICIAL SYSTEM?

(paragraphs 2.1 to 2.15 and 3.1 to 3.43)

The Commission proposes that -

(a) Although some types of dispute now dealt with by Local Courts might be more appropriately dealt with by other tribunals, such as the existing Small Claims Tribunals or by possible new tribunals such as Community Justice Centres, Tenancy Tribunals or a 'Rentalsman', there remains a need for traditional courts of inferior jurisdiction such as Local Courts, for the simple and expeditious resolution of civil claims especially money claims involving relatively small sums. There is a need also to avoid the proliferation of tribunals and to integrate court structures for purposes of efficiency and simplicity.

(b) To give effect to these needs, Local Courts should be merged with Courts of Petty Sessions and the newly created court named the Magistrates Court. [In the proposals which follow, references to Local Courts will include any such newly created Magistrates Court.]

(c) Such a Magistrates Court should sit in Divisions including -

* a Civil Division, exercising the basic money and property jurisdiction now exercised by Local Courts,

* a Small Debts Division, being the equivalent of the newly established Small Debts Division of Local Courts,

* an Administrative Law Division, as outlined in the Commission's report on Review of Administrative Decisions: Appeals (Project No 26 Part I, 1982) to exercise administrative and regulatory jurisdiction now exercised either by Local Courts or by Courts of Petty Sessions,

* a Criminal or Offences Division, to exercise the criminal and quasi-criminal jurisdiction now exercised by Courts of Petty Sessions,

and such other divisions as may be added to the court from time to time as it is found possible to merge other existing tribunals or courts into the system so created or to meet felt community needs. Provision should be made for separate codes of procedure (including provisions dealing with costs, representation, appeals etc) for divisions where appropriate. The Civil Division should always be presided over by a stipendiary magistrate sitting alone.

Administrative efficiency and public convenience should result.

(2) WHAT ARE THE APPROPRIATE CRITERIA AND PRIORITIES TO BE APPLIED IN A REVIEW OF LOCAL COURTS AND THEIR OPERATION, AND TO THE PROCEDURES AND PRACTICES ADOPTED BY LOCAL COURTS?

(paragraphs 3.1 to 3.10 and 4.4 to 4.8)

The Commission proposes that -

(a) The Local Courts Act and Rules and the operation of Local Courts should be evaluated in the light of the seven criteria listed in New Zealand by the Royal Commission on the Courts in 1978, namely -

(i) suitability to conditions,
(ii) economic feasibility,
(iii) service to the public,
(iv) preservation of the independence of the judiciary,
(v) the best use of available judicial and legal talent,
(vi) simplicity, and
(vii) efficient administration.

(b) Because most Local Court proceedings involve relatively small sums of money, Local Court procedures should emphasise simplicity, in order to ensure both that costs and delays are kept within reasonable bounds and that persons not represented by legal practitioners are able to conduct proceedings. These factors apply not only to matters within the Small Debts Division but in all Local Court proceedings. As a result, Local Courts - unlike the District Court - should not simply adopt the Rules of the Supreme Court in force from time to time, but should adopt rules designed to simplify procedure and to minimise the cost of litigation.

(c) However, where a matter is complex and the amount of money involved relatively large, the practices and procedures in use in the Supreme Court in proceedings of a like nature should be available. This should not, of course, apply to the Small Debts Division.

More detailed proposals are set out individually below. Control of the practices and procedures of Local Courts is also dealt with in more detail later.

(d) There should be regular review of the jurisdiction, administration and procedures of Local Courts (as of other courts) by persons with a wide range of relevant knowledge and interest.

(3) WHAT GENERAL PRINCIPLES SHOULD BE ADOPTED IN RESPECT TO -

* THE MATTERS TO BE INCLUDED IN THE LOCAL COURTS ACT AS DISTINCT FROM THE RULES
* THE MATTERS ON WHICH THE LOCAL COURTS ACT AND RULES ARE SILENT?

(paragraphs 4.9 to 4.13)

The Commission proposes that -

(a) Matters of principle should be dealt with in the Local Courts Act itself. Matters of administrative or procedural detail should be dealt with in the Local Court Rules so as to be more readily amended.

(b) Subject to the foregoing, provision should be made in the Local Courts Act that except as otherwise provided in the Local Courts Act and Rules, and as far as is possible consistently therewith, the Rules of the Supreme Court and the practice and procedure of the Supreme Court should apply in Local Courts. These provisions should not, however, apply in the Small Debts Division. In that Division, provision should be made that the magistrate should have control of his own procedures having regard to natural justice.

(c) Where possible, words used in the Local Courts Act and Rules should bear the same meaning in each. They should, if possible, also bear the same meaning in kindred statutes such as the Supreme Court Act, the District Court of Western Australia Act, the Small Claims Tribunals Act and the Stipendiary Magistrates Act.

(4) WHAT SHOULD THE JURISDICTION OF LOCAL COURTS BE IN RELATION TO -

* MONEY JURISDICTION
* SUBJECT MATTER
* REMEDIES
* REPLEVIN
* RECOVERY OF POSSESSION OF LAND?

Money jurisdiction (paragraphs 5.4 to 5.12)

(i) It is important to note that increases in the money jurisdiction of a court bring increasingly complex disputes before the court and change the nature of the proceedings and of the necessary powers of the court.

(ii) As the money jurisdiction of Local Courts was increased in 1981 to include claims not exceeding $6,000, the Commission intends to make no further recommendation as to the matter at this time, but will reconsider the matter when submitting its final report.

(iii) The money jurisdiction of the Small Debts Division and of Small Claims Tribunals may already need revision to a maximum of, say, $2,000.

The Commission therefore proposes that subject to the recommendations to be made in its final report as to the prescribed money jurisdiction of Local Courts -

(a) The jurisdictional money limit of Local Courts, the Small Debts Division and of Small Claims Tribunals should be periodically reviewed by an expert committee of review as part of the functions of that committee. Consideration should be given to permitting increases of these jurisdictional limits from time to time by regulation, as is the case with English County Courts and with Small Claims Tribunals under the Western Australian Small Claims Tribunals Act.

Subject matter (paragraphs 5.13 to 5.26)

(b) (i) The subject matter over which Local Courts are to have jurisdiction requires clarification. The Commission suggests that, subject to the paragraphs below, Local Courts should have jurisdiction to hear and determine all personal actions where the amount, value or damages sought to be recovered is not more than the prescribed money limit (at present $6,000).

It should continue to be irrelevant whether the amount of the claim is that of the original claim or demand or a balance after allowing payment on account or the amount of any set off admitted by the plaintiff. Similarly, Local Courts should continue to have jurisdiction if a claim originally in excess of the prescribed money limit is reduced to the amount of that limit or less by abandonment of any excess.

(ii) The exceptions to this jurisdiction presently contained in section 30 should be abolished, save as to actions in which the title to land or an interest in land is in question. A Local Court therefore should in future have jurisdiction to hear and determine actions in which the validity or effect of a devise, bequest or limitation under a will or settlement is in question and for libel, slander, seduction, and actions for recovery of gifts given in contemplation of marriage, which are at present exceptions to the jurisdiction of Local Courts.

(iii) Consistently with recent amendments to the provisions of the District Court of Western Australia Act, section 30 of the Local Courts Act should be amended to vest in Local Courts jurisdiction to hear -

A. actions brought to recover sums of not more than the prescribed money limit being the whole or part of the unliquidated balance of a partnership account, including in any such action jurisdiction, powers and authority relating to declaration of partnership or dissolution of partnership;

B. actions brought to recover sums of not more than the prescribed money limit being the amount or part of the amount of the distributive share under an intestacy or of a legacy under a will;

C. actions for specific performance of or for the rectifying, delivering up, or cancelling of any agreement whatever, where the amount in dispute or the value of the property affected is not more than the prescribed money limit.

(iv) Local Courts should also continue to exercise jurisdiction to hear actions in which the amount, value or damages sought to be recovered exceeds the prescribed money limit but which might be brought in the Supreme Court if the parties agree by a memorandum signed by them or by their respective solicitors that the court has power to try the action; and also all other actions or matters in respect of which jurisdiction is given to Local Courts by or under any other Act.

Remedies (paragraphs 5.27 to 5.34)

(c) Local Courts should be given the same powers to grant equitable relief and remedies as the District Court. Accordingly section 32 of the Local Courts Act should be repealed.

However, consideration is invited to the question of further amendments to overcome existing uncertainties in regard to the position of inferior courts of civil jurisdiction in this matter.

Replevin (paragraphs 6.1 to 6.4)

(d) Sections 94 to 98 of the Act and Order 35 of the Rules (dealing with replevin actions) should be repealed and replaced with general provisions for jurisdiction to hear actions for the recovery of property other than land. In such cases the existing power to make interim orders for detention and preservation of property contained in Order 14 rule 3 might be expanded by provisions empowering Local Courts -

(i) where the right of a party to a specific fund is in dispute in a proceeding, to order the fund to be paid into court or otherwise secured;

(ii) where personal property is the subject-matter of a proceeding and the court is satisfied that it will be more than sufficient to answer all claims thereon, at any time to allow the whole or part of the income of the property to be paid, during such period as it may direct, to a party who has an interest therein or to direct that part of the property be delivered or transferred to a party;

(iii) where a party claims the recovery of specific property to order that the property claimed be given up to the claimant pending the outcome of the action either unconditionally or upon such terms relating to giving security, time, mode of trial or otherwise as it thinks just;

(iv) where such an order is made and the claimant's action is dismissed, to award to the opposing party damages for any loss suffered or damage sustained arising out of the delivery of the property to the claimant or compliance with any other order.

Recovery of possession of land (paragraphs 6.4 to 6.16)

(e) Local Courts should retain jurisdiction to hear actions to recover possession of any land, where the value of the land or the rent payable in respect of it does not exceed a prescribed sum (presently $10,000 per annum). However the jurisdictional provisions should be simplified and clarified.

(f) As part of that simplification, section 6 of the Distress for Rent Abolition Act 1936-1941 (which permits a lessor or landlord, upon 7 days notice in writing to determine any lease or tenancy where the rent due remains unpaid for 7 days and to bring ejectment proceedings in a Court of Petty Sessions under the Justices Act) should be repealed and replaced by appropriate provisions of the Local Courts Act.

(g) In due course consideration should be given to vesting in the Small Debts Division of Local Courts jurisdiction in respect of claims for recovery of possession of land, and claims for rent, mesne profits, damages and other matters arising out of the tenancy or occupation of land, consistent with the money jurisdiction of that Division.

(h) Consideration should also be given to vesting in the referees of Small Claims Tribunals the functions of the office of 'Rentalsman' to deal on the spot with tenancy disputes as is now the practice in a number of Canadian Provinces.

(5) WHAT PROVISION SHOULD BE MADE IN RELATION TO THE VENUE OF HEARINGS?

(paragraphs 7.1 to 7.18)

The Commission proposes that -

The provisions of the Local Courts Act and Rules (sections 36, 36A, 38A, 61(1), 70(3) and 154, Order 8 rules 3 to 7 and Order 14 rule 9) dealing with jurisdiction of Local Courts as to the venue or locality of the court in which a matter is to be commenced and in which the hearing, if any, is to be conducted should be consolidated and rationalised, to give effect to the following principles -

(i) A plaintiff should remain at liberty to commence proceedings in any Local Court of his choice.

(ii) A defendant should be able to object to the plaintiff's choice of court but such objection should be based upon hardship or inconvenience to the defendant or his witnesses and should set out the relevant facts. The defendant should be at liberty to request transfer of the proceedings to any Local Court, giving reasons for that choice. The plaintiff should be at liberty to answer the objection.

(iii) The right to challenge venue should be brought to the attention of the defendant in simple English.

(iv) The decision on any objection as to venue should be made initially by the clerk of courts subject to review by a magistrate upon simple application. There should be no right of appeal from that review.

(v) A magistrate should have power to transfer an action to another court at any time upon simple application by a party. The guiding criterion should be the balance of convenience.

(vi) A magistrate of a Local Court should be expressly empowered to pronounce judgment or to make any relevant order at any convenient place being a place at which the court is empowered to sit.

(vii) A magistrate who reserves his judgment or his decision on any question of fact or law should be empowered to give his judgment or decision either in court himself or by the clerk reading or delivering the written judgment or decision to the parties at a convenient time and place. This may be valuable in remote areas.

(6) WHAT PROVISIONS SHOULD BE MADE IN RESPECT OF JURISDICTION VESTED IN LOCAL COURTS BY STATUTES OTHER THAN THE LOCAL COURTS ACT?

(paragraphs 8.1 to 8.9)

The Commission proposes that -

(a) Attention should be given to problems arising from jurisdiction vested in Local Courts by other legislation, especially with regard to -

(i) procedures for the exercise of such jurisdiction;
(ii) provisions in relation to awards of costs, and where appropriate provision of scales of costs; and
(iii) rights of appeal from Local Court decisions.

Such attention needs to be given to problems arising in a number of existing statutes, such as the Builders Registration Act, and also when consideration is being given to vesting new jurisdiction in Local Courts.

The Commission drew attention to these matters in its report on Review of Administrative Decisions: Appeals (Project No 26 Part I, 1982) in which it suggested -

(i) the creation of an Administrative Law Division of Local Courts;
(ii) the rationalisation of certain administrative law jurisdictions, both original and appellate;
(iii) appropriate procedures and rules;
(iv) establishment of an ongoing administrative review body to review appeal processes and rights of appeal.

(b) The Commission also re-affirms the recommendation in its report on Dividing Fences (Project No 33, 1975) that Local Courts - being courts of inferior civil jurisdiction - be granted jurisdiction in all dividing fences disputes in place of Courts of Petty Sessions, subject only to appeal to the District Court and no further. Consideration should also be given to vesting concurrent jurisdiction in such matters in Small Claims Tribunals.

(c) Other jurisdiction vested in courts of inferior jurisdiction might also be usefully rationalised. For example, jurisdiction to deal with complaints under the Noise Abatement Act 1972-1981 should be vested in Courts of Petty Sessions - being courts of inferior criminal and quasi-criminal jurisdiction - and not Local Courts. On the other hand, jurisdiction should be vested in Local Courts under the Disposal of Uncollected Goods Act 1970 instead of in Courts of Petty Sessions. Creation of one Magistrates Court would enable such matters to be attended to administratively.

(d) The Broome Local Court Admiralty Jurisdiction Act 1917, which vests very limited admiralty jurisdiction in the Local Court at Broome and remains unamended since 1917, should be repealed and, subject to any general review of admiralty jurisdiction, its provisions, in a modern form, incorporated into the Local Courts Act. This example illustrates the need for regular review of legislation and procedure.

(7) CERTAIN INCIDENTAL MATTERS ARISE IN CONNECTION WITH THE JURISDICTION EXERCISED BY LOCAL COURTS. AS TO THESE THE COMMISSION PROPOSES THAT -

Counterclaims (paragraphs 5.35 to 5.38)

(a) As at present, where any defence or counterclaim involves matters beyond the jurisdiction of a Local Court, that defence or counterclaim should not affect the competence of the court to dispose of the whole matter in controversy, so far as it relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the court has jurisdiction to administer should be given to the defendant upon the counterclaim.

Rules of law enacted by the Supreme Court Act (paragraphs 5.39 and 5.40)

(b) Provisions such as section 35 of the Local Courts Act and section 57 of the District Court of Western Australia Act which apply to Local Court and District Court proceedings "the several rules of law enacted and declared by the Supreme Court Act" duplicate section 34 of the Supreme Court Act. In addition doubts as to their operation may be caused by amendments, additions and repeals of provisions in the Supreme Court Act or in other statutes. These provisions should be re-worded so as to set out more precisely which provisions shall so apply.

Submission to the jurisdiction (paragraphs 5.42 and 5.43)

(c) Provision should be made in the Act or Rules making it clear that the filing of a notice of defence does not constitute a submission to the jurisdiction of the court. Alternatively, provision might be made for entry of a conditional notice of intention to defend which does not constitute submission to the jurisdiction of the court.

Territorial jurisdiction (paragraphs 5.44 and 5.45)

(d) Provision should be made dealing with the question of the extra-territorial jurisdiction of Local Courts, that is, when Local Courts may deal with persons or matters outside Western Australia.

Persons under disability (paragraphs 5.46)

(e) Although Local Courts have been held to have such power, the Local Court Rules should be amended to specifically empower Local Courts to approve compromises or settlements of claims by infants and other persons under disability. The Rules should specifically empower Local Courts to require damages awarded to an infant or other incapable person by way of settlement, compromise or acceptance of money to be paid into court and to require any order approving the same also to order the payment out of those moneys to the Public Trustee or to such other person as the court approves.

Removal of proceedings to and from Superior Courts (paragraphs 5.47 to 5.53)

(f) In any action a Judge of the Supreme Court or District Court should be empowered, either on the application of any party or otherwise, to order on such terms and conditions as he thinks fit that the whole action be transferred to the Supreme Court or District Court respectively. The provisions dealing with the removal of proceedings between Local Courts and superior courts now contained in sections 4A, 34, 86 to 88 and 114 of the Local Courts Act should be reviewed and re-enacted in consecutive, logically complete and mutually consistent form, making reference also to the provisions of sections 74 and 75 of the District Court of Western Australia Act. They should also be amended to permit proceedings to be transferred in part as well as in whole.

Removal of proceedings to and from Small Claims Tribunals (paragraph 5.12)

(g) The provisions of the Local Courts Act and of the Small Claims Tribunals Act should be reviewed, especially in light of the establishment of a Small Debts Division of Local Courts, to enable greater remission of actions between Local Courts and Small Claims Tribunals according to convenience, difficulty of determination or other factors, provided the action is within the jurisdiction of the court or tribunal to which remission is being considered. The Commission leaves open to question whether Small Claims Tribunals should eventually be merged in the Small Debts Division of Local Courts pending experience of the operation of that Division.

(8) WHAT PROVISIONS SHOULD THE LOCAL COURTS ACT MAKE RELATING TO -

* STIPENDIARY MAGISTRATES
* CLERKS OF COURT
* BAILIFFS
* LEGAL PRACTITIONERS?

(paragraphs 9.1 to 9.20)

The Commission proposes that -

(a) All provisions relating to the appointment and assignment of magistrates should be removed from the Local Courts Act and placed in the Stipendiary Magistrates Act.

(b) Clerks of Local Courts should no longer be required to "sign" summonses but should continue to sign orders and warrants.

(c) The question of the organisation and remuneration of bailiffs' services is more appropriately a matter for review not by the Commission but by an expert committee. However, the Commission seeks comment on the need for training and the appropriate method of remuneration of bailiffs, and allocation of bailiff districts.

(d) The Debt Collectors Licensing Act 1964, or other legislation, should make provision for the licensing of process servers to the intent that court documents should only be served by bailiffs, legal practitioners, licensed debt collectors, and the licensed employees of such persons.

(e) The only persons entitled to a right of audience in Local Courts should be -

(i) the parties to the proceedings, and,

(ii) other than in the Small Debts Division, legal practitioners appointed by them,

SAVE THAT,

(iii) where a party is a corporation it may be represented by a director or employee, and

(iv) a magistrate should be empowered, as at present, to permit a party to be assisted by a relative, friend or social worker in appropriate circumstances. However the present provisions should be clarified in this regard and in the light of judicial decisions, such as that in McKenzie v McKenzie, as to the rights of litigants in court to assistance.

(9) WHAT PROVISION SHOULD BE MADE AS TO THE FORM AND CONTENT OF SUMMONSES IN LOCAL COURT PROCEEDINGS?
(paragraphs 10.1 to 10.10)

The Commission proposes that -

(a) The provisions of the Local Courts Act and Rules dealing with the issue of summonses should be redrafted in terms of current practice, by deleting reference to the commencement of actions by the entry of a plaint and simply referring to the issue of a summons.

(b) The Local Court summons form should be redesigned in simple form with notes for guidance of the defendant. An informational pamphlet in simple English should be made available at little or no cost.

(c) Local Court summonses should continue to contain a short statement of particulars of claim, sufficient to enable the defendant to be informed of the demand or claim made against him.

(d) As at present, the defendant should be able to obtain detailed particulars of claim upon request. The summons or pamphlet should make this clear.

(10) HOW SHOULD LOCAL COURT PROCEEDINGS BE LODGED AND SERVED?

The Commission proposes that -

Service (paragraphs 11.1 to 11.14)

(a) Local Court summonses should be served within Western Australia either by mail or by bailiff or other personal service at the election of the plaintiff.

(b) A summons should be served by postal service unless the plaintiff otherwise elects. Postal service should be effected by the clerk of courts who should keep a daily record of all postings. The cost of postal service should be recovered by the court by the addition of a small fee charged to the plaintiff on the issue of the summons, and be recoverable by the plaintiff from an unsuccessful defendant, in the same way as a fee is presently payable for bailiff or other personal service. The fee should however be less. A summons served by post should be deemed to have been served if not returned to the court within a fixed period.

(c) Provision should be made for service to be effected by either bailiff service or other personal service where postal service results in the summons being returned unclaimed to the court.

(d) Such a return to court of a summons not otherwise served, after any judgment has been entered, should act as a stay of execution pending further service or order, and notification thereof should be given to the plaintiff.

(e) Proof of personal service should be simplified so as to be by certificate in all cases, rather than as at present in some cases by affidavit, subject to provision of adequate monetary penalties for the making of false certificates.

(f) The Rules should contain liberal provision for the setting aside of judgments entered in default of notice of defence where the defendant has not, in fact, received the service copy of the summons.

Lodgment (paragraph 11.15)

(g) The Local Court Rules should be amended to permit lodgment of documents by post.

(11) WHAT PROVISIONS ARE DESIRABLE IN RELATION TO LOCAL COURT PROCEEDINGS RELATING TO -

* NOTICES AND PARTICULARS OF DEFENCE
* PLEADINGS GENERALLY
* SETTING ACTIONS DOWN FOR TRIAL
* NOTICES OF PROCEEDINGS
* DEFAULT JUDGMENTS
* SUMMARY RELIEF
* PAYMENT INTO COURT
* ACKNOWLEDGMENT OF DEBT OR CLAIM
* PARTIES
* JOINING AND SEPARATING CLAIMS
* WITNESSES
* INTERLOCUTORY MATTERS?

It should be noted that in the Small Debts Division, and also in the proposed Administrative Law Division, special provisions may be necessary in some of these matters. Subject thereto, the Commission proposes that -

Notices of Defence (paragraphs 12.1 and 12.2)

(a) The defendant should be required to supply concise particulars of defence as part of the notice of defence.

(b) A small fee should still be payable for the filing of a notice of defence, except that no fee should be payable in respect of claims of less than $1,000 or such other sum as constitutes the limit of money jurisdiction of the Small Debts Division and of Small Claims Tribunals from time to time.

(c) Defendants should be permitted a period of 14 days after service of the summons in which to file notice of defence, that period to apply whatever the distance between the court and the place of service of the defendant.

(d) A new form of Notice of Defence should be prescribed to embody these proposals and the proposals in respect to Acknowledgments of Debt or Claim set out below.

Particulars of defence (paragraphs 12.3 and 12.24 to 12.26)

(e) Section 47B dealing with orders to supply particulars of defence should be redrafted so as to -

(i) permit a notice of defence to be struck out if particulars of defence are not supplied following an order of the court to do so; and

(ii) provide the court with a discretion as to liability for the costs of obtaining particulars and in particular to require a positive order before such costs are payable.

These provisions should, like many other procedural provisions, be placed in the Rules rather than in the Act.

(f) In lieu of the existing provisions of section 48 of the Local Courts Act as to the specific pleading of certain special defences and of counterclaims, Order 20 rule 9 of the Rules of the Supreme Court should apply in Local Court proceedings, other than in the Small Debts Division. The court should however be authorised to waive these provisions in appropriate cases, subject to appropriate orders for costs or adjournment.

Pleadings generally (paragraph 12.3)

(g) Provision should be made in proceedings other than those in the Small Debts Division for either party to apply for an order that pleadings be filed as if the action had been commenced in the Supreme Court.

(h) Further, the court should have power so to order of its own motion.

(i) Where such an order is made, the plaintiff should be required to file and serve detailed particulars of claim before the action is listed for trial. Failure by a defendant then to file and serve detailed particulars of defence should not prevent the listing of a matter for trial but should be grounds for an application to strike out the notice of defence, and for judgment accordingly.

Setting actions down for trial (paragraphs 12.7 to 12.12)

(j) In applying to set an action down for trial a party should be required to supply information to the clerk of court not only concerning the estimated duration of hearing time but also estimating the number of witnesses to be called, the nature and complexity of the issues, the name of counsel and a list of unsuitable dates.

(k) The notice given by the court to the parties advising that an action has been listed for hearing or for assessment of damages should advise the parties that -

(i) they are entitled to present their case in person or with legal representation (save in the latter case when the matter is listed in the Small Debts Division);

(ii) they should arrange for the attendance of necessary witnesses and the production of necessary documents; and

(iii) the action will be determined on such evidence as is actually produced.

Notices of proceedings (paragraph 12.12)

(l) All notices of proceedings should be served by the clerk of court by certified post, prima facie proof of service being by the clerk's record of posting.

Default judgments (paragraphs 12.13 to 12.16)

(m) The principle that a judgment entered in default of notice of defence should be set aside only if the judgment debtor shows a prima facie defence on the merits should be expressly stated in the Rules.

(n) However an application to set such a default judgment aside should be able to be made by sworn verbal evidence at the time appointed for the hearing of a judgment summons, as well as upon summons supported by affidavit.

Summary relief (paragraphs 12.17 to 12.21)

(o) Express provision should be made in the Local Court Rules enabling applications for summary judgment to be made against a plaintiff on a counterclaim and against a third party, and for summary dismissal of a frivolous or vexatious claim.

(p) Provision should be made for summary judgment to be set aside, upon sufficient cause being shown and verified.

Payment into court (paragraphs 13.1 to 13.3)

(q) The Local Courts Act and Rules should adopt the same provisions as apply in the Supreme Court in relation to payment into court and offer to consent to judgment, except in the Small Debts Division.

Acknowledgment of Debt or Claim (paragraphs 13.4 to 13.10)

(r) A new form of 'Acknowledgment of Debt or Claim' should be prescribed. The form should set out a clearly worded acknowledgment that the whole of the debt or claim is owed and should include a simple form of affidavit of means and any offer to pay the debt or claim whether by instalments or otherwise. If only part of a debt or claim is acknowledged to be owing the defendant should be required to file only a notice of defence. The notice should specify that part of the debt or claim which is acknowledged. The defendant should be at liberty at the same time to file an affidavit of means and offer to pay.

(s) Upon a defendant filing an Acknowledgment of Debt or Claim which includes an offer to pay by instalments the amount acknowledged, such offer should act as an order for payment and a stay of execution so long as the offer to pay by instalments is complied with or until the order is varied either upon the application of the plaintiff or of the defendant.

Parties (paragraphs 14.1 to 14.15)
Joining and separating claims
Witnesses
Interlocutory matters

(t) The provisions dealing with -

(i) parties to proceedings (sections 53 to 57);

(ii) joining and separating claims (section 58);

(iii) admission of facts, discovery and inspection of documents (sections 65 to 68); and

(iv) examination of witnesses for future use (section 69)

and the Local Court Rules giving effect thereto should be repealed.

Subject to the next succeeding paragraphs provisions should be added to the Local Court Rules in lieu thereof in the same terms as similar provisions of the Rules of the Supreme Court except where some clear need for variation is perceived. The usefulness of the existing proviso to section 57 permitting minors to sue for wages and like monies in Local Court proceedings in their own name is one such example.

(u) Provision should be made for interlocutory orders to be sought, answered and obtained by correspondence, except by order upon the application with cause of another party to the proceedings. Comment is sought as to the extent to which solicitors, clerks of court and magistrates should be encouraged by the rules to utilise mail and telephone services especially for the conduct of uncontested interlocutory and administrative matters.

(v) Supporting affidavits should only be required in respect of matters where verification of the facts concerned is ordered upon the application with cause of another party.

(w) Unnecessary and unnecessarily elaborate use of pre-trial procedures should be discouraged by orders for costs against offending parties.

(x) The Local Court Rules should also make clear that interlocutory applications may be made and dealt with after a matter has been listed for trial, subject to any appropriate orders as to costs and adjournments.

(y) The provisions dealing with witnesses who fail to attend a hearing (sections 63 and 64) should be repealed and replaced with a provision similar to section 64 but avoiding the administrative difficulties caused by the requirement that the witness be brought before the court at a fixed time and date. The section should also provide clearly as to the means by which cause for non-attendance is established and the person upon whom the onus to show cause is placed. Provision should also be made for bail to be granted to arrested witnesses in appropriate cases.

(12) SHOULD DIRECTIONS HEARINGS OR PRE-TRIAL CONFERENCES BE HELD IN LOCAL COURT PROCEEDINGS?

(paragraphs 15.1 to 15.7)

The Commission proposes that -

(a) Upon a matter being listed for hearing, any party to Local Court proceedings should be able to file a summons for pre-trial review including directions as to the future conduct of the proceedings. Such directions could include not only directions as to interlocutory steps such as the filing of further particulars in third party proceedings already made possible by Order 13 rule 5, or the preparation of a 'Scott schedule' in building cases, but directions as to the actual conduct of the hearing. The matters the subject of the summons should also include the possibility of the holding of a pre-trial conference as proposed in (b) and (c) below.

(b) Upon the hearing of a summons for pre-trial review the magistrate should have power to direct the parties to give consideration to the possibility of a negotiated settlement of the proceedings or the agreement of particular issues, documents or reports.

(c) In any event, where a magistrate is of the opinion that it may be advantageous or desirable in the interests of justice between the parties to do so he should be empowered to order the parties to confer in an endeavour to reach agreement on matters in issue between them.

(13) WHAT PROVISIONS SHOULD BE MADE IN RELATION TO LOCAL COURT PROCEEDINGS REGARDING THE TRIAL OF PROCEEDINGS, OTHER THAN IN THE SMALL DEBTS DIVISION?

The Commission proposes that -

Open court (paragraph 16.1)

(a) All Local Court proceedings should be held in open court, save where the court considers it necessary to exclude the public or specific persons in the interests of justice between the parties. There should be no restrictions on the reporting of Local Court proceedings except by order made for the same reasons.

Summary hearing (paragraph 16.2)

(b) A Local Court should be enabled to hear and determine a summons in a summary way where a defendant does not usually reside in Western Australia and is about to leave Western Australia without paying the debt or satisfying the claim or the matter is otherwise one of urgency.

Non-appearance by parties (paragraphs 16.3 to 16.5)

(c) A magistrate should also be specifically empowered, on the written application of a party, to order that an action not be listed for hearing before a certain date or between certain dates. This is designed to overcome problems caused by the inability by reason of sickness or other good cause of a party to attend a hearing before or between certain dates. Notice of application should be given to the other parties to the proceedings and such orders should be revocable.

Hearings before clerks of courts (paragraphs 16.6 and 16.7)

(d) Upon application of the parties and by leave of the magistrate, a clerk of a Local Court should be empowered to hear and determine claims where the sum claimed does not exceed $200, that sum being in lieu of the sum of $10 fixed in 1904 by section 76. It is envisaged that such a provision may be valuable in remote areas.

Evidence (paragraphs 16.8 to 16.10)

(e) Provisions dealing with the procedural conduct of trials and with questions of evidence, now contained in sections 71 to 80 of the Act, should be dealt with in the Local Court Rules rather than by the Act itself.

(f) A magistrate should be empowered at any stage of any action to dispense with -

(i) the rules of evidence for proving any matter which is not bona fide in dispute;

(ii) such rules as might cause expense and delay arising from any commission to take evidence or arising otherwise;

(iii) the proof of handwriting, documents, the identity of parties or parcels, or of authority,

and to require any party to the action other than a minor or person of unsound mind to make admissions with respect to any document or to any question of fact. The costs of proof occasioned by any refusal or neglect should be paid by that party. Such an admission should be for no other purpose than the purpose of the action for which it is made and, with the leave of the court, should be able to be amended or withdrawn.

Use of experts (paragraph 16.11)

(g) A magistrate should be at liberty, either upon the application of a party or of his own motion, to consult any expert or to call for the report of any expert or to invite any expert to sit as an assessor. Any cost incurred thereby should be fixed at the time of giving judgment and borne in such proportions and by such party as the magistrate considers just. It is envisaged that such a power would be used only rarely and in cases involving an unrepresented party or parties apparently unable to properly conduct the proceedings without assistance.

Affidavit evidence (paragraphs 16.12 to 16.15)

(h) In unliquidated claims for damages arising out of motor vehicle collisions, the plaintiff should be permitted to give affidavit evidence, without notice or service on the defendant, in cases where the defendant has not given notice of defence either as to liability or amount, subject to the right of the defendant to file an affidavit of his own evidence and to submit to assessment on affidavit evidence, and to the right of the court to refer the matter to open court and to set aside any orders made on the basis of such evidence.

Medical and other technical reports (paragraph 16.16)

(i) Compulsory exchange of medical and other technical reports in certain cases should be introduced into the Local Court Rules in terms similar to those contained in the Rules of the Supreme Court.

Medical examinations (paragraph 16.17)

(j) The Local Court Rules should be amended to contain provisions similar to those of Order 28 of the Rules of the Supreme Court dealing with the requirement by notice for the physical or mental examination of a party.

Security for costs (paragraph 16.18)

(k) The Local Court Rules should be amended so as to be consistent with the Rules of the Supreme Court in relation to security for costs.

Interpleader proceedings (paragraph 16.20)

(l) The Local Court Rules as to interpleader proceedings should be made consistent with those set out in the Rules of the Supreme Court.

Judgments and orders (paragraph 16.21)

(m) The terms of any judgment or order, whether final or otherwise, should be signed by or on behalf of the magistrate or clerk, and sent to the parties.

Costs (paragraphs 16.22 to 16.26)

(n) The practice of Local Courts in relation to costs, in matters other than those heard in the Small Debts Division and in the proposed Administrative Law Division, should continue to be consistent with the practice in the superior courts exercising civil jurisdiction.

(o) Appropriate scales of costs should be formulated from time to time by the committee of review referred to in this working paper, in as simple a form as possible.

Payment by instalments (paragraphs 16.27 to 16.29)

(p) Upon the conclusion of a trial or other hearing leading to judgment, the magistrate upon the application of, or with the consent of, the judgment debtor should be required to hold a hearing into the means of the judgment debtor to pay the judgment, and to make appropriate orders on the basis of such examination.

New trials (paragraphs 16.31 to 16.36)

(q) The discretion of a magistrate to order a new trial, at present contained in section 90, should be retained but should be restricted to cases in which a substantial wrong or miscarriage of justice has been occasioned other than by an error of law. The provision should also clarify the time at which such an application can be made.

(14) WHAT PROVISION SHOULD BE MADE FOR REVIEW OF LOCAL COURT PROCEEDINGS BY WAY OF -

* APPEAL
* PREROGATIVE WRIT?

(paragraphs 17.1 to 17.8)

The Commission proposes that -

(a) Except in respect of proceedings heard in the Small Debts Division and in the proposed Administrative Law Division, appeals from Local Courts should continue to lie to the District Court under the District Court (Appeal) Rules 1977 by way of 'rehearing' on the papers.

(b) The provisions of the Local Courts Act dealing with judicial review by way of prerogative writs (sections 113 to 119) should be reviewed in the Commission's report on The Judicial Review of Administrative Decisions (Project No 26 Part II). Pending such review the provisions can be retained.

(15) WHAT PROVISION SHOULD BE MADE FOR -

* PRE-JUDGMENT INTEREST
* INTEREST ON JUDGMENTS

IN LOCAL COURT PROCEEDINGS?

(paragraphs 18.1 to 18.10)

The Commission proposes that in order to maintain consistency with the situation in the Small Debts Division and in Small Claims Tribunals -

(a) section 32(3) of the Supreme Court Act in respect of pre-judgment interest should apply to proceedings in Local Courts only where the amount of the judgment including interest exceeds $1,000, or any other sum equal to the money jurisdiction limit of the Small Debts Division and of Small Claims Tribunals from time to time, rather than $750 as at present.

(b) for similar reasons, section 142(2) of the Supreme Court Act should be amended to permit post-judgment interest on all Local Court judgments in a similar manner, that is where the amount of the judgment exceeds $1,000, or other such limit from time to time, rather than $750 as at present.

The Commission will consider the question of enforcement of post-judgment interest in the later Working Paper dealing with Enforcement of Judgments.

(16) WHAT OTHER PROVISIONS SHOULD BE MADE IN RESPECT OF LOCAL COURT PROCEEDINGS?

The Commission proposes that -

Penalties, fees, costs and allowances (paragraphs 19.2 and 19.3)

(a) A number of matters the subject of the Local Courts Act and Rules should especially be reviewed regularly so as to be kept consistent with the provisions of other statutes and where appropriate to take account of the effect of inflation on money values. These include -

(i) All penalties and other money sums referred to in the Local Courts Act and Rules.

(ii) All Local Courts fees, costs and allowances.

Marital status (paragraph 19.6)

(b) All requirements that the status of a female be stated in Local Court proceedings should be repealed, save only such as are necessary to satisfy differences in status remaining since the enactment of the Married Women's Property Act 1892-1962.

(c) The Married Women's Property Act 1892-1962 should be reviewed to bring it into line with modern concepts of sexual equality.

Time limits on issue or service of documents (paragraph 19.7)

(d) There should be a general review of time limits contained in the Local Courts Act and Rules with a view to making the same consistent with the Rules of the Supreme Court and with modern conditions.

Enlargement and abridgement of time (paragraph 19.9)

(e) Order 6 rule 29, preventing an application for the extension of time for the service of the summons being brought more than twelve months after the issue of the summons, should be repealed.

Recovery of possession of land (paragraphs 19.10 to 19.20)

(f) In exercising jurisdiction in actions to recover possession of land, magistrates should be empowered to order that possession be given to the plaintiff either forthwith or on such day, being not more than forty-two days from the date of the order, as the magistrate appoints.

(g) Section 102 which provides that a sub-tenant who fails to bring notice of a summons for recovery of possession of land to the attention of the landlord shall pay a penalty of three years rent of the land should be amended. The Commission seeks comment as to the direction that amendment should take.

(h) Provision should be made for defendants to actions for recovery of possession of land to file admissions to the claim, such admissions to have the effect of limiting costs payable to the plaintiff.

(i) Amendments should be made to the Local Court Rules to provide a special proceeding which can be used to enable the eviction of "squatters" who might otherwise be unable to be identified.

(17) IS THERE A NEED FOR A SYSTEM OF REGULAR REVIEW BY AN EXPERT COMMITTEE OF PERSONS MEETING PERIODICALLY AND HAVING REGULAR CONTACT WITH LOCAL COURTS AND THEIR OPERATIONS?

(paragraphs 20.1 to 20.10)

The Commission proposes that -

(a) A committee should be established to review the operation of Local Courts on a regular basis, to make recommendations for changes to the Local Courts Act and Rules and to the practice and procedures of Local Courts. This proposal is made also in the light of the Commission's suggestion that Local Courts and Courts of Petty Sessions be merged to form a unified Magistrates Court. In the event of such a merger, the composition of the committee referred to below would be suitable for reviews of the Civil Division and of the Small Debts Division. Any review of other Divisions would require variations to the composition of the committee.

(b) Such a committee might include -

(i) a Chairman to be appointed by the Attorney General,

(ii) the Chairman of the Judges of the District Court or another judge of the District Court nominated by him,

(iii) the Chief Stipendiary Magistrate,

(iv) the Under Secretary for Law,

(v) a Stipendiary Magistrate selected from those sitting regularly at the Perth Local Court and a Stipendiary Magistrate selected from those sitting regularly at a suburban or country court,

(vi) two representatives of the legal profession nominated by the Law Society of Western Australia,

(vii) a person nominated by the Commissioner for Consumer Affairs, and

(viii) a referee of the Small Claims Tribunal.

(c) Administrative support should be provided to the committee.

(d) The committee should report periodically and its reports should be tabled in Parliament.

(18) WHAT ARE THE PARTICULAR NEEDS OF LOCAL COURTS IN RELATION TO ADMINISTRATIVE SERVICES?
WHAT IMPROVEMENTS SHOULD BE MADE IN RELATION TO SERVICES RENDERED BY LOCAL COURTS TO THE PUBLIC GENERALLY, AND ESPECIALLY IN RELATION TO -

* INFORMATION FOR LITIGANTS
* COURT FORMS
* ADVICE AND ASSISTANCE
* HEARING TIMES AND OFFICE PRACTICES
* INTERPRETERS
* TECHNOLOGY?

The Commission recognises a need for -

Unification, co-ordination and modernisation (paragraphs 21.1 to 21.16)

Local Court administration should be treated as part of a unified system of administration of all courts in the State and a systematic attempt on an ongoing basis should be made to unify, co-ordinate and modernise the administration of Local Courts. The needs of courts for adequate library facilities, staff and equipment resources must be recognised. The precise details however are matters for administrative decision.

At the same time there is a need for courts, including Local Courts, to respond to public needs. Accordingly the Commission proposes that -

Information (paragraphs 22.2 and 22.3)

(a) A booklet or pamphlet advising litigants in simple terms of basic court procedures including the availability of advisory and aid services, methods of resolving particular difficulties and the methods of enforcement of judgments should be made available at Local Court offices free of charge or at minimal cost.

Court forms (paragraphs 22.4 to 22.8)

(b) A systematic review of Local Court forms should be undertaken with a view to avoiding the unnecessary use of technical terms and obscure language and setting out the alternative responses available. All court forms sent to, or served on, the public should bear the exact address and telephone number of the court. Unnecessary court forms should be abolished.

Advice and assistance (paragraphs 22.9 to 22.13)

(c) A system of court advisory services should be introduced both in respect of pre-trial and post-judgment matters, analogous to that presently operating in New South Wales and in Small Claims Tribunals in Western Australia.

Hearing times and dates (paragraphs 22.14 to 22.36)

(d) Attention should be given to the need as far as possible to fix court hearing times at appointed hours rather than by listing all trials for hearing at 10.00 am.

(e) Administrative attention should be redirected to the possibility of re-arranging listing practices including the possibility of weekly or daily call-overs to arrange the hearing times for the following week or for the day involved.

Office practices (paragraphs 22.37 and 22.38)

(f) Court hearing times, office hours and office practices should if inconsistent be made consistent at least between all courts using shared facilities and staff.

(g) The possibility of keeping the Perth Local Court office open on one evening in each week, coinciding with evening shopping, for the purpose of operating advisory services, the lodgment of process and the payment of monies should be investigated.

Interpreters (paragraph 22.39)

(h) An integrated system of accredited court interpreters should be introduced.

Modern technology (paragraphs 22.40 to 22.43)

(i) Provision should be made for the introduction of court forms and documents which are compatible with modern word processing technology. This may involve the avoidance of other than pre-printed material on the reverse side of documents.

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APPENDIX I

CRITERIA FOR REFORM - EXTRACTS FROM THE REPORT OF THE ROYAL COMMISSION ON THE COURTS, NEW ZEALAND, 1978

Suitability to Conditions . . .

245. The court structure must be appropriate to conditions . . .. There are two basic factors that restrict and shape any attempt to structure the administration of justice . . .. The first is the geographic configuration of the country. The second is the small and scattered nature of its population. These factors produce a conflict between a centralised system making best use of judicial and other legal talents, including specialised knowledge and skills, as well as buildings and administrative staff: contrasted with the need to show the face of justice throughout the country to meet the needs of the local community quickly and with minimum inconvenience to residents. The spread of population results in significant variations in court workloads . . .. It needs to be recognised that a solution suitable for one or more centres may be inappropriate elsewhere. Court structure must also be in harmony with the essential nature of . . . society. New Zealand has a small population and the multi-cultural, relatively egalitarian character of its people has been widely commented upon. It has been suggested to us that the community places greater importance on factors tending to make the court system work efficiently and effectively than on matters of tradition and status. The issues were well summed up by the Solicitor-General on the opening day of the hearings of the Commission:

> In the field of justice particularly, we cannot afford lightly to cast aside what has been found to have stood the test of time. On the other hand, however, we cannot afford to cling stubbornly to what is no longer worth while merely because we have had it for a long time.

. . .

Economic Feasibility

246. To some, administration of justice should not be limited by any question of cost. In our opinion, such a view is unrealistic. The court system . . . must be economically feasible for there are necessary limits on the sum available for expenditure. Proposals relating to court structure should take due account of the costs of administration and provision of buildings and facilities necessary for the courts to function efficiently. There is much to commend proposals which fall within the existing administrative framework and avoid the cost of expansion and duplication of court buildings. . . . Yet recommendations based on current economic conditions should not prejudice changes which would benefit the long-term administration of justice . . ..

Service to the Public

247. It is imperative that the judicial system . . . serves the public and that it should be administered to achieve that end. It follows that the courts must be readily accessible to all; that recourse to the courts must not be unduly expensive; and that the business of persons before the court should be despatched with promptness and

efficiency. Justice administered in the courts should be of a high standard. It also means that the courts must be capable of adjusting to developments and trends within society and of meeting the needs of all groups. While, in our view, generally there should not be special rules for special groups, we must ensure that all persons who come before the courts are in a position to both understand and participate in the proceedings. No person should be disadvantaged. In a democratic society the courts exist to serve the needs of the people. There is a danger that in practice, and over long periods of time, courts, as with other organised institutions, come to regard themselves as ends rather than means and prefer the needs and convenience of the institution and its members to those of the people who use it. Accordingly, it is salutary that the courts should periodically undergo scrutiny.

Preservation of the Independence of the Judiciary

248. Independence is an essential quality in a judge and it is imperative that the independence of the judiciary be respected and maintained. Without that independence, the just determination of proceedings cannot be assured and public confidence in the integrity of the judicial process is destroyed. The tradition of judicial independence, freedom from favour as well as from fear, is of fundamental constitutional importance in maintaining a proper balance in the continuing relationship between the State and the citizen. In revising the structure of the courts this basic principle must not be eroded.

Best Use of Judicial and Legal Talent

249. The court system should make best use of the judicial talent available within the court hierarchy. Different judicial talents are required at the various levels . . . . We should re-define the roles of various courts and carefully analyse their jurisdictions with a view to re-allocating the work. We strongly believe that to make best use of judicial talents the greatest possible degree of flexibility is both necessary and desirable. In approaching this task, two premises should be applied: first, that courts of summary jurisdiction should deal with the bulk of the work; and secondly, adopting a principle from the theory of management, that disputes should be resolved at the appropriate competent level. Judicial attributes should be matched to case importance and difficulty.

Simplicity

250. The court system should also have the advantage of simplicity and uniformity. It should appear logical and have practical meaning to the man in the street. . . . As a general principle, proliferation of courts is undesirable.

Efficient Administration

251. We can do no better than adopt the remarks of the former [New Zealand] Chief Justice, the Rt Hon Sir Richard Wild, when he said:

> If the law itself is bad the Courts may yet manage in many cases to achieve justice. But if the administration of the Courts is bad then, even though the law is sound, injustices will be done. The smooth working of the Courts is therefore essential to justice.

. . .

Ethnic Minorities

253. . . . The goal, if the law is to be seen to be just, must be the even handed application of the law to all members of our community. We therefore consider it is of great importance to retain one law for all our people, while making every effort to ensure that the law is understandable to all, and that adequate allowance is made for the special needs and problems of minority groups. . . . Enhancement of . . . cultural groups should, however, be combined with a process which ensures that all our citizens are taught to speak and read English well and to understand the law, it being made clear that there is one law for all.

APPENDIX II

EXTRACTS FROM JURISDICTION PROVISIONS

A. WESTERN AUSTRALIA

District Court of Western Australia Act, 1969-1978*

s 50 (1) Subject to section 51 the Court has the same jurisdiction to hear and determine and may exercise all the powers and authority that the Supreme Court has and may exercise from time to time, in relation to -

(a) all personal actions, other than those of the kind referred to in subsection (2) of this section, where the amount, value or damages sought to be recovered is not more than fifty thousand dollars, whether on the original claim or demand or a balance after allowing payment on account, or the amount of any set off admitted by the plaintiff;

(b) an action brought to recover a sum of not more than fifty thousand dollars which is the whole or part of the unliquidated balance of a partnership account, including in any such action jurisdiction, powers and authority relating to declaration of partnership or dissolution of partnership;

(ba) an action brought to recover a sum of not more than fifty thousand dollars which is the amount or part of the amount of the distributive share under an intestacy or of a legacy under a will;

(bb) an action for specific performance of or for the rectifying, delivering up, or cancelling of any agreement whatever, where the amount in dispute or the value of the property affected is not more than fifty thousand dollars;

(c) an action of replevin where the value of the goods seized is not more than fifty thousand dollars;

(d) an action of ejectment to recover possession of any land, where the value of the land does not exceed twenty-five thousand dollars by the year or where the rent exclusive of ground rent, if any, payable in respect of the land does not exceed the sum of twenty-five thousand dollars by the year;

(e) any action, whether commenced in the Court or the Supreme Court, in which the amount, value or damages sought to be recovered exceeds twenty thousand dollars, in which the parties thereto agree by a memorandum signed by them or by their respective solicitors, that the Court has power to hear and determine;

(f) all other actions or matters in respect of which jurisdiction is given to the Court by or under this or any other Act.

* As amended by Acts Amendment (Jurisdiction of Courts) Act 1981, s 9.

(2) The Court has the same jurisdiction to hear and determine and may exercise all the powers and authority that the Supreme Court has and may exercise from time to time in relation to all personal actions making a claim for damages in respect of the death of or bodily injury to a person caused by or arising out of the use of any motor vehicle.

. . .

s 51 (1) Where at a trial of any cause in the Court a verdict is returned for or a judgment is given for or the total amount that would have been recoverable if the claimant had not been at fault is found at an amount in excess of fifty thousand dollars but not exceeding seventy-five thousand dollars, the Court shall find and record the amount of the verdict or judgment or, as the case may be, such total amount and the claimant is entitled to recover the full amount of the verdict or judgment, or as the case may be, of such total amount reduced in accordance with the Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act, 1947, notwithstanding that the amount claimed does not exceed fifty thousand dollars.

(2) Subsection (1) of this section does not apply to or in relation to a trial of any personal action of the kind referred to in subsection (2) of section 50.

s 55 The Court or a District Court Judge has, as regards any action or matter within its or his jurisdiction for the time being, power -

(a) to grant, and shall grant, in the action or matter such relief, redress or remedy, or combination of remedies, either absolute or conditional; and

(b) to make any order that could be made in regard to any action or matter, and shall in each such action or matter give such and the like effect to every ground of defence or counterclaim equitable or legal,

in as full and ample manner as might and ought to be done in the like case by the Supreme Court or a Judge thereof.

B. UNITED KINGDOM

County Courts Act, 1959

s 39 (1) A county court shall have jurisdiction to hear and determine any action founded on contract or tort where the debt, demand or damage claimed is not more than five thousand pounds, whether on balance of account or otherwise:

Provided that a county court shall not, except as in this Act provided, have jurisdiction to hear and determine,-

(a) any action for the recovery of land; or

(b) any action in which the title to any hereditament or to any toll, fair, market or franchise is in question; or

(c) any action for libel, slander, seduction or breach of promise of marriage.

(2) A county court shall have jurisdiction to hear and determine any action where the debt or demand claimed consists of a balance not exceeding five thousand pounds after a set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff, being a set-off admitted by the plaintiff in the particulars of his claim or demand.

s 48 (1) A county court shall have jurisdiction to hear and determine any action for the recovery of land where the net annual value for rating of the land in question is not above the county court limit. (Now one thousand pounds)

. . .

s 51 A county court shall have jurisdiction to hear and determine any action in which the title to any hereditament comes in question, being an action which would otherwise be within the jurisdiction of the court -

(a) in the case of an easement or licence, if the net annual value for rating of the hereditament in respect of which the easement or licence is claimed, or on, through, over or under which the easement or licence is claimed, is not above the county court limit; or

(b) in any other case, if the net annual value for rating of the hereditament in question is not above the county court limit.

s 52 (1) A county court shall have all the jurisdiction of the High Court to hear and determine any of the following proceedings, that is to say:-

(a) proceedings for the administration of the estate of a deceased person, where the estate does not exceed in amount or value the sum of thirty thousand pounds;

(b) proceedings for the execution of any trust or for a declaration that a trust subsists or proceedings under section one of the Variation of Trusts Act, 1958, being (in any case) proceedings where the estate or fund subject, or alleged to be subject, to the trust does not exceed in amount or value the sum of thirty thousand pounds;

(c) proceedings for foreclosure or redemption of any mortgage or for enforcing any charge or lien, where the amount owing in respect of the mortgage, charge or lien does not exceed the sum of thirty thousand pounds;

(d) proceedings for the specific performance, or for the rectification, delivery up or cancellation, of any agreement for the sale, purchase or lease of any property, where in the case of a sale or purchase, the purchase money, or in the case of a lease, the value of the property, does not exceed the sum of thirty thousand pounds;

(e) proceedings relating to the maintenance or advancement of an infant, where the property of the infant does not exceed in amount or value the sum of thirty thousand pounds;

(f) proceedings for the dissolution or winding up of any partnership (whether or not the existence of the partnership is in dispute), where the whole assets of the partnership do not exceed in amount or value the sum of thirty thousand pounds;

(g) proceedings for relief against fraud or mistake, where the damage sustained or the estate or fund in respect of which relief is sought does not exceed in amount or value the sum of thirty thousand pounds.

(2) In all such proceedings as aforesaid the judge shall, in addition to any other powers and authorities possessed by him, have all the powers and authorities for the purposes of this Act of a judge of the Chancery Division of the High Court.

(3) Without prejudice to the generality of the foregoing provisions of this section, a county court shall have jurisdiction (including power to receive payment of money or securities into court) under the enactments set out in the . . . Schedule . . . in the cases respectively mentioned in the . . . Schedule.

s 53 (1) If, as respects any proceedings to which this section applies, the parties agree, by a memorandum signed by them or by their respective solicitors or agents, that a county court specified in the memorandum shall have jurisdiction in the proceedings, that court shall, notwithstanding anything in any enactment, have jurisdiction to hear and determine the proceedings accordingly.

. . .

s 65 (1) Where, in any action or matter commenced in a county court, any counterclaim or set off and counterclaim of any defendant involves matter beyond the jurisdiction of a county court, any party to the action or matter may, within such time as may be prescribed by rules of the Supreme Court, apply to the High Court or a judge thereof for an order that the whole proceedings, or the proceedings on the counterclaim or set off and counterclaim, be transferred to the High Court.

. . .

(2) On any such application the High Court or judge may, as it or he thinks fit, order either -

(a) that the whole proceedings be transferred to the High Court; or

(b) that the whole proceedings be heard and determined in the county court; or

(c) that the proceedings on the counterclaim or set off and counterclaim be transferred to the High Court and that the proceedings on the plaintiff's claim and the defence thereto other than the set off (if any) be heard and determined in the county court:

Provided that, where an order is made under paragraph (c) of this subsection, and judgment on the claim is given for the plaintiff, execution thereon shall, unless the High Court or a judge thereof at any time otherwise orders, be stayed until the proceedings transferred to the High Court have been concluded.

(3) If no application is made under this section within the time prescribed as aforesaid, or if on such an application it is ordered that the whole proceedings be heard and determined in the county court, the county court shall have jurisdiction to hear and determine the whole proceedings, notwithstanding any enactment to the contrary.

s 73 Any jurisdiction and powers conferred on any county court by this or any other Act may be exercised by any judge of the court or, to the extent authorised by this or any other Act or by county court rules, by any registrar of the court.

s 74 Every county court, as regards any cause of action for the time being within its jurisdiction, shall in any proceedings before it -

(a) grant such relief, redress or remedy or combination of remedies, either absolute or conditional; and

(b) give such and the like effect to every ground of defence or counterclaim equitable or legal (subject to the provisions of section sixty-five of this Act);

as ought to be granted or given in the like case by the High Court and in as full and ample a manner.

s 75 A judge shall, whether within a district for which he is judge or not, have jurisdiction in any proceedings pending in any of the courts of which he is judge to make any order or to exercise on an ex parte application any authority or jurisdiction which, if it related to an action or proceeding pending in the High Court, might be made or exercised by a judge of the High Court in chambers.

C. NEW SOUTH WALES

Courts of Petty Sessions (Civil Claims) Act, 1970-1980

s 12 (1) Subject to this Part, a court shall have jurisdiction to hear and determine actions for -

(a) the recovery of any debt, demand or damage, whether liquidated or unliquidated; or

(b) the detention of goods,

in which the amount claimed is not more than $3,000, whether on a balance of account or after an admitted set-off or otherwise.

. . .

(6) For the purposes of this section, the amount claimed in an action for the detention of goods is the amount claimed for the value of the goods together with the amount (if any) claimed for damages for the detention of the goods.

s 19 (1) A court shall not have jurisdiction under this Act in any of the following cases:-

(a) where the validity or effect of any devise, bequest or limitation under any will or settlement, or under any document in the nature of a settlement, is disputed;

(b) actions for passing-off, wrongful arrest, false imprisonment or malicious prosecution, or for or in the nature of defamation, or for seduction or enticement, or for breach of promise of marriage;

(c) actions for infringement of letters patent or copyright;

(d) actions for the detention of goods, where any such action is for the detention of goods comprised in a hire-purchase agreement, by the owner of those goods, or any person acting on his behalf; or

(e) actions in which the title to land is in question.

(2) If the title to land incidentally comes in question in an action, the court shall have power to decide the claim which it is the immediate object of the action to enforce, but the judgment of the court shall not be evidence of title between the parties or their privies in another action in that court or in any proceedings in any court, whether or not it is a court of petty sessions.

Law Reform (Law and Equity) Act, 1972

s 6 Every inferior court shall in every proceeding before it give such and the like effect to every ground of defence, equitable or legal, in as full and ample a manner as might and ought to be done in the like case by the Supreme Court under the Supreme Court Act, 1970.

s 7 This Act does not enlarge the jurisdiction of any court as regards the nature or extent of the relief available in that court, but any court may, for the purpose of giving effect to sections five and six of this Act, postpone the grant of any relief, or grant relief subject to such terms and conditions as the nature of the case requires.

D. VICTORIA.

County Court Act, 1958

s 37 (1) The court shall have jurisdiction to hear and determine -

(a) All personal actions where the amount sought to be recovered is not more than -

(i) in the case of any action where the damages claimed by the plaintiff consist of or include damages in respect of personal injury - $12,000;

(ii) in any other case - $6,000 - whether on balance of account or otherwise;

(b) all personal actions, whether commenced in the County Court or in the Supreme Court, where the amount value or damages sought to be recovered is more than the appropriate sum aforesaid if both parties or their respective solicitors consent thereto in writing;

(ba) all actions against municipalities in respect of loss or injury sustained by persons or property by reason of accidents upon or while using any highway street road bridge ferry or jetty or upon or in or while using any baths or any land or building under the control of the council of a municipality;

(c) all other actions in respect of which jurisdiction is given to the court by this or any other Act.

. . .

s 39 (1) Any action of replevin where the goods seized do not exceed in value $2,000 may be commenced heard and determined at the sittings of the court nearest to the place in which the goods have been distrained.

. . .

s 40 (1) The court shall have jurisdiction to hear and determine any action of ejectment to recover possession of any land where the value thereof does not exceed $500 by the year or where the rent exclusive of ground rent (if any) payable in respect thereof does not exceed $500 by the year.

. . .

s 41 The Court shall have the jurisdiction and exercise all the powers and authority of the Supreme Court in the actions or matters hereinafter mentioned (that is to say):-

(a) In all actions by creditors legatees (whether specific pecuniary or residuary) devisees (whether in trust or otherwise) heirs-at-law or next of kin, in which the personal or real or personal and real estate against or for an account or administration of which the demand may be made does not exceed in amount or value the sum of $2,000.

(b) In all actions for the execution of trusts in which the trust estate or fund does not exceed in amount or value the sum of $2,000.

(c) In all actions for foreclosure or redemption or for enforcing any charge or lien, where the mortgage charge or lien does not exceed in amount the sum of $2,000.

(d) In all actions for specific performance of or for the rectifying delivering up or cancelling of any agreement whatever, where the amount in dispute or the value of the property affected does not exceed the sum of $2,000.

(e) In all proceedings under the Trustee Act 1958 . . . in which the trust estate or fund to which the proceeding relates does not exceed in amount or value the sum of $2,000.

(f) In all proceedings relating to the maintenance or advancement or the appointment of a guardian to the property or person of minors, in which the propery of the minor does not exceed in amount or value the sum of $2,000.

(g) In all actions whether for declaration of partnership or for dissolution thereof or otherwise relating to any partnership and in all proceedings for the winding up of any joint stock or other company created by or registered under any Act of Parliament in which the whole property stock and credits of such partnership or joint stock or other company do not exceed in amount or value the sum of $2,000.

(h) In all actions or proceedings for injunctions or for orders in the nature of injunctions where the same are requisite for granting relief in any matter in which jurisdiction is given by this or any other Act to the court, or for a stay of proceedings at law to recover any debt provable under a decree for the administration of an estate made by the court.

s 42 In all the actions or matters referred to in the last preceding section, the judges shall, in addition to the powers and authorities now possessed by them or conferred upon them by this Act, have all the powers and authorities for the purposes of this Act of the judges of the Supreme Court, and each and every one of them, and the registrars bailiffs and other officers of the court shall in all such actions or matters discharge any duties which an officer of the Supreme Court can discharge either under the order of a judge of such court or under the practice thereof, and all officers of the court shall in discharging such duties conform to the rules.

s 49 The court or a judge shall as regards any action or matter within its or his jurisdiction for the time being have power to grant, and shall grant, in any action or matter, such relief, redress or remedy, or combination of remedies, either absolute or conditional, and shall have power to make any order that could be made in regard to any action or matter, and shall in every such action or matter give such and the like effect to every ground of defence or counter-claim, equitable or legal, in as full and ample a manner as might and ought to be done in the like case, by the Supreme Court or a judge thereof.

APPENDIX III

ENGLISH COUNTY COURT AND VICTORIAN MAGISTRATES' COURT DEFAULT SUMMONS FORMS

County Court (Forms) Rules 1982

County Courts Procedure
SI 1982/586

Coming into operation on September 1, 1982.

SCHEDULE

Default Summons (Fixed) Amount)

(Order 3, rule 3(2)(b)).

Form N1

CASE NO.

[*Royal Arms*]

IN THE COUNTY COURT

PLAINTIFF

SEAL

DEFENDANT

TO THE DEFENDANT

THE PLAINTIFF CLAIMS

	£	p
(see particulars attached)		
Court Fee		
Solicitor's costs		
TOTAL		

This summons was issued on

JUDGMENT MAY BE OBTAINED AGAINST YOU and enforced without further notice UNLESS within 14 days after the service of this summons, you:
Pay the total amount of the claim and costs into Court

or

Send to the Court an admission, defence or counterclim using the attached form.

Address all communications to the Chief Clerk AND QUOTE THE ABOVE CASE NUMBER

THE COURT OFFICE AT

is open from 10 am to 4 pm Monday to Friday.

(Important – For Instructions see below)

GENERAL INFORMATION

(a) If you intend to defend this claim and the court issuing this summons is not your local county court, you may write to the Registrar of the issuing court requesting that the action be transferred to your local county court. You should note, however, that if the action is transferred and you subsequently lose the case the costs against you may be increased.

(b) You can obtain help in completing the attached form at any county court office or citizens' advice bureau.

(c) If you dispute the claim, you may be entitled to legal aid. Information about the Legal Aid Scheme may be obtained from any county court office, citizens' advice bureau, legal advice centre and from most firms of solicitors.

(d) If this summons results in a judgment being entered against you, then if £10 or more remains outstanding one month after the date of judgment, your name and address will be entered in the Register of County Court Judgments. Registration may affect your ability to obtain credit although you may apply to the court for the registration to be cancelled when the judgment has been fully satisfied.

INSTRUCTIONS – WITHIN 14 DAYS AFTER THE DATE OF SERVICE YOU MUST:

1. IF YOU ADMIT OWING ALL THE CLAIM EITHER, pay that amount into court together with the costs shown overleaf OR complete and return to the court the attached form of admission stating your proposals for paying the claim.
   If your offer of payment is accepted you will be sent an order from the court explaining how payments should be made.
   If your offer of payment is not accepted, you will be sent a notice telling you when the court will decide how payment must be made. You may if you wish attend that hearing.
2. IF YOU DISPUTE ALL OR PART OF THE CLAIM, complete and return to the court the attached form of defence stating clearly how much of the claim you dispute and your reasons for doing so.
   If you dispute only part of the claim you should also complete the admission part of the form stating how much you owe and either send that amount with the form or state how you propose to pay.
   If you have paid the amount of the claim since the date of issue of the summons, complete and return to the court the attached form of defence stating the date of payment and pay the costs into court.
   If you enter a defence you may have to attend court. The court will send you notice of hearing.
3. IF YOU HAVE A CLAIM AGAINST THE PLAINTIFF, complete and return to the court the attached form of counterclaim giving details of your claim. If your counterclaim exceeds the claim you may have to pay a fee. The court will notify you of this. Unless the plaintiff admits your counterclaim you will have to attend court to prove it.
4. UNLESS payment of the claim and costs in full is made into court within 14 days after the date of service of this summons you may be liable for additional costs.

METHOD OF PAYMENT

By calling at the Court Office. Payment may be made in cash or by BANKER'S DRAFT, GIRO DRAFT or by CHEQUE SUPPORTED BY A CHEQUE CARD SUBJECT TO THE CURRENT CONDITIONS FOR ITS USE. Drafts and cheques must be made payable to HM PAYMASTER GENERAL and crossed.

PAYMENT OTHERWISE THAN AT THE COURT OFFICE COUNTER DURING OFFICE OPENING HOURS IS AT THE PAYER'S OWN RISK. Remittances to the court by post must be by POSTAL ORDER, BANKER'S DRAFT or GIRO DRAFT only, made payable to HM PAYMASTER GENERAL and crossed. Cheques, giro cheques and stamps are not accepted. Payment cannot be received by bank or giro credit transfer.

This form should be enclosed and postage must be prepaid. A stamped addressed envelope must be enclosed to enable this form, with a receipt, to be returned to you.

N12 Certificate of Service

(Order 7 rule 6(1), (4a) and (2)

Case No.

I certify that the summons of which this is a true copy was served by me on (date)

Service was effected

(a) By leaving it at (posting it to) the address stated on the summons (to be the registered office of the Company).

(b) At the address stated in the summons (or at) by delivering it to the defendant personally (or to apparently not less than 16 years old, who promised to give it to the defendant on the same day or on).

(c) By posting it to the defendant on at the address stated on the summons in accordance with the certificate of the plaintiff or his solicitor.

(d) By posting it to the defendant on pursuant to the certificate at (1) below.

(e) By inserting it, enclosed in an envelope addressed to the defendant, in the letter box at the address stated on the summons for the reasons at (1).

Bailiff/Officer of the Court

(1) I have reason to believe the summons will reach the defendant in sufficient time, because:

Bailiff.

Or I certify that this summons has not been served for the following reasons:

Bailiff/Officer of the Court

APPENDIX III

VICTORIAN MAGISTRATES' COURT DEFAULT SUMMONS

Magistrates (Summary Proceedings) Act 1975

Magistrates' Courts Rules 1976—First Schedule—Form 8 No. D

DEFAULT SUMMONS

In the Magistrates' Court

at

Complainant

Defendant

of

Nature of Complaint

TO THE DEFENDANT

Whereas a complaint has this day been made to the Clerk of the above-mentioned Magistrates' Court in respect of a cause of action for a debt or liquidated demand, the particulars whereof are endorsed hereon or annexed hereto.

TAKE NOTICE—Unless, within 21 days of the day this summons is served upon you, you or your Solicitor give notice of defence, together with particulars of your defence, to the Complainant or his Solicitor and to the Clerk of the above-mentioned Magistrates' Court, an order for the amount claimed, together with costs, may be made against you.

The Complainant's address for service is

to which or at which all notices may be posted or left.

The Complainant alleges that the cause of action herein arose at

Dated at the above-mentioned Magistrates' Court this

Clerk of the Magistrates' Court

If you pay the amount of the claim $ and costs $ to the Complainant or his Solicitor without giving notice of defence you will avoid further costs.

PLEASE READ THE NOTES ON THE BACK OF THIS FORM.

NOTES FOR THE INFORMATION OF THE DEFENDANT

After 21 days of the day on which this summons was served upon you, the Complainant may request that an order be made in his favour.

WITHIN THAT TWENTY-ONE DAY PERIOD THE FOLLOWING PROCEDURES ARE AVAILABLE TO YOU:

(a) YOU MAY PAY THE TOTAL AMOUNT OF THE CLAIM, together with costs. You may then not be liable to pay any further amount arising from this claim;

(b) IF YOU ADMIT THE CLAIM and wish to make arrangements for payment you should contact the Complainant or his Solicitor;

(c) IF YOU INTEND TO DEFEND THE COMPLAINT you must complete, file at the court and serve on the Complainant or his Solicitor the forms—"Notice of Defence and Particulars of Defence". You must detail all material facts upon which you rely for your defence. In due course you will be notified by the Clerk of the Magistrates' Court of the place and date fixed for the hearing.

. If you do not have a solicitor and you are unsure of your rights or the procedures to follow, the Clerk of any Magistrates' Court will assist you.

. In any correspondence relating to this case you must quote the Court reference number shown on the face of this document.

ORDERS	REMARKS

Harston Partridge & Co. Pty. Ltd., Printers, Melbourne MC 03

APPENDIX IV

(QLD) MAGISTRATES COURTS ACT, 1921-1976

Plaint No.

NOTICE OF DEFENCE

(Rule 76)

Filed.....
Fee.....
Receipt.....
Initials.....

In the Magistrates Court of Queensland)
Held at)
Between
of Plaintiff
and
of Defendant

Take notice that the defendant..... intends to defend this proceeding on the following grounds:-

*1.
2.
3.
4.

As regards the allegations of fact made in the plaintiff's particulars of claim -

The defendant admits the following facts:-

5.
6.
7.
8.

and does not admit or denies the following facts [OR denies generally the following allegations]:-

9.
10.
11.
12.

The defendant intends to rely on the following facts to show that the transaction sued on is void [OR voidable] in point of law [OR that the plaintiff's claim is not otherwise maintainable] -

13.
14.
15.

Dated at , this day of , 19

(Solicitor for) Defendant.

The address for service of the defendant is at -

---

*Here state concisely and distinctly a statement of the grounds of defence including special grounds such as tender before action, infancy, statutory grounds, etc.

APPENDIX V

VICTORIAN MAGISTRATES' COURT NOTICE OF DEFENCE AND PARTICULARS OF DEFENCE

Magistrates (Summary Proceedings) Act 1975 F. 491

Magistrates' Courts Rules 1976–First Schedule–Part II–Form 9

No.

NOTICE OF DEFENCE AND PARTICULARS OF DEFENCE

In the Magistrates' Court

at

Complainant

Defendant

of

Nature of Complaint

A. — NOTICE OF DEFENCE

1. The defendant hereby gives notice of his intention to defend the matter of the complaint.

2.* The defendant's Solicitor is .....

whose address is .....

to which or at which all notices and documents may be posted or left

OR

2.* The defendant is not represented by a Solicitor. The defendant's address is .....

.....

to which or at which all notices and documents may be posted or left.

3. A copy of the Summons arising out of the complaint was served upon the defendant on ..... (date).

B. — PARTICULARS OF DEFENCE (Details of material facts relied upon must be given.)

Dated the day of 19

TO: Complainant or his Solicitor
AND
Clerk of the Magistrates' Court

*Defendant
*Defendant's Solicitor

*Delete whichever is inapplicable.

3

APPENDIX VI

SUMMARY OF RELEVANT RECOMMENDATIONS CONTAINED IN THE REPORT ON ADMINISTRATION OF ONTARIO COURTS OF THE ONTARIO LAW REFORM COMMISSION, 1973

PART I

Chapter 1 A PHILOSOPHY OF COURT ADMINISTRATION

1. Ontario should adopt a "systems" approach to court administration based on sound management principles consonant with the administration of justice and not on the traditional judicial model which focuses on the judicial hierarchy and structures authority and lines of communication accordingly. The courts must be regarded as an assembly of interdependent parts forming a complex but unitary whole.

2. The premises underlying a sound approach to court administration are as follows:

   (a) the primary role of judges in our court system is to adjudicate, not to administer;

   (b) the primary goal of the court system is to serve the public; this involves adjudicative decisions which are not only fair and just but made without delay and at reasonable cost and convenience;

   (c) sound court management. . .requires a fair. . .share of financial resources. . ..

4. Court administration should be the primary responsibility of government in order to provide the judges with more time to devote to adjudication. However, administrative decisions of government should never adversely affect the judges' adjudicative processes.

5. Because of the interrelationship of many adjudicative and administrative functions in the court system, court administrative personnel will have to work very closely and maintain a special relationship with the judges. This requires a blending of a management "systems" approach with an indispensable concept of judicial independence to create an efficient professionally-sensitive atmosphere in which judges have the maximum opportunity to adjudicate fairly and wisely.

7. As a further management goal, every civil case should normally be disposed of within one year of the issuing and serving of the writ of summons, petition or claim.

8. Attempts should be made to reduce the cost of court proceedings through the application of management and jurisdictional techniques and the more efficient scheduling of cases to maximise the productive times of judges, lawyers, litigants and witnesses in the system.

9. Court structures, procedures and terminology should be simplified so that the court system will be better understood, utilised and accepted by the members of the lay public.

Chapter 2 A NEW STRUCTURE FOR COURT ADMINISTRATION

10. A Provincial Director of Court Administration should be appointed to be responsible for the overall supervision and direction of all non-adjudicative, administrative aspects of the courts.

11. [He] should report directly to the Attorney General for purely administrative matters but should establish and maintain liaison with the Chief Justices and Chief Judges of the various courts.

13. Answering directly to the Provincial Director will be the Regional Directors of Court Administration and where circumstances dictate, such other officials as the Registrar of the Supreme Court. . . .

14. The appropriate existing administrative personnel will report to the Regional Directors.

16. It should be made clear that to preserve the independence of the judiciary on matters of adjudication, including administrative matters which are regarded by the judges as bearing on adjudication, the judges' wishes must prevail. The Chief Justices and Chief Judges ought to be provided with executive assistants to assist them in the performance of their administrative duties.

18. The duties of the Provincial Director should include the following:

(1) He should develop, organise and direct administrative systems for each class of court in the Province.

(2) He should evaluate the administrative requirements in each class of court and after consultation with the Chief Justice or Chief Judge respectively of the court affected make recommendations for change or improvements to the Attorney General.

(3) He should investigate all complaints regarding the administrative operations of each class of court.

(4) He should consult on a regular basis with the Chief Justice or Chief Judge of each class of court with respect to such matters as the judicial manpower needs, changes in jurisdiction, and methods of scheduling and arranging sittings, and should transmit any recommendations the judges wish to make on these matters to the Attorney General.

(5) He should be responsible for court facilities, particularly courtrooms.

(6) He should oversee the development and operation of a comprehensive statistical reporting system for each class of court throughout the Province and ensure the availability of current management reports on both a province-wide and regional basis.

(7) He should oversee the development, revision and distribution of instruction manuals for use of registrars, court clerks, local administrators, special examiners, court reporters, court

interpreters and court statisticians throughout the Province, and should standardise and keep general oversight of all paper and manpower systems in court offices throughout the Province.

(8) He should develop training programmes for local registrars, County Court clerks, local administrators and court reporters, and should arrange for the administration of these programmes.

(9) In consultation with the respective Chief Justices and Chief Judges he should develop policies and standards regarding hours of court sittings throughout the Province.

(10) He should prepare budgets for the operation and maintenance of the various classes of courts in the Province after consultation with the respective Chief Justices and Chief Judges and should oversee the maintenance of budgetary and fiscal control.

(11) He should conduct a continuing examination and evaluation of court facilities and equipment and stay abreast of technological improvements in court and office equipment for potential application in the system.

(12) He should develop a public information facility so that the public might be better informed about the operation of the courts.

(13) He should be responsible for court reporting in all courts throughout the Province, directing the work of court reporters and keeping abreast of developments in electronic reporting techniques.

(14) He should oversee the hiring, employment and job assignment of all court personnel.

(15) He should continually evaluate the administrative operations of the courts, and oversee the conduct of studies to project the likely impact on the courts of legislative changes, and develop new administrative procedures and keep abreast of developments in court administration in other jurisdictions.

25. An Attorney General's Advisory Committee on Court Administration should be established composed of:

(a) the two Chief Justices and all the Chief Judges;

(b) the Deputy Attorney General;

(c) the Deputy Minister of Government Services;

(d) the Provincial Director of Court Administration;

(e) four members of the legal profession, two active in civil litigation and two active in criminal litigation; and

(f) lay representatives.

The Committee should be responsible for monitoring the operations of the courts and making recommendations for long term planning. It should report annually and at such other times as the Attorney General should request or the Committee should decide. The annual report should be required by statute to be tabled in the Legislature.

Chapter 5 THE COUNTY AND DISTRICT COURTS

67. A policy should be adopted under which County Court clerks would be legally trained.

68. Where persons with legal qualifications are appointed as County Court clerks, they should be given extended responsibilities with jurisdiction to deal with minor adjudicative matters arising in the County Court in a way that is similar to the functions of the Master of the Supreme Court.

Chapter 6 MOTIONS IN COURT AND CHAMBERS

72. The Judicature Act should be amended to abolish the present distinction between court and chambers.

73. All motions or applications heard by a judge should be required to be heard in open court (with one specified exception).

74. The hearing of motions or applications by the Master should be open to the public (with one specified exception).

77. The Judicature Act should be amended to provide that nothing in the Rules made thereunder should be construed to deprive the court of any power it may have apart from the Rules, either inherent, statutory or otherwise, to hear matters in the absence of the public.

Chapter 9 COURT VACATIONS

99. Fixed court vacations should no longer remain as an inflexible rule entrenched in the law.

102. Small Claims Courts should be available 12 months a year except in the smaller trial centres where it is more convenient, economic and efficient to transfer trials to neighbouring trial centres during particular periods.

Chapter 10 CASE SCHEDULING AND TRIAL LISTS IN THE HIGH COURT AND COUNTY AND DISTRICT COURTS

110. At the time a case is set down for trial, counsel should be required to provide those responsible for case scheduling with the number of witnesses to be called and an estimate of the length of time required for the hearing of the case.

111. Projections of settlement and adjournment rates in the courts should be developed.

112. Counsel should be required to inform the court by telephone immediately on the settlement or likely settlement of any case on the ready list, and to inform the court as soon as possible of his intention to request an adjournment.

PART III

Chapter 1 THE MASTER'S OFFICE

245. There should be a definite programme of appointing legally qualified local registrars, particularly in the larger centres and conferring on them many of the duties now performed by the County Court judges as local masters, official referees and in a persona designata capacity.

Chapter 2 THE RULES COMMITTEE UNDER THE JUDICATURE ACT

246. A thorough re-examination of the principles and policies upon which the Rules of Practice are based and an evaluation of individual rules against that background should be undertaken.

247. The review of the Rules should comprehend a weighing of the expense to litigants of the prescribed procedures against their convenience, efficiency and social purpose.

248. The Rules Committee should be provided with a permanent secretariat with power to appoint staff as required and with the responsibility for conducting an ongoing review of the Rules.

250. The chairman of the secretariat should have the responsibility for conducting research at the direction of the Committee and preparing documentation and draft legislation for its consideration.

251. A task force should be appointed on the recommendation of the Rules Committee to undertake the initial review and re-examination of the Rules.

252. For the duration of the study the members of the task force should be ex officio voting members of the Rules Committee and the chairman of the Rules Committee secretariat should be an ex officio member of the task force.

253. The Attorney General or Deputy shall be a member of the Rules Committee.

Chapter 3 COURT INTERPRETERS

254. A centralised inventory of court interpreters should be established on a regional basis. Each Regional Director of Court Administration should maintain an open list of persons in the area who are qualified and available to act as court interpreters from which interpreters could be drawn when required. This should not preclude each court from maintaining its own list of available interpreters who meet required qualifications. This recommendation is designed to facilitate securing the services of court interpreters when these are required, by providing a current inventory of available personnel. The maintenance of such a list should provide some measure of control over the standard of interpretation services.

256. In civil cases the responsibility for securing the attendance of an interpreter should rest primarily with the parties.

258. Training programmes should be established for court interpreters to ensure their bilingual competence and instruct them in courtroom procedures and proper standards of practice.

259. In addition to the training programmes for court interpreters an Instructional Guide should be prepared by the Provincial Director of Court Administration and made available to all court interpreters, whether they act in criminal or civil cases. The Instructional Guide should include the following matters:

1. A brief introductory statement setting out the need for court interpreters in a multi-lingual community.

2. A description of the court structure.

3. A brief statement of the "right" of a party or witness to the assistance of an interpreter, a description of the adversary process, and a short explanation of the purpose of the rules of evidence.

4. A discussion of courtroom procedure, as well as courtroom decorum and discipline.

5. A full discussion of the function and duties of a court interpreter. Emphasis should be given to the requirement for interpreters to give a literal translation of the evidence and not to draw their own inferences from what has been said. The Guide should make it clear that the interpreter is to tell the Court exactly what he has said to the witness, and that he is to translate each answer of the witness separately and exactly as it was given; he is not an advocate, nor must he attempt to advise the witness on any matter.

6. A Code of Ethics for court interpreters.

260. Friends and relatives of a party or witness should be permitted to act as interpreters in cases where no other interpreter is available and counsel raises no valid objection.

261. There should be an upward revision of the fee structure for interpreters fixed by statutory authorisation.

Chapter 6 THE PRE-TRIAL CONFERENCE IN CIVIL CASES

286. The adoption of rules governing pre-trial conferences is worthy of consideration. The initiative for conducting research to evaluate its effectiveness should come from the judiciary and the profession.

287. If the pre-trial conference is introduced, it should not be conducted in any case by the judge who will preside at the trial. No procedures should be introduced which would have the effect or appearance of interfering with the proper role of the judiciary.

Chapter 9 COURT ACCOMMODATION

310. It is essential that all court facilities should not only be adequate for an orderly and dignified administration of justice but they should be such as to reflect respect for the rule of law in the community.

311. A professional in court architecture should be appointed to advise the Provincial Director or Court Administration on planning and design of facilities and to act as liaison with the Ministry of Government Services.

312. He should stay abreast of developments in other jurisdictions, study reports of inspection juries, assist in establishing priorities for improvements in all courts, and develop qualitative standards for court houses for the approval of the Attorney General.

Chapter 10 PAPER AND MANPOWER SYSTEMS

314. Studies should be undertaken without delay by management consultants and systems analysts of the paper systems of the administrative offices of the court system with a view to:

(a) promoting uniformity of forms and practices throughout the Province; and

(b) constructing models in all courts to provide standards for maximum proficiency in paper flow and more economical utilisation of manpower.

APPENDIX VII

SUMMARY OF RELEVANT PROPOSALS OF THE LAW REFORM COMMISSION OF NEW SOUTH WALES IN ITS WORKING PAPER ON THE COURTS, 1976, RELATING TO COURT ADMINISTRATION

1. A State Court Administrator should be appointed responsible for all aspects of court administration so far as they affect the Supreme Court, the District Court and Courts of Petty Sessions.

2. Court administration so far as it concerns these courts should be unified.

3. New committees should be constituted as follows -

   (a) The Jurisdiction Committee - to review the jurisdictional limits of the courts.

   (b) The Criminal Courts Rule Committee - to prescribe procedure in the criminal courts.

   (c) The District Court Rule Committee - reconstituted, to replace the existing de facto committee.

   (d) The Petty Sessions Courts Rule Committee - to prescribe procedure in non criminal matters before magistrates.

   (e) The Courts Administration Committee - to review the administration of the courts.

4. The jurisdiction of the Supreme Court, the District Court and Courts of Petty Sessions should, so far as possible be restated in one statute. Any future alterations to the jurisdictional limits so stated should, with certain stated exceptions, be by proclamation.

5. Court procedure should, so far as possible, be prescribed by rule of court and not by statute.

6. There should be more extensive rights and powers in relation to the transfer of matters from one court to another court of different jurisdiction.

The State Court Administrator should -

(a) evaluate continuously the efficiency of the administrative operations of the courts;

(b) project the likely impact on such administrative operations of any legislative and other changes and develop new administrative procedures to cope therewith;

(c) review regularly available accommodation and make such recommendations to the Court Administration Committee as may be necessary in respect thereof with particular reference to future accommodation needs;

(d) submit, or oversee the submission, to the Public Service Board of such recommendations as to staff requirements as may be necessary;

(e) prepare budgets for the operation and maintenance of the court system and oversee the maintenance of budgetary and fiscal control;

(f) submit appraisals of the technological improvements in court and office equipment that might usefully be applied in the court system;

(g) oversee court reporting and recording within the State court system, making use of new developments where these are appropriate;

(h) establish procedures for and oversee the management of the jury system;

(i) oversee the development and operation of a comprehensive statistical reporting system and the preparation and distribution of court management reports;

(j) develop and arrange for the administration of training programs for court staff.

APPENDIX VIII

THE RELATIONSHIP BETWEEN THE COURTS AND THE PEOPLE - RECOMMENDATIONS OF THE ROYAL COMMISSION ON THE COURTS, NEW ZEALAND, 1978, RELEVANT TO LOCAL COURTS IN WESTERN AUSTRALIA

1. In a prominent place in the entrance to every court building there should be an information desk, manned from 9 am each morning.

2. Uniforms should be worn by court reception staff.

3. Special training programmes in public relations should be provided for court staff.

4. Participation of members of voluntary social welfare groups in the work of the courts is commended and should be encouraged.

5. As much information as possible about their rights should be available and placed in the hands of people coming to court.

6. Educational programmes need to be developed for school children and the general public on the structure and function of the . . . courts.

7. The present practice of calling everyone to court at 10 am should be reviewed and a greater flexibility introduced, where possible, by allotting varying times for fixtures during the day.

8. The Judicial Commission should keep under review public demand for court hearings outside normal sitting hours.

9. In the larger centres, arrangements should be made for a cashier to be on duty at the court office one evening a week (preferably Thursday) to receive payment of monies owing.

10. Interpreters' and translators' skills should be recognised as an additional qualification for an administrative career in the Courts Division of the Department of Justice; these skills to be reflected in salary scales and promotional prospects. Interpreters should be recruited and trained in court procedures and legal terminology, and should be able to provide an accurate translation between English and the other language and vice versa.

15. The oath or affirmation should be administered clearly and deliberately so that the person taking the oath or affirming is aware of the seriousness of the undertaking he has given.

16. The use of plain English is to be encouraged in court. Wherever possible, charges should be framed in simple language.

18. Fees for witnesses, jurors, and interpreters should be kept under regular review.

20. Buildings:

(a) Court building design should be constantly under review. Where delay occurs between the design and construction stage, building should not proceed until investigation determines that the design is as relevant to the current requirements of the court, as when it was first conceived.

(b) Comments on the design should be sought, at an early stage of the planning, from the users of the court buildings.

(c) The comfort and convenience of staff and the public should be given proper emphasis in new court building design.

(d) A building programme should be drawn . . . with the objective of up-grading or replacing . . . court buildings.

Up-grading should include provision of:

(i) adequate reception facilities in all court buildings;

(ii) information boards, large and distinctive enough to attract attention, giving the lay-out of each floor, with the position of the courts and facilities thereon (multi-lingual where necessary);

(iii) adequate toilets and washrooms for staff, lawyers, jurors, litigants, and witnesses, with access for disabled persons;

(iv) redesigned witness-boxes to allow for the witness (and an interpreter where necessary) to sit; also a place for spreading papers and documents;

(v) public telephones;

(vi) interview rooms;

(vii) better office accomodation to reduce overcrowding and poor working conditions;

(viii) better waiting areas;

(ix) ramps to all courtrooms to allow access of disabled persons and book trolleys;

(x) better lighting, heating, and airconditioning where necessary.

New buildings should include all of the above, as well as the following features:

. . .

(iv) adequate interview rooms for duty solicitors, other lawyers, probation and welfare officers;

(v) comfortable waiting areas with sufficient space for litigants, witnesses, and others, to have a degree of privacy;

(vi) good courtroom acoustics.

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LOCAL COURT PROCEDURE

CAUSE OF ACTION ARISES, MUST BE WITHIN JURISDICTION OR BY CONSENT
(Time for action fixed by Statute (usually Limitation Act))

If P files summons for recovery of possession of land, summons requires D to attend on hearing on date fixed by summons. The summons may include claims for rent or mesne profits. Must be filed in court nearest land. A plaint or file number is given.

P = plaintiff
D = defendant

If P files a summons other than for recovery of land the summons will require D to file a Notice of Defence within a certain time or to confess the claim. The summons does not fix a date for hearing. P may file the summons in any Local Court. A plaint or file number is given.

Service of Summons. Method of service prescribed by Act and Rules. (Provision for service by post and for substituted service in some cases). Prima facie evidence of service may be by affidavit.

Service of Summons. Method of service prescribed by Act and Rules. (Provision for service by post and for substituted service and for service by affixing to premises in some cases.)

D may file Notice of Defence. If relying on "Special Defence" or counterclaim particulars must normally be provided at this point.

If D does not file Notice of Defence within time allowed from service

If D files confession of debt

D may also lodge Objection to Jurisdiction. P is then given opportunity to justify choice of court. The Clerk of original Court may transfer proceedings to Local Court nearest D's residence or place of business.

If claim is for debt or for liquidated demand or for pecuniary damages not exceeding $500 in motor vehicle damage claims (otherwise $300) P may enter JUDGMENT

If confession is for whole of claim P obtains JUDGMENT

ENFORCEMENT

ENFORCEMENT

If claim is for pecuniary damages exceeding $500 in motor vehicle damage claims (otherwise $300) P obtains JUDGMENT subject to assessment of damages.

If confession is for part of claim only, with notice of defence as to balance

If confession is for part of claim only but with no notice of defence as to balance P may go to ⊙

Note: Special provisions for replevin actions: Part V.

May be set aside upon application by D showing grounds. If so D goes to ⊙

Notice of hearing sent to parties by court.

Interlocutory Proceedings such as particulars of further particulars of claim or defence, third party action, discovery or interrogatories may be entered into, either before or after P applies to list for trial.

Judgment may be set aside and/or Interlocutory Proceedings may be entered into

If P accepts he obtains JUDGMENT for that amount only

If P rejects he may go to ⊙

P may apply for summary judgment under s 47A if claim is for debt or liquidated demand

Defendant to claim or counterclaim may make payment into court with or without denial of liability

ENFORCEMENT

P or D may file application to list for trial. Notice of hearing sent to parties by Court.

Note: Special Provisions: Part VI.

If P's application succeeds P obtains JUDGMENT (Cannot be set aside)

If P's application fails P may file application to list for trial. Notice of hearing sent to parties by Court.

Defendant to claim or counterclaim may make payment with or without denial of liability

ENFORCEMENT

Interlocutory Proceedings may be entered into.

Defendant to claim or counterclaim may make payment into court with or without denial of liability.

TRIAL AND JUDGMENT
(usually including taxation of costs)

NOTE: SPECIAL PROVISIONS RELATING TO ACTIONS FOR RECOVERY OF POSSESSION OF LAND: PART VI. ALSO POWER TO REFER TO ARBITRATION BY CONSENT OF PARTIES - s 92.

ENFORCEMENT

APPEAL TO DISTRICT COURT JUDGE

NEW TRIAL MAY BE ORDERED BY LOCAL COURT - s 90.

APPEAL TO FULL COURT OF SUPREME COURT
(With leave of Supreme Court Judge)