THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 55 Part II

Review of The Justices Act 1902-1982 Constitution, Powers And Procedure of Courts of Petty Sessions

DISCUSSION PAPER

JUNE 1984

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

The Commissioners are -

Mr H H Jackson, Chairman
Mr P W Johnston
Mr C W Ogilvie
Dr J A Thomson
Mr D R Williams, QC

The officers are -

Executive Officer and Director of Research –

Dr P R Handford

Research Officers -

Mr M G Boylson
Mr R W Broertjes
Mr A A Head

Consultants

During the course of preparation of this paper, the Commission consulted a number of persons with expertise in order to ensure that the paper accurately reflected the current practice of Courts of Petty Sessions and raised issues of practical concern. The following lists the names of those who acted as honorary consultants or otherwise assisted the Commission.

P Ayling	-	Police Superintendent
E W Dwyer	-	Assistant Clerk of Courts, Midland
T J Farrar	-	Justice of the Peace
M R Hall	-	Barrister and Solicitor

Sir Clifford Grant	-	Chief Stipendiary Magistrate
R E L Greaves	-	Barrister
D J Grose	-	Inspecting Clerk of Courts
V J Jones	-	Probation and Parole Supervisor
S J Macliver	-	Director, Aboriginal Legal Service
D P Manea	-	Administrative Officer, Courts, Crown Law Department
I G Martin, SM	-	Chairman of the Chief Stipendiary Magistrate's Committee on Legislative Reform
H McLernon	-	Barrister, then Chairman of the Law Society's Courts Committee
H E Newby	-	then Senior Tutor, Law School, University of Western Australia
L W Roberts-Smith	-	Director of Legal Aid, Legal Aid Commission of Western Australia
K W Sheedy	-	Clerk of Petty Sessions, Perth

The Commission is most grateful for their assistance. The views expressed in the paper do not of course necessarily reflect those of the people listed.

Commission's address

The Commission's offices are on the 16th Floor, St Martins Tower, 44 St George's Terrace, Perth, Western Australia, 6000. Telephone: 325 6022.

CONTENTS

PART III: COURTS OF PETTY SESSIONS

CHAPTER 3

PART IV: SUMMARY PROCEEDINGS

CHAPTER 4 - COMMENCEMENT OF PROCEEDINGS

CHAPTER 5 - MATTERS PRELIMINARY TO THE HEARING

CHAPTER 6 - THE HEARING

PART V: SUMMARY PROCEEDINGS AND MENTALLY DISORDERED PERSONS

CHAPTER 8

PART VI: INDICTABLE OFFENCES

CHAPTER 9

PART VII: PREVENTIVE JURISDICTION

CHAPTER 10

PART VIII: UNREPRESENTED DEFENDANTS

CHAPTER 11

PART IX: QUESTIONS AT ISSUE

PREFACE

The Law Reform Commission of Western Australia has been asked to review the *Justices Act 1902-1982*.

Scope of this paper

This paper deals with the provisions of the *Justices Act* relating to -

(a) justices of the peace (Part II);
(b) the constitution, composition and jurisdiction of Courts of Petty Sessions (Part III);
(c) the procedure for dealing with complaints of simple offences (Part IV);
(d) preliminary proceedings for indictable offences (Part VI); and
(e) the preventive jurisdiction of Courts of Petty Sessions (Part VII).

The Commission also considers -

(a) whether special provisions ought to be enacted dealing with unrepresented defendants in Courts of Petty Sessions (Part VIII); and
(b) the powers of Courts of Petty Sessions to deal with a defendant who comes before them suffering from mental disorder (Part V).

Having already reported on the provisions relating to appeals, bail and the retention of court records,[1] only one other part of the *Justices Act* is yet to be considered, namely the enforcement of orders under the Act. This matter has been deferred to enable the Commission to take into account decisions by the Government on the recommendations as to enforcement of orders contained in section VI of the Report of the Committee of Inquiry into the Rate of Imprisonment.[2] If necessary, the Commission will then issue a separate discussion paper on the topic.

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1 *Review of the Justices Act 1902: Part I -Appeals (1979), Bail (1979) and Retention of Court Records (1980).*

2 The report was submitted in 1981. It is hereinafter cited as "the Dixon Report".

Preliminary submissions and consultants

In order to help identify problems in the operation of the *Justices Act*, the Commission by means of advertisements in newspapers invited preliminary submissions from interested persons. Responses included those from a number of stipendiary magistrates, The Law Society of Western Australia and solicitors. Their comments have been taken into account in drafting this paper. The Commission expresses its thanks to all those concerned.

Comments invited

The Commission welcomes comments, with reasons where appropriate, on all or any issues raised in this paper or on any other matter coming within the Commission's terms of reference.[3] These comments may be made in writing, orally or by completing the accompanying Questionnaire. The Commission requests that comments be forwarded by 2 November 1984.

Unless advised otherwise, the Commission will assume that comments are not confidential and that the commentator agrees to the Commission quoting from or referring to the comments, in whole or part, and to the comment being attributed to him or her. The Commission emphasises, however, that any desire for confidentiality or anonymity will be respected.

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[3] The research material on which the paper is based will, upon request, be made available to any interested person at the offices of the Commission.
The paper is based on material available to the Commission in Perth on 25 June 1984.

PART I: INTRODUCTION
CHAPTER 1

1. THE PURPOSES OF THE JUSTICES ACT 1902-1982

1.1 The *Justices Act 1902-1982* ("the Justices Act") regulates a number of matters. Those matters considered in this paper are concerned with -

(i) the appointment, jurisdiction and protection of justices of the peace;
(ii) the procedure to be followed in dealing with people charged with offences triable summarily in Courts of Petty Sessions;
(iii) the procedure to be followed in conducting preliminary proceedings where a person has been charged with an indictable offence;
(iv) the procedure for dealing with applications for orders to keep the peace.

As pointed out in the Preface, the Commission has already reported on certain other provisions of the Act, namely, appeals from decisions of justices, bail and retention of court records. Consideration of the part of the Act dealing with the enforcement of orders has been deferred for the time being.

2. THE ROLE OF COURTS OF PETTY SESSIONS

1.2 The term "petty sessions" originated in England and was used to refer to the jurisdiction of justices of the peace to deal summarily with offences outside the normal quarterly meetings of justices of a county which heard charges for the more serious offences, that is, indictable offences.[1] Petty sessions came to be recognised by various statutes which conferred on those sessions of two or more justices power to inflict penalties for breaches of statutes.[2] Quarter Sessions were also held in Western Australia until 1861 when the Supreme Court was established.[3] The term "petty sessions" was adopted in Western Australia, as it had been in England, to refer to the summary jurisdiction of justices.

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1 W J V Windeyer, *Lectures on Legal History* (2nd ed, 1957), 133. A K R Kiralfy, *Potter's Historical Introduction to English Law* (4th ed, 1958), 229.

2 W K A Allen, *The Justices Acts of Queensland* (3rd ed, 1956), 52-54 (hereinafter cited as "Allen" and W Holdsworth, *A History of English Law* (7th ed, 1971) ed by A L Goodhart and H G Hanbury, Vol 1, 293-294.

3 A C Castles, *An Australian Legal History* (1982), 296-297 and 300-301.

1.3 In Western Australia Courts of Petty Sessions deal with charges of simple offences against adults,[4] such as traffic offences and drunkenness or disorderly behaviour. These courts also deal with indictable offences triable summarily, such as assault and theft. They also conduct preliminary proceedings relating to indictable offences which are not triable summarily, or on which the defendant has an election and elects to be dealt with on indictment. Apart from these criminal matters, Courts of Petty Sessions also have jurisdiction to deal with a range of administrative and licensing matters.

1.4 Courts of Petty Sessions are held in a large number of towns throughout Western Australia, including those as remote as, and as small as, Eucla and Halls Creek. The wide availability of these courts enables charges for lesser offences to be disposed of more speedily and conveniently for those involved than if they had to be dealt with at a regional centre.

1.5 Courts of Petty Sessions deal with the great bulk of charges disposed of by courts in Western Australia. In 1981, for example, 99,392 convictions were recorded by Courts of Petty Sessions. By comparison, the Supreme and District Courts recorded 1,759 convictions.[5] The system is able to cope with this large number of cases because most defendants plead guilty.[6] In most instances, therefore, the judicial officer's major responsibility is to impose the appropriate penalty.

1.6 Courts of Petty Sessions may be presided over by a stipendiary magistrate or by two or more justices of the peace or, in certain circumstances, by a single justice. The only survey[7] covering the whole State which provides information on the respective role of these judicial officers indicates that stipendiary magistrates deal with the bulk of charges (according to the survey they were responsible for 82.35% of convictions recorded during September 1979) with a lesser role being played by two or more justices (13.85% of such convictions) or a single justice (3.80% of such convictions).

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4 Other courts, Children's Courts, have exclusive jurisdiction to hear and determine a complaint of an offence (other than wilful murder, murder, manslaughter or treason) alleged to have been committed by a person under the age of 18 years: *Child Welfare Act 1947 -1982*, s 20. The provisions of the *Justices Act* apply to hearings in Children's Courts: id, s 143.

5 [1983] *Western Australian Year Book*, 247-248. A further 17,538 convictions were recorded by Children's Courts: ibid.

6 In one survey, pleas of not guilty accounted for only 11.6% of cases in which a plea was required: H E Newby and M Martin, *Aborigines and the Criminal Law*: *A Study of Summary Criminal Courts in Two Country Towns in SW Australia*, 53rd ANZAAS Congress (Perth, 1983), 12. Hereinafter cited as "Newby and Martin".

7 Para 2.16 below.

1.7 Justices nowadays rarely, if ever, hear defended cases. Where a defendant pleads not guilty before justices, they nearly always adjourn the case so that the trial can be conducted by a stipendiary magistrate. Although stipendiary magistrates also deal with the bulk of charges where the defendant pleads guilty, they tend to hear a greater percentage of charges in the Perth metropolitan region and in the country centres in which they reside.[8] Although they visit other towns,[9] there is a greater likelihood that guilty pleas in these towns will be dealt with by justices.[10]

3. THE COMMISSION'S APPROACH

(a) Time for review

1.8 The existing *Justices Act* is the result of the consolidation in 1902 of a number of earlier Acts,[11] together with 32 amendments, some substantial, made in the 82 years since then. A significant feature of the legislation is the emphasis given to the role of justices, although stipendiary magistrates now play the major part, as paragraphs 1.6 and 1.7 above show. A thoroughgoing review of the legislation as a whole, including the respective roles of justices and stipendiary magistrates as reflected in that legislation, now seems overdue.

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8 Albany, Broome, Bunbury, Carnarvon, Derby, Geraldton, Kalgoorlie, Narrogin, Northam and Port Hedland.

9 Approximately 54 other towns are visited by stipendiary magistrates on a periodic basis.

10 Newby and Martin, 10.

11 The most important of these were three Acts enacted in Western Australia in 1850. The first (14 Vict No 1) made provision for the protection of justices for acts done in the execution of their duties. Equivalent provisions are now contained in Part IX of the *Justices Act*. The second (14 Vict No 4) made provision for preliminary hearings before justices where a person was charged with an offence triable on indictment, that is, before a jury. The existing procedure in the *Justices Act* in this regard is discussed in Chapter 9. The third Act (14 Vict No 5) laid down the procedure to be followed in dealing with people charged with offences triable summarily. The existing procedure relating to this matter, which is contained in Parts IV and VI of the *Justices Act*, is discussed in Chapters 4, 5, 6 and 7.
The three Acts were based on three English statutes, the *Justices Protection Act 1848* (11 & 12 Vict, c 44), the *Indictable Offences Act 1848* (11 & 12 Vict, c 42) and the *Summary Jurisdiction Act 1848* (11 & 12 Vict, c 43), which were known as the "Jervis Acts" after Sir John Jervis, the then Attorney General. They were introduced to provide a uniform practice and procedure for dealing with offences triable summarily. The reforms were regarded as long overdue because:

> "While the administrative duties of the justices had declined, their criminal business had burgeoned. The statutory extensions of summary jurisdiction...had continued unabated, and pressure on all courts had been increased by the steady rise in criminal prosecutions which had gone hand in hand with the increase in the population and more efficient law enforcement brought about by the 'new police'" : D Freestone and J C Richardson, *The Making of English Criminal Law (7) Sir John Jervis and his Acts* [1980] Crim LR 5, 15.

(b) Major policy issues

1.9 The paper discusses a number of important policy questions, as follows -

(a) What should be the role of justices in Courts of Petty Sessions?

(b) Should oral preliminary hearings of indictable offences be abolished?

(c) Should Courts of Petty Sessions have additional powers to deal with mentally disordered defendants?

(d) Should special procedures be established to deal with unrepresented defendants?

(e) Should express provision be made for pre-trial hearings in appropriate cases and what information should be disclosed before the hearing by the prosecution and the defence?

(c) Minor matters

1.10 Although many of the other matters considered below deal with points of comparative detail, taken together they could involve a significant recasting of procedures and powers of Courts of Petty Sessions.

(d) Assumptions

1.11 The Commission has assumed that fundamental concepts underlying the criminal justice system, such as its adversarial nature, and the onus and standard of proof, will remain unchanged.[12] Within this general framework, the Commission considers that -

* Although simplicity in procedure is a desirable goal, it should not be at the expense of fairness, and in particular -

(a) the procedure should ensure that a defendant receives sufficient information about the charge to ensure that he can make an informed decision about the plea to enter;

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12 But see paras 6.45 to 6.50 below as to the onus of proof in some cases.

(b) special procedures may be required to facilitate the disposition of some charges, particularly those of a more serious or complex nature such as certain charges under the Companies (Western Australia) Code.

* Any uncertainty concerning the procedure and powers of Courts of Petty Sessions should be identified and removed.

(e) Implementation

1.12 The changes contemplated in this paper could be implemented by a single Act dealing both with the jurisdiction and composition of the court[13] and its procedure or, as in Victoria, by two Acts, one dealing with the jurisdiction and constitution of the court and the other dealing with procedure.[14] In either case, separate provision could be made for matters relating to the appointment, termination of appointment and protection of justices of the peace as has been done in Queensland and New Zealand.[15]

4. OTHER JURISDICTIONS

1.13 The Commission has carried out a comparative study of the law elsewhere in Australia and in New Zealand, England and the Canadian Province of Ontario. The provisions in these jurisdictions, particularly those of England and Australia, are based on or developed from the *Jervis Acts*[16] and consequently have many common features.[17] They are referred to below when they may provide a basis for reforming the law in Western Australia.

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13 Paras 3.3 to 3.6 below discuss the possibility of amalgamating Courts of Petty Sessions and Local Courts.

14 *Magistrates' Courts Act 1971-1983* (Vic) and *Magistrates (Summary Proceedings) Act 1975-1984* (Vic).

15 *Justices of the Peace Act 1975* (Qld); *Justices of the Peace Act 1957-1979* (NZ).

16 See footnote 11 to para 1.8 above.

17 The following are the main Acts which have been studied -

South Australia:	*Justices Act 1921-1983* (the "South Australian Justices Act" or "(SA) Justices Act");
Tasmania:	*Justices Act 1959-1983* (the "Tasmanian Justices Act" or " (Tas) Justices Act");
Victoria:	*Magistrates' Courts Act 1971-1984* (the "Victorian Magistrates' Courts Act" or "(Vic) Magistrates' Courts Act"); *Magistrates (Summary Proceedings) Act 1975- 1984* the "Victorian Summary Proceedings Act") or "(Vic) Summary Proceedings Act");
New South Wales:	*Justices Act 1902-1983* (the "New South Wales Justices Act" or "(NSW) Justices Act");
Queensland:	*Justices Act 1886-1982* (the "Queensland Justices Act" or "(Qld) Justices Act"); *Justices of the Peace Act 1975*;
Australian Capital Territory	*Court of Petty Sessions Ordinance 1930- 1982* (the "ACT Ordinance" or "(ACT) Ordinance");

Northern Territory of Australia	*Justices Act 1928-1984* (the "Northern Territory Justices Act" or "(NT) Justices Act");
New Zealand	*Summary Proceedings Act 1957-1982* (the "New Zealand Summary Proceedings Act" or "(NZ) Summary Proceedings Act");
England:	*Magistrates' Courts Act 1980-1982* (the "English Magistrates' Courts Act" or "(Eng) Magistrates' Courts Act");
Ontario	*The Provincial Offences Act 1979* (the "(Ont) Provincial Offences Act").

PART II: JUSTICES OF THE PEACE
CHAPTER 2

1. INTRODUCTION

2.1 The office of justice of the peace dates back to 1195. It seems that the office of keeper or conservator of the peace was created by the King as part of his struggle to extend his control over the country, and in particular, over local sheriffs.[1] Keepers or conservators of the peace, who became known as justices of the peace from about 1363, exercised both administrative and judicial functions.[2] This was also the position in the early years of Western Australia.[3] In addition to conducting summary trials of minor offences they conducted Quarter Sessions in which serious crimes were tried with a jury. They also controlled the local police constables until a single police force was created under the control of the Mounted Police Superintendent. So far as civil administration was concerned they carried out the administrative instructions of the Government and were responsible for licensing public houses.[4] Although justices of the peace in Western Australia continue to exercise administrative functions their responsibilities in this area have been greatly reduced, being largely in the hands of local authorities, corporations, commissions and Government departments. Their judicial role has also become increasingly limited. Courts of superior jurisdiction such as the Supreme Court and the District Court (the "higher courts") exercise authority with regard to more important judicial matters, and although justices of the peace still retain legal authority to conduct summary trials and preliminary hearings in relation to indictable offences, in practice these matters are dealt with almost exclusively by stipendiary magistrates.[5]

2.2 The main functions of justices of the peace at the present time are -

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1 W Holdsworth, *A History of English Law* (7th ed 1971) ed by A L Goodhart and H G Hanbury, Vol 1, 286-287.

2 Id, 288. For a general history of justices in England see E Moir, *The Justice of Peace* (1969).

3 A C Castles, *An Australian Legal History* (1982), 298, 306-308.

4 E Russell, *A History of the Law in Western Australia and its Development From 1829 to 1979* (1980), 54-55.

5 Para 2.2(4) below. This may be contrasted with the position in England where justices still play a major role in conducting trials. However, justices in England have the assistance of legally qualified clerks of courts.

(1) **Taking affidavits**: A number of Acts provide that an affidavit may be sworn before a justice of the peace.[6] (Affidavits may also be sworn before commissioners for affidavits.)

(2) **Taking statutory declarations**: Justices of the peace, together with a large number of other people (including commissioners for declarations, clerks of local authorities, State and Commonwealth public servants, school teachers and police officers) are authorised to take statutory declarations.[7]

(3) **Receiving complaints, issuing summonses and warrants and granting bail**: Justices of the peace have authority under the *Justices Act* to receive complaints and issue summonses and warrants. They also have authority to issue warrants under a number of other Acts including the *Criminal Code* (a search warrant),[8] the *Police Act 1892-1983* (a search warrant)[9] and the *Absconding Debtors Act 1877-1965* (a warrant of arrest).[10]

Where a person has been arrested and the police have refused to grant bail or have no authority to grant bail,[11] the defendant may ask to see a justice who may grant bail. At the Central Police Lock-up in Perth a justice is in attendance on roster each day except Sunday for this purpose.[12]

The Bail Act 1982 (which is not yet in force) expressly empowers a justice to grant bail following an arrest.[13]

(4) **Conducting hearings under the Justices Act**: Justices of the peace have various functions under the *Justices Act*, including conducting summary trials and preliminary proceedings in relation to indictable offences. In fact, as indicated above, justices generally do not exercise these latter functions. At the

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6 For example, *Supreme Court Act 1935-1984*, s 176; *Bills of Sale Act 1899-1983*, s 9.

7 *Declarations and Attestations Act 1913-1972*, s 2. In its report on Project No 28 - *Official Attestation of Forms and Documents* (1978) at paras 1.15 to 1.20 the Commission recommended that provision should be made for an unattested statutory declaration.

8 S 711.

9 S 70.

10 S 1.

11 In such cases the police may also of their own volition take the defendant before a justice for the purpose of bail.

12 (1982) 25 *The JP WA*, 163.

13 S 6(2).

Central Law Courts in Perth justices deal with traffic and parking offences but not where the defendant pleads not guilty.[14] In other courts in the metropolitan area[15] justices sit on Saturday mornings or public holidays (if necessary) or if the stipendiary magistrate based at that court is unavailable. At these sittings they deal with people who are being held in custody and who plead guilty.[16] In country towns justices sit only when a magistrate is unavailable and then, as a matter of course, deal with pleas of guilty and impose penalties.

(5) **Other functions**: Justices of the peace also have responsibilities under other Acts. Under the *Absconding Debtors Act 1877-1965*, for example, justices are authorised to conduct a hearing to determine whether or not a debtor should be required to remain in the State until the debt is discharged.[17] They are under a duty under the *Criminal Code* to make a proclamation ordering any twelve or more persons who have riotously assembled together to disperse.[18] They may also appoint special constables to deal with any "tumult, riot, felony, or civil emergency".[19]

2. APPOINTMENT

(a) Method of appointment

2.3 Justices of the peace are appointed by the Governor who may appoint so many justices as may be deemed necessary to keep the peace in the State or in any magisterial district.[20]

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14 The justices there deal with such offences where the defendant pleads guilty (whether or not he appears in person) and where the defendant -
(a) does not appear;
(b) does not enter a plea by endorsement on the summons; and
(c) the prosecution presents affidavit evidence: P 3 of Chapter 6 below.

15 Such as Midland and Fremantle.

16 Cases of pleas of not guilty are adjourned and the justices may grant bail for this purpose.

17 *Absconding Debtors Act 1877-1965*, s 2. The Commission made a report on this Act in 1981: *Report on the Absconding Debtors Act 1877-1965*.

18 S 65.

19 *Police Act 1892-1983*, s 34(1).

20 *Justices Act*, s 6. In fact justices are usually appointed for the whole State and not for a magisterial district. One exception is in the case of justices who are appointed by virtue of their office as the mayor of a city or town or the president of a shire: para 2.9 below.
Magisterial districts may be proclaimed under the *Magisterial Districts Act 1886*. The existing districts were proclaimed in 1940: [1940] *Government Gazette*, 1981. The *Magisterial Districts Act 1886* was enacted because a number of Ordinances and Acts referred to magisterial districts but there were doubts as to whether such districts could be judicially noticed. The *Justices Act* contains a number of references

Justices may be appointed either by a General Commission of the Peace[21] or by special appointment notified in the *Government Gazette*.[22] A General commission of the Peace, which is issued from time to time, supersedes all previous Commissions and lists all justices of the peace at that time.[23] A person appointed to be a justice by a special appointment is deemed to be included in the then existing General Commission of the Peace for the State or for a magisterial district, as the case may be, from the time of his appointment. The Commission suggests that the concept of the General Commission of the Peace should be abolished. The jurisdiction so conferred is in very general and vague terms and seems unsatisfactory as a source of authority. In any case it seems unnecessary, since the powers of justices are specifically conferred by various statutes.[24] If this were done, justices could be appointed by a warrant under the hand of the Governor notified in the *Government Gazette*.[25] Provision could be made for a register of justices, as has been done in Victoria and Queensland[26] and a list of justices could be published periodically for the information of the public.

(b) Criteria for appointment

2.4 The *Justices Act* does not specify any qualifications for appointment as a justice. Training and qualifications have not historically been required. In response to a question in Parliament recently, the Minister representing the Attorney General in the Legislative Assembly said that the criteria for appointment to the commission of the peace and exclusion from eligibility is as follows: [27]

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to magisterial districts: paras 2.9 and 2.10, 3.12 and 3.13 below. Magisterial districts are also used to fix the areas in which Children's Courts exercise jurisdiction: *Child Welfare Act 1947-1982*, s 19(1)(d). The boundaries of the districts, last fixed in 1940, seem to be of little, if any, relevance today as far as the lines of communication, the distribution of the population of the State and the towns which are visited by various stipendiary magistrates are concerned. If it is considered desirable to retain the concept of magisterial districts, they should be redrawn so that they are relevant to conditions today.

21 The form of the Commission (which is contained in the Second Schedule of the *Justices Act*) is reproduced in Appendix I to this paper.

22 *Justices Act*, s 6.

23 The last General Commission of the Peace was issued in August 1983. The previous General Commission was issued in July 1980. Justices may be omitted from a new General Commission if they do not respond to attempts by the Crown Law Department to contact them during the preparation of the new General Commission.

24 See para 2.2 above.

25 Cf *Justices of the Peace Act 1957-1979* (NZ), s 3.

26 *Magistrates' Courts Act* (Vic), ss 12-15; *Justices of the Peace Act 1975* (Qld), s 7.

27 Western Australian Parliamentary Debates (1983), 5155. At present there are approximately 2,700 justices in Western Australia. This is far in excess of the number required to perform the judicial duties of justices and may also be far more than that required for other duties. Criterion (4), in particular, appears to

"(1) Australian citizenship, and a minimum of 12 months' residence in Western Australia.

(2) A willingness and capacity to fulfil the full duties of a justice of the peace if called upon.

(3) Good character, record and reputation, including preferably a record of community service.

(4) A perceived need for additional justices in the area of the applicant's residence or work.

Exclusions -

(a) Persons not resident in the State.

(b) Persons with a record of criminal or serious traffic convictions.

(c) Situations where appointment would result in a conflict of interests.

(d) Persons over 65 or under 25 years of age."

(c) Ex officio appointments and appointments of Members of Parliament

2.5 The following office holders are, while acting as such, justices of the peace for the State, without any further commission or authority: a member of the Executive Council of the State, a judge of the Supreme Court, a judge of the District Court of Western Australia, a judge of the Family Court of Western Australia, a magistrate and a coroner.[28] No doubt it is desirable that judicial officers are so appointed in order to enable them to exercise any jurisdiction expressly conferred upon justices, for example, to grant bail.[29] As the Masters of

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have been loosely applied in some areas. For example, the last General Commission of the Peace lists the following number of justices in the areas mentioned -

Albany	33	Como	32	Mt Lawley	28
Applecross	32	Cottesloe	33	Mt Pleasant	22
Attadale	29	Dalkeith	21	Nedlands	55
Balga	6	Dianella	46	Nollamara	5
Belmont	21	Floreat Park	37	Perth Business District	199
Bentley	22	Fremantle	33	Safety Bay	24
Bull Creek	21	Geraldton	36	South Perth	37
Bunbury	36	Joondanna	6	Subiaco	33
Busselton	29	Mandurah	27	Wembley	21
City Beach	39	Morley	20	Wembley Downs	23
Claremont	27	Mosman Park	24	West Perth	59

There is some duplication in these figures because some justices are listed in the General Commission under both their residential address and their business address.

28 *Justices Act*, s 12.

29 *Bail Act 1982*, s 6.

the Supreme Court are members of the Supreme Court[30] it may be desirable to provide for their appointment as a justice of the peace under this provision.

2.6 The Government has decided to allow all Members of Parliament, should they so wish, to be appointed as a justice of the peace without the usual formalities. The Attorney General, the Hon J M Berinson, MLC has said that he does not expect that Members of Parliament would serve on the bench[31] but that they could issue search warrants.[32] In the interest of preserving the constitutional separation of law making and law enforcing functions, it may be undesirable to empower Members of Parliament to exercise judicial functions by appointing them as justices of the peace. If the main purpose of the appointment is to enable them to witness the execution of various documents, it would be preferable instead to authorise them to do so expressly rather than to appoint them as justices.[33]

(d) Training and assistance

2.7 While justices need have no formal qualifications, the Justices of the Peace Training and Advisory Committee has developed training programmes for them. In Perth a course of training lectures is conducted by the Royal Association of Justices of Western Australia and the Education Department. Regional training sessions are arranged by stipendiary magistrates. Recently a correspondence training course, mainly for country justices, has been set up in conjunction with the Technical Extension Service of the Education Department. Although there is no examination involved, justices are expected to complete the course in a satisfactory manner and are given a certificate when they do so. The text for the course is the *Handbook for Justices* which is issued to all justices. The handbook and course cover matters such as out-of-court duties, bail, the constitution of Courts of Petty Sessions, trials, evidence and sentencing .The former Attorney General, the Hon I G Medcalf, QC, MLC, announced that all new justices appointed in country areas would be required to take the correspondence training course.[34] The Commission understands that justices can receive assistance from stipendiary magistrates if they are unsure of the law. At least one stipendiary magistrate circulates judicial decisions relating to penalties to justices in his district.

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30 *Supreme Court Act 1935-1984*, s 7(1).
31 Western Australian Parliamentary Debates (1983), 349.
32 Id, 686.
33 They are already authorised to witness and attest statutory declarations: *Declarations and Attestations Act 1913-1972*, s 2(iii).
34 News Release dated 17 March 1981.

(e) Appointment of justices outside Western Australia

2.8 There is power in the *Justices Act* to appoint a person to the office of justice even though he is not a resident of this State.[35] The purpose appears to be to facilitate the execution outside the State of documents which are to be used within Western Australia. The General Commission of the Peace published in 1983 contains a list of persons appointed as justices in the other Australian States and Territories, the United Kingdom, Malaysia and Papua New Guinea.

(f) Appointment of a mayor or the president of a shire as a justice

2.9 A person who is for the time being the mayor of a city or town or the president of a shire is, by virtue of his office and without any further commission or authority of the *Justices Act*, a justice for the magisterial district or districts in which the municipal district of the city, town or shire is situated.[36] Such a person cannot, however, exercise the powers and authorities of a justice until -[37]

* his name is entered in a roll kept by the Under Secretary for Law,
* he receives notice in writing that his name has been entered in the roll, and
* he has taken or made an Oath or Affirmation of Allegiance and the Oath or Affirmation of Office.

A mayor or president who is ex officio a justice and has commenced to exercise his functions may, however, be prevented from doing so by the Governor. He is then incapable of acting as a justice unless and until he is re-elected as mayor or president or otherwise appointed to be a justice by the Governor.[38]

2.10 The provision for a mayor or president to be a justice of the peace raises two main issues. First, should it be retained? While it ensures that there is at least one justice of the peace in each municipal district, the same result could be achieved by appointing mayors or presidents in the same way as other justices, or by ensuring that at least one person is

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35 *Justices Act*, s 13.
36 Id, s 9(1).
37 Id, ss 9(2) to (4) and 16.
38 Id, s 10.

appointed in each such district. Retention of the present method of selection has the consequence that a person can become a justice without a consideration of the factors normally taken into account in such appointments. Secondly, assuming the provision is retained, should the jurisdiction of justices so selected continue to be confined to the magisterial district in which the municipal district of the local authority is situated? This limitation means that a justice must be careful to ensure that he or she does not perform judicial functions outside that magisterial district. It may be difficult to do so since these districts do not necessarily bear any relationship to existing municipal districts, and maps showing magisterial districts are not generally available.[39] It might accordingly be preferable to provide that mayors or presidents should be justices for the whole State.

3. TERMINATION OF APPOINTMENT

(a) Method of termination

2.11 A justice may be removed or discharged from his office either by the issue of a new General Commission of the Peace for the State, or for a magisterial district,[40] as the case may be, omitting his name, or by an order of the Governor notified in the *Government Gazette*.[41] A justice may also tender his resignation in writing to the Attorney General. His office is vacated once the resignation is accepted by the Governor and notified in the *Government Gazette*.[42]

2.12 The Commission suggests that a justice should also be removed from office if he or she -

(i) is convicted of an offence that, in the opinion of the Governor, shows him or her to be unfit to hold the office of a justice; [43] or

(ii) is admitted to an approved hospital under the *Mental Health Act 1962-1979*.[44]

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39 See the first footnote to para 2.3 above.

40 Ibid.

41 *Justices Act*, s 7.

42 Id, s 8.

43 Cf *Justices Act* (SA), s 18(1)(b). In Queensland an appointment ceases if a justice is convicted of an indictable offence : *Justices of the Peace Act 1975*, s 14(1)(a).

44 The *Mental Health Act 1981*, which repeals this Act, has not been proclaimed. The mental health legislation has been reviewed by the Mental Health Legislation Review Committee.

2.13 In Western Australia a stipendiary magistrate is deemed to have vacated the office if he or she: [45]

> "...becomes bankrupt or insolvent, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his creditors, or makes an assignment of his salary for their benefit."

The Commission seeks comment on whether or not a similar provision should be made with respect to justices in this State. Such a provision with respect to justices exists in South Australia, Tasmania, Victoria, Queensland and the Northern Territory. [46]

(b) Age limit

2.14 Although it does not provide that a justice's commission must then be terminated altogether, one other Australian jurisdiction limits the functions which may be performed by a justice after he has attained a particular age. In Tasmania, a justice who has attained the age of 70 years must not sit in a court of summary jurisdiction or conduct a hearing into an indictable offence.[47] He may carry out other duties such as receiving complaints, issuing summonses or warrants, taking affidavits or attesting declarations.

2.15 The Attorney General of Western Australia has recently determined that justices should not preside in courts[48] after reaching 70 years of age.[49] Assuming justices are to continue to have authority to preside in courts in some circumstances, it would seem desirable

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In the Northern Territory an appointment may be terminated if a justice is found by a judge or another justice to be a mentally defective person: *Justices Act*, s 18(1)(d). In Queensland an appointment ceases if a justice becomes mentally ill: *Justices of the Peace Act 1975*, s 14(1)(c). In South Australia a justice may be removed from office where he is mentally or physically incapable of carrying out satisfactorily the duties of his office: *Justices Act*, s 18(1)(a).

45 *Stipendiary Magistrates Act 1957-1982*, s 5A(a). Both Supreme Court and District Court judges hold office during good behaviour and may be removed from office by Her Majesty, upon the address of both Houses of Parliament: *Supreme Court Act 1935-1984*, s 9(1) and *District Court of Western Australia Act 1969-1982*, s 11(1).

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South Australia : *Justices Act*, s 18(1)(c);
Tasmania : *Justices Act*, s 10;
Victoria : *Magistrates' Courts Act*, s 20;
Queensland : *Justices of the Peace Act 1975*, s 14(1)(b);
Northern Territory : *Justices Act*, s 18(1)(a) and (b).

47 *Justices Act* (Tas), s 7(1).

48 Such justices could still perform the other duties referred to in para 2.2 above.

49 Western Australian Parliamentary Debates (1983), 1880 and The *JP WA Journal*, March 1984, 5. This is also the age at which judges of the Supreme and District Courts must retire from office: *Judges' Retirement Act 1937-1950*, s 3. In Western Australia stipendiary magistrates must, in general, retire at the age of 65: *Stipendiary Magistrates Act 1957-1982*, s 5B(1).

to place the Attorney General's determination on a statutory footing and also probably to include associated functions, such as the issuing of summonses or warrants.

4. JURISDICTION

(a) Existing law and practice

2.16 Justices may exercise any power or authority conferred upon justices by the *Justices Act* or any other Act.[50] However as indicated above, justices are not called upon to conduct trials (that is, where the defendant pleads not guilty) although they still have a significant role in sentencing after pleas of guilty. There are no general statistics available as to the number of cases in which justices have heard pleas of guilty. A survey conducted for the purpose of the Dixon Report for the month of September 1979 gives an indication of the number of cases in which stipendiary magistrates and justices were called upon to impose sentences. In that month the following convictions were recorded,[51] including convictions both where the accused pleaded guilty and where a trial was held.

Composition of the Court	**No.**	**%**
Stipendiary Magistrate	8,699	82.35
Two justices of the peace	1,462	13.85
One justice of the peace	402	3.80
	10,563	100.00

However, the proportion of cases dealt with by justices can vary significantly between one town and another, depending on whether or not a stipendiary magistrate is resident in the town.

(b) Limiting the jurisdiction of justices in respect of offences

2.17 In the course of its initial inquiries it was suggested to the Commission that the powers of justices of the peace should be legislatively restricted by providing that they may not conduct trials where a defendant pleads not guilty, or conduct preliminary hearings of

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50 This jurisdiction is referred to in paras 3.15 to 3.19 below. A justice is not disqualified from discharging his duties in any matter relating to a local authority merely because he is a rate-payer or interested in common with the public: *Justices Act*, s 15(2).

51 This information was extracted from information collected for the Dixon Report. The table in which this information is compiled (*Table 16: Number of Convictions and Related Penalties (Distinct Persons) - Penalties Imposed According to Offences, Constitution of Court Representation of Defendant*) is on file with the Commission.

indictable offences.[52] There appears to be no objection to the adoption of this proposal which in effect would merely confirm the existing practice.

2.18 It has also been suggested that justices should expressly be restricted even in relation to pleas of guilty by providing that they may not impose a term of imprisonment. A number of reasons could be advanced in favour of the suggestion -

* It seems to be unfair for the State to expect lay persons, who often having heavy responsibilities elsewhere, to perform the onerous and complex task of determining an appropriate sentence in serious cases.

* The presiding judicial officer should ensure that before a plea is taken the defendant understands the nature of the charge and is fit to plead.[53] Where a plea of guilty is entered the officer should ensure that the plea is unequivocal, and that the facts of the case as they appear disclose an offence.[54] These obligations apply in the case of every plea, but are particularly important where the defendant is at risk of imprisonment. Some justices of the peace may not fully appreciate their responsibilities in this regard or be experienced in applying them to particular cases.[55]

* A more consistent approach to sentencing is likely if sentences of imprisonment could only be imposed by stipendiary magistrates who, because of their involvement on a day to day basis with the administration of justice, are more likely to be aware of the principles laid down by superior courts and the penalties being imposed by their colleagues.[56]

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52 Para 3.17 and Chapter 9 below. Justices are limited already by statute in relation to the summary trial of indictable offences triable summarily: para 3.16 below.
In Victoria it has been provided that as from 1 July 1984 no justice of the peace shall act in any criminal matter, including any preliminary hearing, other than in relation to an application for bail: *Magistrates' Courts Act*, s 18A. The Commission has been informed that in New South Wales justices do not sit in Courts of Petty Sessions. However, specially authorised justices will be able to make enforcement orders under a penalty notice procedure which will be introduced in New South Wales on 1 July 1984: see *Justices Act* (NSW), Part IVB.

53 Para 8.3 below.

54 Para 11.17 below.

55 It is to be noted that the *Handbook For Justices* by P Nichols sets out these responsibilities in some detail: p 7. 1- 7.4.

56 There is evidence of inconsistencies between the sentencing practices of justices and those of stipendiary magistrates. A survey carried out for the purposes of the Dixon Report showed that while stipendiary magistrates were responsible for 82.35% of convictions recorded in the survey, they imposed only

* Justices generally sit in courts in which the clerk of petty sessions is a police officer, rather than a full time clerk of petty sessions (who is either an officer of the Crown Law Department or a mining registrar). Because of their prosecutorial functions, police officers acting as clerks of petty sessions may face a conflict of interest in offering advice or assistance.

* Where courts presided over by justices deal with an Aborigine they are less likely than a stipendiary magistrate to have the assistance provided by a solicitor of the Aboriginal Legal Service representing the defendant. This arises because, although the Aboriginal Legal Service has solicitors in a number of country towns,[57] they tend to appear in courts presided over by stipendiary magistrates either in towns visited by the magistrates or in which the magistrates reside.[58]

* Pre-sentence reports prepared by the Probation and Parole Service are a prerequisite to the making of a community service order as an alternative to imprisonment. It may also be desirable to obtain a pre-sentence report before making a probation order or otherwise passing sentence. The Probation and Parole Service has regional officers in a number of country towns[59] and endeavours to provide a service to all courts, no matter how remote. However

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66.10% of the sentences of imprisonment recorded (according to the major sentence imposed) while justices who were involved in 17.65% of convictions imposed 33.90% of the sentences of imprisonment: Australian Bureau of Statistics, Western Australian Office, *Surveys and Associated Work Undertaken in Connection with the Terms of Reference of the Inquiry into the Rate of Imprisonment* (1981), Table 1.7.1. Whereas stipendiary magistrates sent 11.10% of the offenders before them to prison, justices sent 16.20% of offenders before them to prison: ibid. There is also a significant difference between justices and stipendiary magistrates in the use of alternatives to imprisonment, such as probation and community service orders. While these orders were used in 6.6% of sentencing decisions by stipendiary magistrates they were used on only one occasion (0.1%) by justices: ibid. The Commission understands that many justices are still reluctant to impose such orders, though no statistics are available.

The Dixon Report stated that short terms of imprisonment were often used by justices in the case of persistent drink offenders (particularly Aborigines), not primarily as punishment but so that the offenders could "dry out" and be fed. A fine, which was the only other sentencing option which was available in practice, was not seen as being satisfactory: Dixon Report, 116-117. In the Dixon Report the view was expressed that its recommendation that the power to imprison for the offence of being found drunk in a public place be abolished would of itself "remedy substantially the position in cases where Justices appear to have been using imprisonment more than is really necessary": id, 119. This recommendation has not, as yet, been implemented.

57 Kununurra, Derby, Port Hedland, Carnarvon, Kalgoorlie and Narrogin.

58 Field officers of the Aboriginal Legal Service, who may represent Aborigines *(Aboriginal Affairs Planning Authority Act 1972-1982*, s 48), are situated in a number of other towns but this still does not mean that representation is necessarily readily available for Aborigines in all courts presided over by justices.

59 Broome, Port Hedland, Geraldton, Bunbury, Albany and Kalgoorlie.

it is perhaps inevitable that justices who do not have regular contact with officers of the Service do not use the facilities so provided to the same extent as stipendiary magistrates. Another possible reason for the reluctance of justices to use these reports in determining sentence is that the case must often be adjourned pending their preparation. This may be an impediment to justices who have business commitments or who have to travel a considerable distance to the court hearing.

(c) Problems associated with abolishing the power of justices to impose sentences or imprisonment

2.19 Abolishing the powers of justices to sentence to imprisonment would have certain consequences. If the justices considered that a term of imprisonment should be imposed it would be necessary to adjourn the matter until it could be dealt with by a stipendiary magistrate.[60] This would cause delay where a stipendiary magistrate was not due to visit the town for some time. It could also be inconvenient if the town was not on the magistrate's circuit and the matter had to be adjourned to a town which was visited by a stipendiary magistrate or where he resided. However, adjournments for a period of time and adjournments to other towns occur at present where pleas of not guilty are entered. It may in fact be to a defendant's advantage for a hearing to be adjourned to a court in the town in which his solicitor had an office. In such a case, the costs that the defendant would be liable to pay may not be as great as they would have been if the solicitor had been required to travel to another town for the trial or a sentencing hearing.

2.20 Removing the power to impose a prison sentence would create a problem if the defendant were being held in custody and for some reason could not be released on bail. He thus might be held in custody pending sentencing by a stipendiary magistrate for a period longer than the sentence of imprisonment that the justices would have imposed or any sentence of imprisonment that the stipendiary magistrate would consider imposing. This problem is most likely to be encountered by offenders who are transients, particularly in remote areas.

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60 There are some offences with a mandatory minimum sentence of imprisonment. For example, a mandatory minimum sentence of imprisonment of one month is prescribed for a second or subsequent offence of driving while disqualified from holding or obtaining a driver's licence: *Road Traffic Act 1974-1982*, s 49(2). In such cases the matter could be remanded to a stipendiary magistrate unless the justices intended to impose the minimum term of imprisonment prescribed.

(d) Comment invited

2.21 **The Commission would welcome comments** on the proposal to abolish the power of justices to sentence to imprisonment for the offence altogether, or, as is provided in South Australia,[61] to limit the power to a sentence of seven days or less. In regard to the latter alternative it should be pointed out that a short term of imprisonment may in a particular case be as injurious as a longer term, for example, the offender may lose his job in either case.

2.22 If the power of justices to sentence to imprisonment for an offence is to be abolished or restricted, it may also be necessary to provide for some limitation on the power of justices to impose a fine. Otherwise the offender could be imprisoned for non-payment of the fine imposed, particularly if the presiding justices refused to allow time to pay.

(e) Removing or limiting the power of justices to issue warrants

2.23 It has also been suggested to the Commission that search warrants and warrants of arrest should not be issued by justices and that stipendiary magistrates and judges should be responsible for their issue.[62] The reason advanced is that many justices do not appreciate the seriousness of a decision to issue a warrant, or give inadequate consideration to whether or not the particular circumstances justify its issue. A significant disadvantage with the suggestion is that stipendiary magistrates are not generally as readily available as justices. It would also place a significant burden on stipendiary magistrates.[63]

2.24 The fact that a stipendiary magistrate or judge may not be available, particularly in country areas, could be overcome by allowing applications for warrants to be made by a telephone call to a judge or a stipendiary magistrate. The following procedure for obtaining a search warrant by telephone was recommended by the Australian Law Reform Commission in its report, *Criminal Investigations*: [64]

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61 In South Australia justices do not have power to impose a sentence of imprisonment (except a sentence in default of payment of a pecuniary sum) for a term in excess of seven days: *Justices Act* (SA), s 5(6).

62 The power to issue holding orders and embargo notices under the *Misuse of Drugs Act 1981* could also be limited so that they could not be issued by justices.

63 For example, in 1982-1983, justices on duty at the Central Police Lock-up issued 2,257 search warrants and 808 arrest warrants: *The JP WA Journal*, October 1983, 11.

64 Australian Law Reform Commission, Report No 2 (1975), 95, para 201. The Law Reform Commission of Canada has also recommended that it should be possible to obtain a search warrant by telephone or other means of telecommunication in circumstances in which personal appearance before a judicial officer would be impracticable: *Writs of Assistance and Telewarrants* (Report No 19, 1983). In New South

"(a) the police officer shall state his reasons for seeking the warrant, which the magistrate shall either accept or reject, keeping a written record of his reasons and of the date and time of approval where a warrant is granted;

(b) the police officer shall complete a warrant form in all respects but for the magistrate's signature, and use this as necessary in the search;

(c) as soon as reasonably practicable after the search is completed, the police officer shall forward the warrant to the magistrate for endorsement, attaching a signed statement of the reasons advanced in originally seeking the warrant; and

(d) on receipt of the warrant and statement of reasons, the magistrate shall endorse them and file them with a court in the normal way."

2.25 Even so, the burden on magistrates and judges would be considerable. A more practical alternative would be to allow justices to continue to issue warrants but to endeavour to ensure that they appreciate that they are exercising a judicial discretion and that they "genuinely turn their minds to the grounds advanced to support the issuance of the warrant".[65] To this end the provisions authorising the issue of warrants could be amended, for example, in the case of a warrant of arrest, to contain the following safeguards:[66]

> " ...first, a requirement that the information on oath be supported by affidavit, stating in some detail the reasons upon which the officer believes both that the person in question is guilty of an offence and that he ought to be arrested instead of being proceeded against by summons. Secondly, the judicial officer should be obliged to satisfy himself, by questioning if necessary, that the stated reasons amount to reasonable grounds for issuing the warrant. Further, the judicial officer should endorse the informant's affidavit indicating his satisfaction with some or all of the reasons there set out and stating whether he relies on any other evidence than those written reasons."

Wales a member of the police force may upon complaint made by telephone to a stipendiary magistrate apply for a search warrant to search premises for a drug of addiction or a prohibited drug or plant: *Poisons Act 1966-1982* (NSW), s 43A.

65 Australian Law Reform Commission, *Criminal Investigations* (Report No 2, 1975), 12.

66 Id, 12, para 26 and Draft Bill, cl 8. Where a warrant is being sought in the first instance in Western Australia the matter of complaint must be substantiated upon oath (*Justices Act*, s 59).

The Australian Law Reform Commission recommended the provision of similar safeguards in the case of applications for a search warrant.[67]

(f) Training for justices

2.26 The Commission considers that training courses for justices appropriate to their functions should continue to be developed and justices encouraged to undertake them, particularly justices in the country who are more likely to be involved in the administration of criminal justice. [68]

2.27 If justices are to continue to perform a judicial role (whether presiding over courts in certain cases or issuing summonses or warrants) the Commission considers that the importance of that role should be enhanced. One possible step would be to limit the appointment of justices to those likely to be called upon to perform a judicial role. At present there are approximately 2,700 justices in Western Australia, a number clearly in excess of that required for this purpose. With fewer persons appointed as justices, greater emphasis could be placed on their training and supervision.

2.28 A selection committee, with a legal practitioner as chairman, could be appointed to develop criteria for the appointment of justices and to recommend individual appointments to the Governor.[69] This committee could also supervise their training and performance. In country areas, the tasks of training and supervision could be given to stipendiary magistrates who could also provide advice where, for example, a justice was acting contrary to sentencing principles laid down by the Supreme Court. Stipendiary magistrates could alert the committee as to areas of the law causing difficulties for justices so that training programmes could be appropriately adapted.

2.29 Another possible step would be to reimburse justices for expenses incurred in presiding over courts, and perhaps pay them an allowance for doing so. This would go some

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67 Id, 94, para 200, and Draft Bill, cl 62.

68 In the Dixon Report it was recommended that the "present practice of formal instruction of Justices be continued and where necessary expanded": Dixon Report, 121.

69 Cf the *Justices of the Peace Act* (Ont), s 9(1), which establishes the Justices of the Peace Review Council. The functions of the Council are to review the conduct of and performance of duties by justices, receive complaints of misbehaviour or neglect of duty by justices, to investigate such complaints and make recommendations to the Attorney General with respect to such complaints (s 9(3)).

way to compensating justices who had to leave a business for a time while presiding over a court.

5. CIVIL ACTIONS AGAINST JUSTICES

2.30 Sections 222-232 of the *Justices Act* contain provisions relating to civil actions against justices. The Commission has not been made aware of any difficulties with these provisions. **It welcomes comment** on the provisions and any need to amend them.

6. IMPERIAL STATUTES RELATING TO JUSTICES OF THE PEACE AND OTHER MATTERS

2.31 Appendix II of this paper contains a list of Imperial statutes relating to justices of the peace which may be in force in Western Australia, together with a brief account of their purpose. The Commission suggests that most of these statutes could be repealed as obsolete. Appendix III of this paper contains a list of Imperial statutes relating to other associated matters which could also be repealed. **The Commission welcomes comment** on all or any of the statutes listed in these appendices.[70]

7. QUESTIONS AT ISSUE

2.32 The Commission welcomes comment on the following issues raised in this chapter -

Limitation on jurisdiction of justices

1. Should the existing practice whereby -

   (i) justices do not conduct trials where the defendant pleads not guilty;

   (ii) justices do not conduct preliminary hearings of indictable offences;

   be statutorily confirmed?

(Paragraph 2.17)

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[70] There may be other Imperial statutes relating to the terms of references of this project of which the Commission is not aware. Anyone who is aware of such statutes is welcome to draw them to the attention of the Commission.

2. Should any further limitation be placed on the jurisdiction of justices? If so, should this be by providing that -

   (i) justices should not be permitted to impose a term of imprisonment where a person has pleaded guilty;

   (ii) justices should not be permitted to issue search warrants and warrants for the arrest of a person?

(Paragraphs 2.18 to 2.25)

Age limit

3. Should any statutory limitation be placed on the judicial functions which justices may perform once they reach a certain age and, if so, what should that age be?

(Paragraphs 2.14 and 2.15)

Abolition of the concept of the General Commission of the Peace

4. Should the concept of the General Commission of the Peace be abolished?

(Paragraph 2.3)

5. If so, should justices be appointed by a warrant under the hand of the Governor?

(Paragraph 2.3)

Appointment and supervision of justices

6. Should a committee be established to recommend to the Governor the appointment of individuals as justices and to supervise their training and performance?

(Paragraphs 2.26 to 2.28)

7. If justices retain a judicial role should they be -

(i) reimbursed for expenses incurred in attending to preside over a court;

(ii) paid an allowance for doing so?

(Paragraph 2.29)

Mayors and shire presidents

8. Should the mayor of a city or town or the president of a shire continue to be appointed a justice merely by virtue of his office?

(Paragraph 2.10)

9. Should the jurisdiction of justices who hold office by virtue of their position as mayor or president continue to be confined to the magisterial district or districts in which the municipal district of the city, town or shire is situated?

(Paragraph 2.10)

Members of Parliament

10. Should it be possible for Members of Parliament to be appointed justices of the peace?

(Paragraph 2.6)

Masters of the Supreme Court

11. Should the Masters of the Supreme Court hold office ex officio as a justice of the peace?

(Paragraph 2.5)

Removal of justices from office

12. Should a justice be removed from the office by law if he or she -

(i) becomes bankrupt or insolvent, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors, or makes an assignment of his or her salary for their benefit;

(ii) is convicted of an offence that, in the opinion of the Governor, shows him or her to be unfit to hold the office of a justice;

(iii) is admitted to an approved hospital under the *Mental Health Act 1962-1979*?

(Paragraphs 2.12 and 2.13)

Civil actions against justices

13. So far as civil actions against justices arising out of the performance of their duties are concerned, is there any need to amend sections 222-232 of the *Justices Act*?

(Paragraph 2.30)

Imperial statutes relating to justices of the peace and other matters

14. Should any of the Imperial statutes listed in Appendices II and III of this paper be retained?

(Paragraph 2.31)

PART III : COURTS OF PETTY SESSIONS
CHAPTER 3

1. THE STRUCTURE OF COURTS OF PETTY SESSIONS

(a) Formally constituting a court

3.1 Although the *Justices Act* assumes the existence of Courts of Petty Sessions in a number of sections (for example, section 24(1) provides that the Governor may appoint magisterial districts for the purposes of Courts of Petty Sessions) the Act does not seem expressly to establish such courts and to invest them with criminal jurisdiction. Instead, the Act bestows jurisdiction on two or more justices, or a stipendiary magistrate, to try certain offences "in a summary manner". Thus the Act provides that:[1]

> "Whenever by any Act past or future, or by [the *Justices Act*], any person is made liable to a penalty or punishment, or to pay a sum of money -
>
> (a) For any offence made punishable on summary conviction; [2] or
>
> (b) For any offence, act, or omission, and such offence, act, or omission is not by the Act declared to be treason, felony, [3] a crime, or a misdemeanour,[4] and no other provision is made for the trial of such person, [5] the matter may...be heard and determined by two or more Justices [or by a stipendiary magistrate[6]] in a summary manner... "

Justices or a stipendiary magistrate exercising the jurisdiction so bestowed on them sit as a Court of Petty Sessions.[7]

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1 *Justices Act*, s 20. Other courts, Children's Courts, have jurisdiction to hear and determine a complaint of an offence alleged to have been committed by a child (that is, a person under the age of 18 years), except charges of wilful murder, murder, manslaughter or treason: *Child Welfare Act 1947-1982*, s 20. The provisions of the *Justices Act* apply to hearings in Children's Courts: id, s 143.

2 Such offences are created under various Acts including the *Local Government Act 1960-1983*, the *Health Act 1911-1982* and the *Road Traffic Act 1974-1982*.

3 There are no such offences in Western Australia: *Criminal Code*, s 3. A reference to a "felony" must be taken as a reference to an offence which is a crime: *Criminal Code Act 1913*, s 3(1).

4 Crimes and misdemeanours are indictable offences triable by a jury in the Supreme or District Court: *Criminal Code*, s 3. It has been recommended that this categorisation of offences be abolished so that all indictable offences would be called crimes: M J Murray QC, *The Criminal Code - A General Review* (1983), 2 (hereinafter cited as "the Murray report").

5 At common law where an Act of Parliament created a new offence without prescribing the mode of trial the offence was treated as an indictable offence: *R v Hall* [1891] 1 QB 747.

6 *Justices Act*, s 33(1).

7 For the history of the term "petty sessions" see para 1.2 above.

3.2 The Commission suggests that legislation be enacted so as expressly to establish a court of summary jurisdiction, as has been done in other jurisdictions studied by the Commission.[8] The Act could then proceed in a logical order by providing for the appointment of judicial officers of the court, its jurisdiction and the procedure to be followed.

3.3 If the proposal in the previous paragraph is adopted, the further question arises whether inferior civil and criminal jurisdiction in Western Australia should be combined in the one court system. At present, inferior civil jurisdiction is exercised by Local Courts. This question was discussed in the Commission's working paper on Project No 16, *Local Courts Act 1904-1982 and Rules, Part I - Jurisdiction Procedures and Administration* ("the Local Courts Working Paper") issued in 1983.[9] Such a system operates in Victoria, New South Wales, Queensland, the Australian Capital Territory and New Zealand.

3.4 In country and suburban areas staff, administrative facilities and courtrooms are used for both Local Courts and Courts of Petty Sessions. In Perth, both courts are housed in the Central Law Courts building where there has been some rationalisation of staff and facilities, but courtrooms and administrative facilities are still largely separated.

3.5 As was suggested in the Local Courts Working Paper, the formal merger of inferior criminal and civil court systems may provide an opportunity to improve the economy or efficiency of the operations of each.[10] Inevitably the existence of two systems operating under different Acts and with different though shared judicial officers, staff, administrative facilities and courtrooms causes some public confusion, and may result in inflexibility, duplication or waste. Merger may also facilitate the assimilation of the procedures for enforcement of orders of the two systems, assuming this is desirable.[11]

3.6 The merger would perhaps be best achieved by the establishment of a court with divisions such as -

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8 See, for example -
NSW - *Local Courts Act 1982* (to be proclaimed)
QLD - *Justices Act*, s 22
ACT - *Court of Petty Sessions Ordinance*, s 18(1)
NT - *Justices Act*, s 41A.

9 Para 3.18.

10 Paras 3.16 to 3.26.

11 Such assimilation has been made in Victoria and the Australian Capital Territory.

(1) an Administrative Law Division;[12]

(2) a Small Debts Division;[13]

(3) a Civil Division ;

(4) a Criminal or Offences Division; and

(5) a Family Law Division.

Matters such as procedure, the judicial officers who may sit in the division, costs, appeal rights and procedures could be dealt with separately in accordance with the requirements of the division. For example, at present, Local Courts are constituted by a stipendiary magistrate. That rule could be retained by providing that the civil division of the court could only be constituted by a stipendiary magistrate.

3.7 In the above discussion it was assumed that the merger would result in one court exercising inferior civil and criminal jurisdiction throughout the State. It would, of course, be possible to effect a merger of the two systems by providing for courts of combined civil and criminal jurisdiction to be established at specified places throughout the State, as is presently the case with Local Courts.[14] However, it would seem conceptually simpler to adopt a similar approach to that of the District Court of Western Australia.[15] There would then be no need to provide for the territorial jurisdiction of each such court or, alternatively, to provide for each territorially located court to have jurisdiction throughout the State.[16]

(b) Places at which summary proceedings may take place

3.8 At present a summary hearing under the *Justices Act* can be held in any place at which the judicial officers necessary to exercise the jurisdiction are present. In comparable legislation elsewhere, provision is made for places to be fixed for the exercise of summary jurisdiction.[17] This may have been because the courts there also have a civil jurisdiction.

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12 The establishment of an Administrative Law Division of the Local Court was recommended by the Commission in its report, *Review of Administrative Decisions : Appeals* (1982) (paras 4.2 , 4.9 and 4.10).

13 Following the Commission's report, *Small Debts Court* (1979), a Small Debts Division of the Local Court has been established: *Local Courts Act 1904-1982*, s 106D.

14 *Local Courts Act 1904-1982*, s 5.

15 S 7(1) of the District Court of *Western Australia Act 1969-1982* provides:
"There shall be in and for the State a Court to be known as The District Court of Western Australia."
This of course is also the position in regard to the Supreme Court.

16 As has been done in the case of Local Courts: *Local Courts Act 1904-1982*, s 36.

17 Victoria (*Magistrates' Courts* Act (Vic), s 4), New South Wales (*Local Courts Act 1982* (NSW), s 11), Queensland (*Justices Act* (Qld), s 22(3)), Australian Capital Territory (*Ordinance* (ACT), s 18(1)), England (*Magistrates' Courts Act* (Eng), s 121(3).

3.9 In Western Australia places are fixed for holding Local Courts and a clerk of courts is appointed at each place.[18] Civil proceedings involve considerably more documentation than summary criminal proceedings. It is necessary to provide registries for filing documents relating to the matter in dispute, for interlocutory applications and for the payment of money into and out of court. Summary criminal proceedings do not involve the exchange of documents and on many occasions the only document involved will be the complaint form used to institute the proceedings. There is, therefore, not the same need for registries in those proceedings.

3.10 In practice, however, most hearings are conducted at towns where clerks of petty sessions have been appointed and where court facilities are available. Even if the suggestion above as to the merger of inferior civil and criminal jurisdictions is not adopted, it would seem desirable formally to fix places as registries for the Court (or Courts) of Petty Sessions and at which hearings are to take place.[19] There is no reason why these should not be the same places as at present.[20] Provision could be made for hearings to be held at a place other than the registry, for example a hospital, if that is required for the convenience of the parties or the prompt administration of justice. *The Commission seeks comment*.

(c) Venue

3.11 In a number of towns hearings take place in the local police station, often with both the prosecutor and the clerk of petty sessions being a police officer.[21] The Commission does not favour the present practice of holding hearings in police stations since it confuses the role of prosecution and court and thereby tends to reduce confidence in the administration of justice. The Commission is however sensible of the fact that to require hearings to be conducted in a separate building could increase security problems or entail considerable expense in hiring or erecting a suitable building. The Commission accordingly suggests that

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18 Clerks are also appointed for Courts of Petty Sessions: para 3.12 below. In fact there are more clerks of petty sessions than clerks of local courts and Courts of Petty Sessions sit in more towns than do Local Courts. The most appropriate response would be to continue this position by differentiating between registries and sitting places of the various divisions.

19 A number of provisions in the *Justices Act* appear to assume that there are places fixed for courts and registries: paras 4.17 and 5.1 below. The only purpose for which places for holding Courts of Petty Sessions are presently fixed is in relation to the exercise of the family law jurisdiction: para 3.18 below.

20 Para 3.12 below.

21 Ibid.

the Government should review the present arrangements throughout the State and ensure that wherever practicable the proceedings take place elsewhere than in a police station.

(d) Clerks of petty sessions

3.12 Under the *Justices Act* any person appointed to the office of clerk of petty sessions must be appointed for a magisterial district.[22] Such number of clerks of petty sessions as may be considered necessary for the due administration of the Act may be appointed for each magisterial district. In Perth and in approximately 30 country towns the clerks are officers of the Crown Law Department. In another eight country towns the clerk is the mining registrar and in approximately 82 further towns he is a police officer.[23] A magistrate may discharge the functions of a clerk of petty sessions in "any place appointed for holding Courts of Petty Sessions" in which a clerk of petty sessions is not appointed or from which the clerk is absent.[24] The Commission has been informed that the clerk of petty sessions at Derby, who is an officer of the Crown Law Department, travels with the stipendiary magistrate in that town when the latter visits other locations in the Kimberley region, and acts as the clerk at hearings presided over by the magistrate. The Commission considers that this is a sound practice and suggests that consideration be given to adopting it in other areas where a stipendiary magistrate visits places at which a police officer would otherwise be called upon to act as a clerk of petty sessions.

3.13 One consequence of the appointment of clerks of petty sessions for a magisterial district is that the clerk may not be able to exercise any of the functions assigned to clerks with regard to matters occurring in another district. For example, where an offence is alleged to have occurred in another magisterial district[25] the clerk of petty sessions may not be able to

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22 *Justices Act*, s 25A.

23 Police officers also act as attendants in Courts of Petty Sessions. In this capacity they wear their police uniform. The New South Wales Law Reform Commission suggested that police officers acting as officers of the court:

> "...should cease to be uniformed whilst engaged in this work and, if possible, that they be seconded or in some other way made responsible only to the presiding magistrate during the hours, or periods, of their service with the court. In our view persons acting as court officers should not be, or be seen to be, part of the service which is responsible for the vast majority of prosecutions" : First Issues Paper: Criminal Procedure - *General Introduction and Proceedings in Courts of Petty Sessions*, 70, para 9.60.

24 *Justices Act*, s 34. The reference to "any place appointed for holding Courts of Petty Sessions" appears to be a drafting error because there is no provision for the appointment of such places, except for the exercise of jurisdiction in relation to family law matters: *Justices Act*, s 24(2).
Justices in Petty Sessions or the Attorney General may require a police officer to act as a clerk of petty sessions even though not appointed as such: *Justices Act*, s 34.

25 See the first footnote to para 2.3 above.

issue a summons in respect of an offence.[26] Such a territorial limitation on the powers of clerks of petty sessions does not appear to serve any purpose. It may be preferable to appoint clerks without confining them to a particular magisterial district. Clerks could still be assigned to particular court offices in the State.

3.14 Clerks of petty sessions are responsible for carrying out administrative duties in relation to the operation of the court. A complaint may also be made to a clerk of petty sessions who may sign and issue a summons. One suggestion which has been made is that they should also have power to issue warrants of execution and warrants of commitment. At present, only justices of the peace have power to issue these warrants.[27] This is a power which clerks or registrars have in a number of other jurisdictions.[28] Whether such a step is desirable will at least to some extent depend on the nature of the discretion to be exercised in these circumstances. This is a matter which the Commission proposes to deal with in Part III of this project (that is, enforcement of orders). However, **the Commission would welcome comments** in general terms on the suggestion. [29]

2. JURISDICTION AND COMPOSITION OF THE COURT

(a) The present law

(i) Simple offences

3.15 The major jurisdiction of Courts of Petty Sessions is with respect to simple offences, that is, offences only triable summarily. This jurisdiction may be exercised by two or more justices or a stipendiary magistrate.[30] If the court hearing the matter is constituted by two or more officers, one of whom is a magistrate, the decision of the magistrate prevails

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26 *Justices Act*, s 53.

27 Id, s 27.

28 *Justices Act* (Tas), s 17(2) and (2A) and *Magistrates' Courts Act* (Vic), s 26(c).

29 The Commission has been informed that the computerisation of records of the Court of Petty Sessions at the Central Law Courts, Perth, is expected to make it practicable to print all enforcement warrants by means of the computer system. There appears to be no legal impediment to the printing of warrants by this method so long as the proper discretions are exercised prior to their issue.

30 *Justices Act*, ss 20(1) and 33(1). S 742 of the *Criminal Code* also provides that a stipendiary magistrate may exercise alone any jurisdiction conferred by the Code on two justices in petty sessions. It has been recommended that s 742 should be repealed: Murray Report, 519. The position would then be governed by the *Justices Act*. There are some offences which can be tried only by a court constituted by a stipendiary magistrate such as possession of gold suspected of being stolen (*Police Act 1892-1983*, s 76A) and some drug offences (*Misuse of Drugs Act 1981*, s 9(2)).

notwithstanding that a majority of the justices are of a different opinion.[31] Where two or more justices are present and they are equally divided in opinion, the case must be reheard at a time appointed by the justices present or a majority of them.[32] If they are equally divided on this question, the time must be set by the "senior" justice present.[33] One justice may exercise the jurisdiction of two justices if "no other Justice usually residing in the district can be found at the time within a distance of sixteen kilometres". On any conviction, the justice must certify that no other justice could be found within 16 kilometres. Such a certificate is conclusive evidence of the fact stated.[34] As a certificate need only be given where the defendant has been convicted, a single justice has authority to dismiss a complaint (for example, if the complainant does not appear) or order an adjournment.[35] A sentence of whipping imposed by a single justice cannot be carried out until it is approved by the Governor.[36] A simple offence may also be heard by one justice if all the parties concerned consent. A memorandum of such consent must be made forthwith and signed by the justice.[37]

(ii) Indictable offences triable summarily

3.16 At present there are a number of indictable offences which may be tried summarily, for example, in certain circumstances a person who is charged with assault may be tried summarily.[38] Section 3 of the *Criminal Code* provides that the complaint must be heard by a stipendiary magistrate alone, unless there is no stipendiary magistrate available, in which case it may be heard by two justices if the defendant consents. However, section 20(2) of the

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31 *Justices Act*, s 33(2).

32 Id, s 30. According to P Nichols, *Handbook for Justices* (1980), p 6.2 in "Western Australia the decision of the senior of the two justices prevails" where the justices cannot agree on a decision. The author states that this practice is merely a matter of "custom and consent" and the "junior" justice should not feel bound to agree with the senior justice. The Commission considers that a justice would be failing in his duty if he did not reach his own decision on the charge.

33 This no doubt means the justice who has served as a justice for the longest period of time. It would be desirable to make this explicit.

34 *Justices Act*, s 32. It has been held that if there is no certificate any conviction recorded cannot stand, even though no other justice could in fact be so found: *Taylor v Johnson* [1977] WAR 95, per Jackson CJ. S 743 of the *Criminal Code* is to the same effect as s 32. It has been recommended that s 743 should be repealed: Murray Report, 520. The position would then be governed by the *Justices Act*.

35 *Taylor v Johnson* [1977] WAR 95, 96 per Jackson CJ.

36 *Justices Act*, s 32. Whipping may still be inflicted in Western Australia as a punishment for certain offences though it has not been imposed for many years. The last case of which the Commission is aware in which the penalty was imposed was in 1966: M W Daunton-Fear, *Sentencing in Western Australia* (1977), 137. It has been recommended that whipping as a form of punishment should be abolished: Murray Report, 19, 117 and 433.

37 *Justices Act*, s 29.

38 *Criminal Code*, Part 31. S 574(1) of the *Criminal Code* provides that the procedure upon the prosecution of such offences and for enforcing orders in respect of such offences is set forth in the laws relating to justices of the peace, their powers and authorities.

Justices Act provides that the complaint must not be heard by justices if there is a stipendiary magistrate available or the defendant does not consent, thus apparently implying that justices may deal with these offences where the defendant **does** consent even though there is a magistrate available. Furthermore, section 29 of the *Justices Act* provides that two or more justices (or one justice if all the parties consent) may hear complaints of indictable offences triable summarily. These provisions should be amended to clarify the position,[39] assuming that justices are to retain jurisdiction in this area.

(iii) Preliminary proceedings in relation to indictable offences

3.17 Two or more justices or a stipendiary magistrate may conduct preliminary proceedings in relation to an indictable offence (including a preliminary hearing where one is held).[40] The proceedings may also be conducted by one justice if all the parties consent.[41] A preliminary hearing, where one is held, is to determine whether or not there is sufficient evidence to put the defendant on trial either in the Supreme Court or the District Court. The procedure relating to preliminary proceedings in respect of indictable offences is discussed in Chapter 9.

(iv) Family law matters

3.18 Under the *Family Court Act 1975-1982* a court of summary jurisdiction constituted by a stipendiary magistrate has -

(i) the federal jurisdiction with which it is vested by or under the Commonwealth *Family Law Act*; [42]

(ii) outside the metropolitan region all the non-federal jurisdiction of the Family Court of Western Australia[43] except that conferred by the *Adoption of Children Act 1896-1981*.[44]

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39 Para 3.26 below.

40 *Justices Act*, s 29. In practice justices do not conduct preliminary hearings.

41 *Justices Act*, s 29.

42 *Family Court Act 1975-1982*, s 74. For this purpose the court may also be constituted by a stipendiary magistrate who is the Registrar or a Deputy Registrar of the Family Court of Western Australia. In the Perth metropolitan region this jurisdiction may only be exercised by a court of summary jurisdiction sitting at 45 St George's Terrace, Perth, the premises of the Family Court of Western Australia.

43 See, for example, Part III of the *Family Court Act 1975-1982*.

44 *Family Court Act 1975-1982*, s 75(1). For this purpose the court may be constituted by a stipendiary magistrate who is the Registrar or a Deputy Registrar of the Family Court of Western Australia. This jurisdiction is subject to the limits imposed by s 75(2) of the *Family Court Act 1975-1982*.

For the purpose of exercising this jurisdiction, section 24(2) of the *Justices Act* enables the Governor by proclamation to order Courts of Petty Sessions constituted by a stipendiary magistrate to be held at such places as he thinks fit. [45]

(v) Other matters

3. 19 Courts of Petty Sessions also have jurisdiction to hear other matters which involve civil law, for example disputes under the *Dividing Fences Act 1961-1969*.[46] Courts of Petty Sessions also act as administrative law decision-makers, for example, in respect of licensing of employment agents, or as appellate bodies from certain administrative decision-makers.[47]

(vi) Federal jurisdiction

3.20 Courts of Petty Sessions are, within the limits of their jurisdiction, also invested with federal jurisdiction. This jurisdiction can only be exercised by a stipendiary magistrate.[48]

(b) Discussion

(i) Jurisdiction of the court

3.21 The formal creation of a court exercising criminal jurisdiction, or both civil and criminal jurisdiction, would provide an opportunity to set out the nature of that jurisdiction in the same way as the jurisdiction of other courts in Western Australia is set out. The court could be invested with the same criminal jurisdiction as Courts of Petty Sessions presently have, namely to -

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45 A number of such proclamations have been made: [1977] *Government Gazette*, 4193-4194, [1979] *Government Gazette*, 3770, [1981] *Government Gazette*, 607.

46 In its report on Project No 33, *Dividing Fences* (1975), para 45, the Commission recommended that this jurisdiction be transferred to Local Courts. If Courts of Petty Sessions and Local Courts systems were merged, this recommendation could be implemented by placing dividing fences disputes under the merged court's civil jurisdiction.

47 The jurisdiction of Courts of Petty Sessions as appellate bodies from administrative decision-makers was recently considered in a report of the Commission: *Review of Administrative Decisions : Appeals* (1982). The Commission recommended that the appellate jurisdiction of Courts of Petty Sessions should be conferred on a proposed Administrative Law Division of the Local Court: id, 41, para 5.12. In the interests of consistency, the Commission also suggested that consideration be given to conferring on Local Courts the original jurisdiction of Courts of Petty Sessions with respect to administrative decisions: id, 41 footnote 1.

48 *Judiciary Act 1903-1983* (Cth), s 39(2).

(a) hear and determine any complaint of a simple offence;

(b) hear and determine any complaint of an indictable offence which may be tried summarily;

(c) conduct preliminary proceedings in relation to indictable offences.

A decision would require to be made whether the non-criminal jurisdiction at present conferred on Courts of Petty Sessions[49] should be transferred to the new court. If the merger discussed in paragraphs 3.3 to 3.7 above took place, that jurisdiction could conveniently be allocated to the Administrative Law Division, the Civil Division or The Family Law Division, as was appropriate.[50]

(ii) Composition of the court

3.22 Provision could then be made for the manner in which the court should be composed in order to exercise jurisdiction, subject to any provision in any other Act.[51] In regard to its criminal jurisdiction, this is a matter which largely depends on the future role to be assigned to justices of the peace, which was discussed in Chapter 2. However, some incidental questions remain.

3.23 **First**, it has been suggested to the Commission that there may be cases in which it would be desirable to have a case heard by more than one stipendiary magistrate, for example, where a complaint raised unusually complex issues, particularly issues of fact, or was likely to be politically contentious. An order for the court to be constituted by more than one stipendiary magistrate could be made either on the motion of the court itself or following an application by a party. If provision were to be made for more than one stipendiary magistrate to sit on a case it would be desirable that the court comprise an uneven number of such officers and to provide for the decision of the majority to prevail.

3.24 **Secondly**, the circumstances in which one justice should be able to exercise the jurisdiction of the court would require to be determined, assuming justices are to continue to

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49 This would include those matters referred to in paras 3.18 and 3.19 above.

50 If the merger of Courts of Petty Sessions and Local Courts does not take place, it would seem preferable to give the non-criminal jurisdiction to the Local Court or some other body. The Commission has made recommendations in this regard in other reports: see footnotes 2 and 3 to para 3.19 above.

51 Such as a statute which provides that a complaint for an offence must be heard by a stipendiary magistrate: see the first footnote to para 3.15 above.

have a judicial role. At present one justice may exercise the jurisdiction of two justices if "no other Justice usually residing in the district can be found at the time within a distance of sixteen kilometres".[52] According to the Dixon Report there was "a tendency for a Justice sitting alone to impose penalties which are sometimes inconsistent with those imposed by two Justices or by a Magistrate".[53] The Dixon Report concluded that it was undesirable for a justice to sit alone and recommended that the section be amended to provide that:[54]

> "...when only a single Justice is available the offender should be remanded on bail until a second Justice or a Magistrate is available, with the proviso the defendant have the right to elect to be dealt with by a Justice." [[55]]

3.25 The Commission approves in principle the proposal to limit the jurisdiction of a single justice, but considers that there may be objection to the suggestion that the defendant should be released on bail until a second justice or magistrate is available. It also sympathises with the philosophy behind the suggestion, namely that a defendant should not be prejudiced by the absence of a second justice. However automatic release on bail could carry an unacceptable risk that a defendant might abscond. An alternative may be to permit the justice to make the decision whether or not to grant bail in the ordinary way. If bail is denied, arrangements should be required to be made for the defendant to be conveyed forthwith to a place where two justices are available, or for another justice to attend forthwith at the original place. If the existing approach is retained whereby a single justice may in certain circumstances sentence[56] a defendant, consideration should be given to the question whether the present formula for conferring jurisdiction on one justice, namely "whenever no other Justice usually residing in the district can be found at the time within a distance of sixteen kilometres" is now appropriate.[57] At the very least, it would seem desirable for a duty to be placed on a court official to investigate whether no other justice "can be found" within the prescribed distance. At present the section appears to leave this task to the justice himself.[58]

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52 Para 3.15 above

53 Dixon Report, 119.

54 Id, 120.

55 Under the *Justices Act* at present a complaint may be heard by one justice if all parties concerned consent: *Justices Act*, s 29.

56 In practice justices do not deal with defended cases. The Commission has suggested above that this limitation should be made statutory: para 2.17. It also invited comment on the suggestion that justices should not be able to sentence to a term of imprisonment: paras 2.18 to 2.22 above.

57 In *Taylor v Johnson* [1977] WAR 95 it was held that, to provide jurisdiction if he convicts, the justice must also certify to that effect. Doubt was cast on the correctness of this decision by Barwick CJ during the hearing of an application for special leave to appeal to the High Court in *Anderson v Galton-Fenzi*: 9 of 1979, Western Australian Registry. The matter should be clarified.

58 It has been suggested to the Commission that in some places a single justice routinely sits when in fact another justice or justices are to "be found" within the required distance. A justice might not be expected

3.26 **Thirdly**, at present, as was pointed out in paragraph 3.16 above, it is not clear how the court must be constituted where an indictable offence is determined summarily. Since justices in practice do not hear defended cases,[59] the question is only a practical problem nowadays when the defendant pleads guilty. Assuming justices are to retain a role in sentencing the Commission suggests that the section be clarified by providing that even undefended cases should be dealt with only by a stipendiary magistrate, unless no magistrate is available and the accused expressly consents to the matter being dealt with by two or more justices.[60] Where the matter can be dealt with by justices it should be possible for the matter to be dealt with by one justice if all parties consent, that is, it should be subject to section 29 of the *Justices Act*.

3.27 **Fourthly**, in cases where an Act other than the Justices Act confers jurisdiction of a civil or administrative law nature on a Court of Petty Sessions or of summary jurisdiction,[61] that Act often provides for the court to be constituted by a stipendiary magistrate. The Commission suggests that it should be provided that the court should be similarly constituted where the relevant Act is silent. Generally, the result would be that the court would be constituted in the same manner as a Local Court hearing civil or administrative matters. As indicated above, the Commission would prefer to see this jurisdiction conferred on Local Courts, or on the Civil or Administrative Law Divisions, as the case may be, of the single court should one be established.[62]

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to undertake extensive enquiries as to the whereabouts of other justices, whereas a court official could. The official could report periodically to the Under Secretary for Law to ensure that consideration is given to appointing further justices in the district, or other steps taken.

59 The Commission has suggested that this be confirmed by statute: para 2.17 above.

60 This approach was in fact recommended by the Commission's predecessor, the Law Reform Committee, in its report, *Summary Trial of Indictable Offences* (1970), 11. It has, however, been recommended that the court should be " ...constituted by a Magistrate alone, unless there is no Magistrate available, or whether or not a Magistrate is available, unless the defendant consents to the matter being heard by J's P": Murray Report, 4.

61 A "Court of summary jurisdiction" means any justices or stipendiary magistrate to whom jurisdiction is given by, or who is authorised to act under the *Justices Act: Interpretation Act 1918-1981*, s 4. This provision is replaced by a provision to the same effect in s 5 of the *Interpretation Act 1984* which comes into force on 1 July 1984.

62 Footnotes to para 3.19 above.

3. REVIEW OF DECISIONS OF JUSTICES BY A STIPENDIARY MAGISTRATE

(a) Appeal

3.28 One proposal made from time to time is that there should be a right of appeal from justices to a stipendiary magistrate. This matter was canvassed in the Commission's Working Paper on the first part of the project.[63] Only one commentator[64] on the paper adverted to the question and it opposed the suggestion. The Commission's report did not recommend that there should be such a right of appeal.

3.29 Those who support the proposal do so on the basis that it would involve less cost than an appeal to the Supreme Court and that, in country areas at least, it would be more convenient and speedy than an appeal to the Supreme Court. However, it is not clear that these advantages would in fact be realised. Even though the appeal would in general relate only to the sentence imposed (since justices do not try defended cases), it would still be necessary to prescribe rules of procedure so that the parties know with reasonable certainty how to proceed and that the court, and the parties, know the grounds of appeal and the basis on which the decision was made. The costs involved in complying with these procedural requirements and appearing before the appellate body may be similar whether the appellate body is a stipendiary magistrate or the Supreme Court.

3.30 An appeal to a stipendiary magistrate is only likely to be a more convenient alternative where the defendant resides in a town in which a stipendiary magistrate is based and if legal representation is available in that town. Otherwise, the difficulties caused by remoteness may be similar whether the appeal was to a stipendiary magistrate or to the Supreme Court. The greatest difficulty at present in respect of many appeals from justices seems to be in obtaining legal advice. Once that is obtained and the decision to appeal is made, it is possible to commence and have heard appeals quickly through an agent in Perth or the Perth office of the Aboriginal Legal Service or the Legal Aid Commission, as the case may be.

3.31 There is another factor. It is important in the Commission's view to have one body, the Supreme Court, supervising the implementation of the criminal law and sentencing policy in

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63 *Review of the Justices Act 1902*: *Part I - Appeals* (1978), 49-50, para 3.26.

64 The Law Society of Western Australia (Inc).

Western Australia. Sentencing policy, in particular, is more likely to be developed in a consistent and coherent manner by a small group of judges based in Perth than by a larger group of stipendiary magistrates spread throughout Western Australia. It would, of course, be possible to allow a further right of appeal from the magistrate's decision to the Supreme Court, but to do so would not only add substantially to the costs should the disaffected party choose to avail himself of it, but would also add complexity. Appeals from magistrates in their original jurisdiction would be direct to the Supreme Court, but appeals from justices would be to magistrates with a further right of appeal to the Supreme Court.

(b) Review

3.32 Another possible approach is to provide for all sentences of imprisonment imposed by justices[65] to be reviewed by a stipendiary magistrate. At first sight this proposal may seem attractive, but there are many questions to be answered before a proper assessment of it can be made. First, would the stipendiary magistrate be empowered to substitute the sentence he considered appropriate, or would the decision of the justice be affirmed unless the stipendiary magistrate was satisfied that it was clearly wrong? Secondly, would the stipendiary magistrate merely be told of the conviction and the sentence imposed, without more, or would he also have before him the court file, a copy of the prosecution brief as read to the justices and the defendant's conviction record? Thirdly, would the parties be entitled to make a submission to the stipendiary magistrate? If not, the procedure would not only seem objectionable in principle (as involving the review of a judicial decision by an administrative rather than a judicial procedure) but may create difficulties in practice. Unless the stipendiary magistrate had as much information as the justices he may not be well enough informed to review the justices' decision. Fourthly, would the sentence be suspended pending the review? This seems desirable, but may create complications as regards bail for the defendant pending the review. The creation of such a review mechanism would also probably require the appointment of more stipendiary magistrates, the number required depending on the nature of the review procedure.

3.33 *The Commission seeks comment* on whether there should be provision for -

(a) a right of appeal from decisions of justices to a stipendiary magistrate; or

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65 Assuming that justices continue to have a sentencing role in this area: paras 2.18 to 2.22 above.

(b) an automatic review by a stipendiary magistrate of all sentences of imprisonment imposed by justices,

and if so, what should be the nature of that appeal or review.

4. OPEN COURT AND REPORTING OF PROCEEDINGS

(a) Exclusion of members of the public from trials

3.34 The room or place in which an offence which is being tried summarily is heard is deemed to be an open and public court to which all persons may have access, or at least so many as may be conveniently admitted to the room.[66] This provision recognises a fundamental principle of the administration of justice, namely that courts should be open and public. However, there is a statutory exception in that the presiding judicial officer may require that all or any persons, except counsellor solicitors engaged in the case, be excluded from the court if that is required in the interests of public morality.[67] The presiding judicial officer may also have power under the common law to exclude members of the public to ensure that justice is done. This would cover the case of tumult or disorder or the reasonable apprehension of it.[68]

3.35 It is doubtful whether members of the public should be excluded on the basis of "public morality", which in any case is a vague concept, presumably referring to hearings where evidence to be given is indecent. The Commission suggests that the power to exclude members of the public should be expressly defined and limited to cases in which it is necessary to do so in the interests of justice (for example, by removing an influence which might affect the testimony of a witness or to maintain order in the courtroom) or to protect the reputation of a victim of a crime, *The Commission seeks comment*.

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66 *Justices Act*, s 65.
67 Id, ss 65 and 67.
68 *Scott v Scott* [1911-1913] All ER Rep 1, 13.

(b) Exclusion of members of the public from preliminary hearings

3.36 At present the room or place in which a preliminary hearing[69] of an indictable offence is held is not deemed to be an open court and the presiding officer may order that no person, other than any counsellor solicitor engaged in the case, shall be in the room without his permission, However such an order may not be made unless the interests of justice require it.[70] Most of the jurisdictions studied by the Commission have a similar provision.[71] The Commission suggests that the place where a preliminary hearing is held should be deemed to be an open court but that the presiding officer should be able to make an order excluding members of the public where the interests of justice require and also to protect the reputation of a victim of crime.[72]

(c) Publication of a report of a preliminary hearing

3.37 The presiding officer may also prohibit the publication of any report of, or relating to, the evidence given or tendered at the proceedings[73] if of opinion that such publication is undesirable in the interests of justice.[74] A person who publishes a report contrary to a prohibition commits a contempt of the Supreme Court and is punishable accordingly by that Court.[75] This provision could also be extended to allow for prohibition of publication of a report to protect the reputation of a victim of a crime.[76]

3.38 These provisions appear to be aimed at balancing the principle that openness tends to maintain confidence in the fairness and impartiality of the proceedings against the need to ensure that the defendant's subsequent trial is not prejudiced by the publication of information

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69 A preliminary hearing is an inquiry as to whether or not there is sufficient evidence to place the defendant on trial before a jury in the Supreme or the District Court. It does not involve a determination of whether or not the defendant committed the alleged offence.

70 *Justices Act*, ss 66 and 67, See Allen, 197-198.

71 In New South Wales the place at which committal proceedings are held is " deemed to be an open and public court, to which all persons may have access so far as that room or place can conveniently contain them": *Justices Act* (NSW), s 32.

72 A recommendation in terms similar to this was made in the Murray Report at 408-409 and 604-605.

73 *Justices Act*, s 101D. Where a defendant elects not to have a preliminary hearing a person who discloses any of the contents of a deposition or written statement tendered as part of the preliminary procedure commits a contempt of the Supreme Court and is punishable accordingly by that Court: *Justices Act*, s 101C(c).

74 It is an offence to publish any matter likely to lead members of the public to identify the victim of the offences of rape or indecent assault except by leave of the Supreme Court or the District Court: *Evidence Act 1906-1982*, s 36C.

75 *Justices Act*, s 101D.

76 It is the policy of at least one newspaper, The West Australian, not to identify victims of rape, incest and other sex crimes: *SM Rules Out Press-gag Plea*, The West Australian, 20.1.1983, 32.

beforehand. Information disclosed at a preliminary hearing is capable of giving potential jurors a distorted view because usually only the prosecution case is presented at the preliminary hearing, the defendant reserving his defence for the trial.

3.39 While it is difficult to assess the extent to which the publication of a report of a preliminary hearing might prejudice a fair trial, it seems prudent to have some provision whereby the publication of a report of the proceedings can be prohibited.[77] In Western Australia the court has a discretion. In England however express provision has been made as to the circumstances in which information relating to a preliminary hearing may be disclosed.

3.40 Subject to some exceptions, it is not lawful to publish in Great Britain a written report, or to broadcast in Great Britain a report, of any committal proceedings[78] containing any matter other than the following:[79]

> "(a) the identity of the court and the names of the examining justices;
> (b) the names, addresses and occupations of the parties and witnesses and the ages of the accused and witnesses;
> (c) the offence or offences, or a summary of them, with which the accused is or are charged;
> (d) the names of counsel and solicitors engaged in the proceedings;
> (e) any decision of the court to commit the accused or any of the accused for trial, and any decision of the court on the disposal of the case of any accused not committed;
> (f) where the court commits the accused or any of the accused for trial, the charge or charges, or a summary of them, on which he is committed and the court to which he is committed;
> (g) where the committal proceedings are adjourned, the date and place to which they are adjourned;
> (h) any arrangements as to bail on committal or adjournment;
> (i) whether legal aid was granted to the accused or any of the accused."
>
> The accused, or one of them, may apply to have the prohibition on publishing or broadcasting of reports of the proceedings lifted.[80]

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77 Following a review of the law in South Australia relating to suppression orders (C M Branson, *Section 69 of the Evidence Act 1929*), the South Australian Attorney General has announced that legislation will be introduced in that State to clarify the existing law: *Name ban to go on in SA courts*, The West Australian , 22 .8. 1983 - This legislation has not, as yet, been introduced.

78 *Magistrates' Courts Act* (Eng), s 8(1).

79 Id, s 8(4). This provision is based on recommendations of the Departmental Committee on Proceedings Before Examining Justices (Cmnd 479, 1957): see E F Frohlich, *Committal Proceedings in England and Australia* (1975) 49 ALJ 561,567-569.

80 *Magistrates' Courts Act* (Eng), s 8(2). The presiding officer is required to explain to the accused the restrictions on reports of the proceedings and inform him of his right to apply to the court for an order removing those restrictions: *Magistrates' Courts Rules 1981* (Eng), r 5(1). One of a number of co-accused may wish to have the prohibition lifted in the hope that a person with information relating to the offence

The proceedings may also be reported if the court determines that there is insufficient evidence to put the defendant on trial, or, where the accused is committed for trial, after the trial.[81]

3.41 **The Commission welcomes comment** on whether the English approach should be adopted in Western Australia and, if so, whether the matters referred to in (a) to (h) are appropriate to be adopted.[82] This assumes that preliminary hearings will continue to take place in this State. If the scheme outlined in Part 3 of Chapter 9 below is adopted, the question of publication will only be relevant in the limited circumstances where a defendant makes application to a stipendiary magistrate for discharge on the basis of the prosecution's written case.

(d) Exclusion of witnesses

3.42 In a number of other jurisdictions the court has express power to order that any or all of the witnesses, except the parties, should leave the courtroom until required to give evidence.[83] The exclusion of one or more witnesses in such circumstances may be desirable because of the risk that their evidence may be influenced by the evidence given by an earlier

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might learn about the case and come forward. However, this may not be in the interests of the others. An attempt has been made to overcome this dilemma by providing that where an application for reporting restrictions to be lifted is opposed by one or more of the co-accused, the court has a discretion whether or not to make the order: *Magistrates' Courts Act* (Eng), s 8(2A). The restriction may only be lifted if a strong case is made out for reporting proceedings, for example, "...so that there might be an opportunity of missing witnesses, vital to the defence case, identifying themselves and putting themselves forward" : *R v Leeds Justices; Ex parte Sykes* [1983] 1 WLR 132, 136.

81 *Magistrates' Courts Act* (Eng), s 8(3). S 399A of the *Criminal Code* (WA) contains a limitation on the reporting of proceedings of charges of demanding property with menaces with intent to steal, and certain cognate offences, but is designed to protect the alleged victim and not the defendant. Under s 399A it is an offence to publish, except with the leave of the Supreme Court or a judge, any particulars of the proceedings, other than :

"(a) the name, address and occupation of the person charged;
(b) the nature (but not the particulars) of the charge;
(c) the name or names of a member or members of a court, at any stage of the proceedings, and of counsel and solicitors ;
(d) submissions made on any point of law, at any stage of the proceedings, and the decision of the court on any such submission; and
(e) the result of a hearing and the final outcome of the proceedings."

The Attorney General has announced his intention to introduce legislation to amend this provision: *Government to lift Reporting Restriction, News Release*, 4 May 1984.

82 Matter (i) would not be appropriate because an application for legal aid is not determined by the court in Western Australia as it is in England.

83 South Australia: *Justices Act*, s 61(2); Tasmania: *Justices Act*, s 37(2); Victoria: *Summary Proceedings Act*, s 78(1)(h); Australian Capital Territory: *ACT Ordinance*, s 56; Northern Territory: *Justices Act*, s 61(2); and New Zealand: *Summary Proceedings Act*, s 40.

witness. This is the practice in Western Australia. It seems desirable to confirm it by an express provision. [84]

(e) Removal for misbehaviour and disobedience of an order to leave the court

3.43 Another matter which could be clarified is whether or not a defendant who misbehaves can be excluded from the hearing. The *Criminal Code* provides that, in the case of trials on indictment:

> "The trial must take place in the presence of the accused person, unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable, in which case the Court may order him to be removed, and may direct the trial to proceed in his absence."[85]

3.44 It may also be desirable to give the presiding judicial officer express power to order the physical removal from the courtroom of all persons who have disobeyed an order to leave.[86]

5. CONTEMPT OF COURT[87]

3.45 Section 41 of the *Justices Act* provides that -

> (a) any person who insults any justices sitting in the exercise of their jurisdiction under the *Justices Act* or any other Act; or
>
> (b) wilfully interrupts the proceedings of justices so sitting,

commits an offence and may be excluded from the court.[88] Whether or not the person is so excluded, he may be summarily convicted by the justices present. On conviction he is liable to

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84 Such an approach has also been recommended by the Murray Report at 410 and 604.

85 *Criminal Code*, s 635. See also *Provincial Offences Act* (Ont), s 53(1)(a) and, in the case of preliminary hearings, *Summary Proceedings Act* (NZ), s 158(1). The South Australian Criminal Law and Penal Methods Reform Committee has recommended that a similar provision be introduced in South Australia: Third Report, *Court Procedure and Evidence* (1975), 45-47. It also recommended that if a person is so removed he should be brought back into court from time to time at the discretion of the presiding officer to give him an opportunity of remaining there without continuing to disrupt the proceedings. It also recommended that it should be possible to pronounce sentence in the absence of the defendant.

86 *Magistrates' Courts Act* (Vic), s 47(2).

87 The Australian Law Reform Commission has been asked to consider and report on the law of contempt within Federal and Territory courts, State courts exercising federal jurisdiction and tribunals and commissions created by or under Commonwealth laws. The Commission has published an Issues Paper, *Reform of Contempt Law* (1984, ALRC IP 4).

a penalty not exceeding ten dollars, and in default of payment to be imprisoned for a period not exceeding seven days.

3.46 This provision is confined to contempts in the face or hearing of the court and not to actions which take place outside the court, for example, publishing material which scandalises the court. Where contempts are committed outside a Court of Petty Sessions, the Supreme Court has power to punish for contempt[89] by motion on notice to the contemnor.[90]

3.47 In the jurisdictions studied by the Commission the power of Courts of Petty Sessions or equivalent to deal with contempts of court is generally confined to matters occurring in the face or hearing of the court.[91] The Commission has not received any information which suggests that the existing scope of the power is unsatisfactory but there may be a need to redefine the power or extend it. **The Commission would welcome views**.

3.48 As stated above, a person may be excluded from the court. In addition a penalty not exceeding ten dollars may be imposed. This penalty has not been altered since 1902. In a preliminary submission to the Commission, a stipendiary magistrate[92] commented that in most cases the power to exclude a person is sufficient but that if there is to continue to be a power to punish, the penalty should be adequate. The Commission agrees that the present maximum penalty is too little and suggests that it be increased to a fine not exceeding $500 or imprisonment not exceeding three months.

3.49 **The Commission also seeks comment** on whether or not the court should have express power to remit the penalty or imprisonment, either wholly or in part, if the offender apologises before the rising of the court. A number of jurisdictions have such a provision.[93]

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88 As Courts of Petty Sessions are not courts of record they do not have the common law power to punish a person summarily for contempt of court preserved by s 7 of the *Criminal Code Act 1913*

89 *John Fairfax and Sons Pty Ltd v McRae* (1955) 93 CLR 351.
Disobedience to any lawful order of a Court of Petty Sessions is a misdemeanour punishable by imprisonment for one year: *Criminal Code*, s 178.

90 *Rules of the Supreme Court 1971-1984*, O 55 r 4.

91 See, for example, Cont*empt of Court Act 1981* (UK), s 12.

92 Mr D A McCann, SM.

93 *Justices Act* (SA), s 46(5); *Magistrates' Courts Act* (Vic), s 46(5); *Justices Act* (Qld), s 40(4); *Justices Act* (NT), s 46(5).

6. PROCEDURE

3.50 The *Justices Act* contains many procedural provisions to be followed in dealing with summary proceedings. Where the particular procedure is specified the court or justices must of course comply with it. If, however, there is no relevant statutory provision, the court or justices have inherent power to control the procedure.[94] While it may be possible to improve the procedure set out in the *Justices Act* and remove any uncertainty it would seem to be desirable expressly to preserve this inherent power for the situation where the Act is silent .

7. QUESTIONS AT ISSUE

3.51 The Commission welcomes comment on the following issues raised in this chapter -

The Court

1. Should the Court of Petty Sessions be formally constituted?

(Paragraph 3.2)

2. Should a new court merging Courts of Petty Sessions and Local Courts be established?

(Paragraphs 3.3 to 3.6)

3. Should there be one court or a number of courts established at specified places throughout the State?

(Paragraph 3.7)

4. Should places for holding the court be fixed?

(Paragraphs 3.8 to 3.10)

5. Should courts be held in police stations?

(Paragraph 3.11)

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94 *Sparks v Bellotti* [1981] WAR 65.

6. Should it be possible to appoint clerks of petty sessions without confining their appointment to a particular magisterial district?

(Paragraph 3.13)

7. Should clerks of petty sessions have power to issue warrants of execution or commitment?

(Paragraph 3.14)

Jurisdiction and composition of the court

8. What should be the jurisdiction of the court?

(Paragraph 3.21)

9. What should be the composition of the court in the case of -
   (i) an indictable offence triable summarily;
   (ii) civil or administrative matters?

(Paragraphs 3.26 and 3.27)

10. Should it be possible for a court to be constituted by more than one stipendiary magistrate?

(Paragraph 3.23)

11. Should the jurisdiction of a single justice be confined to circumstances in which the defendant elects to be dealt with by a single justice?

(Paragraphs 3.24 and 3.25)

12. If not, is the present formula for conferring jurisdiction on one justice, namely "whenever no other Justice usually residing in the district cannot be found at the time within a distance of sixteen kilometres" satisfactory?

(Paragraph 3.25)

13. If this formula is retained, should a duty be placed on a court official to investigate whether no other justice "can be found" within the prescribed distance?

(Paragraph 3.25)

Review of decisions of justices by a stipendiary magistrate

14. Should provision be made for an appeal from the decision of a court constituted by justices to one constituted by a stipendiary magistrate and, if so, what should be the scope of such an appeal?

(Paragraphs 3.28 to 3.31)

15. Should all sentences of imprisonment imposed by justices be reviewed by a stipendiary magistrate and, if so, what should be the nature of the review and the procedure?

(Paragraph 3.32)

Open court and reporting of proceedings

16. Should the circumstances in which it is possible to exclude a person from a summary trial be limited to cases in which it is necessary to do so in the interests of justice or to protect the reputation of a victim of a crime?

(Paragraph 3.35)

17. Should the place at which a preliminary hearing is held be deemed to be an open court but that the presiding officer should be able to make an order excluding members of the public where the interests of justice require and also to protect the reputation of a victim of a crime?

(Paragraph 3.36)

18. Should the power to prohibit the publication of a report of a preliminary hearing be extended to allow for prohibition of the publication of a report to protect the reputation of a victim of a crime?

(Paragraph 3.37)

19. Should the legislation go further by expressly limiting the information which may be published relating to a preliminary hearing as is the case in England?

(Paragraphs 3.40 and 3.41)

20. Should express provision be made for the exclusion of witnesses from a hearing except to give evidence?

(Paragraph 3.42)

21. Should there be express power to exclude a defendant who misbehaves?

(Paragraph 3.43)

22. Should the presiding judicial officer have express power to order the physical removal from the courtroom of all persons who have disobeyed an order to leave?

(Paragraph 3.44)

Contempt of court

23. Should there be any extension of the court's power to deal with contempts, and if so, what should it be?

(Paragraphs 3.45 to 3.47)

24. Should the penalty for interrupting proceedings in Courts of Petty Sessions be increased and, if so, what penalty should be provided?

(Paragraph 3.48)

25. Should the court have power to remit the penalty, either wholly or in part, if the offender apologises?

(Paragraph 3.49)

PART IV: SUMMARY PROCEEDINGS
CHAPTER 4
COMMENCEMENT OF PROCEEDINGS

1. INTRODUCTION

4.1 Proceedings for offences may be commenced by a complaint or, in the case of some offences (mainly of a regulatory nature), by an infringement notice. Where a complaint is laid the matter is dealt with by a Court of Petty Sessions. The infringement notice procedure enables a matter to be disposed of without a court hearing or conviction. Both these procedures are discussed in this chapter.

2. COMPLAINTS

(a) General

4.2 Proceedings before a Court of Petty Sessions must be commenced by a complaint.[1] The complaint may be laid by the complainant[2] in person or by his counsellor solicitor or other person authorised in that behalf. A complaint may be received by a single justice.[3] If a summons is being sought in the first instance the complaint need not be in writing or on oath.[4] If a warrant is being sought, however, the complaint must be in writing and on oath. [5]

4.3 In a preliminary submission to the Commission, a stipendiary magistrate[6] made two suggestions with regard to the laying of complaints. First, they should be required to be in writing. The Commission provisionally agrees with this suggestion. Secondly, once proceedings are so instituted, the complaint and a copy of any summons or warrant issued should be held as part of the court record by the nearest clerk of petty sessions. It appears that in some cases at present the complaint is returned to the complainant. This suggestion could

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1 *Justices Act*, s 42. Such description of persons or things as would be sufficient in an indictment is sufficient in a complaint : id, s 44. It is sufficient in law to describe the offence in the words of the Act, order, by-law, regulation or other instrument creating the offence: id, s 45.

2 This means the person who makes the complaint. It does not necessarily mean the person who was injured by the conduct the subject of the complaint: *Potts v Brooks; Ex part Potts* [1983] 2 Qd R 48,51.

3 *Justices Act*, s 26. An Imperial statute also provides that a single justice may receive a complaint: 1822 3 Geo 4, c 23, s 2. This section could be repealed.

4 *Justices Act*, s 50.

5 Id, s 49.

6 Mr D A McCann SM.

be implemented by requiring the complaint to be lodged in the nearest Court of Petty Sessions once a summons or warrant has been issued by a justice.[7]

4.4 The complaint and summons form[8] introduced by the Justices (Forms) Regulations 1982 provides that the defendant be informed of -

(a) the date on which the offence is alleged to have been committed;

(b) the nature of the offence or subject matter alleged; and

(c) the statutory provision under which the offence was alleged to have been committed.

As a defendant may enter a plea of guilty or not guilty of the offence[9] in writing it may be desirable to require that the form include additional information to assist him in making a decision as to which plea to enter. The form could be required to contain, or be accompanied by, a summary of the facts upon which the allegation that an offence was committed is based,[10] or to state that the defendant may apply to the complainant for such a statement before he enters a plea.[11] In *Baker v Flynn*,[12] Olney J commented that:

> "...interests of justice would be better served if...a complainant [were required] to supply to the defendant a written copy of 'the facts of the case'...prior to the defendant being called upon to plead to the charge and irrespective of whether the defendant has indicated to the prosecutor an intention to plead guilty."

4.5 Unless some other time limit is provided for making a complaint for a simple offence,[13] the complaint must be made within six months from the time when the matter of

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7 It has, however, been suggested that this would cause administrative difficulties in some courts. In Perth, for example, the court would have to receive and file a large number of complaints which would not be dealt with further because the summons could not be served on the defendant. It was suggested that it was preferable from an administrative point of view for the complaint and a copy of the summons to be filed in court once the summons was served on the defendant.

8 For the form see Appendix IV.

9 Para 5.1 below.

10 At present in regard to certain offences usually involving motor vehicles the complaint may be accompanied by affidavits of evidence in support of the matters alleged in the complaint: para 6.33 below.

11 At present where a person is arrested without a warrant the defendant is not necessarily given a copy of the complaint: para 4.21 below. The introduction of a requirement to provide a statement of facts by either of these means would further emphasise the importance of ensuring that a defendant arrested without a warrant received a copy of the complaint.

12 [1982] WAR 289, 293.

13 For example, s 117 of the *Stamp Act 1921-1983* provides that a prosecution for an offence against the Act may be commenced at any time within two years after the offence was committed

complaint arose.[14] The purpose of this limitation is to ensure that a person is not harassed by accusations of stale offences. However, there may be cogent reasons for the failure to lay a complaint within six months, for example, the commission of the offence or the identity of the person who committed it may not have been discovered within that period. While consideration could be given to permitting a person to apply to a Court of Petty Sessions for leave to lay a complaint outside the period which would otherwise apply, the Commission considers that the best approach would be for the legislature to provide longer limitation periods for offences which by their nature may not be discovered for a long period of time after they are committed.

(b) Joinder of offences

4.6 Subject to the matters referred to in paragraph 4.8 below, a complaint must be for only one matter.[15] This rule is designed to ensure that -

(a) the defendant is precisely acquainted with the offence with which he is charged;

(b) a court is not placed in the position of having to separate the evidence applicable to a number of unconnected matters; and

(c) there is no uncertainty or ambiguity as to the final order of the court, thus avoiding the difficulty of resolving a plea of autrefois acquit or autrefois convict on a subsequent complaint.[16]

4.7 A complaint which is for more than one matter involves a defect of substance.[17] As section 46 of the *Justices Act* provides that no "objection shall be taken or allowed to any complaint....for any alleged defect therein, in substance or in form" the court is not justified in refusing to give judgment in the case.[18] Although section 46 permits a complaint to be amended where there is a variance between the complaint and the evidence, it does not

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14 *Justices Act*, s 51; *Criminal Code*, s 574(2). S 51 of the *Justices Act* does not apply to indictable offences triable summarily: *Criminal Code*, s 574(3)(d). It has been recommended that s 574(2) should be repealed, so that the position would be governed by s 51 of the *Justices Act*, and that s 574(3) should be retained in a more concise form: Murray Report, 4.
Note that the limitation period relates to the laying of the complaint. A summons based on the complaint may be served outside that period.

15 *Justices Act*, s 43. More than one complaint can be tried at the same time if the facts are sufficiently connected to justify a joint trial: *Chief Constable of Norfolk v Clayton* [1983] 2 AC 473.

16 For examples see W Paul, *Duplicity in Indictments and Informations* (1935) 8 ALJ 430, 433.

17 *Rodgers v Richards* [1891-1894] All ER Rep 394,395.

18 *Hedberg v Woodhall* (1913) 15 CLR 531,535.

expressly permit an amendment to be made for the purpose of overcoming a defect in substance or form.[19] In the case of a complaint which improperly is for more than one matter the court should: [20]

> "...inform [the complainant] of his right of election, and ask him on which charge he desires to proceed. But in the case of an illiterate or ignorant complainant..., if he does not know what to do, that would not, in my opinion, relieve the magistrate from his duty to hear the evidence and form his own conclusion as to whether either of the offences charged is proved."

Only if the prosecutor will not make an election should the complaint be dismissed. [21]

4.8 The *Justices Act* contains two provisos to the rule that a complaint must be for only one matter.[22] First, a number of matters may be joined in the same complaint where -

(a) in the case of indictable offences, the matters of complaint are such that they may be charged in one indictment;[23]

(b) in other cases, the matters of complaint are substantially of the same act or omission on the part of the defendant.

Secondly, where several simple offences are alleged to be constituted by the same acts or omissions or by a series of acts done or omitted to be done in the prosecution of a single purpose, the charges for the offence may be joined in the same complaint. If it appears to the justices that the defendant is likely to be prejudiced by the joinder, they may require the complainant to elect upon which of the charges he will proceed or may direct that the defendant be tried separately on each or any of the charges.[24] In addition, where an offence is a continuing offence, for example, carrying on an offensive trade, it may be described as being committed between specified dates or on two separate dates.[25]

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19 The question of whether or not such an amendment should be permitted is raised in para 6. 13 below.

20 *Hedberg v Woodhall* (1913) 15 CLR 531, 536, per Griffith CJ.

21 *Edwards v Jones* [1947] 1 All ER 830,831. Approved in *Hunt v Sutton* [1975]WAR 55, 63-64.

22 Where more than one matter is charged in a complaint, it could be expressly provided that each matter be set out in a separate paragraph.

23 See *Criminal Code*, ss 585 and 586.

24 *Justices Act*, s 43

25 *W Thomas & Co (WA) Ltd v Martin* [1967] WAR 68, 70.

4.9 An example of the proviso referred to in (b) in the previous paragraph is provided by the case of *R v Jones; Ex Part Thomas*.[26] In this case the defendant was charged with and convicted of driving an automobile on a highway "recklessly and at a speed which was dangerous to the public". It was held that the conviction was not bad because the driving of the automobile was one act which might include both the offences charged. This proviso, however, does not permit a person to be charged with alternative offences, for example, with driving, "...a motor car without due care and attention or without reasonable consideration for other persons using the road."[27]

4.10 The second proviso permits a number of offences to be joined in the same complaint if they were done in the prosecution of a single purpose, for example, an officer of a company knowingly contracting debts by the company at a time when he had no reasonable or probable grounds of expectation of the company being able to pay the debts.[28] The *Criminal Code* goes further in respect of indictable offences.[29] It enables charges for distinct offences to be joined in the same indictment when " ...several distinct indictable offences form or are a part of a series of offences of the same or a similar character. " This permits, for example, three counts of false pretences to be joined in the one indictment.[30] This provision also applies to complaints of indictable offences tried summarily.[31] It seems undesirable that there should be different rules for the matters which may be included in the one complaint, depending on whether the offence is an indictable offence triable summarily or a simple offence.

The Commission seeks comment on whether or not the provision in the *Criminal Code*[32] should be extended to cover all offences or whether separate provision to the same effect be made in respect of summary trials.

4.11 The question of whether or not a charge is bad for duplicity can raise difficult problems in practice. Generally, they arise out of the manner in which provisions creating offences are drafted, since the question whether a provision creates a single offence or two or more offences depends on the subject matter and language of the provision. The way to avoid

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26 [1921] 1 KB 632.

27 *R v Surrey Justices; Ex parte Witherick* [1931] All ER Rep 807.

28 *De Rossi v Hamilton* (1982) 7 ACLR 40, 42-43.

29 *Criminal Code*, s 585.

30 *Seiler v R* [1978] WAR 27.

31 *Criminal Code*, s 593.

32 With one exception, which is not relevant to this project, the Murray Report contains recommendations for minor amendments to s 585 of the *Criminal Code*: Murray Report, 371-372.

such problems seems to depend on ensuring that provisions are drafted so that they clearly disclose whether they are intended to create one or more offences.[33] Where there is concern as to whether or not a complaint was bad for duplicity, this issue could be determined at a pre-trial hearing without any inconvenience which would be caused if it were raised at the trial.[34]

(c) Charging more than one defendant in a complaint

4.12 The *Justices Act* contains no provision as to whether or not more than one defendant may be charged in a complaint. It has been held by the Full Court of Western Australia that this may be done in the case of persons alleged to have joined in committing the same offence.[35] In the case of trials on indictment, section 586(7) of the *Criminal Code* provides that any number of accused persons may be charged in the same indictment with committing different or separate offences if the offences arise substantially out of the same or closely related facts. *The Commission seeks comment* on whether express provision should be made in the *Justices Act* for more than one accused person to be charged in a complaint either in the terms of the decision of the Full Court or section 586(7) of the *Criminal Code*.[36] If such provision were made it would, however, be desirable to allow a defendant to apply for a separate trial.[37]

(d) The summons

4.13 A justice, a stipendiary magistrate or clerk of petty sessions[38] has a discretion to issue a summons when a complaint is made before him that any person is guilty of, or is suspected

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33 The *Police Act* contains provisions which present a "real danger of duplicity in laying charges": P Nichols, *Police Offences in Western Australia* (1979), 1. Any review of this Act would require careful redrafting in this regard.

34 Paras 5.5 to 5.8 below.

35 *Kucera v Fotia* [1979] WAR 130, 131. The defendants were charged with cultivating a prohibited plant, cannabis. Even if separate complaints are made against each defendant the complaints may be tried together if the facts are sufficiently connected to justify a joint trial: *Chief Constable of Norfolk v Clayton* [1983] 2 AC 473.

36 This provision, in any case, applies to indictable offences triable summarily: *Criminal Code*, s 593.

37 Cf *Criminal Code*, s 624.

38 Some police officers are clerks of petty sessions (para 3.12 above). As the decision whether or not to issue a summons is a judicial act it seems incongruous that a police officer should have power to issue a summons. In New Zealand, although a constable may act as a Registrar he may not issue a summons: *Summary Proceedings Act* (NZ), s 19(1)(a). The last General Commission of the Peace lists approximately 280 localities outside the metropolitan area in which at least one justice is situated.

of having committed or is liable to be dealt with in respect of, any indictable offence, simple offence or other matter within the jurisdiction of justices. [39]

4.14 It appears therefore that a summons (or a warrant[40]) can only be issued by the justice who received the complaint. In a number of other jurisdictions a summons or warrant may be issued by another justice.[41] Thus, for example, another justice can amend a summons or issue a new summons where necessary if the summons was not served on the defendant before the date set down for his appearance in court. *The Commission seeks comment* on whether or not a similar rule should be introduced in this State.

4.15 A summons must be directed to the defendant and state shortly the matter of the complaint as a result of which it was made. In the case of a summons for an indictable offence, it must contain a statement requiring the defendant to appear before a court at a time and place appointed by the summons to be dealt with according to law.[42] In the case of a summons for a simple offence, it must advise the defendant of the procedures under section 135 of the *Justices Act*, according to which a hearing may be held in his absence,[43] and section 136, according to which a defendant may notify his wish to plead not guilty.[44]

4.16 Generally a summons must be served on the defendant by delivering a duplicate to him personally,[45] or, if he cannot be found, by leaving it with some person for him at his last known place of abode.[46] In the latter case it may be desirable to require that it be left only with a person who is or appears to be not less than sixteen years of age. Provision could also be made for service by bringing it to the defendant's notice if he refuses to accept it. A magistrate or clerk of court may permit the summons to be served by prepaid registered post in some circumstances.[47] A summons may also be served by prepaid registered post for a simple offence against -

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39 *Justices Act*, ss 52 and 53.

40 Para 4.18 below.

41 *Justices Act* (SA), ss 57 and 58; *Justices Act* (NT), ss 57 and 58 and *Summary Proceedings Act* (NZ), s 19(1).

42 For the form to be used where the offence is an indictable offence triable summarily see *Justices (Forms) Regulations 1982*, Form 1.

43 Para 6.28 below.

44 Para 5.1 below. For the original and duplicate form to be used where the offence is a summary offence see *Justices (Forms) Regulations 1982*, Forms 2A and 2B and Appendix IV.

45 Service of the summons may be proved by an indorsement on the summons, signed by the person by whom it was served, setting forth the day, place and mode of service. Proof of the service may also be given on oath at the hearing: *Justices Act*, s 57.

46 *Justices Act*, s 56. For service on a company see *Companies (Western Australia) Code*, s 528.

47 *Justices Act*, s 56.

(a) the *Road Traffic Act 1974-1982*;

(b) any Act prescribed for the purpose;[48]

(c) any regulation, rule, by-law or order made under the *Road Traffic Act 1974-1982* or any Act so prescribed.[49]

The summons may be posted either by an officer of a Court of Petty Sessions, by the person who made the complaint or by a person authorised by him.[50] The court may accept as proof of service of the summons, a certificate of its due posting by the person who posted it. It is not necessary to prove that the summons was actually served on the defendant.

4.17 Two safeguards are provided in the procedure for service by post. First, the court hearing the complaint cannot impose a sentence of imprisonment in respect of the offence mentioned in the complaint unless and until the person to whom the summons is directed is personally before the justices.[51] Secondly, where a summons which has been posted does not, in fact, come to the notice of the defendant prior to his being convicted of the matter of complaint stated in the summons, he may, within fourteen days of becoming aware of the conviction or within any additional period allowed by justices, serve upon the clerk of petty sessions at the place where he was convicted a notice requiring a rehearing of the complaint.[52] On a rehearing, the court must either confirm or set aside the conviction. If the conviction is set aside, the complaint must be reheard.[53] A person may, however, be discouraged from pursuing this course of action because of the cost involved, particularly if the offence is of a minor nature, for example, a parking offence.[54]

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48 Approximately eighty-one Acts have been so prescribed: *Justices (Service of Summonses by Post) Regulations 1982*. These Acts create offences of a regulatory nature, for example, the *Clean Air Act 1964-1981* and the *Local Government Act 1960-1983*.

49 *Justices Act*, s 56A(1).

50 Id, s 56A(3). Generally, the summons is posted by the complainant or someone authorised by him.

51 *Justices Act*, s 56A(4)(b).

52 Id, s 56A(5).

53 Id, s 56A(7).

54 The Commission has received one complaint concerning the procedure for service by post. In this case the defendant was convicted without being served with the summons. The defendant's inaction had, however, contributed to this result because she had not notified the authority responsible for licensing vehicles of her change of address. The summons was posted, in accordance with the *Justices Act*, to the address recorded on her vehicle's licence. When it was found that she no longer resided at that address, the summons was sent on to her forwarding address, a country post office, but she did not collect her mail.

(e) The warrant

4.18 When a complaint of an offence is made before a justice the justice may issue a warrant to apprehend the defendant and cause him to be brought before a court to be dealt with according to law. The justice may, however, instead of issuing a warrant issue a summons.[55]

4.19 The warrant may be directed either to any police officer or officers by name, or generally to all police officers within the State. Any police officer may execute any warrant as if it was directed, specially to him by name.[56] A warrant must -

(i) state shortly the offence or matter of the complaint;

(ii) name or otherwise describe the person against whom it is issued, and

(iii) order the police officers to whom it is directed to apprehend the defendant and take him before justices to be dealt with according to law.[57]

A warrant remains in force until it is executed.[58] Provision could be made for a copy of the complaint to be served on the defendant following his arrest.

4.20 The Commission's attention has been drawn to the practice of withdrawing warrants in certain circumstances, for example, where a defendant appears before the court voluntarily or on some other charge and the offence for which the warrant was issued is dealt with by the court. In these cases it is desirable for the warrant to be withdrawn so that the defendant is not subject to arrest. There would also be cause to withdraw a warrant or a summons, where it was discovered that the process had been wrongly issued due to a mistake of law or fact. There is, however, some doubt as to whether this can be done.[59] In New Zealand any warrant to arrest a defendant or warrant for the appearance of a person required as a witness can be withdrawn.[60] In Victoria a warrant or summons may be withdrawn by the justice or clerk who

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55 *Justices Act*, ss 58 and 59. A warrant may be issued and executed on a Sunday: id, s 63.
56 Id, s.60.
57 Id, s.61.
58 Id, s.62.
59 Allen, 173.
60 New Zealand: *Summary Proceedings Act*, s 23.

issued it, or by a stipendiary magistrate, if that justice or clerk is dead, has ceased to hold office or if his whereabouts cannot be ascertained.[61] If express provision is made for a warrant to be withdrawn along the lines of the Victorian provision it would also be desirable to allow the court before which a person appeared to withdraw a warrant.

(f) Arrest without warrant

4.21 Although the *Justices Act* contains specific provisions as to the manner in which a complaint must be laid where a warrant or summons is being sought,[62] it contains no specific provision for the manner in which a complaint must be made where a person has been arrested without warrant. In practice a complaint is made out before a justice, but the defendant is not necessarily given a copy of it. He can, however, obtain a copy of it from the relevant clerk of petty sessions and, in any case, the charge is read to him when he appears in court.

4.22 In cases in which a summons or warrant is being sought it is necessary for the complaint to be laid before a justice or stipendiary magistrate who must consider whether or not a summons or warrant should be issued. In cases where a person has been arrested without a warrant, express provision could be made for proceedings to be commenced by filing the complaint in the appropriate court and by serving a copy of it on the defendant.[63] The responsibility for serving a copy of the complaint on the defendant before he appeared in court could be placed on the complainant, as it is in other cases. Where the defendant has been released on bail to appear before the court, provision could be made for the procedure to be integrated with that applicable to summonses so that a defendant could notify his wish to plead not guilty[64] or a hearing could be held in his absence if he failed to appear at the appointed time and place.[65] Whichever procedure is followed, it is only fair that the defendant is given a copy of the complaint before he first appears in court so that he knows what he is alleged to have done and when he is alleged to have done it.[66] As Mr L W Roberts-Smith, Director of Legal Aid in Western Australia, stated in a submission to the Commission:

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61 Victoria: *Summary Proceedings Act*, s 15(2).

62 Para 4.2 above.

63 The defendant could also be given a right to obtain a copy of the complaint before he enters his plea: para 6.2 below.

64 Para 5.1 below.

65 Para 6.28 below.

66 In New South Wales all defendants must be given a written copy of any charges against them: *Justices Act* (NSW), s 78(1).

> "The fact that the complaint is read to him in Court is not sufficient. Many defendants have to face numerous complaints and cannot be expected to remember the details of each one. Some are not sufficiently intelligent to be able to know what is being alleged against them. By furnishing a defendant with a copy of the complaint it assists in the preparation of his defence and enables the lawyer who interviews him to know more about the allegations made against him."

3. INFRINGEMENT NOTICES

4.23 A number of Acts provide for proceedings relating to certain simple offences to be commenced by an "infringement notice".

4.24 One such Act is the *Road Traffic Act 1974-1982*. Section 102(1) of that Act provides that where a member of the police force or a warden has "reason to believe" that a person has committed a prescribed offence[67] against the Act, the officer or warden may serve a "traffic infringement notice" on the person.

4.25 A notice may be served on him personally or by post. If the identity of the person driving or in charge of the vehicle is not known and cannot immediately be ascertained, the notice may be addressed to the owner of the vehicle, without naming him or stating his address, and be served by leaving it in or upon, or by attaching it to, the vehicle.

4.26 Where the notice is served on the alleged offender personally or by post he may dispose of the matter by payment of the penalty shown or by declining to be dealt with under the provisions of the section. If he fails to pay the penalty within the period he is deemed to have declined to be dealt with under the provisions. Where the person declines to be dealt with under the provisions or is deemed to have so declined the matter must be dealt with by a court. [68]

4.27 Where the notice is served by addressing it to the owner of the vehicle and leaving it in or upon, or attaching it to the vehicle, the owner of the vehicle is deemed to have committed the offence if the prescribed penalty is not paid within the period specified in the

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67 See *Road Traffic (Infringements) Regulations 1975-1983*, reg 3 and the First Schedule.

68 For other similar provisions see *Control of Vehicles (Off-road Areas) Act 1978-1981*, s 37; *City of Perth Parking Facilities Act 1956-1983*, s 19A and the *City of Perth Parking Facilities By-Law*, reg 61; *Litter Act 1979-1981*, s 30; *Parks and Reserves Act 1895-1983*, s 14; *Police Act 1892-1983*, s 87(7)-(9); *Western Australian Institute of Technology Act 1966-1983*, s 20A and the *Western Australian Institute of Technology Land and Traffic By-Laws*, reg 51; and *Western Australian Marine Act 1982*, s 132.

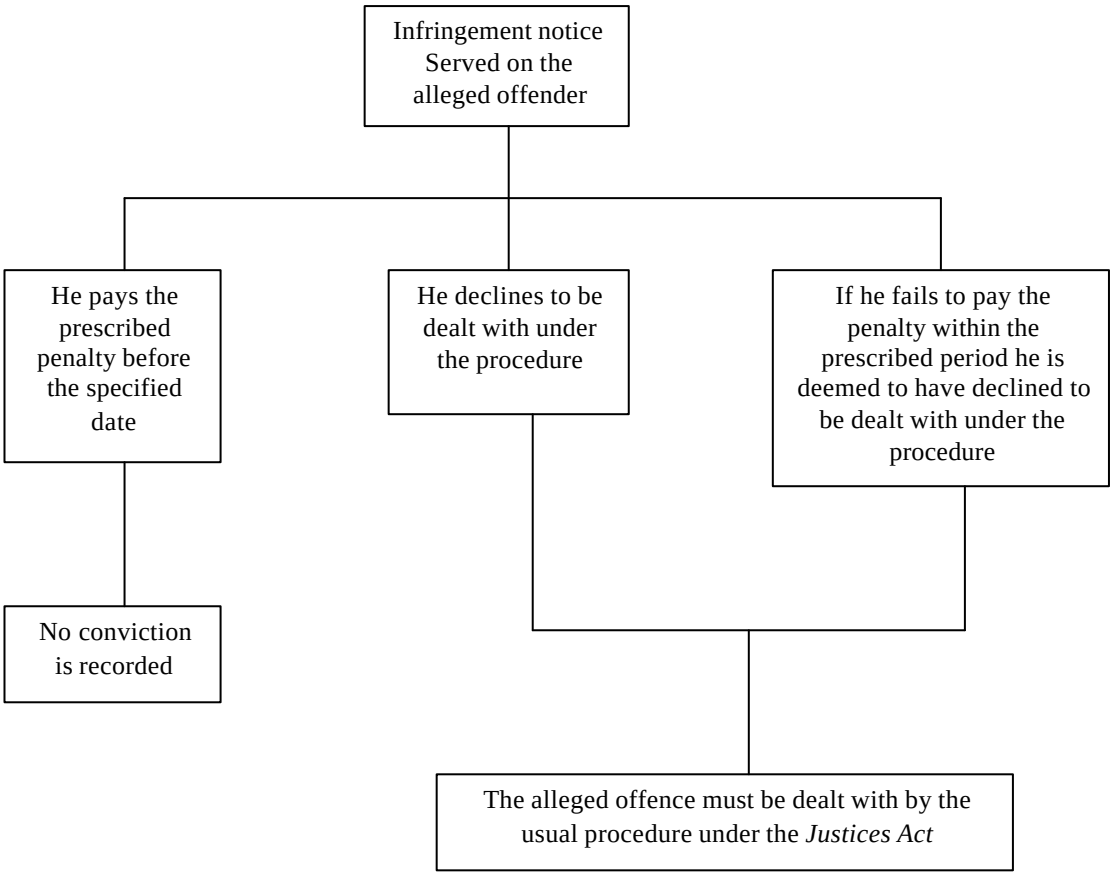
notice[69] or if he does not identify the person who was the driver of or person in charge of the vehicle at the relevant time or satisfy a prescribed officer that, at the relevant time, the vehicle had been stolen or unlawfully taken or used.[70] It would also seem that the owner of the vehicle can decline to be dealt with under the provisions, in which case the matter must be dealt with by a court.

4.28 The following chart provides a summary of this procedure.

69 There appears to be a conflict between this provision (*Road Traffic Act 1974-1982*, s 102(3)(a)) and s 102(4) of the Act which provides that a person who receives a notice is deemed to have declined to be dealt with under the provisions if he fails to pay the prescribed penalty within the specified time.

70 *Road Traffic Act 1974-1982*, s 102(3). In these cases the notice may be withdrawn.

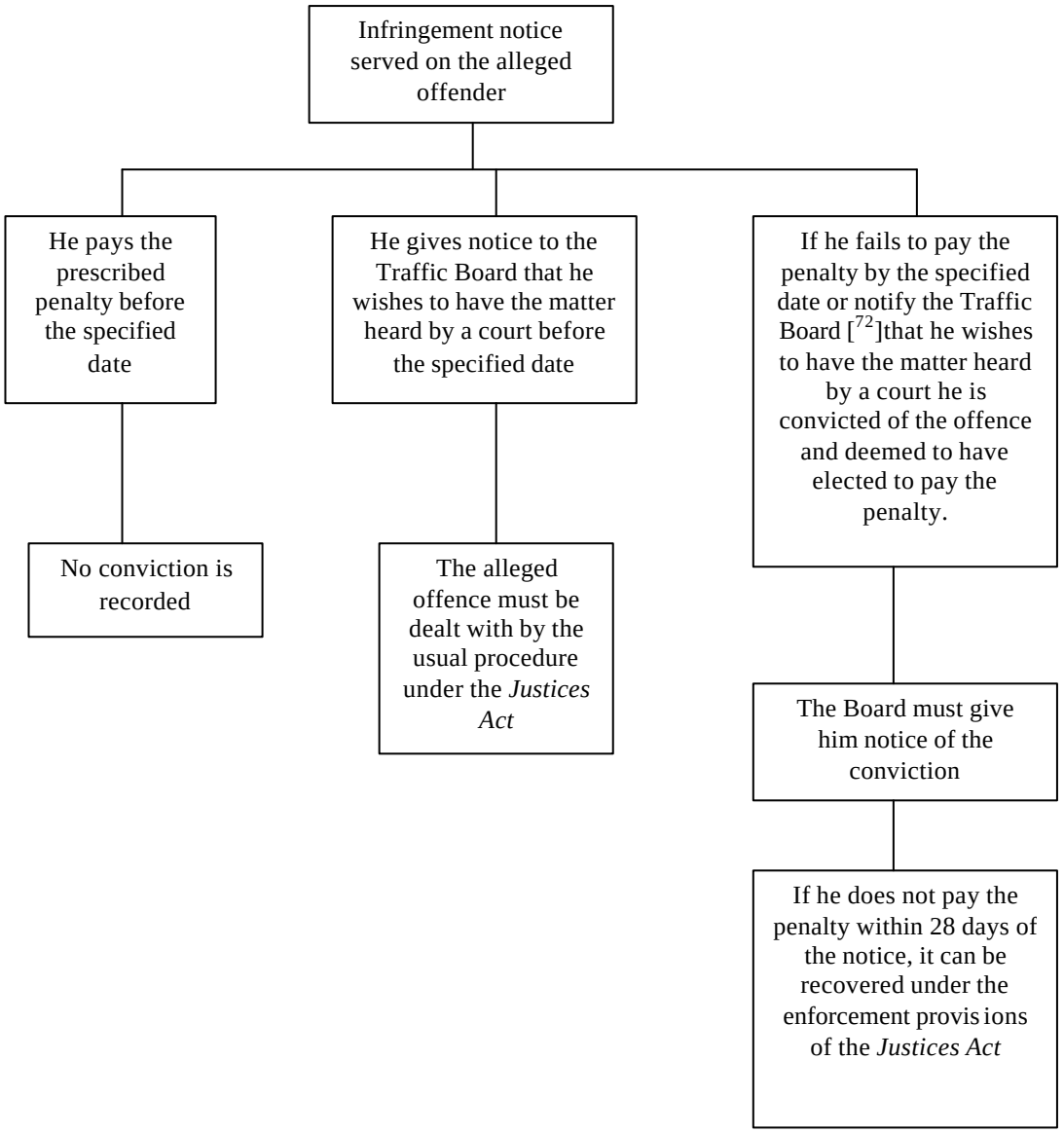
SUMMARY OF PROCEDURE FOR DEALING WITH INFRINGEMENT NOTICES UNDER THE ROAD TRAFFIC ACT 1974-1982



4.29 Section 102 of the *Road Traffic Act 1974-1982* was amended by section 16 of the *Road Traffic Act Amendment Act 1978*. This amendment has not, as yet, been brought into force so that the procedure described above is still applicable. However, the amendment would, if proclaimed, provide a new procedure following service of the notice.

4. 30 The following chart provides a summary of this procedure.

SUMMARY OF THE PROCEDURE FOR DEALING WITH INFRINGEMENT NO'I'ICES PROVIDED UNDER THE AMENDMENT OF THE ROAD TRAFFIC ACT 1974-1982[71]



4.31 The amendment provides for a conviction to be set aside by a Court of Petty Sessions if it is satisfied that -

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71 This amendment is not yet in force.

72 The Board consists of seven members: the Commissioner of Police, who is Chairman; a member of the Police Force nominated by the Commissioner; the Commissioner of Main Roads (or an officer of the Main Roads Department); the Director General of Transport (or other nominated person); three other persons appointed by the Governor on the nomination of the Minister from names submitted by the Local Government Association of Western Australia, the Country Shire Councils' Association of WA and the Country Urban Councils' Association: *Road Traffic Act 1974-1982*, s 7. The Board is charged with the administration of the *Road Traffic Act* except that the Commissioner of Police is responsible for the control and regulation of traffic in the State and the enforcement of the Act: id, ss 11(1) and 13(1).

(a) the defendant was not notified of the offence;

(b) the defendant was not notified of the conviction for the offence; or

(c) having been notified of the offence, the defendant served notice on the Board that he wished to have the matter heard and determined by a Court of Petty Sessions.

Where a conviction is set aside, the court may proceed to hear a complaint relating to the alleged offence or adjourn the hearing to a day fixed by it.

4.32 This procedure is less complex than the existing procedure in that if the defendant fails to pay the penalty without indicating that he wishes to be dealt with by a court he is convicted of the offence without the need to issue a summons and hold a court hearing. However, for this very reason it would seem to be objectionable in principle. In the Commission's view the existing procedure is preferable because a conviction cannot be recorded without the safeguards provided by a court hearing. For example, the court can ensure that the summons has been served on the defendant. If it has, the court may issue a warrant for the defendant's arrest so that he may be brought before the court. Where the court proceeds with the hearing in the absence of the defendant a conviction is at least based on affidavit evidence.[73] *The Commission seeks comment* on which procedure is the more desirable one. It would welcome suggestions as to whether any other procedure is preferable.

4. DEVELOPMENT OF A STANDARD INFRINGEMENT NOTICE PROCEDURE

4.33 The infringement notice procedures have four main advantages. First, because it is not necessary to obtain a summons or warrant from a justice by way of complaint they involve a simple means of commencing proceedings with a minimal use of the time of the police and other enforcement officers. Secondly, by paying the prescribed penalty, they enable a person to avoid the need for a court appearance and the cost and time necessarily involved therewith.[74] Thirdly, they reduce the number of cases requiring to be dealt with by Courts of

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73 Para 6.33 below.

74 By pleading guilty by endorsement, a defendant can also avoid the need for a court appearance in the ordinary case: para 5.1 below. However, he may be reluctant to do this if he considers that there may be a risk that the court may impose a heavier sentence in the absence of an account by the defendant or his counsel of extenuating circumstances.

Petty Sessions.[75] Fourthly, where the penalty is paid without the need for a hearing no conviction is recorded.

4.34 At present infringement notice provisions are contained in a number of statutes. One suggestion which has been made by officers of the Crown Law Department is that a standard infringement notice procedure be provided in the *Justices Act*. Various Government departments and instrumentalities could be authorised in statutes[76] to use the standard procedure.

4.35 The development of a standard infringement notice procedure could be accompanied by the provision of a model infringement notice form which could be modified to meet the needs of the various departments or local authorities using it. This would allow, as at present, the enforcement officer to place a tick in a box opposite the offence alleged to have been committed. Some modification would also be necessary in cases in which a vehicle was involved in an alleged offence, as the offender is often identified by means of the vehicle. For example, an infringement notice prescribed under the *Road Traffic (Infringements) Regulations 1975-1983* enables a police officer to record details of the vehicle used to commit the offence. The notice may then be sent to the owner of the vehicle. If the owner was not in charge of the vehicle at the time the alleged offence was committed he may avoid liability for the alleged offence by identifying the driver or person in charge of the vehicle, or by satisfying the appropriate officer that the vehicle had been stolen or unlawfully taken or was being unlawfully used at the relevant time.

4.36 A standard infringement notice procedure could initially be available in respect of offences presently dealt with under the various existing infringement notice procedures. Those offences could be listed either in a schedule to the *Justices Act* or in the statute creating the offence.[77] This would give Parliament an opportunity to consider whether it was desirable to permit a particular offence to be dealt with by the procedure.

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75 For example, in 1982/1983 160,031 infringement notices were issued for traffic offences. Of these 128,973 (80.59%) were "finalised by payment of the penalty. Only 25,095 (15.68%) were dealt with by court proceedings. The balance (3.73%) apparently were either withdrawn or had not been finalised at the end of the statistical period: Police Department, Western Australia, *Annual Report 1983,* 45 (Appendix Q).

76 Para 4.36 below.

77 If the offence were created in a regulation or by-law, provision for the use of the infringement notice procedure for that offence could be made either in the *Justices Act* or in the Act which authorised the creation of the offence.

4.37 The question then arises whether there are any circumstances in which the infringement notice procedure should not be used. At present the offences concerned are almost all of a relatively minor regulatory kind[78] in which the degree of culpability is not likely to vary greatly. The Commission is tentatively of the view that it should continue to be so confined.[79] It is also of the view that the procedure should only be used to impose a fine, and not a term of imprisonment, with an upper limit of say $200 in the modified penalty to be provided for the offences.

5. QUESTIONS AT ISSUE

4.38 The Commission welcomes comment on the following issues raised in this chapter -

Complaints

1. Should all complaints be required to be in writing?

(Paragraph 4.3)

2. Should it be required that, once a summons or warrant has been issued, the complaint be lodged in the nearest Court of Petty Sessions by the justice?

(Paragraph 4.3)

3. Should the complaint and summons contain or be accompanied by a summary of the facts upon which the allegation that an offence was committed is based or state that the defendant may apply to the complainant for such a statement before he enters a plea?

(Paragraph 4.4)

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78 At present, infringement notices may be issued for parking offences, offences relating to the control of off-road vehicles, visitors to parks and reserves and minor traffic offences. However, two offences in respect of which an infringement notice may be issued which are not of a regulatory nature are being present at any gaming or at any unlawful game conducted at a common gaming house for the purpose of taking part therein: *Police Act 1892-1983*, s 87(6)-(8).

79 The Dixon Report, however, contains a recommendation that the system of infringement notices should be extended in " appropriate areas": p 176. The Committee stated:

> "It is interesting to consider whether or not infringement notices might not be used for cases of minor breaches of the criminal law. An infringement notice served forthwith on a group of young offenders disturbing the peace might have a very sobering effect and perhaps prevent the commission of further acts of misbehaviour during the course of an evening's 'entertainment'."

4. Should a court have power to grant leave to lay a complaint more than six months (or any other prescribed period) from the time when the matter of complaint arose?

(Paragraph 4.5)

5. Should the provision in the *Criminal Code* applicable to indictable offences, however tried, that charges for distinct offences may be joined where they "form or are a part of a series of offences of the same or a similar character", apply also to simple offences?

(Paragraph 4.10)

6. Should express provision be made for more than one accused person to be charged in a complaint and, if so, in what circumstances?

(Paragraph 4.12)

7. If such a provision were enacted, should defendants be able to apply for separate trials?

(Paragraph 4.12)

Issue of Summons or warrant

8. Should a justice other than the justice who received the complaint be able to issue a summons or warrant in respect of that complaint?

(Paragraph 4.14)

Service of a summons

9. Should the provisions for service of a summons be amended to provide for service -

(a) by bringing it to the defendant's notice if he refuses to accept it; or

(b) where it may be left with some person at his last known place of abode, requiring that that person be or appear to be not less than sixteen years of age?

(Paragraph 4.16)

Defendants arrested on warrant

10. Where a defendant is arrested on a warrant should it be necessary to serve a copy of the complaint on him?

(Paragraph 4.19)

Withdrawal of warrant

11. Should there be express power to withdraw a warrant?

(Paragraph 4.20)

Arrest without warrant and complaints

12. Where a person has been arrested without warrant and is charged with an offence, should proceedings be commenced by filing the complaint in the appropriate court and by serving a copy of the complaint on the defendant?

(Paragraph 4.22)

Infringement notice procedures

13. Should a standard infringement notice procedure be provided in the *Justices Act*?

(Paragraphs 4.34 and 4.35)

14. If so, should either of the existing road traffic models be adopted?

(Paragraphs 4.23 to 4.32)

15. Should the infringement notice procedure be confined to relatively minor regulatory offences?

(Paragraphs 4.36 and 4.37)

16. Should the infringement notice procedure be confined so that it is only used to impose a fine, and not a term of imprisonment?

(Paragraph 4.37)

CHAPTER 5
MATTERS PRELIMINARY TO THE HEARING

1. NOTIFICATION BY DEFENDANT OF PLEA

5.1 A person on whom a summons for a simple offence is served who wishes to plead not guilty may do so by endorsing that plea in the place provided in the copy of the summons with which he is served and returning it to the clerk of petty sessions at the place at which the summons is returnable.[1] The defendant is not bound by his plea and may enter a plea of guilty at the hearing. Alternatively, he may indicate on the copy of the summons that he wishes to plead guilty to the charge.[2] If he does so he may be dealt with by the court even if he does not appear.[3] If the defendant does not endorse a plea and does not appear before the court, the court may proceed to hear and determine the matter, or may issue a warrant for his arrest so that he may be taken before the court to answer the complaint. [4]

5.2 If the clerk of petty sessions receives a plea of not guilty before the time appointed for the hearing he must notify the complainant that he has received such a plea. The complaint is then not heard at the time appointed for the hearing and consequently it is not necessary for the parties or their witnesses to appear at that time. A new time and place for the hearing is fixed by the justices.[5] However, if, notwithstanding the receipt by the clerk of the plea, both the defendant and complainant appear at the original time and place appointed, the court may hear and determine the complaint if both parties consent.[6]

5.3 Where the court has fixed a new hearing date the clerk of petty sessions is required to notify the complainant and the defendant of that date.[7] If the defendant does not appear at the appointed time and place and due service of the notice is proved the court may -

(a) proceed to hear and determine the complaint in the absence of the defendant; or

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1 *Justices Act*, s 136(1). This procedure was introduced by the *Justices Amendment Act 1981*.
2 *Justices Act*, s 135(1).
3 Para 6.28 below.
4 Ibid.
5 *Justices Act*, s 136(2).
6 Id, s 136(3).
7 Id, s 136(4).

(b) adjourn the hearing and issue a warrant to apprehend the defendant and bring him before a court to answer the complaint and be dealt with according to law, that is, for the hearing of the complaint.[8]

If the court proceeds to hear and determine the complaint in the absence of the defendant, it may not impose a sentence of imprisonment on the defendant until he is present. For this purpose it may issue a warrant to apprehend the defendant.[9]

5.4 The procedure for endorsement of plea has the advantage that the complainant and the court will find out before the date set down for the return of the summons the plea which the defendant wishes to enter.[10] The complainant would therefore know in advance whether or not the matter is to be defended and, consequently, whether or not it is necessary to summon witnesses to attend the hearing. It also enables the clerk of petty sessions to prepare the court's list of hearings taking into account the number of matters to be defended.

2. PROPOSALS FOR A PRE-TRIAL HEARING OR DISCOVERY

5.5 At present the *Justices Act* contains no procedure for dealing with matters before the hearing of a complaint. The Commission understands that there are differing views on whether or not a pre-trial hearing may be held. Such a hearing may sometimes be desirable to resolve matters before the trial and so to facilitate the conduct of the trial. One such circumstance would be to determine whether or not the complainant should supply particulars of the alleged offence to the defendant.[11] While the Commission has suggested that a complaint should either contain or be accompanied by additional information,[12] complaints may still be drafted which do not contain sufficient particulars of the offence. A claim that a complaint was drawn so as to disclose more than one offence[13] could also be dealt with at a

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8 Id, s 136(5).

9 Id, s 136(5)(c).

10 Provision could be made for the defendant to indicate his wish to enter other pleas, such as that he has already been convicted of the offence with which he is charged: para 6.4 below.

11 *Johnson v Miller* (1937) 59 CLR 467, 490 per Dixon J. A defendant is entitled "...to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge": id, 489.

12 Para 4.4 above.

13 Paras 4.6 to 4.11 above. See generally G Nash, *Magistrate's Courts*, 195-197 and P Nichols, *Police Offences of Western Australia* (1979), 1-4.

pre-trial hearing. A pre-trial hearing could also be used to determine whether or not the matter should be heard at a more convenient place.[14]

5.6 The Commission accordingly suggests that a procedure for conducting pre-trial hearings should be introduced.[15] Such a hearing could be held in chambers. There is a model for such a hearing in New South Wales where the Supreme Court has summary jurisdiction in respect of certain offences.[16] In that Court a judge may, of his own motion, or on the application of a party, make orders and give directions for the just and efficient disposal of the proceedings. [17] Without limiting the generality of this power, the judge may make orders and give such directions as may be appropriate relating to -[18]

1. The giving by the prosecutor to the defendant of particulars or further and better particulars.
2. The giving by the prosecutor to the defendant of a list of persons who it is expected will be called to give evidence at the trial or, if the judge thinks fit, who have made statements in writing but who it is expected will not be so called.
3. The giving by the prosecutor to the defendant of a copy of any statement made in writing by any person whose evidence it is expected will be given at the trial or, if that person has not made a statement in writing or if the judge thinks fit, of a summary of the evidence which it is expected he will give at the trial.
4. The giving by the prosecutor to the defendant of a list of documents or things which it is expected will be tendered in evidence at the trial.
5. The giving by the prosecutor to the defendant of copies of documents.
6. The inspection by the defendant of documents or property.
7. The evidence to be tendered, including evidence of statements of fact in a document.
8. Any admission or consent of the defendant under section 404 of the *Crimes Act, 1900-1983*.[19]
9. Any alibi that the defendant intends to allege. [20]

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14 Para 6.19 below.

15 Provision for pre-trial hearings has been recommended by the United States National Conference of Commissioners on Uniform State Laws, [1974] Handbook, *Rules of Criminal Procedure*, rr 451 and 491

16 Offences which may be tried in this manner are listed in the Tenth Schedule of the *Crimes Act 1900-1983* (NSW): *Crimes Act 1900-1983* (NSW), ss 475A and 475B. Included are offences relating to companies and the securities industry, frauds by factors and other agents, obtaining credit by fraud, forgery, perjury and false statement in a solemn declaration.

17 *Supreme Court Rules 1970-1984* (NSW), P 75, r 11(4)(a).

18 Id, r 11(4)(b).

19 There is a similar provision in Western Australia. S 32 of the *Evidence Act 1906-1982* provides that:

> "An accused person, either personally or by his counsellor solicitor, in his presence, may admit on his trial any fact alleged or sought to be proved against him, and such admission shall be sufficient proof of the fact without other evidence."

Although this section is used, the police prosecutor is usually given notice that an admission of fact is to be made only when the person called to give evidence relating to the fact is about to give his evidence at the hearing. A witness may therefore be put to the inconvenience of being called as a witness but not be required to give any evidence. The prosecutor may, however, apply for witness fees and expenses in such a case.

5.7 If a defendant in a summary trial could obtain more information before the trial it would mean that he would be in a comparable position to a person charged with an indictable offence who can obtain information relating to the prosecution case during preliminary proceedings.[21] A pre-trial hearing is only likely to be necessary in a small number of defended cases which raise complex issues of law or fact. This would be particularly so if prosecutors adopted the practice of providing the information referred to above at the request of the defendant or his solicitor.[22]

5.8 It is to be noted that the New South Wales provision would enable the judge to require the defendant, as well as the complainant, to disclose the evidence, if any, he intends to adduce at the trial.[23] This, of course, may seem to be counter to the general principle that the defence is not to be required to make any information available to the prosecution or to tender evidence at the trial. However, the proposal may not be objectionable if the power were limited, in the case of the defence, to prior disclosure of information or evidence which it intends to adduce at the trial, with the aim of avoiding the need for adjournments to allow the prosecution to consider the material or the need to call witnesses in relation to evidence not disputed by the defendant. [24] **The Commission would welcome comment**.

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20 Provision has recently been made in Western Australia for a defendant to give the prosecution notice of an alibi in trials on indictment: *Criminal Code*, s 636A. Whether or not provision is made for a pre-trial hearing consideration could be given to requiring a notice of an alibi to be given in summary trials. There is not the same need for a provision relating to alibis in summary trials because an adjournment of the hearing would not cause as much disruption as it would in a trial with a jury.

21 Para 9.9 below.

22 One benefit of a system of disclosure would be that, having seen the case against him, the defendant might decide to plead guilty thus avoiding the additional cost of a trial to himself, the prosecution and the community.

23 See in particular item 7 in para 5.6 above and also the generality of the power referred to earlier in that para.

24 An interesting variant is the approach in England where s 48 of the *Criminal Law Act 1977* provides for rules to be made for the prosecution to disclose to the defence certain information in prescribed cases. No rules have yet been made under the section, but an experiment is being carried out in Newcastle, England, aimed at providing background material for that purpose: W Merricks, *Disclosure Experiment Starts* (1982) 132 New LJ 1040 and W Merricks, *Advance Disclosure Inches Nearer* (1983) 133 New LJ 1051.

3. SUMMONING WITNESSES AND REQUIRING THE PRODUCTION OF DOCUMENTS

(a) Issuing a summons

5.9 A party who wishes to summon a witness may apply to a justice, stipendiary magistrate or clerk of petty sessions to issue his summons to any person requiring him to appear as a witness at a time and place mentioned in the summons.[25] A person may also be compelled to bring and produce all relevant documents and writings in his possession or power so that they may be tendered in evidence. A person is not bound to produce any document or writing not specified or sufficiently described in the summons or which he would not be bound to produce upon a subpoena duces tecum[26] in the Supreme Court.[27]

5.10 One means of reducing the inconvenience to a person who is merely required to produce any document or writing, and not to give oral evidence,[28] would be to provide that production to the clerk of petty sessions is sufficient compliance with a summons.[29] Production of the documents could be made at a convenient time before the trial. He would not have to attend the court at the time set down for the trial, a time which might prove to be inconvenient. Nor would he have to spend time waiting at the court for his turn to be called as a witness. This approach would, however, have the disadvantage that it would increase the administrative burden of clerks of petty sessions, particularly in a busy court such as the Perth Court of Petty Sessions.

5.11 Two stipendiary magistrates who made preliminary submissions to the Commission criticised the provision for summoning witnesses.[30] Both referred to cases in which people who had been summoned to give evidence were unable to give any material evidence. One referred to a case in which about thirty people were summoned in such circumstances. He

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25 *Justices Act*, s 74(1). There is no application form and the practice is merely to present the summons to the appropriate officer for signature. In addition, any person present at any legal proceeding who might have been summoned to give evidence or produce documents is compellable to give evidence and produce documents then in his possession and power. If he refuses to do so, he is subject to the same penalties and liabilities as if he had been duly summoned for the purpose: *Evidence Act 1906-1982*, s 15.

26 This is a writ used to compel a witness to attend in court with the relevant documents.

27 *Justices Act*, s 78.

28 Of course a person required to produce documents may also be required to give oral evidence as to the documents.

29 Such a provision was suggested by the New South Wales Law Reform Commission: First: Issues Paper: Criminal Procedure - *General Introduction and Proceedings in Courts of Petty Sessions* (1982), 72, para 9.69. This suggestion is based on a provision in the New South Wales *Rules of the Supreme Court 1970-1984*: P 37 r 4.

30 Mr H F Harlock SM and Mr D A McCann SM.

stated that it was reasonable to conclude that they were called as an abuse of the process of the court.[31]

5.12 Both magistrates referred with approval to section 23 of the South Australian *Justices Act*.[32] This section provides that before a justice can exercise his discretion to issue a summons he must be satisfied that the person sought to be summoned "...is likely to give material evidence or to have in his possession or power any article...required for the purpose of evidence upon behalf of either party". The justice should: [33]

> "....take reasonable precautions to satisfy himself, by statements made by the party applying for the summons, that the evidence intended to be adduced of the proposed witness has some relevance and probative value in relation to the issues which the court will be called upon to determine".

5.13 The corresponding provisions in New South Wales, Queensland, the Australian Capital Territory and England additionally provide that it must be shown that the person proposed to be summoned will not appear voluntarily.[34] This provision could, however, be considered to be unnecessarily restrictive. For example, if a party to a proceeding suspected, but could not establish, that a person would not appear voluntarily he may not be able to obtain a summons. If the person did not appear voluntarily at the hearing the party would not only have to seek a summons or a warrant but probably also an adjournment or the hearing.

(b) Setting a summons aside

5.14 Although it appears to be possible to apply to a Court of Petty Sessions to set a summons aside[35] this is a matter which could be dealt with expressly by providing that a summons may be set aside where there has been an abuse of the process of the court or the

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31 A summons could be set aside by the Supreme Court on the application of the person summoned if it were being used for improper purposes: *R v Baines* [1908-1910] All ER Rep 328. However this still could involve inconvenience and cost for the person summoned. It also appears that a Court of Petty Sessions could set aside a witness summons if there has been an abuse of the process of the court: *R v Lewes Justices; Ex parte The Gaming Board of Great Britain* [1971] 2 All ER 1126, 1132 and *Darcey v Pre-term Foundation Clinic* [1983] 2 NSWLR 497, 503.

32 There are similar provisions in most other Australian jurisdictions and in Ontario. Tasmania and New Zealand have provisions similar to the Western Australian provision.

33 *Holland v Sammon* (1972) 4 SASR 1, 3.

34 *Justices Act* (NSW), s 61; *Justices Act* (Qld), s 78; *Ordinance* (ACT), s 61; and *Magistrates' Courts Act* (Eng), s 97(1).

35 See footnote 2 to para 5.11 above.

witness is unable to give any material evidence or to produce any documents or writings which are material[36] and are not privileged.

(c) Service of the summons

5. 15 Where a witness summons is issued under the Western Australian provision it must be served by delivering a duplicate of the summons to the person personally or, if he cannot be found, by leaving it with someone for him at his last known place of abode.[37] Service by post is not permitted.

5.16 Consideration could be given to revising this provision so that it provides for service of a witness summons by -

(i) delivering a duplicate of the summons to the witness personally or by its being brought to his notice if he refuses to accept it;[38]

(ii) leaving it for him at his last known or usual place of residence or of business with some other person, apparently a resident of or employed at that place, and apparently not less than sixteen years of age;[39] or

(iii) sending it to him by certified mail addressed to him at his last known or usual place of residence or of business.[40]

(d) Issuing a warrant

5.17 At present, if a justice or stipendiary magistrate is satisfied by evidence upon oath that it is probable that a person whose evidence is desired will not attend to give evidence without being compelled to do so, he may issue a warrant instead of a summons.[41] If a provision along

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36 The United States National Conference of Commissioners on Uniform State Laws, [1974] Handbook, *Rules of Criminal Procedure*, r 731(c), has recommended that the court "on motion made promptly may quash or modify the subpoena [to a witness] if compliance would be unreasonable or oppressive".

37 *Justices Act*, ss 74(2) and 56.

38 *Summary Proceedings Act* (NZ), ss 26 and 24(1)(a).

39 *Justices Act* (SA), s 27(1)(b).

40 *Summary Proceedings Act* (NZ), ss 26 and 24(1)(c). The introduction of such provisions would mean that the procedures for service of a summons on a witness would be similar to those for service on a defendant.

41 *Justices Act*, s 76. It is uncommon for a warrant to be sought.

the lines of section 23 of the South Australian *Justices Act* were adopted in Western Australia,[42] it would be desirable to ensure that the conditions relating to the issue of a summons contained in that section also applied to the issue of a warrant in the first instance.

5.18 The warrant referred to in the previous paragraph requires the arresting officer to take the person arrested before a justice or justices "to testify what [he] knows concerning the matter of the said complaint". This could possibly be construed as requiring the officer to hold the person in custody until the hearing of the complaint. However, it may be that he can be discharged, before the hearing, under section 89 of the *Justices Act* which provides that:

> "A witness or person sought to be made a witness may be discharged upon recognisance."

This provision may, however, only apply to an adjournment of a summary trial or preliminary hearing or where a person is committed for trial in the Supreme or District Court.

5.19 The Commission considers that this matter should be clarified. In Victoria it is expressly provided that where a person sought as a witness is arrested under a warrant, any justice may -

(i) commit the person to prison until the hearing; or

(ii) discharge him upon his entering into a recognisance for a reasonable amount with or without sureties conditioned for his appearing at the hearing or for his producing all documents mentioned in the warrant. [43]

In England, a justice on issuing a warrant for the arrest of a person may endorse the warrant with a direction that that person shall on arrest be released on bail conditioned for his appearance before a Magistrates' Court. Where the person is taken to a police station after being arrested, the officer in charge of the station is required to release the person in accordance with the endorsement.[44] *The Commission seeks comment* on whether or not either of these approaches should be adopted in this State.

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42 Para 5.12 above.
43 *Summary Proceedings Act* (Vic), s 23.
44 *Magistrates' Courts Act* (Eng), s 117.

(e) Failing to appear in response to a summons

5.20 A person who neglects or refuses to appear at the time or place appointed in a summons either to appear as a witness or to produce documents may "then and there....in his absence" be fined a sum not exceeding forty dollars[45] by the court before which he was required to appear, if no just excuse is offered for such neglect or refusal. It must also be proved that the summons was duly served and, except in the case of indictable offences, that a reasonable sum was paid or tendered to him for his costs and expenses of attendance (called "conduct money").[46] The court may also issue its warrant to bring the person before such justices or stipendiary magistrate who are present at a time and place mentioned to testify.[47]

5.21 In practice the police do not provide a witness with conduct money when a summons is served. As a result a warrant cannot be issued for the arrest of a witness who fails to appear in response to a summons. It has been suggested to the Commission that the requirement for conduct money is an anachronism. If a person's place of residence is reasonably close to the court, there is no great hardship in travelling to the court. In any case, a witness is reimbursed for his expenses at the conclusion of the trial. If, on the other hand, the witness is required to travel a considerable distance to a court it is possible to apply to the Crown Law Department for an airline ticket.[48] *The Commission seeks comment*.

5.22 In a preliminary submission to the Commission, one stipendiary magistrate[49] criticised the provision whereby a penalty may be imposed in the absence of a person who neglects or refuses to appear at the time or place appointed in a summons. He considered that the imposition of a penalty without giving the person an opportunity to show cause could result in an injustice. In two of the jurisdictions studied by the Commission this possibility is avoided by the creation of an offence of failing to attend at the hearing, an offence which must be dealt with in the same way as any other offence.[50] *The Commission seeks comment* on whether or not a similar offence should be introduced in Western Australia.

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45 The maximum fine for a similar offence under s 63 of the *Local Courts Act 1904-1982* is presently $100.

46 *Justices Act*, s 75(1).

47 Id, s 75(2).

48 See generally the *Evidence Act 1906-1982*, s 119 and the *Evidence (Witnesses' and Interpreters' Fees and Expenses) Regulations 1976-1982*. These provisions apply to summary proceedings against a person charged with an offence on a complaint by a public official acting or purporting to act by virtue of his office.

49 Mr D A McCann, SM.

50 *Summary Proceedings Act* (NZ), s 20(5); *Provincial Offences Act* (Ont), s 43.

(f) Discharge of witness at adjourned hearing

5.23 Where a hearing is adjourned, a witness or person sought to be made a witness may be discharged upon recognisance to appear at an appointed time and place.[51] A warrant may be issued for his apprehension if he does not then appear.[52] Where a person is arrested in either of these circumstances, provision could be made for him to be released on bail in circumstances similar to those referred to in paragraph 5.19 above.

4. QUESTIONS AT ISSUE

5.24 The Commission welcomes comment on the following issues raised in this chapter -

Pre-trial hearings and disclosure of information

1. Should a procedure for conducting pre-trial hearings be introduced?

(Paragraphs 5.5 to 5.8)

2. If so, what matters should it be possible to deal with at a pre-trial hearing?

(Paragraph 5.6)

Summoning witnesses and requiring the production of documents

3. Should a person merely required to produce any document or writing in his possession or power (and not to give oral evidence) be permitted to produce the document or writing to the clerk of petty sessions?

(Paragraph 5.10)

4. Should the circumstances in which a person may be summoned to give evidence be limited by requiring that the judicial officer authorised to issue the summons be satisfied that the person sought to be summoned -

   (i) is likely to give material evidence or to have in his possession or power any article required for the purpose of evidence;

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51 *Justices Act*, ss 89 and 90. In practice, the police do not seek such a recognisance but seek a new summons for the person's appearance on the date set down for the recommencement of the hearing.

52 *Justices Act*, s 91.

(ii) will not appear voluntarily?

(Paragraphs 5.11 to 5.13)

5. Should express provision be made for a person who has been summoned to appear as a witness to apply to the officer who issued the summons for an order setting the summons aside?

(Paragraph 5.14)

6. Should the manner in which a witness summons may be served be changed so that it may be served by -

(i) delivering a duplicate of the summons to the witness personally or by its being brought to his notice if he refuses to accept it;

(ii) leaving it for him at his last known or usual place of residence or of business with some other person, apparently a resident of or employed at that place, and apparently not less than sixteen years of age; or

(iii) sending it to him by certified mail addressed to him at his last known or usual place of residence or of business?

(Paragraphs 5.15 and 5.16)

7. Should the law relating to the grant of bail to a person sought to be made a witness or who has failed to appear at an adjourned hearing who has been arrested be clarified by adopting provisions similar to those in Victoria or England?

(Paragraphs 5.17 to 5.19, and 5.23)

8. Should the requirement to supply a person summoned to appear with conduct money be abolished?

(Paragraph 5.21)

9. Should an offence of failing to attend at the hearing in response to a witness summons be created in lieu of the existing provision for a fine to be imposed "then and there ...in his absence"?

(Paragraph 5.22)

CHAPTER 6
THE HEARING

1. THE PROCEDURE WHERE BOTH PARTIES APPEAR

(a) Entry of plea

6.1 Where both the complainant and defendant appear either personally or by counsel or solicitor the court may proceed to hear and determine the complaint. However, if the defendant has not, prior to the hearing, notified the clerk of petty sessions concerned of his wish to plead not guilty to a charge of a simple offence, the court cannot proceed to hear and determine the complaint at that time without the complainant's consent.[1] A similar provision applies if the offence charged is an indictable offence which may be dealt with summarily at the election of the defendant and the defendant -

(i) elects to have the charge dealt with summarily; and

(ii) pleads not guilty to the charge. [2]

6.2 When the defendant is present at the hearing, the substance of the complaint must be stated to him and he must be asked if he has any cause to show why he should not be convicted or why an order should not be made against him.[3] This provision is discussed further in paragraph 6.4 below. As in trials on indictment,[4] the Commission considers that a defendant should be entitled, on application, to receive a written copy of the complaint before he enters his plea, whether or not he has previously received a copy of the complaint.

6.3 If he pleads guilty, the defendant may be convicted of the offence.[5] If not, the court must, if the complainant consents in the circumstances referred to above, proceed to hear the matter. If the complainant does not consent, the court must adjourn the hearing. The provisions relating to the adjournment of a hearing are discussed below. [6]

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1 *Justices Act*, s 137(1) and (2).
2 Id, s 137(3).
3 Id, s 138.
4 *Criminal Code*, s 613.
5 *Justices Act*, s 138.
6 Paras 6.18 and 6.19.

6.4 The provision referred to in paragraph 6.2 above relating to the entry of the plea at the hearing was criticised by two stipendiary magistrates in preliminary submissions to the Commission.[7] One[8] suggested that if the courts complied strictly with the provision, defendants, particularly unrepresented defendants, would not understand what was being put to them.[9] In practice a defendant is instead asked whether he pleads guilty or not guilty.[10] The Commission suggests that the practice be statutorily confirmed.[11] At this stage, the accused could enter any other appropriate plea, for example -

(1) that the complaint does not disclose any offence cognisable by the court;

(2) that the court has no jurisdiction to try him for the offence;[12]

(3) that he has already been convicted of the offence with which he is charged;

(4) that he has already been acquitted of the offence with which he is charged.[13]

As in trials on indictment if, on being called upon to plead to the complaint, the defendant does not plead, the court could be expressly empowered to order a plea of not guilty to be entered on behalf of the accused person.[14]

(b) Practice at the hearing

6.5 Where the hearing proceeds, the court must hear the complainant and his witnesses and the defendant and his witnesses. If the defendant gives evidence other than as to his

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7 Mr D A McCann, SM, and Mr A E Clark then a stipendiary magistrate.

8 Mr D A McCann, SM.

9 The words might in fact suggest to a defendant that the onus was on him to show that he did not commit the offence.

10 The *Handbook for Justices* prepared by P Nichols at p 7.2 advises justices to ask this question.

11 Cf *Criminal Code*, s 612. Under s 49(1) of the *Aboriginal Affairs Planning Authority Act 1972-1982* a court may refuse to accept a plea of guilty if the offence is one punishable in the first instance with a term of imprisonment of six months or more where the court is satisfied that the accused is a person of Aboriginal descent who from want of comprehension of the nature of the circumstances alleged, or of the proceedings, is or was not capable of understanding that plea.

12 It seems that this matter can also be raised under a plea of not guilty: R Watson and H Purnell, *Criminal Law in New South Wales* (1971), Vol 1, 361.

13 Cf *Criminal Code*, s 616. The Murray Report contains a recommendation for a minor amendment to this section: 390 and 598.

14 Cf *Criminal Code*, s 619. In the Murray Report it is recommended at 395-396 and 600 that this section be amended so that it would also deal with the situation where a person will not plead because he is unable to do so.

general character, the complainant may examine witnesses in reply.[15] The practice before the court at the hearing in respect of the examination and cross-examination of witnesses must be in accordance with the practice for the time being of the Supreme Court upon the trial of an issue of fact in an action at law.[16] The provision that the complainant may examine witnesses in reply if the defendant gives evidence other than as to his general character appears to represent a departure from the general principle that the prosecution should adduce all the evidential matter on which it intends to rely before it closes its case.[17] The court, however, has a discretion to permit evidence to be given in reply or rebuttal.[18] The Commission can see no good reason for this departure from the general principle and suggests that the relevant portion of this provision be repealed.

(c) Representation

6.6 Each party to a proceeding is entitled to be represented by his counsellor solicitor.[19] The power to exclude any person from the court[20] must not be exercised for the purpose of excluding any counsellor solicitor engaged in the case.[21] It is a common practice in this State for a complainant who is a police officer to be represented by another police officer.[22] However, it appears that section 67 of the *Justices Act* would not prevent such a person being excluded from the court during a hearing. In at least two jurisdictions[23] studied by the Commission it has been expressly provided that a police officer may conduct proceedings on behalf of another officer and that an officer of a government department or authority may conduct proceedings on behalf of another officer of the department or authority.[24] Whether or

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15 *Justices Act*, s 139.

16 Id, s 141. In New South Wales the *Justices Act* provides that the practice at the hearing should as nearly as possible be in accordance with that of the Supreme Court upon a trial on indictment (s 79). In England the rules of court lay down the procedure to be followed: *Magistrates' Courts Rules 1981*, r 13. In Tasmania the practice at the hearing is also laid down in the *Justices Rules 1976-1981*, r 36.

17 *R v Rice* [1963] 1 All ER, 832, 839 per Winn J.

18 J A Gobbo, D Byrne and J D Heydon, *Cross on Evidence* (1979, 2nd Aus Ed), 260 - 261, para 10.64.

19 *Justices Act*, s 68. He may also have a right to obtain the assistance of a "McKenzie friend": para 11.22 below.

20 Para 3.34 above.

21 *Justices Act*, s 67.

22 This practice was held to be permissible in *Busato v Dempsey* (1909) 11 WALR 238.

23 *Justices Act* (Tas), s 38(3) and (4); *Summary Proceedings Act* (NZ), s 37(2)-(4).

24 In Western Australia uniformed police officers wear their uniform when conducting prosecutions. The New South Wales Law Reform Commission suggested that police officers conducting prosecutions should continue the practice of not wearing their police uniform. The New South Wales Law Reform Commission was concerned that members of the public may see a uniform as indicating an allegiance to the police force, an allegiance which could be seen as conflicting with the duties which an advocate owes to the court: First Issues Paper: Criminal Procedure - *General Introduction and Proceedings of Courts of Petty Sessions* (1982), 70, para 9.59.

not such a provision were introduced it appears to be desirable to provide that such an officer should not be excluded from the court.

6.7 On a more minor point, the New South Wales Law Reform Commission has suggested that a solicitor, when first announcing his appearance, should give a notice of appearance to the bench clerk. The notice should contain the following information: his name, the name of his firm, address and telephone number. Forms of notice of appearance could be placed on the Bar table in each court.[25] *The Commission welcomes comment* on whether a similar rule is desirable in this State.

(d) Representation of a corporation

6.8 Although corporations may be prosecuted for simple offences[26] there is no express procedure for dealing with prosecutions of corporations. For example, there is no provision for how a corporation is to be represented in court or how it is to enter a plea or conduct its case. Following a case in Queensland where this problem was raised in the case of an indictable offence,[27] express provisions were introduced with regard to trials on indictment and committal hearings.[28] In Queensland section 594A of the *Criminal Code* provides that where an indictment is presented against a corporation in respect of an indictable offence, the corporation may be present in court by its representative and it may enter a plea in writing by its representative. In respect of a trial, any requirement that anything shall be done in the presence of the accused person or shall be read or said to or asked of the accused person shall, in the case of a corporation present in court by its representative, be construed as applying to that representative. Conversely, anything required to be done or said by the accused person personally may be done or said by the representative. The *Commission seeks comment* on whether similar provisions should be introduced in this State in the case of preliminary proceedings[29] and trials in Courts of Petty Sessions.

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25 Id, 60-61.

26 S 4 of the *Interpretation Act 1918-1981* provides that, in every Act, unless the contrary intention appears "person" or "party" includes a body corporate. This provision is replaced in the *Interpretation Act 1984* which comes into force on 1 July 1984. Under s 5 of the *Interpretation Act 1984*:

> "'Person' or any word or expression descriptive of a person includes a public body, company, or association or body of persons, corporate or unincorporate."

27 *R v Ampol Refineries Ltd* [1978] Qd R 378.

28 *Criminal Code 1899-1982* (Qld), s 594A and *Justices Act* (Qld), s 113A, respectively. See also the Third Report of the Criminal Law and Penal Methods Reform Committee of South Australia, *Court Procedure and Evidence* (1975), 42-43.

29 The Murray Report, at 388-389, contains a recommendation for the enactment of a similar provision in the case of preliminary proceedings for indictable offences.

(e) Witnesses

6.9 A witness must be examined upon oath or in such other manner as is prescribed or allowed in any Act relating to the giving of evidence in courts of justice,[30] for example, on affirmation.[31] If a person called as a witness refuses to take an oath, refuses to be examined upon oath or refuses to answer questions put to him without offering a just excuse, the court may commit him to prison for a period not exceeding seven days, unless in the meantime he consents to being examined and to answering questions. [32]

(f) Evidence of a person not present in court

6.10 At present a person must be present in court in order to give evidence in a trial of a simple offence. There is no procedure for obtaining evidence from a person who is, for example, dangerously ill, about to leave the State or at a distance from the court. There is, however, provision for obtaining a statement from a person who is dangerously ill in relation to an indictable offence.[33]

6.11 In Ontario, New Zealand, England and the Australian Capital Territory it is possible to obtain evidence from a person notwithstanding that he is not present at the trial. In Ontario, for example, an application may be made to a court, either before or during a trial, for an order appointing a commissioner to take the evidence of a person who is -

(a) out of Ontario; or

(b) not likely to be able to attend the trial by reason of illness or physical disability or for some other good and sufficient cause.[34]

Evidence so taken may be read in evidence at the trial if: [35]

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30 *Justices Act*, s 69(1).

31 *Evidence Act 1906-1982*, s 99.

32 *Justices Act*, s 77. This provision should be amended to apply not only to oaths but also to other means prescribed for giving evidence including an affirmation.

33 *Justices Act*, ss 110-113 cmd *Evidence Act 1906-1982*, ss 107 and 108.

34 *Provincial Offences Act* (Ont), s 44(1). In New Zealand evidence may be obtained from a person who is not or cannot be present at the trial where it is "desirable or expedient that the evidence" should be obtained or if the person intends to depart from New Zealand before the hearing: *Summary Proceedings Act* (NZ), ss 31 and 32, respectively. In the ACT evidence can be obtained from a person who is "likely to be absent from the Territory when the case comes on for hearing": *Ordinance* (ACT), s 67.

35 *Provincial Offences Act* (Ont), s 44(2).

> "(a) it is proved by oral evidence or by affidavit that the witness is unable to attend for a [prescribed] reason;
>
> (b) the transcript of the evidence is signed by the commissioner by or before whom it purports to have been taken; and
>
> (c) it is proved to the satisfaction of the court that reasonable notice of the time and place for taking the evidence was given to the other party, and the party had full opportunity to cross-examine the witness."

This provision preserves the other party's right to cross-examine a witness while ensuring that evidence which might not otherwise have been obtained or which could not have been obtained without some additional cost or delay is tendered at the trial.[36] If such a provision were introduced in Western Australia it might be more appropriate to include it in the *Evidence Act 1906-1982*.

6.12 In England, a written statement by a person is admissible as evidence to the like extent as oral evidence by that person if:[37]

> "(a) the statement purports to be signed by the person who made it;
>
> (b) the statement contains a declaration by that person to the effect that it is true to the best of his knowledge and belief that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he wilfully stated in it anything which he knew to be false or did not believe to be true;
>
> (c) before the hearing at which the statement is tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings; and
>
> (d) none of the other parties or their solicitors, within seven days from the service of the copy of the statement, serves a notice on the party so proposing objecting to the statement being tendered in evidence under this section."

Conditions (c) and (d) need not be met if the parties agree before or during the hearing that the statement may be tendered.

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[36] The Criminal Law and Penal Methods Reform Committee of South Australia in its Third Report, *Court Procedure and Evidence* (1975) at 120-122, recommended that consideration be given to the video-taping of evidence in appropriate circumstances.

[37] *Criminal Justice Act 1967* (Eng), s 9(1) and (2). See generally D Napley, *A Guide to Law and Practice under the Criminal Justice Act 1967* (1967), 29-32 and the *Magistrates' Courts Rules 1981* (Eng), r 70.

(g) Variation and amendment

6.13 Section 46 of the *Justices Act* provides that no objection shall be taken to any complaint or to any summons or warrant issued on a complaint, for any defect, in substance or form,[38] therein or to any variation between it and the evidence in support thereof.[39] Any such variance can be corrected by order of the court.[40] If it appears to the court that the variance is such that the defendant has been deceived or misled, the court may, and at the request of the defendant must, adjourn the hearing of the case to some future day on such terms as it thinks fit. In the meantime the defendant may be held in custody or released on bail.[41] An order for the amendment of a complaint must be recorded and, if required, a minute of the amendment must be given to the party against whom it was made.[42] A strict interpretation of these provisions suggests that the power of amendment and the power to adjourn apply only to a variance and not to a defect of substance or form.[43] This result may not have been intended. In other jurisdictions studied by the Commission, the powers of adjournment and amendment of a complaint, summons or warrant apply to both a variance and a defect of substance or form.[44] *The Commission seeks comment* on whether or not the same approach should be adopted expressly in Western Australia.

6.14 These provisions seem to have been motivated by a desire to avoid having charges dismissed because of some technical error. The defendant is provided with some protection because there is power to adjourn the hearing if he has been deceived or misled by a variance.

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38 If, for example, two offences are charged in the one complaint: *Rodgers v Richards* [1891-1894] All ER Rep 394.
An Imperial statute (1822 3 Geo 4, c 23, s 3) provides that where the merits have been tried a conviction cannot be set aside because of a defect of form. This section could be repealed.

39 For example, where there is a variance between the complaint and the evidence with regard to the name of the place in which the offence is proved to have been committed: *Kelly v Wigzell* (1907) 5 CLR 126.

40 *Justices Act*, s 46. See generally, G Nash, *Magistrates' Courts*, paras 1103-1112.

41 *Justices Act*, s 47.

42 Id, s 48. For the position in the case of an indictable offence being tried summarily see *Criminal Code*, ss 591 and 593: para 6. 17 below.

43 Notwithstanding this apparent limitation it appears that a complaint containing a defect of substance can be amended if "it can be seen that the complaint is aimed at an identifiable offence but misses its mark as a result of careless or incompetent drafting": *Kalgoorlie Regional Traffic Council v Fostinelli* [1974] WAR 3, 6.

44 *Summary Proceedings Act* (Vic), s 157; *Justices Act* (SA), ss 182 and 183; *Justices Act* (Qld), ss 48 and 49.

6.15 Most of the jurisdictions studied by the Commission contain similar provisions although there are differences in emphasis.[45] For example, in the Australian Capital Territory, if objection is taken to -

(a) an alleged defect in substance or form in any information or summons; or
(b) any variation between the information or summons and evidence adduced at the hearing,

the court may make such amendment to the information or summons as appears "to it to be desirable or to be necessary to enable the real question in dispute to be determined". However, such an amendment cannot be made if the court considers that the amendment cannot be made "without injustice to the defendant". [46] Where an amendment is made, and the court considers that the defendant has been misled by the form in which the information or summons was made out, the court may adjourn the hearing.[47]

6.16 In South Australia and the Northern Territory, no objection may be taken to an alleged defect, in substance or form, in a complaint, or any variation between it and the evidence adduced at the hearing, unless -

(a) the defendant has been prejudiced by the defect or variance; or
(b) the complaint fails to disclose any offence or matter of complaint.

In either of these cases the court must dismiss the complaint unless it is just to amend it.[48]

6.17 The position with regard to correction of the variance between the complaint and the evidence may be different on the summary trial of an indictable offence and on the trial of a simple offence. The effect of section, s 591 and 593 of the *Criminal Code* in their application to the former case is that the court cannot amend the complaint if it considers that the variance is material to the merits of the case and that the accused person will be prejudiced thereby. As pointed out above, in the case of the summary trial of a simple offence any variance between

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45 The provisions in Victoria, New South Wales and England are similar to Western Australian provisions: *Summary Proceedings Act* (Vic), s 157(1) and (2); *Justices Act* (NSW), s 65; *Magistrates' Courts Act* (Eng), s 123.

46 *Ordinance* (ACT), s 28.

47 Id, s 29.

48 *Justices Act* (SA), ss 182 and 183; *Justices Act* (NT), ss 182 and 183.

the complaint and the evidence can be amended by order of the court. The Commission suggests that this difference in treatment between the two sorts of offences is undesirable and that whatever conclusion is reached regarding the power to amend a complaint should apply equally to the trial of simple offences and the summary trial of indictable offences.

(h) Adjournment sine die

6.18 During a hearing the court has power to adjourn the hearing to an appointed time and place.[49] The onus of persuasion is upon the person seeking the adjournment.[50] Although there is no limit on the period of time for which a hearing may be adjourned it appears that it must be a reasonable time.[51] Whatever the period of the adjournment, the *Justices Act* requires that the time and place to which the hearing is adjourned be fixed. There seems to be no power to adjourn a case sine die, that is, to adjourn a case indefinitely without setting a date for a further hearing. In a number of jurisdictions studied by the Commission there is express power to adjourn a hearing to a time and place to be fixed by the court.[52] If a hearing were adjourned in this manner the clerk of petty sessions or list clerk could fix a date which would be convenient to the parties, while enabling matters to be set down for hearing so as to make best use of the available court time.[53] As in England, this power could be limited to those cases in which the defendant is not remanded in custody.[54]

(i) Other adjournments

6.19 The power of adjournment could be further amended in a number of other ways either to clarify the power or to make the procedure for obtaining an adjournment more convenient. One possible clarification would be to make express provision for a matter to be adjourned

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49 *Justices Act*, s 86.

50 *Vick v Drysdale and Robb* [1981] WAR 321, 326.

51 Allen, 241.

52 *Summary Proceedings Act* (Vic), s 79(1)(b); *Justices Act* (Qld), s 88(1)(b); *Magistrates' Courts Act* (Eng), s 10(2).

53 Where a hearing is adjourned, a witness or a person sought to be made a witness may be discharged upon recognisance conditioned for his appearance at the time and place to which the hearing is adjourned: *Justices Act*, ss 89 and 90. If provision were made for the hearing; to be adjourned to a date to be fixed the conditions of the recognisance would have to be in similar terms. It would also be necessary for the clerk of petty sessions to give any witness notice of the time and place fixed for the continuation of the hearing: *Justices Act* (Qld), s 91. See also the recommendation in the Murray Report (362, para 4, and 588, cl 577) for the procedure for amending recognisances of witnesses where the venue of hearing is changed.

54 *Magistrates' Courts Act* (Eng), s 10(2).

and transferred to a court which is more convenient.[55] Express provision could also be made for an adjournment in the absence of a defendant who has been remanded, if the court is satisfied that the defendant is by reason of illness or accident unable to appear at the expiration of the period of the remand.[56] Where the officer hearing a case becomes incapable of proceeding with a hearing, provision could be made for another officer or the clerk of petty sessions to adjourn or discharge the hearing and in the latter case to order that the hearing be recommenced at a later date.[57] A clerk of petty sessions could also be given power to adjourn a hearing if no competent court is available.[58]

6.20 While it may be possible to grant these adjournments in Western Australia under the court's power to control its own procedure,[59] it may be desirable to remove any uncertainty by making specific provision for them.

(j) Bringing matter on for hearing

6.21 In practice a defendant or his counsel and the prosecutor may make arrangements[60] for a matter to be brought on for hearing at an earlier date than that set down, particularly if the defendant intends to plead guilty. This practice has the advantage that it can reduce the inconvenience or delay involved in dealing with a matter. It may be desirable to confirm this practice by an express provision.[61] Such a provision would alert people to the availability of such a facility.

(k) Failure of party or parties to appear after an adjournment

6.22 If the parties or either of them do not appear at the time or place to which a hearing is adjourned, the court has power to proceed as if such party or parties were present or, if the complainant does not appear, to dismiss the complaint with or without costs.[62]

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55 *Justices Act* (SA), s 47; *Justices Act* (Tas), s 50B; *Local Courts Act 1904-1982*, ss 36 and 36A. Such an adjournment could be sought at a pre-trial hearing: paras 5.5 to 5.8 above.

56 *Justices Act* (NT), s 65(13); *Magistrates' Courts Act* (Eng), s 129(1). Otherwise, if, for example, the defendant were in hospital, a court could be convened at the hospital.

57 Cf *Criminal Code*, s 645.

58 *Justices Act* (SA), s 66; *Justices Act* (NT), s 66.

59 Para 3.50 above.

60 They merely ask the clerk for a new hearing date. However, in busy courts it may be difficult, if not impossible, to set an earlier date.

61 There are precedents in other jurisdictions: *Justices Act* (SA), s 65(4); *Summary Proceedings Act* (Vic), s 79(3) and (4); *Provincial Offences Act* (Ont), s 50(2).

62 *Justices Act*, s 140.

(l) Adjournment after determination of matter

6.23 Once the court has heard the evidence adduced, it must consider and determine the matter and convict or make an order against the defendant or alternatively dismiss the complaint.[63] It may be that the power contained in section 86 of the *Justices Act* to adjourn the hearing can be exercised only up to the time the matter being heard is determined, that is, until the defendant is convicted or an order is made against him.[64] If this is the case, the court would not have power under this section to adjourn the matter in order to obtain a pre-sentence report, although it may nevertheless be able to do so under its inherent power. In practice adjournments are sometimes made to enable the court to decide upon an appropriate sentence and a pre-sentence report may be required for this purpose. Such a power is obviously desirable and the Commission considers that section 86 should be amended to put the matter beyond doubt. Section 10(3) of the English *Magistrates' Courts Act* provides that the court may:

> " ...for the purpose of enabling inquiries to be made or of determining the most suitable method of dealing with the case, exercise its power to adjourn after convicting the accused and before sentencing him or otherwise dealing with him."

The Commission suggests that a similar provision should be adopted in this State.

(m) Withdrawal of complaint

6.24 Two stipendiary magistrates[65] suggested to the Commission that Courts of Petty Sessions should be given power to permit a complaint to be withdrawn at any time before a matter is finally determined. At present there is no express statutory power to grant leave to withdraw and it is doubtful whether the court has inherent power. If the complainant does not wish to proceed with a matter, for example, because he is persuaded that on the evidence then available the defendant has no case to answer, the practice is to present no evidence at the hearing, in which case the complaint will be dismissed. In such cases the complaint could instead be withdrawn if the court had express power to permit this course. As the complaint would not have been dismissed, however, the defence of autrefois acquit would not be open to

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63 Id, s 139.

64 *Green v Sargeant* [1951] VLR 500.

65 Mr H F Harlock, SM and Mr D A McCann, SM.

the defendant[66] if he was again charged with the same offence.[67] Such a charge would, however, have to be laid within any time within which a complaint for the offence must be laid.[68] Complaints could also be withdrawn where the prosecution decides not to proceed with some charges where a defendant had pleaded guilty to other charges.

6.25 A number of other jurisdictions have made express provision for the withdrawal of a complaint.[69] Where a complaint is withdrawn a defendant would be able to obtain an order for costs under the *Official Prosecutions (Defendants' Costs) Act 1973-1974* in respect of an official prosecution.

2. THE PROCEDURE WHERE A COMPLAINANT DOES NOT APPEAR

6.26 If the complainant, either personally or by his counsellor solicitor,[70] does not appear at the time and place set down in the summons for the hearing of a simple offence,[71] but the defendant attends the hearing, the court is required either to dismiss the complaint or to adjourn the hearing to some other day on such terms as it thinks fit.[72] Where the hearing is adjourned, the defendant may be remanded in custody or released on bail.

6.27 If the complaint is dismissed the question arises whether the dismissal operates as a bar to subsequent proceedings with respect to the same offence. The doctrine of autrefois acquit, under which the accused asserts that the charge has already been the subject of a prior acquittal, does not seem to apply where a complaint has been dismissed because the complainant failed to appear at the hearing. This is because it is an essential ingredient of such a plea that the defendant should have been in peril at the earlier proceedings, that is, that the

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66 Para 6.27 below.

67 Ibid.

68 Unless the time for commencing proceedings had been extended: para 4.5 above.

69 South Australia: *Justices Act*, s 69; Northern Territory: *Justices Act*, s 69; New Zealand: *Summary Proceedings Act*, s 36.

70 Or other authorised representative such as a police officer or an officer of a government department or authority; para 6.6 above.

71 Although s 134 refers to a "simple offence" (which includes an indictable offence triable summarily - *Justices Act*, s 4), the section may not have been intended to apply to indictable offences triable summarily because it refers to a "summons for hearing and determining a complaint". In the case of indictable offences (including indictable offences triable summarily) the defendant is summoned in the first instance to attend preliminary proceedings which do not involve a hearing and determination: Chapter 9 below.

72 *Justices Act*, s 134. This section is subject to s 136 of the *Justices Act* which provides for the procedure where a defendant notifies his wish to plead not guilty: paras 5.1 to 5.3 above.

dismissal was "on the merits".[73] In New Zealand this question has been clarified by section 64 of the *Summary Proceedings Act* which provides that dismissal of a charge because the informant did not appear does not operate as a bar to any other proceedings in the same matter.

3. THE PROCEDURE WHERE A DEFENDANT DOES NOT APPEAR

(a) General procedure

6.28 Where the defendant fails to appear at the hearing of an offence that is not an indictable offence,[74] and due service of the summons is proved, the court may either proceed to hear and determine the matter in the absence of the defendant, or adjourn the hearing and issue a warrant to bring the defendant before a court to answer the complaint and be dealt with according to law. Where the defendant is apprehended under the warrant, he must be detained in safe custody until he can be brought before a court at a time and place of which the complainant has had due notice,[75] at which time the complaint may be heard.

6.29 This provision appears to be subject to section 5(1) of the *Bail Act 1982* which gives a defendant in custody for an offence awaiting his initial appearance in court for the offence a right to have bail considered by a justice or an authorised police officer.[76] In the interests of certainty it may be desirable to provide expressly that section 135(3) of the *Justices Act* is subject to the *Bail Act 1982*.

6.30 Where the defendant fails to appear at the hearing but has notified the clerk of courts in writing that he wishes to plead guilty to the charge, the court may proceed to hear and determine the complaint as though the defendant were present and pleaded guilty. In this case, the court cannot impose a sentence of imprisonment until the defendant is before it and, for this purpose, it may issue its warrant to arrest the defendant.[77] If a defendant, having given such a written notice, subsequently intimates to the clerk that he wishes to withdraw the plea

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73 *Barnes v Gougousis* [1969] VR 1019, 1022. Even if the doctrine does not apply further proceedings cannot be commenced if the time limit for commencing the proceedings has expired.

74 *Justices Act*, s 135.

75 Id, s 135(3).

76 *Bail Act 1982*, s 13 and item 1 of Part A of the Schedule. This Act has not, as yet, been proclaimed.

77 *Justices Act*, s 135(1).

but does not appear at the hearing the court may take one of the actions referred to in paragraph 6.28 above.

6.31 Apart from advising a defendant that he may plead guilty or not guilty, the summons form also advises the defendant that he may, if he pleads guilty, forward "with the summons any written explanation or other information [he believes] is relevant to the charge." This appears to be designed to give the defendant an opportunity to make a submission on the question of penalty. If so, it could be expressed more clearly. The form of complaint and summons could also give the defendant an opportunity to request the court to grant him time to pay any fine which may be imposed and to give reasons for making the request. In any case, the defendant could expressly by statute be given 14 days in which to pay the fine, subject to making an application to extend that period.

6.32 The court may not impose a sentence of imprisonment on the defendant until he is before it and for that purpose it may issue a warrant for his arrest. This limitation on the imposition of a penalty in the absence of a defendant could be restricted further as is the case in other jurisdictions. In Queensland, the court may not order that the defendant be disqualified from holding or obtaining any licence, registration, certificate, permit or other authority under any Act or that any such thing be cancelled or suspended unless the matter is adjourned to enable the defendant to appear for the purpose of making submissions on the matter.[78] In South Australia the court may not make an order disqualifying the defendant from holding or obtaining a driver's licence unless he is given an opportunity to appear for the purpose of making a submission on the question of penalty.[79] Where the court proposes to impose a large fine, the court could also be required to adjourn the matter to enable the defendant to appear so as to provide information about his means, or to apply for time to pay.

(b) Use of affidavit evidence under the Justices Act

6.33 Where the court proceeds to hear and determine the complaint in the absence of the defendant, it may receive affidavits of evidence[80] in support of the matters alleged in the

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78 *Justices Act* (Qld), s 142(2).

79 *Justices Act* (SA), s 62c(l).

80 Use of affidavits saves the time of officers in waiting at the court for a matter to be brought on for hearing and in appearing before the court.

complaint and determine the complaint on that evidence if the complaint is of a simple offence against -

(a) the *Road Traffic Act 1974-1982*;[81]

(b) any other prescribed Act;[82] and

(c) any regulation, rule, by-law or order made under the above Acts.[83]

(c) Use of affidavit evidence under the Transport Act

6.34 A different procedure for providing evidence by affidavits is contained in the *Transport Act 1966-1982*.[84] Under this Act, where a summons is served on the defendant at least 28 days before the time for the hearing and determination of the complaint, the summons may be accompanied by: [85]

"(a) copies of affidavits of evidence in support of the matters alleged in the complaint; and

(b) a notice in the prescribed form advising the defendant that he may, by election in writing in the prescribed form (copies of which form shall be attached to the notice) delivered by post or otherwise to the complainant and also to the clerk of petty sessions at the place so appointed not later than twenty-one days before the time so appointed, elect to appear or not on the hearing of the complaint but that if he does not so appear the Court may proceed -

(i) to hear and determine the complaint in his absence;
(ii) to permit those affidavits to be tendered in evidence; and
(iii) to determine the complaint on such particulars in the affidavits in support of the matters alleged in the complaint as would, under the laws of evidence apart from this section, be admissible if given orally before the Court, and not on any other particulars."

The summons may also be accompanied by a copy of a separate document signed by the complainant setting out particulars of any alleged prior convictions of the defendant.[86]

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81 This procedure is used in the case of traffic offences in which a police officer has observed an offence being committed.

82 See the *Justices Act (Evidence by Affidavit) Regulations 1974-1975*. Two Acts have been prescribed: the *City of Perth Parking Facilities Act 1956-1983* and the *Motor Vehicle Dealers Act 1973-1982*.

83 *Justices Act*, s 135(2).

84 This Act generally provides for the control of the transport of passengers and goods by road, rail, air and sea.

85 *Transport Act 1966-1982*, s 56A(1).

86 Id, s 56B(1). The document must contain a notice advising the defendant that if he does not appear at the hearing and is convicted of the offence alleged, the document is admissible evidence that he was convicted of the offences alleged in the document: id, s 56B(2).

6.35 If the defendant does not appear at the hearing of the complaint, whether or not he has elected to do so, the court may hear and determine the complaint in his absence on the basis of affidavit evidence.[87] If the defendant elects not to appear or makes no election, but does in fact appear, the court must, on the application of the complainant, adjourn the hearing for at least such time as is necessary to enable the complainant to proceed otherwise than by affidavit evidence.[88]

6.36 Where this procedure is used and the defendant is convicted of the offence, the court may receive the document relating to the defendant's prior convictions as evidence that the defendant was convicted of the offences alleged in that document. [89]

6.37 If the court has reasonable grounds to believe that this document was not in fact brought to the notice of the defendant or that the defendant was not in fact convicted of the offences as alleged in the document, the court may set aside any conviction or order it has made.[90]

(d) Comparison of the two affidavit systems

6.38 The Commission understands that Crown Law officers who have used section 135 of the *Justices Act* and the procedure provided in the *Transport Act 1966-1982* consider that the latter procedure is better and more workable. *The Commission seeks comment* on whether or not the procedure in the *Justices Act* should be replaced with a procedure along the lines of that in the *Transport Act 1966-1982*. If this were done, provision could be made for the procedure to be used for offences against -

(a) the *Transport Act 1966-1982*;
(b) the *Road Traffic Act 1974-1982*;
(c) any other prescribed Act; and
(d) any regulation, rule, by-law or order made under the above Acts.

87 Id, s 56A(2).
88 Id, s 56A(2).
89 Id, s 56B(3).
90 Id, s 56B(5).

6.39 In one incidental respect, both systems are the same, namely that the written evidence must be provided by means of an affidavit. A person who made a preliminary submission to the Commission[91] suggested that the use of an affidavit be replaced by use of a statement of facts because witnesses, often a departmental inspector, must spend considerable time finding a qualified person, such as a justice of the peace, before whom an affidavit must be sworn. There is a precedent for such an approach in the case of a written statement which may be tendered at a preliminary hearing. The *Justices Act* provides that a person is guilty of a crime if he "...has wilfully included anything which he knew to be false or did not believe to be true" in such a statement,[92] and the statement must contain "...a declaration by the person who made it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be guilty of a crime if he has wilfully included in the statement anything which he knew to be false or did not believe to be true."[93] *The Commission seeks comment* on the suggestion.

(e) Notice of conviction

6.40 In Western Australia, in cases other than those involving a sentence of imprisonment, there does not appear to be any express provision for giving a defendant notice of a conviction. In practice the defendant is sent an assessment showing the penalty imposed, including any suspension of a motor driver's licence, and any costs or fees ordered to be paid. Where a fine or costs are payable to the State Government the assessment is sent out by the court. Where the money is payable to a local authority the assessment is sent out by the authority. In South Australia the clerk of court is required either personally or by post to give written notice to the defendant of the conviction and any order as to penalty or other sum adjudged to be paid and of the time allowed for payment.[94] The general question of whether or not a clerk of petty sessions should be required to give a defendant notice of a penalty is discussed below.[95]

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91 Mr J Falconer.
92 *Justices Act*, s 69(7).
93 *Justices Act*, s 69(3)(b).
94 *Justices Act* (SA), s 62b(8).
95 Para 7.5.

4. SETTING ASIDE DECISION GIVEN OR RECTIFYING AN ORDER MADE IN DEFAULT OF APPEARANCE OF ANY PARTY

6.41 Where a decision is given by a court in default of appearance either by the complainant or by the defendant, the defaulting party may within 21 days of the decision or such further period as is permitted, apply to the court to set the decision aside. At the hearing of the application the court may either refuse the application to set aside the decision or adjourn the hearing to an appointed time and place and direct that the applicant give to the other party written notice of that time and place. The other party may appear to oppose the application. The court may either set the decision aside or refuse to do so.[96] The court, either on its motion or the application of a party, may also rectify a punishment order which is incorrect.[97]

5. PROCEEDINGS AGAINST YOUNG PERSONS

6.42 Generally, complaints against persons under the age of 18 years must be dealt with in a Children's Court. However, where another court proceeds to hear and determine a complaint against a person under the age of 18 years in the belief that the person was of or over that age, the proceedings are not on that account invalidated and the determination has full effect. However, either a party to the complaint or the Minister may apply to the court for an order setting aside the determination. If the decision is set aside the court may transmit the complaint for hearing and determination to the Children's Court which might have heard and determined it in the first instance.[98] Subject to the *Child Welfare Act 1947-1982*, the provisions of the *Justices Act* apply to proceedings, orders and convictions of a Children's Court. [99]

6. EVIDENTIARY PROVISIONS

6.43 A number of provisions of the *Justices Act* relating to evidence are discussed below. The Commission considers that it would be more appropriate if they were contained in the *Evidence Act 1906-1982*.

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96 *Justices Act*, s 136A.
97 Para 7.34 below.
98 *Justices Act*, s 136B.
99 *Child Welfare Act 1947-1982*, s 19(6).

(a) Compellability of spouses as witnesses

6.44 One such provision,[100] section 71(3), provides that upon a complaint of a simple offence or other matter, the husband or wife of the defendant is a competent and compellable witness. The law relating to the competence and compellability of spouses to give evidence in criminal proceedings was reviewed by this Commission in a report in 1977.[101] In this report the Commission drew attention to an apparent conflict between section 71(3) of the *Justices Act* and section 8(1) of the *Evidence Act 1906-1982* except in respect of some offences.[102] The Commission recommended that legislation to give effect to its main recommendations in the report should be introduced in such a way as to remove this inconsistency.[103] This recommendation has not yet been implemented.

(b) Onus of proof

6.45 A second evidentiary provision, section 72, provides that where a person is proved to have done or omitted to do something which constitutes an offence, the defendant has the onus of proving that he is entitled to a defence based on any exemption from or exception or proviso to the offence[104] contained in the Act[105] which creates the offence, so long as the exemption, exception or proviso is negatived in the complaint.

6.46 Section 72 has the effect of placing a legal burden of proof on the defendant,[106] that is, the matter must be taken as proved against the defendant unless he satisfies the court, on a balance of probabilities, to the contrary. Such a provision has been criticised because:[107]

> "...even after allowance has been made for the fact that the standard of proof would be that appropriate to civil proceedings; it means that the tribunal of fact may be obliged

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100 Another provision is s 70 which provides that upon any complaint of an indictable offence, simple offence or other matter, the prosecutor or complainant is a competent witness to support the complaint. If the provision serves any purpose it would be preferable to place it in the *Evidence Act 1906-1982*.

101 *Competence and Compellability of Spouses To Give Evidence in Criminal Proceedings* (1977).

102 Id, paras 4.14 to 4.19.

103 Id, para 7.44(b).

104 See, for examp le, *W Thomas & Co (WA) Ltd v Martin* [1967] WAR 68. The defendant was charged with having carried on an offensive trade without the consent of the local authority. It was held that it was for the defendant to prove that the consent had been obtained.

105 This section, therefore, appears to apply only to Acts or Ordinances and not to delegated legislation: *Interpretation Act 1918-1981*, s 4. This provision is replaced by a provision to the same effect in s 5 of the *Interpretation Act 1984* which comes into force on 1 July 1984.

106 *Gatland v Metropolitan Police Commissioner* [1968] 2 All ER 100.

107 J A Gobbo, D Byrne and J D Heydon, *Cross on Evidence* (1979 2nd Aus Ed), 97, para 4.24.

> to convict a person of whose guilt they are so far from being sure as to regard the probabilities of the existence of a lawful excuse as equally balanced."

6.47 Similar laws in England have been reviewed by the English Criminal Law Revision Committee. The Committee suggested that the real purpose of such provisions was to prevent a defendant:[108]

> "...in a case where his proved conduct calls, as a matter of common sense, for an explanation, from submitting at the end of the evidence for the prosecution that he has no case to answer because the prosecution have not adduced evidence to negative the possibility of an innocent explanation. This applies especially to cases....where the defence relates to a matter peculiarly within the knowledge of the accused."

The Committee concluded that this purpose would be sufficiently served if the burden were an evidential one.[109] This would mean that "the matter must be taken as proved against the accused unless there is sufficient evidence to raise an issue on the matter but that, if there is sufficient evidence, then the prosecution have the burden of satisfying the [court] as to the matter beyond reasonable doubt in the ordinary way."[110]

6.48 In Australia, the Senate Standing Committee on Constitutional and Legal Affairs has examined the law relating to proof of negatives in Commonwealth legislation.[111] It agreed with the English Committee that all such legal burdens on the defendant should be reduced to evidential burdens.[112] The Senate Committee, however, went further by recommending that Commonwealth legislation be reviewed to ensure that not even an evidential burden should rest on a defendant unless the offence involved matters: [113]

> "(i) where the prosecution faces extreme difficulty in circumstances where the defendant is presumed to have peculiar knowledge of the facts in issue; or
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> (ii) where proof by the prosecution of a peculiar matter in issue would be extremely difficult or expensive but could be readily and cheaply provided by the defence."

6.49 In making this recommendation, the Committee concurred with the following argument put forward by the Law Institute of Victoria:

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108 Eleventh Report, *Evidence (General)* (1972 Cmnd 4991), 89-90, para 140.
109 Subject to two exceptions: id, 90-91, para 141.
110 Id, 87, para 138.
111 *The Burden of Proof in Criminal Proceedings* (1982).
112 Id, 49-50, para 5.41.
113 Id, 62, para 6.13(b).

> "In a simple instance, such as whether a person is licensed to drive a motor vehicle, one can argue that the evidentiary burden should be placed on the defendant as all that he would be required to do is to produce his licence. On the other hand, one can justifiably argue that if such an evidentiary burden were not on the defendant, the Crown would take great care to check the appropriate records before serving the information and, if a licence was discovered, an unnecessary information and proceeding would not occur. Those who prepared this submission have acted for clients in this position and have noted that, in view of the fact that it is impossible to show that the police have been vexatious in bringing such proceedings (quite often because a third party has given the defendant's name and address) costs cannot be obtained. Thus a completely innocent person becomes liable for legal costs and is forced to attend at Court and suffer the trauma of such an attendance."

The Committee pointed out that the argument for placing the onus of proof of licensing matters on the defendant is weak as the storing and processing of records can be greatly simplified by computers.

6.50 *The Commission seeks comment* on whether merely an evidential burden should be placed on defendants to prove negatives and, whether or not such an approach is taken, a requirement for the proof of a negative by a defendant should be confined to the circumstances recommended by the Senate Standing Committee on Constitutional and Legal Affairs.

7. QUESTIONS AT ISSUE

6.51 The Commission welcomes comment on the following issues raised in this chapter -

Entry of plea

1. Should a defendant have a right to a written copy of the complaint before he enters his plea?

   (Paragraph 6.2)

2. Should section 138 of the *Justices Act* relating to the entry of a plea be amended to provide expressly for a plea of guilty or not guilty to be entered and for other pleas to be made?

   (Paragraph 6.4)

3. Where a defendant will not or does not enter a plea, should the court be expressly empowered to order a plea of not guilty to be entered on his behalf?

(Paragraph 6.4)

Practice at the hearing

4. Should section 141 of the *Justices Act* be amended by repealing that part dealing with examining witnesses in reply where the defendant gives evidence other than as to his general character?

(Paragraph 6.5)

Representation

5. Should there be express provision that a police officer may conduct proceedings on behalf of another officer and that an officer of a government department or authority may conduct proceedings on behalf of another officer of the department or authority?

(Paragraph 6.6)

Representation of a corporation

6. Should express provision be made with regard to the representation of a corporation and, if so, what form should such a provision take?

(Paragraph 6.8)

Evidence of persons not present in court

7. Should procedures such as those in Ontario and England be provided for obtaining evidence from a person who cannot be present in court?

(Paragraphs 6.11 and 6.12)

Amendment of complaint, summons or warrant

8. Should the power to amend a complaint, summons or warrant expressly apply also to a defect therein, in substance or in form?

(Paragraph 6.13)

9. Should there be any amendment to the provisions relating to a variation between a complaint, summons or warrant and the evidence in support thereof or defect of substance or form therein and, if so, how should the provisions be amended?

(Paragraphs 6.14 to 6.17)

Adjournment sine die

10. Should there be express power to adjourn a hearing sine die?

(Paragraph 6.18)

Other adjournments

11. Should there be express power to adjourn a hearing in other circumstances and, if so, in which circumstances?

(Paragraph 6.19)

Bringing matter on for hearing

12. Should express provision be made for bringing a matter on for hearing before the date set down for a hearing or the recommencement of an adjourned hearing or where a matter has been adjourned sine die?

(Paragraph 6.21)

Adjournment after determination of a matter

13. Should section 86 of the *Justices Act* be amended to ensure that a case may be adjourned after the determination of the matter?

(Paragraph 6.23)

Withdrawal of a complaint

14. Should it be possible to withdraw a complaint?

(Paragraphs 6.24 and 6.25)

Dismissal of a complaint

15. Should a dismissal of a complaint where the complainant does not appear operate as a bar to subsequent proceedings with respect to the same offence?

(Paragraph 6.27)

Ex parte proceedings

16. Should the procedure provided in section 135 of the *Justices Act* be replaced with a provision similar to that contained in section 56A of the *Transport Act 1966-1982*?

(Paragraphs 6.28 to 6.38)

17. Should the court's power to impose a penalty in the absence of a defendant be further restricted so that the following penalties could not be imposed in the absence of the defendant -

(i) a disqualification from holding or obtaining a licence, registration, certificate, permit or other authority; or

(ii) a large fine?

(Paragraph 6.32)

18. Should it be possible to provide evidence at an ex parte hearing by means of a written statement rather than an affidavit?

(Paragraph 6.39)

19. Should a defendant who pleads guilty in writing and who does not intend to appear at the hearing be given an opportunity to request the court to grant him time to pay any fine which may be imposed?

(Paragraph 6.31)

20. In any case, should a defendant be given at least 14 days in which to pay the fine?

(Paragraph 6.31)

Onus of proof

21. Should the burden of proof of a defence based on any exemption or exception or proviso placed on a defendant be changed from a legal burden to an evidential burden?

(Paragraphs 6.46 to 6.50)

22. Should the legal, or as the case may be evidential, burden be confined to circumstances where -

(i) the prosecution faces extreme difficulty because the defendant is likely to have peculiar knowledge of the facts in issue; or

(ii) proof by the prosecution of a peculiar matter in issue would be extremely difficult or expensive but could be readily and cheaply provided by the defence?

(Paragraphs 6.48 to 6.50)

CHAPTER 7
MATTERS ANCILLARY TO THE COURT'S DECISION AND OTHER MATTERS

1. RECORDING THE COURT'S DECISION

7.1 Where a complaint is dismissed, the court may make an order of dismissal[1] and give the defendant a certificate thereof.[2] The certificate is a bar to any subsequent complaint for the same matter against the same person.[3] As the certificate is merely evidentiary, the defence of autrefois acquit may be raised if an order of dismissal has been made even though a certificate has not been issued.[4]

7.2 Where a conviction or order is made against a defendant the *Justices Act* does not generally require the court to draw up a formal record of the decision, except on summary conviction for an indictable offence.[5] A formal record must be prepared if it is required by a party to the proceedings for the purpose of an appeal against the decision or for a writ of habeas corpus or other writ of the Supreme Court.[6]

7.3 Neither of the provisions referred to above requires the court to make a record of its decision at the time it is made. The failure to accurately record the decision has led to people being wrongly imprisoned on occasions. In one case drawn to the Commission's attention, the court convicted a defendant and imposed a fine and ordered costs to be paid but gave the defendant time to pay.[7] However, the fact that the defendant had been given time to pay the fine and costs was not recorded by the court. Before the time expired, a justice issued a warrant of commitment. The defendant was arrested and imprisoned. The defendant was released from custody once the error was discovered.

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1 *Justices Act*, fourth schedule, form no 40.

2 Id, form no 41.

3 Id, s 142. See also *Criminal Code*, s 734, *R v Dunham* (1911) 13 WALR 87 and P Nichols, *Police Offences Of Western Australia* (1979), 11-12, para 15/8.

4 *Vick v Drysdale and Robb* [1981] WAR 321, 340-341. As a justice in making an order of dismissal is acting judicially, and not ministerially, the prosecutor must be given an opportunity to be heard: id, 329-330.

5 *Justices Act*, s 146. Provision for a formal record of the conviction is, however, made by an Imperial statute: 1822 3 Geo 4, c 23, s 1. This latter section could be repealed.

6 *Justices Act*, s 146. The court is under a duty to keep a proper record of proceedings in all cases including those where a plea of guilty is entered: *Caratti v Commissioner of Police* [1974] WAR 73. It is also accepted practice that the reasons for any judicial decision should be given at the time the decision is made: *Baker v Flynn* [1982] WAR 289, 292 per Olney J.

7 Para 7.11 below.

7.4 In another case, *Casley v Commonwealth of Australia*,[8] no formal record of the conviction or the court's orders in respect of a default in payment of a fine had been prepared. The court merely made notes on the charge sheet indicating that the defendant had been convicted and that an order for the payment of a fine and costs had been made. Wickham J stated that:[9]

> "...the charge sheet standing alone is an unsatisfactory document upon which to base a warrant of committal to prison. If amendments to the *Justices Act* are being considered, some attention could usefully be given to the question as to whether orders which are not to be immediately executed should be drawn up, so that a Justice asked to issue a subsequent warrant may have a formal document before him in order to make sure that the form of warrant is adequately backed by the order made."

Alternatively, an express duty could be imposed on the court or the clerk of petty sessions to make a minute or memorandum of the decision, whether it be a dismissal of a complaint or a conviction or other order such as to costs or an order giving the defendant time to pay.[10] Both these approaches would have the disadvantage of involving additional work for clerks of petty sessions and their staff. The existing complaint form has provision for information to be recorded, including the following: the defendant's plea, the finding of the court, any penalty and costs ordered to be paid, any imprisonment in default of payment of a fine and any other order made. There is no specific place to record whether or not the defendant was given time to pay. If the defendant were given time to pay this could be recorded in the place for recording other orders, but it would be preferable if the form was amended to make specific provision for this information to be recorded. It should of course be emphasised that the mere imposition of either of the duties referred to above would not necessarily avoid a recurrence of the problems which have been encountered since success would depend on the extent of compliance with the duty.

2. NOTICE OF THE PENALTY IMPOSED

7.5 As stated in paragraph 6.40 above, although there is no requirement that a defendant be given a notice of the penalty imposed, in practice such a notice is given. The Dixon Report contains a recommendation that this should be an express requirement.[11] It recommended that

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8 (1980) 30 ALR 38.
9 Id, 43-44.
10 *Justices Act* (SA), ss 70 and 71.
11 Dixon Report, 157.

a defendant, whether or not he was present in court at the time of the decision, should be given a notice of the penalty imposed by the court. It pointed out that such a notice would be desirable even when the defendant is present in court because many "...defendants are under considerable stress at the time or may not understand fully what was said". The Committee recommended that the notice should specify:

"(a) The name and address of the offender.
(b) The court reference.
(c) The amount of fine.
(d) The time allowed for payment.
(e) The default provisions.
(f) Any other court order.
(g) Advice as to the action to be taken if the offender is unable to pay within the prescribed period."

3. ORDERS INVOLVING IMPRISONMENT

7.6 If the court orders that a convicted defendant be imprisoned it must issue a warrant of commitment accordingly.[12] Where the defendant has previously been adjudged to be imprisoned, the court may order that the imprisonment for the subsequent offence be cumulative, that is, commence at the expiration of the term of imprisonment which the defendant is then undergoing or is liable to undergo.[13] In fixing the term of imprisonment, the court may, where provision is made for imprisonment with hard labour, impose imprisonment without hard labour, and may reduce the prescribed period of imprisonment.[14] It may also impose a fine not exceeding $500 where an Act, other than the *Justices Act*, provides that the offence is punishable with a term of imprisonment.[15] In the Commission's view the sum of $500 which was set in 1975 is no longer adequate and should be increased, perhaps to $1,500.

7.7 There seems to be no reason why this provision should not apply to provisions in the *Justices Act* which authorise the imposition of imprisonment and not a fine.[16] The Commission therefore suggests that this limitation be removed.

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12 *Justices Act*, s 149.
13 Id, s 150(1).
14 Id, s 166. The reference to "hard labour" should be removed as obsolete. In practice the Prisons Department has no special regime for "hard labour". It has been recommended that the *Criminal Code* should make no provision for "hard labour": Murray Report, 23.
15 *Justices Act*, s 166.
16 For an example of such a provision see para 10.14(b) below.

7.8 When the court commits the defendant after the decision, it must commit him to prison,[17] and the person to whom the warrant is directed must convey him to prison.[18]

4. PERSONS CHARGED WITH SIMPLE AND INDICTABLE OFFENCES

7.9 On occasions a person may be charged with both simple offences and indictable offences arising out of the same circumstances. In this situation the Court of Petty Sessions can either proceed to deal with the simple offence before the trial of the indictable offence or adjourn the matter until the trial of the indictable offence has been completed. Whichever course of action is taken, if the defendant is convicted of both types of offences, it means that one court must impose a sentence without regard to the penalty imposed by the other court. Even if one court knows of the sentence imposed by the other court difficulties can arise. In one case recently, the defendant was placed on probation by the District Court but a Court of Petty Sessions subsequently sentenced him to imprisonment because it then had before it a person with a number of convictions including the offence for which he had been placed on probation.[19]

7.10 In order to avoid such a fragmentation of sentencing decisions and to enable one judicial officer to sentence an offender for a number of related offences, the Murray Report recommended that a person convicted in the District Court or Supreme Court should be able to plead guilty to offences which could otherwise only be dealt with in a lower court. The District or Supreme Court would then be able to sentence or otherwise deal with the defendant in accordance with the powers of the lower court.[20] The Commission agrees with this recommendation in so far as it would deprive Courts of Petty Sessions of jurisdiction in respect of certain matters.

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17 *Justices Act*, s 88

18 Id, s 95. The form provides for the warrant to be directed to all police officers in the State: id, fourth schedule, form no 59.

19 See *Elkington v Adams* (unreported) Supreme Court of Western Australia, Appeals Nos 49, 52, 53 and 54 of 1983, 3 June 1983. In this case, however, the offences did not arise out of the same circumstances. The offences involved a number of offences committed over a number of months. The sentence of imprisonment was set aside and a fine imposed because the District Court had already made the decision not to imprison the defendant and that decision operated to "tie the hands" of the Court of Petty Sessions: id, 4-5.

20 Murray Report, 427-432 and 611-613.

5. ORDERS INVOLVING A PAYMENT OF MONEY

7.11 When, on conviction, a sum of money or costs are ordered to be paid, the court may -

(1) allow time for the payment of the money;[21]

(2) direct that the sum be paid by instalments;

(3) direct that the person liable to pay the sum shall be at liberty to give security for the payment of the money or any instalments thereof.[22]

7.12 Even though a provision imposes a minimum monetary penalty, the court may, in the case of a first offence, impose a lesser amount.[23] In certain cases where two or more persons charged with a simple offence are severally convicted of the offence, the court may apportion among those persons the fine they might have imposed on one of them, had he been the only person convicted of the offence.[24]

7.13 Where a person has been convicted of assault, the court may order that the fine or part thereof be paid to the person assaulted.[25] Where the fine is paid to the clerk of petty sessions he is authorised to pay it to the person assaulted. The Commission understands that it is unusual for such an order to be made,[26] no doubt because the *Criminal Injuries Compensation Act 1982* makes provision for the payment of compensation in certain circumstances to persons who suffer injury or loss by reason of the commission of an offence or an alleged offence. *The Commission seeks comment* on whether or not section 145 of the *Justices Act* should be retained.

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21 In the Dixon Report (at 159) it was recommended that the court should record in writing the reasons for any refusal to grant time to pay.

22 *Justices Act*, s 144.

23 Id, s 166.

24 Id, s 166A. This provision was enacted to overcome an anomalous situation which arose where joint owners, such as a husband and wife, were prosecuted for the one offence for which a minimum penalty was provided. Before this provision was enacted both people had to be fined at least the minimum penalty, say $10, a total of $20, whereas, had the owner of the property been an individual on whom the minimum fine was imposed, the penalty would have been only $10: Western Australian Parliamentary Debates (1967) Vol 176, 489-490.

25 *Justices Act*, s 145.

26 An order was however made under this provision recently: *Magistrate Berates Wife-beater*, *The West Australian*, 1 July 1983, 4.

7.14 In other cases, where the fine or penalty is recovered by a warrant of execution, section 168 of the *Justices Act* provides that if the Act under which the complaint was made contains no direction for the payment of the money to any person the money must be paid into the Treasury.[27] Section 2 of the *Fines and Penalties Appropriation Act 1909* also contains directions for the disposal of money collected as the consequence of the imposition of a fine or penalty by a court of summary jurisdiction. Although this section has a general provision requiring every fine or penalty so imposed to be paid to the Treasury, it does not:

> "affect the appropriation of fines and penalties -
>
> (a) Incurred and recovered under any law in force for the time being relating to the sale of fermented or spiritous liquor; or
>
> (b) Incurred under the provisions of any Act or by-law relating to local government; or
>
> (c) Incurred under any Act administered by a local authority;
>
> (d) Fines and penalties recovered under sub-section (b) and (c) shall be paid to the local authority within whose district the offences are proved to have been committed."

7.15 In the Commission's view the provisions in these two Acts could be repealed and replaced with a single provision providing for fines and penalties, however recovered, to be paid into the Treasury subject to an order that it be paid to the person assaulted,[28] to any provision in any other Act,[29] and to the existing exceptions now contained in the *Fines and Penalties Appropriation Act 1909*.

7.16 Section 171 of the *Justices Act* provides that when any fine or penalty or part thereof is payable to any person other than Her Majesty, the clerk of petty sessions must retain the sum and not pay it to any such person for a period of seven days. Where such a payment is made to the person entitled to it, it is not recoverable from Her Majesty, even if the conviction is subsequently set aside. The period of seven days would appear to be insufficient in view of the fact that section 197 of the *Justices Act* provides that an appeal by way of an order to review may be commenced within two months of the giving of the decision. The period for

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27 An Imperial statute (1801 41 Geo 3, c 85) which may apply in Western Australia and which makes provision for the payment of fines has been superseded by this provision and could be repealed.

28 Should s 145 of the *Justices Act* be retained: para 7.13 above.

29 See, for example, s 12 of the *Aboriginal Communities Act 1979*.

commencing an ordinary appeal is seven days.[30] However, in the case of both types of appeal, the time for commencing the appeal may be extended.[31] It would therefore seem to be desirable to replace the period of seven days with a period of two months[32] or, where an appeal is instituted within that period, until the defendant's rights of appeal are exhausted.

6. COMPENSATION OF VICTIMS OF CRIME AND RESTITUTION OF PROPERTY

7.17 Apart from section 145 of the *Justices Act* referred to in paragraph 7.13 above which provides for the payment of a fine or part thereof to the victim of an assault, section 672 of the *Criminal Code* provides for the payment of the penalty to the victim of a crime when the "penalty is imposed upon the basis of the value of any property taken, killed, or destroyed, or of the amount of any injury done to any property". More generally, section 719 of the *Criminal Code* provides that any court before which any person is convicted may, upon the application of my person aggrieved made immediately after the conviction, order the person convicted to pay the person aggrieved compensation for any loss of property suffered or expenses incurred by the applicant through or by means of the offence.

7.18 In the Murray Report it was recommended that section 672 be repealed because it "is an outmoded provision". It was concluded that the "preferable way of handling such matters is to ensure that the court has an ample power to award compensation for the injury done".[33] In order to ensure that courts have ample power in this regard, it was recommended that section 719 be amended in a number of respects.[34] Noting that this section is little used at any level of the court system because the order can only be made upon the application of a person aggrieved and only if the application is made immediately after conviction, it was recommended that it should be possible to make a compensation order at any time, and either without any application being made therefore, or upon the application of a person aggrieved or the prosecution.[35]

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30 *Justices Act*, s 184.
31 Id, s 206B.
32 The period of two months for instituting an appeal by way of order to review can be enlarged. However, it would appear to be impracticable to allow for such an eventuality.
33 Murray Report, 445.
34 Id, 502-505 and 636-637.
35 Ibid.

7. 19 In addition to the provisions relating to compensation, there are a number of provisions in the *Justices Act* and the *Criminal Code* relating to the restitution of property of victims of an offence. Section 131 of the *Justices Act* provides that when a defendant is summarily convicted of an indictable offence or the court is of opinion that the offence is proved, it may order restitution of the property in respect of which the offence was committed to the owner thereof. Section 132 of that Act provides that if the property is not then forthcoming, the court may order that the defendant pay the owner the amount of the value of the property.[36] Section 717 of the *Criminal Code* also makes provision for the restitution of property on a charge of an indictable offence.

7.20 In the Murray Report it was recommended that section 717 of the Code be repealed and re-enacted in a form which would apply to Courts of Petty Sessions and consequently that sections 131 and 132 of the *Justices Act* should be repealed.[37] Under the provisions recommended in the Report, where a person is convicted of an offence or the court finds the offence proved, the court required to pass sentence would have power to order that:[38]

> "(a) any property to which the offence relates, or
>
> (b) any property in the possession of the offender which appears to the court to be directly or indirectly derived from the disposal or realisation of all or any part of any property to which the offence relates,
>
> shall be restored to a person who appears to be the owner thereof, or shall be delivered or transferred to a person who appears to be entitled to such property, as the case may require. "

If the defendant fails to comply with the order, a further hearing could be held before the court which made the order. The court would have power to:[39]

> "(a) dismiss the application;
>
> (b) vary, revoke or add to any of the terms of the order; or

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36 Ss 131 and 132 of the *Justices Act* are duplicated in respect of a number of indictable offences triable summarily by s 427(b) of the *Criminal Code*. It has been recommended that s 427(b) should be repealed: Murray Report, 281.

37 Murray Report, 498.

38 Id, 633.

39 Id, 635.

(c) revoke the order, fix the value of the property the subject of the order, and order that the person bound by the order shall pay to the person for whose benefit that order was made that sum of money, or any part thereof."

The Commission seeks comment on these recommendations of the Murray Report insofar as they apply to Courts of Petty Sessions.

7. REMISSION

7.21 The Governor has power to remit the whole or any part of any fine, penalty, forfeiture or costs imposed by a conviction.[40]

8. COPIES OF PROCEEDINGS IN SUMMARY CASES

7.22 Both where a person has been convicted and where a complaint has been dismissed, all parties interested in the proceedings are entitled to demand and receive copies of the complaint, any depositions, and the conviction or order from the officer having custody thereof, on payment of a reasonable sum.[41]

9. COSTS

(a) The present position

7.23 Where the defendant is convicted or an order is made against him, the court has a discretion to order the defendant to pay to the complainant such costs as seem just and reasonable.[42] Costs generally include fees for legal representation, court fees, necessary disbursements and witnesses' expenses.[43] Where a complaint is dismissed the court has a discretion to order the complainant to pay to the defendant such costs as seem just and

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40 *Justices Act*, s 170.

41 Id, s 148. In its report, *Review of the Justices Act 1902*: *Part I - Appeals*, the Commission recommended (at para 5.31) that the documents which should be available under this provision should be expanded to include, for example, the justices' notes of evidence and any probation report.

42 *Justices Act*, s 151. An order for costs either on a conviction or on a dismissal of a complaint must be made at the time of the conviction or dismissal and not at a later time: *Bateman v Clarke* [1973] WAR 101.

43 Where a prosecution is conducted by a police officer, the application for costs is confined to witnesses' expenses, disbursements and court fees. Where, however, prosecutions are conducted by or on behalf of the Crown Law Department acting for various Government departments an order is sought to recover witnesses' expenses, court fees and the costs of the counsel.

reasonable.[44] The sum ordered to be paid must be specified in the conviction or order or order of dismissal.[45] Where the prosecution is an "official prosecution", the provision for the award of costs to a defendant must be read with the *Official Prosecutions (Defendants' Costs) Act 1973-1974* which is discussed below.

7.24 Under the *Official Prosecutions (Defendants' Costs) Act 1973-1974* costs must be awarded to an accused in a trial in a Court of Petty Sessions where the charge against him is dismissed, withdrawn or struck out, or a conviction is quashed on appeal.[46] The operation of the Act is confined to cases where the accused is charged with an offence in an "official prosecution", which is defined as a prosecution "...on a complaint by a public official acting or purporting to act by virtue of his office".[47] A public official is defined as:[48]

> "a Minister of the Crown, a person employed in the Public Service of the State, a member of the Police Force, or a person employed by a municipality within the meaning of the *Local Government Act 1960* or any other statutory body and includes any person acting as agent of or under the instructions of such a person or body".

7.25 Unless the court is satisfied that having regard to the "special difficulty, complexity, or importance of the case" the payment of greater costs is desirable, the amount payable under the Act, other than court fees, is in accordance with the scale prescribed in the *Official Prosecutions (Defendants' Costs) Regulations 1974-1979*.[49]

7.26 Where costs are ordered to be paid under this Act, they are not payable by the complainant personally. Where the complainant is a Minister of the Crown, a public servant, a police officer or a person acting as agent of or under the instructions of any of these persons, payment of the costs is made out of the Consolidated Revenue Fund upon the production of a

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44 *Justices Act*, s 152.

45 Id, s 153.

46 *Official Prosecutions (Defendants' Costs) Act 1973-1974*, s 5. S 6 of this Act contain some limitations on the right of a successful defendant to obtain costs. For example, where a charge is dismissed under s 669 of the *Criminal Code* the court may order that a successful defendant is not entitled to his costs or part thereof. Also, the *Suitors' Fund Act 1964-1982* established a fund which is available to assist in the payment of costs incurred in certain appeals or in the case of abortive, discontinued and adjourned proceedings. In its report on *The Suitors' Fund Act - Part B: Criminal Proceedings* (1977) the Commission recommended that the *Official Prosecutions (Defendants' Costs) Act* be amended so as to provide that the legal œsts of accused persons incurred in certain appeals or in the case of aborted, discontinued and adjourned proceedings which are at present payable out of the Suitors' Fund, but not under the *Official Prosecutions (Defendants' Costs) Act*, be payable under the latter Act.

47 *Official Prosecutions (Defendants' Costs) Act 1973-1974*, s 4.

48 Ibid.

49 Id, s 5(5).

certificate to the Treasurer.[50] Where the complainant is employed by a municipality or other statutory body or is a person acting as agent of or under the instructions of such a body, the costs are payable by that body.[51]

(b) Fixing costs scales

7.27 In other proceedings, for example, where a charge laid by a private complainant is either proved or dismissed or where a defendant is convicted on an official prosecution there is no scale of costs, allowances and other expenses. The scale provided in the *Official Prosecutions (Defendants' Costs) Regulations 1974-1979* could be adopted for other proceedings. However, this scale is not reviewed on a regular basis, the last review being conducted in 1979.

7.28 In 1983 the Committee of Inquiry into the Future Organisation of the Legal Profession ("the Clarkson Committee") recommended the establishment of a Costs Committee to fix all scales of costs in respect of all legal services other than scales applicable to the Supreme Court or the District Court.[52] The Clarkson Committee also recommended that the Costs Committee be required to review each scale of costs within its jurisdiction at least once every two years.[53] If these recommendations are not implemented[54] and if a Rules Committee for Courts of Petty Sessions is established,[55] it could be given responsibility for ensuring that the Official Prosecutions (Defendants' Costs) scale is periodically reviewed and for setting and periodically reviewing a separate costs scale for Courts of Petty Sessions where the matter is not within the *Official Prosecutions (Defendants' Costs) Act 1973-1974*.

(c) Taxation of costs

7.29 At present there is no provision for the taxation of costs in respect of either proceedings within the *Official Prosecutions (Defendants' Costs) Act 1973-1974* or other proceedings. In Local Courts all costs and charges between the parties must be taxed by the

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50 Id, s 9.
51 Ibid.
52 Report of the Committee of Inquiry into the Future Organisation of the Legal Profession in Western Australia (1983), 231-232.
53 Id, 232-233.
54 The Attorney General has announced that he expects that the Costs Committee will be established in 1984: News Release, *Solicitors' Remuneration Order*, 23 December 1983.
55 Para 7.39 below.

clerk of courts, subject to review by a magistrate on the application of either party.[56] A magistrate may, however, fix the costs without taxation but only by consent of the parties.[57] Costs and charges allowed must be sanctioned by the scale of costs in force for the time being.

7.30 Proceedings leading to trials in Courts of Petty Sessions are generally less complex than those leading to a trial in a Local Court and for this reason there is not the same need for the taxation of costs in Courts of Petty Sessions. However, there may be some proceedings, for example, prosecutions under the *Companies Code* (Western Australia), which because of their complexity, warrant provision for the taxation of costs. *The Commission seeks comment* on whether or not there should be provision for the taxation of costs in more complex cases. The taxation could be performed by the clerk of petty sessions, subject to a review by a magistrate on the application of either party.[58]

10. INDICTABLE OFFENCES TRIABLE SUMMARILY

7.31 There are a number of indictable offences which may be tried summarily in certain circumstances. Reference has been made to a number of cases in which there is an inconsistency between the *Criminal Code* and the *Justices Act* as to the provisions relating to the trial of these offences.[59] These inconsistencies arise because section 593 of the *Criminal Code* provides that a number of provisions of the *Criminal Code* relating to trials on indictment apply to the summary trial of indictable offences in Courts of Petty Sessions. Section 593 could be repealed thus ensuring that the powers and procedures of Courts of Petty Sessions in relation to the summary trial of indictable offences were the same as those for simple offences.

7.32 Rationalisation of aspects of the law relating to indictable offences triable summarily has been recommended by the Murray Report.[60] The Report proposed that all such indictable offences be set out in a schedule to the Code and that section 3 of the *Criminal Code* set out

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56 *Local Courts Act 1904-1982*, s 82.

57 *Local Court Rules 1961-1984*, O 37 r 7.

58 If provision were made for costs to be awarded following a preliminary hearing (para. 9.48 below) provision could also be made for the taxation of such costs.

59 Paras 4.10 and 6.17 above. However, the procedure for the summary trial of indictable offences is substantially the same as that for simple offences.

60 Murray Report, 5-7.

the procedure for deciding whether an indictable offence should be dealt with summarily.[61] It may, however, be preferable to set this procedure out in the Act or regulations prescribing the procedure for Courts of Petty Sessions rather than in the *Criminal Code* which is mainly concerned with creating indictable offences and prescribing the procedure to be followed in trials on indictment.

11. SURETIES

7.33 Although the *Bail Act 1982*[62] contains provisions for the granting of bail to defendants in criminal proceedings, including provisions relating to sureties and surety undertakings, there are still some provisions of the *Justices Act* under which a person may be required to obtain a surety or sureties.[63] For example, a witness or person sought to be made a witness may be discharged upon recognisance[64] with or without sureties.[65] An appellant may also be required to enter into a recognisance, with or without sureties, to appear on his appeal.[66] Part VI of the *Bail Act 1982* relating to sureties could also be applied (with appropriate amendments) to sureties for witnesses and appellants. This Part contains provisions relating to, for example, the meaning of surety and surety undertakings,[67] the provision of certain information to a surety,[68] the persons disqualified from being sureties,[69] the matters relevant to approval of sureties,[70] the duties of the person before whom a surety undertaking is entered

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61 Id, 5-7 and 536-537.

62 This Act has not yet been proclaimed.

63 A number of provisions in the *Justices Act* relating to bail for defendants are repealed or amended by the *Acts Amendment (Bail) Act 1982*. The latter Act has not been proclaimed as yet.

64 *Justices Act*, ss 89 and 124.

65 Id, s 90.

66 Id, ss 187 and 200. In its report, Review of the *Justices Act 1902*: *Part I - Appeals* (1979) the Commission recommended that the requirement for a recognisance relating to an appeal should be repealed (paras 5.14 to 5.16).

67 A surety is a person who undertakes that he will forfeit a specified amount of money if the defendant fails to comply with the requirements of his bail undertaking: *Bail Act 1982*, s 35.

68 This includes information as to the terms and conditions on which bail has been granted to the defendant and the rights, obligations and liabilities of sureties: *Bail Act 1982*, s 37.

69 A person is not qualified to be approved as a surety if he is under 18 years of age, or the value of his assets, less the amount of his debts, is less than the amount which he might become liable to forfeit under his proposed surety undertaking, or there are reasonable grounds for believing that he has been, or will be, indemnified by any person against any such forfeiture: *Bail Act 1982*, s 38.

70 Regard must be had to all matters which are relevant including the character and antecedents of the applicant, his proximity to or connection with the defendant, and his ability to pay, or give security for, the amount which he might become liable to forfeit under his proposed surety undertaking: *Bail Act 1982*, s 39.

into,[71] the surety's right to apply for cancellation of his undertaking[72] and the forfeiture of money under a surety's undertaking.[73]

12. RECTIFICATION OF ORDERS

7.34 Where a person has been convicted and the court either imposes a punishment that is contrary to law, or fails to impose a punishment in conformity with the law, the court may, after giving the parties an opportunity of being heard, recall the order and impose a punishment that is in conformity with the law. Such an order may be made on the court's own motion or on application of a party to the complaint.[74] In the Commission's report, *Review of the Justices Act 1902, Part I - Appeals* (1979), it was recommended that the section should be amended to make it clear that the power may be exercised where the court has erred on the true facts, and where the penalty is imposed on incorrect facts which are subsequently corrected.[75] It was also recommended that, if the members of the court which made the initial decision are not available, the order should be rectifiable by a stipendiary magistrate or by two justices.[76]

13. ENFORCEMENT OF ORDERS

7.35 The main provisions relating to the enforcement of orders of Courts of Petty Sessions are contained in sections 154, 155 to 165A and 167 of the *Justices Act*. As stated in the Preface of this discussion paper, aspects of the law relating to the enforcement of orders under these sections were dealt with by the Dixon Report. For this reason the Commission has decided not to deal at this stage with these sections. Deferment will enable the Commission to take into account any decisions by the Government on the recommendations of the Dixon Report. If necessary, the Commission will then issue a separate discussion paper on the enforcement of orders under the *Justices Act*.

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71 *Bail Act 1982*, s 43.
72 Id, s 48.
73 Id, s 49.
74 *Justices Act*, s 166B.
75 *Review of the Justices Act: Part I - Appeals* (1979), para 6.4.
76 Id, para 6.5.

14. REGULATIONS AND FORMS

7.36 Section 96 of the *Justices Act* provides that the Governor may make regulations for carrying out the Act, including prescribing the forms to be used and the fees to be taken in Courts of Petty Sessions and providing for procedural matters relating to such courts.

7.37 As the *Justices Act* itself contains detailed provision as to the procedure to be used in Courts of Petty Sessions few regulations have in fact been made. The existing regulations relate to fees in Courts of Petty Sessions, the form of warrant which may be issued under section 91 of the *Justices Act*, the summons form, evidence by affidavit, service of summons by post and the procedure to be followed and the forms to be used in applications for an extraordinary driver's licence.

7.38 One question on which the *Commission seeks comment* is whether or not the provisions relating to the practice and procedure of Courts of Petty Sessions should be contained in rules[77] rather than a statute, the statute being confined to establishing a court, defining its jurisdiction and powers and the membership of the court for the purpose of exercising that jurisdiction and the procedural provisions which are important because of the protection that they provide for defendants either before or after conviction.

7.39 A further question is whether a formal mechanism, such as a Rules Committee, should be established to keep the practice, procedure and administration of Courts of Petty Sessions under review and to recommend any changes it considers desirable. The Chief Stipendiary Magistrate could be appointed chairman. Other members could consist of a small number of other magistrates and representatives of the Attorney General, the Law Society and the Bar Association. The Administrative Officer, Courts could act as secretary to the committee. *The Commission seeks comment* on whether or not such a committee should be established and, if so, its membership. Such a committee could also carry out a review of the forms used in Courts of Petty Sessions, many of which are, as one stipendiary magistrate submitted, "verbose and obscure, and difficult to understand".

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77 Practice directions could also be given for administrative matters, for example, such as requiring a solicitor to give a notice of appearance to the bench clerk: para 6.7 above.

15. QUESTIONS AT ISSUE

7.40 The Commission welcomes comment on the following issues raised in this chapter -

Recording the court's decision

1. Should the court or clerk of petty sessions be required to draw up orders which are not to be immediately executed or make a minute or memorandum of the decision?

(Paragraph 7.4)

2. Should there be an express provision requiring the defendant to be given notice of the penalty imposed?

(Paragraph 7.5)

Orders involving imprisonment

3. Should the provision permitting a court to impose a fine where an Act other - than the *Justices Act* provides for the imposition of a term of imprisonment be amended to include a provision in the *Justices Act* itself?

(Paragraph 7.7)

4. Should this provision also be amended to provide for a fine not exceeding say $1,500 instead of $500?

(Paragraph 7.6)

Payment of fine to victim of crime

5. Should section 145 of the *Justices Act*, which provides that justices may order that the fine or part thereof be paid to the victim of an assault, be retained?

(Paragraph 7.13)

Payment of fine or penalty

6. Should section 171 of the *Justices Act* and the *Fines and Penalties Appropriation Act 1909* be repealed and replaced with a single provision?

(Paragraphs 7.14 and 7.15)

7. Should the period which a clerk of petty sessions must retain a sum paid by way of fine or penalty before it is paid to any person other than the Crown be extended?

(Paragraph 7.16)

Compensation and restitution orders

8. Are the proposals in the Murray Report for amendment of the provisions relating to compensation and restitution orders satisfactory?

(Paragraphs 7.19 and 7.20)

Costs

9. Should a scale of costs, allowances and other expenses be provided for Courts of Petty Sessions?

(Paragraphs 7.27 and 7.28)

10. Should provision be made for the taxation of costs in Courts of Petty Sessions?

(Paragraphs 7.29 and 7.30)

Indictable offences triable summarily

11. Should section 593 of the *Criminal Code*, which provides that a number of procedural provisions of the *Criminal Code* apply to the summary trial of indictable offences in Courts of Petty Sessions, be repealed?

(Paragraph 7.31)

Sureties for witnesses and appellants

12. Should Part VI of the *Bail Act 1982* relating to sureties also be applied to sureties for witnesses and appellants?

(Paragraph 7.33)

Rules of court

13. Should procedural matters be dealt with in rules rather than in a statute to a greater extent than at present?

(Paragraph 7.38)

14. Should a Rules Committee be established to keep the practice, procedure and administration of Courts of Petty Sessions under review and to recommend any changes it considers desirable?

(Paragraph 7.39)

PART V - SUMMARY PROCEEDINGS AND MENTALLY DISORDERED PERSONS
CHAPTER 8

1. INTRODUCTION

8.1 The Commission's terms of reference for Project No 69 - *Criminal Proceedings and Mental Disorder* - require it to consider whether courts of summary jurisdiction require any powers beyond those contained in section 36 of the *Mental Health Act 1962-1979* to permit them to deal with an accused person who comes before them suffering from mental disorder. In particular, the Commission is required to consider whether such courts should be invested with powers analogous to those given to courts hearing charges of indictable offences under sections 631, 652 and 653 of the *Criminal Code*. These sections permit superior courts to deal respectively with fitness to stand trial, soundness of mind during the trial and the defence of insanity. A number of aspects of these terms of reference can be dealt with conveniently as part of the review of the *Justices Act* and accordingly are discussed below. [1]

8.2 Although the *Mental Health Act 1981*, which repeals the *Mental Health Act 1962-1979*, has been enacted it is not yet in force. The relevant provisions of both Acts are referred to below. The mental health legislation in this State has been reviewed by the Mental Health Legislation Review Committee and this review may result in the enactment of new legislation. [2]

2. FITNESS TO STAND TRIAL

(a) The present law

8.3 Unlike trials on indictment, there is no statutory provision under which the question of a defendant's fitness to stand trial can be raised and dealt with in a summary trial before a

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1 Other aspects of the terms of reference, such as whether courts should have power to make hospital orders and psychiatric probation orders, appear to be best dealt with in the wider context of a consideration of the law relating to criminal proceedings and mental disorder, that is, as part of Project No 69, rather than as part of a review of the *Justices Act*.

2 'Mental Health Change Ahead', *The West Australian*, 16 June 1984, 2. The report of this Committee has not yet been released (25 June 1984).

Court of Petty Sessions. Apart from using section 36 of the *Mental Health Act 1962-1979*,[3] the purpose of which appears to be to determine whether or not a person should be committed to an approved hospital and not to determine fitness to stand trial, one course of action that may be open to a court which concludes that a defendant may be unfit to stand trial is to enter a plea of not guilty. Otherwise, it would appear that any conviction subsequently recorded could be set aside.[4] On the other hand, there is authority for the view that the court should go no further and should desist from hearing the charge.[5]

(b) Discussion

8.4 One stipendiary magistrate[6] suggested to the Commission that it would be desirable to have an express procedure whereby the question of a defendant's fitness to stand trial can be raised in Courts of Petty Sessions.

8.5 In the case of trials on indictment, if it appears to be uncertain, for any reason, whether the defendant is capable of understanding the proceedings at the trial, so as to be able to make a proper defence, a jury of twelve must be empanelled to determine whether or not he is so capable.[7] The incapacity is not confined to incapacity caused by insanity or by infirmity or defect of the mind.[8] In one case, involving an Aborigine, incapacity was successfully based on cultural differences, one culture having concepts not appropriate to another culture.[9] Whatever the incapacity, it must be established that it renders the defendant incapable of understanding the proceedings at the trial so as to make a proper defence. This does not mean that he must be able to understand the purpose of "all the various formalities [or] be conversant with court procedure".[10] Nor need he be able "to understand the substantive law bearing upon criminal responsibility for the act alleged to have been done or the significance of intent which is part

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3 Paras 8.7 to 8.10 below.

4 *R. v Martin* (1904) 4 SR (NSW) 720, 725.

5 *Pioch v Lauder* (1976) 13 ALR 266, 272.

6 Mr M J McGuire, SM.

7 *Criminal Code*, s 631. The Murray Report contains a number of recommendations for changes to this provision. One is that the criterion for fitness to stand trial should be that the accused was in "such a state of mental disease or natural mental infirmity as to deprive him of capacity to make a proper defence" to the charge (400 and 601-602). It was also recommended that a judge, and not a jury, should determine this question. These recommendations were accompanied by a recommendation that s 652 of the *Criminal Code* should be repealed (423). This section provides for the holding of an enquiry to determine whether a person is of sound mind during the trial. It was thought that this matter could be dealt with under s 631 once amended in the manner so recommended.

8 *Ngatatyi v R* [1980] WAR 209, 210. Although the defendant was granted special leave to appeal to the High Court the appeal was unsuccessful: *Ngatatyi* (1980) 54 ALJR 401.

9 'Fast End To Trial: Law Too Hard For Youth To Follow', *The West Australian*, 18 May 1976.

10 *Ngatatyi v R* [1980] WAR 209, 216.

of that law."[11] The Commission suggests that the same criterion apply in summary trials but that the issue be determined by the presiding judicial officer.[12] If the defendant is found to be capable of understanding the proceedings, the trial should proceed in the normal manner.

8.6 One question which arises is how a defendant should be dealt with if he is found to be incapable of understanding the proceedings. In the case of trials on indictment, the Murray Report recommended that the court should be able to order either that the accused be discharged without trial[13] or that he be kept in custody in such place and in such manner as the court thinks fit.[14] As at present, a finding that the defendant was not fit to stand trial would not mean that he could not be again indicted and tried for the offence. *The Commission seeks comment* on whether or not a similar approach to that recommended in the Murray Report should be adopted in the case of summary trials. The person responsible for any place in which the defendant was held could be required to review whether the defendant was fit to stand trial. If, in his opinion, the defendant became fit to stand trial he would be required to report that fact to the court, and in any case could be required to report to the court on the defendant's mental condition and fitness to stand trial periodically, say every 28 days or such other period as the court thinks fit. The court could also be given power to order, at any time, that the defendant be brought before it for a consideration of whether or not he was then fit to stand trial or to reconsider whether he should be discharged from custody. In addition, the Attorney General after receiving a report from the same source could be authorised to apply to the court for the complaint to be struck out. The report would have regard to the mental condition of the defendant, any relationship between the mental disorder of the patient and the alleged offence, the likely duration of the disorder and the likely outcome of treatment and other matters likely to assist the Attorney General in this regard. Such a power would provide a simple and speedy way of disposing of a complaint where, for example, the defendant was unlikely to respond to treatment for a long period of time or if a conviction was likely to interfere with or prolong his recovery.[15] The consequence of the striking out of the complaint would be that the defendant would no longer be subject to any special procedures relating to

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11 Id, 211.

12 The question of whether or not the court should have power to obtain a psychiatric report for the purpose of determining this issue is raised in paras 8.18 and 8.19 below.

13 This may be appropriate if the defendant is not mentally ill but is intellectually handicapped. Of course, in such a case the court may require to be satisfied that adequate arrangements had been made for the care of the defendant.

14 Murray Report, 402-404 and 601-603.

15 See generally *Mental Health Act 1974-1978* (Qld), s 32.

mentally disordered defendants. He would, however, remain subject to the civil law relating to mentally disordered persons.

3. SECTION 36 OF THE MENTAL HEALTH ACT 1962-1979

(a) The present law

8. 7 This section provides that where it appears to a court of summary jurisdiction that a person charged with an offence is, or may be, suffering from mental disorder,[16] the court may order that he be remanded for any period not exceeding 28 days, either -

(a) on bail, for examination by a medical practitioner; or
(b) in custody, for reception into, and observation in, an approved hospital.

In one case of which the Commission is aware, a stipendiary magistrate held that this power was not available where a person had been convicted because the person was no longer "charged with an offence".

8.8 If the defendant is released on bail for examination by a medical practitioner and the practitioner is of the opinion that he appears to be suffering from mental disorder, the practitioner is required to refer him to an approved hospital and the court may then order that the defendant be conveyed to, and received into, an approved hospital.[17] Where the defendant is remanded in custody for observation in an approved hospital and the superintendent of the hospital is of the opinion that he is suffering from mental disorder, the superintendent is required to admit him as a patient and inform the court of that fact.[18]

8.9 When a person who has been admitted to an approved hospital under section 36 is to be discharged, the superintendent, unless the court which made the order otherwise directs, is required to inform the court of the proposed discharge, and if so required by the court, discharge the defendant into his former custody.[19]

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16 S 5 of the *Mental Health Act 1962-1979* provides that "mental disorder" means "any illness or intellectual defect that substantially impairs mental health."
17 *Mental Health Act 1962-1979*, s 36(2).
18 Id, s 36(3).
19 Id, s 36(4).

8.10 The *Mental Health Act 1981* (not yet in force) provides for the repeal of section 36. The corresponding section (section 50) provides in effect that a person may be remanded for any period not exceeding *seven* days, either -

(a) on bail, for examination by a psychiatrist; or

(b) in custody, at such place as the court may specify for observation and examination by a psychiatrist;

if it appears to the court that a person charged with an offence is, or may be, a person -

(a) who is suffering from a mental illness;[20]

(b) that the illness is of a nature or degree which warrants detention for treatment -

(i) in the interests of his welfare; or

(ii) for the protection of other persons; and

(c) he does not, by reason of his mental illness, appreciate that he needs treatment for it.

The section further provides that if the psychiatrist is of the opinion that the person comes within the conditions referred to above, he is required to furnish the court with a certificate as to his opinion. The court may then order that the defendant be received into an approved hospital. If the superintendent of the hospital is of opinion that the defendant does not come within the conditions so referred to he must discharge the defendant into his former custody. A similar provision to that described in paragraph 8.9 above exists in the case of discharge from the hospital of a defendant who has been admitted to the hospital.

(b) Discussion

8.11 At present, the power contained in section 36 of the *Mental Health Act 1962-1979* is the principal power which Courts of Petty Sessions have to deal with a person who appears to be mentally disordered. Under this section it is possible for a person to be diverted from the

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[20] S 3(1) of the *Mental Health Act 1981* provides that "mental illness" means:

"a psychiatric or other illness or condition that substantially impairs mental health, but does not include a handicap whereby a person is an intellectually handicapped person".

Accordingly, this provision, unlike s 36 of the *Mental Health Act 1962-1979*, would not apply to persons who are intellectually handicapped and not suffering from mental illness. The position of intellectually handicapped persons has been considered by the Mental Health Legislation Review Committee.

criminal process and detained as a patient in an approved hospital without the charge being determined.

8.12 Diversion from the criminal process under section 36 is not, however, without problems. The section in its terms is not related to fitness to plead and appears to empower a Court of Petty Sessions to set proceedings in train for an involuntary commitment of a person who happens to appear before the court on a criminal charge. While it may be in a defendant's interest to receive treatment in hospital, he may resent an involuntary commitment, particularly if it is for a period longer than the likely sentence under the offence charged. It also deprives a defendant of an opportunity to exonerate himself. For these reasons it may be considered that the only ground on which a defendant should be able to be diverted from the criminal process before a charge is considered is where the trial cannot proceed because the defendant is unfit to stand trial.[21]

4. THE INSANITY DEFENCE

(a) The present law

8.13 Although the insanity defence provided by section 27 of the *Criminal Code* can be raised by a person who is charged with a simple offence[22] there is no requirement that the court record a finding that the defence of insanity has been raised successfully and the court has no power to make orders for the disposition of a person who successfully raises this defence. It would appear that the court should dismiss the complaint and, if the defendant is in custody, release him.

(b) Discussion

8.14 Where a court finds that the defence of insanity under section 27 of the *Criminal Code* has been established, the Commission considers that there should be an express requirement for the court to record such a finding.[23]

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21 Paras 8.3 to 8.6 above.

22 *Criminal Code*, s 36. See *Geraldton Fisherman's Co-operative Ltd v Munro* [1963] WAR 129, 133. The Commission's inquiries indicate that it is rare for the defence of insanity to be raised in Courts of Petty Sessions.

23 A recommendation similar to this has been made in England: *Report of the Committee on Mentally Abnormal Offenders* (Cmnd 6244, 1975), 223, para 18.19 (the "Butler Committee").

8.15 Where the defence of insanity under section 27 of the *Criminal Code* is successfully raised in trials on indictment, the court is required to order that the defendant be kept in strict custody until Her Majesty's pleasure is known.[24] The Governor, in the name of Her Majesty, may give such order for the safe custody of such person during his pleasure, in such places of confinement and in such manner as the Governor may think fit. The purpose of this provision "is to protect the community and to protect the person himself so long as he would, if released, constitute a danger to the community or to himself, either in respect to the person or to property".[25]

8.16 In Courts of Petty Sessions, one option would be to provide for the court to acquit the defendant and leave the question of his disposition to the existing civil procedures. In support of this view, it could be argued that the charges dealt with in summary courts are unlikely to be of such a dangerous character as to require special dispensing powers.[26] Alternatively, the approach recommended in the Murray Report in the case of trials on indictment could be adopted. The court could be required to order that the person be detained in safe custody, under such conditions as the court may order, until his disposition could be dealt with by the Executive through the Governor. The Governor could be given power to -

(a) change the terms of such an order;

(b) from time to time to vary, revoke or add to any terms of an order previously made;

(c) release the person from custody either conditionally or unconditionally or revoke a conditional order for release; or

(d) vary, revoke or add to any conditions specified in such an order.[27]

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24 *Criminal Code*, s 653.

25 *Wilsmore v Court* [1983] WAR 190, 200.

26 For example, s 29 of the *Mental Health Act 1962-1979*, provides that a justice may, upon the application of any person, order that a person be apprehended and conveyed to and received into an approved hospital if the justice is satisfied that the person is suffering from mental disorder and that it is in the interest of that person or of the public that he should be admitted to an approved hospital for treatment under the Act.

27 This general approach was recommended in the case of trials on indictment at 423-425 and 609-611 of the Murray Report.
It is to be noted that in England, the Butler Committee recommended that the court should have power to make any of the following orders -
(a) an order for in-patient treatment in hospital with or without a restriction order;
(b) an order for hospital out-patient treatment;
(c) an order for forfeiture of any firearm, motor vehicle, etc, used in a crime;
(d) a guardianship order;

5. OTHER POWERS

(a) The present law

8.17 Courts of Petty Sessions have power to obtain a pre-sentence report in respect of any convicted person.[28] This report may include a psychological or psychiatric report. Where the offence for which the person has been convicted is punishable by a term of imprisonment the court may, instead of sentencing him, make an order requiring him to be under the supervision of a probation officer for a period between six months and five years.[29] Such a probation order may require the person to submit himself to medical, psychiatric or psychological treatment, including treatment in an institution. [30]

(b) Discussion

8.18 One circumstance in which the power of Courts of Petty Sessions to obtain a psychiatric report could be extended is where the issue of fitness to stand trial arises. Such a power would seem to be a useful one and *the Commission seeks comment* on whether there are any difficulties in the proposal.

8.19 Without more, the report would not be privileged.[31] Consequently, a self-incriminating statement made by the defendant during a psychiatric examination for the purpose of a report might be admissible in a trial of the offence charged. Such a statement could still be a voluntary one (and so admissible) even though the examination itself was not voluntary.[32] It might be argued that the requirement that the confession must be made voluntarily would provide adequate protection for the defendant. On the other hand, it might be considered that further protection was warranted and that the psychiatrist's report and statements made by a defendant during the examination should be admissible only for the purpose of determining the issue of fitness to stand trial. If so, it would follow that any judicial officer involved in a

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(e) any disqualification (eg from driving) normally open to the court to make on conviction;
(f) discharge without any order: Butler Committee, 231-232, para 18.42 and 151, para 10.29.

28 *Offenders Probation and Parole Act 1963-1983*, s 8.

29 Id, s 9(1). See *R v Mooney* (1978) 2 Crim LJ 351.

30 *Offenders Probation and Parole Act 1963-1983*, s 9(6)(a).

31 *R v Salahattin* [1983] 1 VR 521, 527.

32 See generally, J A Gobbo, D Byrne and J D Heydon, *Cross on Evidence* (2nd Aus Ed, 1979), 521-531.

consideration of this issue and who obtained a psychiatric report should not sit on the subsequent trial of the defendant where the defendant is found to be -

(i) fit to stand trial; or,
(ii) unfit to stand trial and he subsequently becomes fit enough to stand trial.

6. QUESTIONS AT ISSUJE

8.20 The Commission welcomes comment on the following issues raised in this chapter -

Fitness to stand trial

1. Should Courts of Petty Sessions have express statutory power to deal with the question of fitness to stand trial?

(Paragraph 8.5)

2. How should a defendant be dealt with if he is found to be incapable of understanding the proceedings?

(Paragraph 8.6)

3. Should the judicial officer considering the question of fitness to stand trial on account of the defendant's mental condition have power to obtain a psychiatric report?

(Paragraph 8.18)

4. If so, should a psychiatric report obtained under such a power be admissible against the defendant at his trial?

(Paragraph 8.19)

Section 36 of the Mental Health Act 1962-1979

5. Should the power contained in section 36 of the *Mental Health Act 1962-1979* be retained?

(Paragraph 8.12)

The defence of insanity

6. Should there be an express provision to enable a Court of Petty Sessions to record a finding that a person is not guilty under section 27 of the *Criminal Code*?

(Paragraph 8.14)

7. What powers should a Court of Petty Sessions have to deal with a person who is found to be not guilty under section 27 of the *Criminal Code*?

(Paragraphs 8.15 and 8.16)

PART VI: INDICTABLE OFFENCES
CHAPTER 9

1. INTRODUCTION

9.1 Proceedings for an indictable offence in the Supreme Court or District Court are usually preceded by the preliminary proceedings discussed in this chapter. However, trials of indictable offences may also be commenced either by an ex officio indictment,[1] a private information[2] or following a committal for trial by a coroner.[3]

9.2 The right to a preliminary consideration of a charge of an indictable offence has existed in England, in one form or another, for many centuries, and in this State since the foundation of the colony. In England, before the development of police forces, one of the functions of justices was to investigate alleged offences.[4] Once information was collected it was presented to a Grand Jury, comprised of laymen, which decided whether or not the accused person should stand trial. When the colony of Western Australia was established provision was made for Grand Juries to be conducted according to the rules applicable in England.[5] In the early years of the colony there was no central police force. Instead constables were assigned to justices.[6] In these circumstances, the Grand Jury provided a means of ensuring that people were not put on trial by indictment unless there was sufficient cause. By 1855, however, Grand Juries were no longer considered to be necessary for the due administration of justice and were abolished.[7] There appear to have been two reasons for this. First, by 1853 a single police force had been created under the control of the Mounted Police Superintendent. Secondly, in 1850 the role of justices in respect of indictable offences had been clarified and they were given power to discharge a defendant following a committal hearing.[8] This hearing involved recording in depositions the evidence given orally before the examining magistrate or justices in the presence of the accused. The magistrate or justices could commit the accused for trial if he or they were of opinion that the evidence given was

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1 *Criminal Code*, s 579. See *R v Booy* [1980] SR (WA) 1.
2 *Criminal Code*, s 720.
3 *Coroners Act 1920-1983*, s 12A.
4 See generally J H Langbein, *Prosecuting Crime In The Renaissance* (1974), Part I.
5 1832 2 Wm IV No 3, s 1.
6 E Russell, *A History of the Law in Western Australia and its Development From 1829 to 1979* (1980), 186.
7 18 Vict No 5, s 1.
8 14 Vict No 4, s 16.

sufficient to put the defendant on trial for an indictable offence. If not, the defendant was discharged.

9.3 This procedure remained basically unchanged until the procedure discussed below was introduced in 1976. The new procedure was introduced following a report of the Commission's predecessor, the Law Reform Committee, on *Committal Proceedings* in 1970.

9.4 The movement for reform which resulted in the new procedure was prompted by concern at -

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

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

(c) the delay in bringing cases to trial.

9.5 As pointed out above, the old procedure involved a hearing in every case. The new procedure gives the defendant the right to elect whether or not to have a hearing and requires the prosecution to give him certain information for this purpose.[9]

9.6 In the following part of this chapter the Commission sets out in detail the present law and practice for conducting preliminary proceedings and makes suggestions for amendments. For the purposes of discussion the Commission assumes that the present system will be retained largely in its present form. The Commission is, however, aware of suggestions elsewhere for the introduction of a radically different system. One of the most well-known of these is that contained in the report of the English Royal Commission on Criminal Procedure.[10] In Part 3 below the Commission sets out the proposals of that Commission, and the results of the research which prompted them. The Commission's aim is to obtain the views of those who are involved in the present system in this State on the extent to which the situation in England is mirrored here and, if so, whether the proposals of the Philips Commission would be likely to provide a remedy. In the Commission's view, the defendant's right to an oral preliminary hearing should not be abolished (as the Philips Commission

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9 Paras 9.9 and 9.10 below.

10 Cmnd 8092 (1981), (hereinafter cited as "the Philips Commission"). For other reports making similar recommendations see footnote 2 to para 9.55 below.

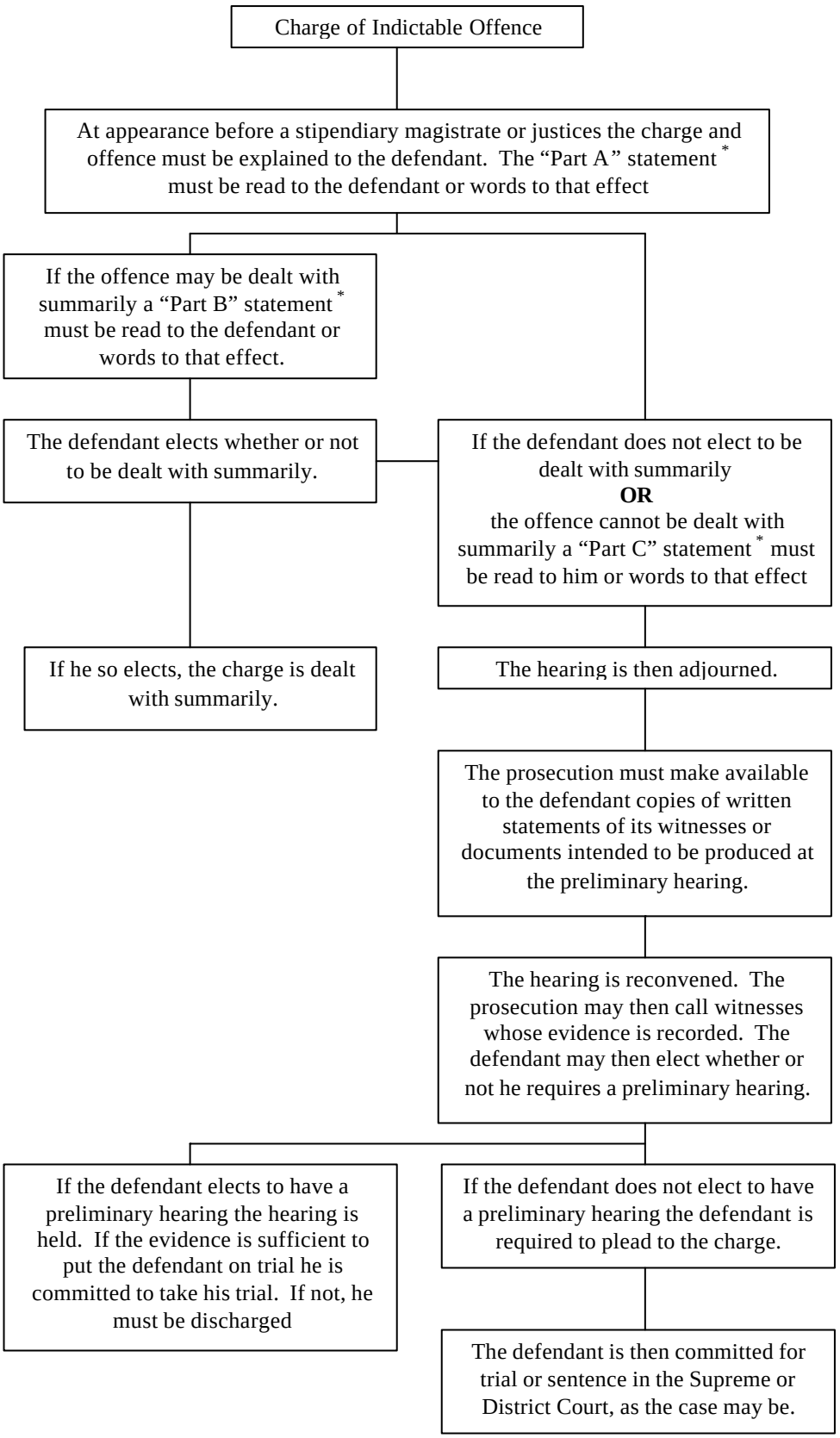
proposes) unless it can be clearly shown that any alternative procedure protects the defendant's interests at least to an equal extent.

2. THE PROCEDURE

(a) Summary of the present procedure

9.7 The following chart summarises the procedure now provided in the *Justices Act* for dealing with charges of indictable offences.

SUMMARY OF PROCEDURE IN THE JUSTICES ACT FOR DEALING WITH CHARGES OF INDICTABLE OFFENCES



* see following paragraphs

(b) Commencement of procedure and elections

9.8 Where a person first appears in court charged with an indictable offence, the judicial officer must read the charge to the defendant and explain to him the offence with which he is charged. He must then address the defendant in the form of words prescribed in Part A of the Ninth Schedule to the *Justices Act* or in words to the like effect, that is:

> "You are not required to plead to this charge [these charges] now but your rights will be explained to you".

In those cases in which the charge is one which may be dealt with summarily at the election of the defendant,[1] the judicial officer is also required to address him in the form of words prescribed in Part B of the Ninth Schedule to the *Justices Act*. These words are to the effect that the defendant may elect to have the charge dealt with by a Court of Petty Sessions instead of the Supreme Court or the District Court.[2]

9.9 Where a charge cannot be dealt with summarily before a Court of Petty Sessions, or the defendant elects to have the charge dealt with by the Supreme Court or the District Court, the judicial officer must also address the defendant in the form of words prescribed in Part C of the Ninth Schedule of the *Justices Act* or words to the like effect. These words advise the defendant that -

(i) The hearing will be adjourned to enable the prosecution to make available to the defendant copies of written statements of its witnesses[3] and to give the defendant a copy or description of any documents or other exhibits intended to be produced by the prosecution at the trial. These papers must be served on the defendant and be lodged with the clerk of petty sessions at least four days before the hearing is to be resumed.[4]

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1 That is, an indictable offence triable summarily.

2 *Justices Act*, s 101A(1).

3 These statements can be tendered in evidence at the preliminary hearing (should one be held) if the defendant does not object and if certain other conditions exist: see footnote 22, para 9.20 below. The admission of written statements has the advantage that witnesses need not attend to give their evidence orally.

4 *Justices Act*, s 101A(I). It has been suggested that there is no need to have these documents served on the clerk. This requirement may have been considered necessary because the presiding officer must have a copy of the documents where a preliminary hearing is conducted: para 9.20 below. Moreover, where a defendant is committed for trial, the presiding officer is responsible for transmitting the statements, amongst other documents, to the Attorney General or some other appropriate officer: para 9.32 below. However, these ends could be achieved if the documents were presented to the officer at the hearing.

(ii) When the hearing is resumed the prosecution may call witnesses to give oral evidence.[5] The evidence will be recorded and the defendant is provided with copies and given an opportunity to consider them. The defendant will then be asked to elect whether or not he requires a preliminary hearing. [6]

(c) Provision of written statements and tendering of evidence

9.10 It is to be noted that the prosecution is only obliged to serve the defendant copies of statements of witnesses it proposes to tender in evidence at the preliminary hearing should the defendant elect to have one. The prosecution is not obliged to serve the defendant copies of statements of witnesses it intends to call to give oral testimony at that hearing.[7] The defendant may accordingly be put to his election even though he has not necessarily been given copies of the statements of all the prosecution's witnesses. [8]

9.11 *The Commission invites comment* on whether the provisions should be amended so as specifically to require the prosecution to provide the defendant, before his election, with copies of the statements of *all* the witnesses it proposes to call to give oral testimony at the preliminary hearing, should one be held, as well as those statements it intends to tender in evidence at that hearing.[9] If such an amendment were made, the defendant would be able to make his election decision in the light of the statements of all those witnesses and possibly not, as now, only some of them. In the Commission's view, this is the fairer course. Of course, it should be provided that the judicial officer could grant the prosecution leave to call a person to give oral testimony :It the preliminary hearing if it did not know of his existence or availability before the defendant made his election.

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5 This may be necessary where a person refuses to provide a written statement voluntarily but is prepared to give evidence at a hearing. Such a case may occur in the case of a family murder situation.
It would seem that, if the defendant elects to have a preliminary hearing, the prosecution would have to call these witnesses again at that hearing if it wished to have the magistrate consider their evidence.

6 *Justices Act*, s 101B(1).

7 *Re Harlock*; *Ex parte Robinson* [1980] WAR 260, 264-265 per Brinsden J.

8 The statement in Part C of the Ninth Schedule to the *Justices Act* that the "hearing is going to be adjourned to enable the prosecution to make available to you copies of written statements of its witnesses" is accordingly misleading.
The Commission understands that at least one magistrate has held that the Act does not require the defendant to be put to his election where the prosecution did not propose to provide *any* written statements or call *any* witness to give oral evidence pursuant to the power referred to in para 9.9(ii) above.

9 Where a prosecution witness is not prepared to make a voluntary written statement to the police, but is nevertheless prepared to make the statement under legal compulsion at a hearing (see footnote 5 to para 9.9 above) it should be sufficient compliance if the statement of a prosecution witness is given to the defendant in the form of a deposition, as Part C of the Ninth Schedule of the *Justices Act* already provides: see para 9.9(ii) above.

9.12 The previous paragraph only concerns the evidence which the prosecution proposes to adduce at the preliminary hearing, should one be held. However, as the prosecution is presently only required at that hearing to establish that there is sufficient evidence to put the defendant on trial, it is not necessary for the prosecution to disclose at that stage all the evidence it proposes to adduce at the trial. The amendment suggested by the Commission above would not alter this position. The prosecution could decide to withhold some evidence,[10] being confident that it could nevertheless produce sufficient evidence at the preliminary hearing, if one were held, to satisfy the judicial officer that the defendant should be committed for trial. Even if a defendant were discharged at the hearing because the evidence presented was insufficient, the prosecution could still put him on trial by means of an ex-officio indictment. It was suggested to the Commission that the prosecution should be required to go further and provide the defendant with the written statements of all those people it intends to call at the trial should the defendant be committed for trial.[11] Such a requirement would enable the defendant to elect whether or not to have a preliminary hearing in the light of the evidence of *all* the prosecution evidence then available. *The Commission would welcome comment on the suggestion.* As in the analogous situation discussed in the previous paragraph, the leave of the trial judge would be required to call as a witness at the trial a person whose statement was not served on the defendant prior to his election.

9.13 One practical difficulty with the suggestion above is that under the present system it is the police who normally handle prosecutions up to the stage when the defendant is committed for trial. The Crown Prosecutor normally only takes over when this decision has been made. Accordingly, the police are not necessarily able to anticipate which witnesses the Crown will choose to call at the trial. This problem could be ameliorated if the Crown Prosecutor conducted or supervised prosecutions for indictable offences from the outset. This, however, would involve substantial reorganisation with a reallocation of police and Crown Law Department resources.[12]

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10 For example, the prosecution may desire to spare the chief witness in a sexual offence case the ordeal of being cross-examined both at the preliminary hearing and at the trial: *R. v Epping and Harlow Justices, Ex parte Massaro* [1973] 1 All ER 1011.

11 These statements could be either voluntary statements or recorded depositions: para 9.9 above. The Commission understands that in practice at present the defendant is able to obtain copies of the statements of all witnesses the Crown intends to call at the trial. However, some statements may be given only after committal for trial.

12 See Part 3 below for a more radical approach involving the Crown Prosecutor's early assumption of the case.

(d) Service of written statements

9.14 While section 101A(1)(b)(ii) of the *Justices Act* provides that the statements must be served on the defendant, Part C of the Ninth Schedule of the *Justices Act* indicates that they may be served either on the defendant or on his solicitor. The Commission understands that some stipendiary magistrates have held that the statements must be served on the defendant and that the hearing cannot proceed until they are. In the Commission's view, where a defendant is represented by a solicitor, it is not unreasonable to make provision for service on the solicitor.[13] The Commission suggests that the defendant should be able to consent to the documents being served on his solicitor, if he has one, at the latter's business address. Where a solicitor is appointed after this procedure is completed but before the statements are served, the solicitor should be able to notify the prosecutor so that the statements may be served on him.

(e) Plea of guilty

9.15 The Commission has been informed that there are cases where the defendant is aware of the evidence against him, intends to plead guilty and wants to get the matter over with as quickly as possible. *The Commission accordingly invites comment* on whether the Act should be amended so as to permit a defendant to plead guilty before[14] the prosecution is required to serve on the defendant the statements of its witnesses. The aim would be to avoid the need for an adjournment to allow the prosecution time to obtain and serve the statements and time for the defendant to consider them. However, to provide a safeguard against the possibility that the defendant's plea may be ill-considered, the Commission suggests that the defendant should only be able to plead guilty at this stage if he is legally represented and his counsel has assured the judicial officer that he has explained to the defendant the elements of the offence charged, the consequences of the plea, and that the plea is a considered one.

9.16 If a plea of guilty were entered, the defendant would then be committed for sentencing by the Supreme Court or District Court, as the case may be. One problem which could arise is

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13 The Commission understands that some solicitors have complained at the practice of serving the statements on the defendant since the defendant sometimes loses them.

14 At present the defendant can enter a plea of guilty after he has elected not to have a preliminary hearing (para 9.18 below) or on a preliminary hearing: para 9.28 below. In a number of jurisdictions a defendant may enter a plea of guilty at an early stage of the proceedings: *Justices Act* (Tas), s 56A; *Justices Act* (NSW), s 51A and *Ordinance* (ACT), s 90A.

that the defendant may wish subsequently to change his plea. It is possible to change a plea under the existing procedure only if it appears to the Supreme Court or District Court, upon examination of the depositions of the witnesses, if any, and the written statements tendered in evidence under section 69 of the *Justices Act*, that the defendant has not in fact committed the offence charged in the indictment.[15] However, this material would not be available if a plea of guilty were entered at the stage contemplated in the previous paragraph. To provide for such a case, provision could be made for the plea of guilty to be withdrawn with the leave of the court and for the trial to proceed after an adjournment to allow the prosecution to prepare its case or, alternatively, provision could be made for the court to order that a preliminary hearing be held in the normal way.

(f) Change of election to have a charge dealt with on indictment

9.17 Another matter which has been drawn to the Commission's attention relates to indictable offences triable summarily. Some defendants elect to have a trial on indictment[16] but once they have received the statements of witnesses they wish to have the charge dealt with summarily. Although there does not appear to be any express provision in the *Justices Act* which would permit a defendant to do so, in practice a defendant who has elected trial on indictment subsequently is permitted to elect summary trial. This has the effect of enabling the defendant to prepare for the trial in the Court of Petty Sessions with the advantage of having the statements of the prosecution witnesses, which he would otherwise not have received. While this may be the main reason for the development of this practice,[17] there may be cases in which a defendant has not fully appreciated the consequences of the election for a trial on indictment at the time he made that election. *The Commission seeks comment* on whether express provision should be made for a defendant to change his election with regard to the mode of trial, and if so, in what circumstances.

(g) Election not to have a preliminary hearing

9.18 If a defendant elects not to have a preliminary hearing he is not permitted to -

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15 *Criminal Code*, s 618.

16 Para 9.8 above.

17 This practice would not be necessary for this reason if a defendant could apply for a copy of a statement of a witness at a pre-trial hearing: para 5.6 above.

(i) cross-examine any witness before the justices;

(ii) give or tender before the judicial officer any evidence other than written statements tendered in accordance with section 69 of the *Justices Act*; and

(iii) submit to the judicial officer that there is insufficient evidence before them to put him on trial for the offence.[18]

The judicial officer must then require the defendant to plead to the charge and, without any consideration of the contents of the written statements or depositions, if any, commit the defendant for trial or sentence, as the case requires, in the Supreme Court or the District Court.[19] If there is no preliminary hearing the written statements are not read aloud and the evidence is not publicised before the trial or sentence.[20] This procedure removes from the judicial officer the task of determining whether or not the evidence is sufficient to put the defendant on trial.

(h) Election to have a preliminary hearing

9.19 A preliminary hearing is held where -

(i) the defendant, or if there is more than one defendant, where one of the defendants, elects to have a preliminary hearing;

(ii) the defendant stands mute or does not answer directly to the question putting him to his election; or

(iii) the defendant objects to any statement being tendered as evidence under section 69 of the *Justices Act*.[21]

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18 *Justices Act*, s 101C(a).

19 Id, ss 101C(b) and 107. The circumstances in which a change of plea is permitted in the Supreme or District Court are outlined in para 9.16 above.

20 *Justices Act*, s 101C(b)(ii) and (c). Where the defendant pleads guilty and is committed for sentence the material facts of the case must be stated aloud by the Crown before sentence is passed: *Criminal Code*, s 617A. The purpose is to ensure that the public are made aware of the circumstances of the offence. If the offence carries a fixed penalty (for example, murder) there would be no point in the Crown outlining them to the court for the purpose of penalty.

21 *Justices Act*, s 101B(2) and (3).

(i) Examination of witnesses

9.20 On a preliminary hearing, the stipendiary magistrate is required to examine all the witnesses called by the prosecution and to read aloud, or cause to be read aloud, the parts of written statements of any person tendered in evidence by the prosecution which are admissible to the like extent as oral evidence to the like effect by that person.[22]

9.21 The *Justices Act* does not provide any exemption from the requirement that the judicial officer read aloud, or cause to be read aloud, the written statements. Sometimes the reading can be time-consuming. For example, in one case brought to the attention of the Commission, lengthy statements of fifteen witnesses were involved. The object of the requirement is, of course, to ensure that the whole of the proceedings are open and that the public are given an opportunity of hearing the totality of the evidence upon which the judicial officer bases his decision to commit or discharge. However, there may be a case for waiving the requirement when the statements are unduly prolix or when the reading would occupy the court for an undue length of time, having regard to their content. *The Commission seeks comment* on the suggestion that in such cases the judicial officer be empowered to summarise their contents. However, if he takes this course the full statement should be made available to any member of the public for inspection. [23]

9.22 The judicial officer may, on his own motion or on the application of any party to the proceedings, require the person who made the statement to attend before him and give evidence if he is satisfied that the presence of that person as a witness is necessary in the interests of justice.[24]

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22 Id, s 102(b). S 69 of the *Justices Act* contains a number of limitations under which a written statement can be tendered as evidence at a preliminary hearing. In addition to the requirement that no other party objects to the tender of the statement, the statement must contain a declaration by the person who made it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be guilty of a crime if he has wilfully included anything which he knew to be false or did not believe to be true.
This crime is created by: s 69(7) of the *Justices Act*. It would seem to be more appropriate for this offence to be contained in the *Criminal Code* since the *Justices Act* is mainly concerned with jurisdiction and procedure.

23 The defendant, of course, will have already been served copies of the statements. The suggestion as to inspection is intended to provide an opportunity for any person other than the parties to gain access to them.

24 *Justices Act*, s 102. The defendant could be required to give the prosecution notice at least, say, five days before the hearing that they intended to apply to have the person called as a witness. In practice it does, however, seem that the prosecutor is given notice.

(j) Means of recording the evidence of a witness

9.23 Where a witness is examined during a hearing, his evidence is taken down either by a typist or the judicial officer. Once he has completed giving his evidence the statement is read to him and he is required to sign it.[25] The practice of recording the evidence in writing as it is presented means that the witness cannot answer questions in a natural manner. He must speak slowly or haltingly so that the typist or judicial officer may record his statements. The process is slow and laborious, with a consequent increase in the cost of the proceedings both to the parties and to the judicial system.

9.24 In Victoria, for example,[26] this problem can be avoided because the judicial officer has power to direct that the examination of the witness be recorded or transcribed pursuant to the provisions of Part VI of the *Evidence Act 1958-1983*. This Part permits evidence to be recorded by a shorthand writer or by mechanical means such as a tape recording machine.[27] Where these means are adopted, it is not necessary for any evidence so recorded to be read or played over to the witness or to be signed by the witness and the judicial officer.[28] Pursuant to section 135 of the *Evidence Act 1958-1983* the record or transcript is prima facie evidence of anything therein recorded. In Western Australia the *Recording of Proceedings Act 1980* (which has yet to be proclaimed) contains similar provisions for the recording of proceedings. However, preliminary proceedings under Part V of the *Justices Act* relating to indictable offences are expressly excluded from the operation of the Act.[29] *The Commission seeks comment* on whether the approach in Victoria should be adopted in Western Australia.

(k) Statement of or evidence presented by the defendant

9.25 Once the evidence is presented the judicial officer is required to make the following statement to the defendant, or words to the like effect:

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25 There is no express requirement that this procedure be followed: contrast *Justices Act* (SA), ss 106 and 108; *Justices Act* (Tas), s 57; *Summary Proceedings Act* (NZ), s 161(2) and *Magistrates' Courts Rules 1981* (Eng), r 7(2). However, such a statement is not admissible at the trial of the person against whom it was taken unless it is signed by the judicial officer by or before whom it purports to have been taken: *Evidence Act 1906-1982*, s 107 and *Justices Act*, s 109.

26 See also *Justices Act* (NSW), s 36(4) and *Justices Act* (Qld), s 111.

27 *Evidence Act 1958-1983*(Vic), s 131.

28 *Summary Proceedings Act* (Vic), s 48(3).

29 *Recording of Proceedings Act 1980*, s 5. A similar exclusion is contained in the *Recording of Evidence Act 1975-1979* (WA).

> "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial."

Any statement then made by the defendant must be taken down in writing and read to him and signed by the judicial officer and the defendant, if he so desires.[30] Such a statement may be given in evidence against the defendant without further proof.[31]

9.26 The defendant may also give evidence, call any witness, or tender any written statement under section 69 of the *Justices Act*.[32]

(l) Discharging the defendant or committing him for trial

9.27 If the judicial officer is of the opinion that the evidence is sufficient to put the defendant upon trial for an indictable offence he must order that he be committed to take his trial for the offence before the Supreme Court or the District Court, as the case may be.[33] In the meantime the defendant may be remanded in custody or released on bail. If the evidence is not sufficient to put the defendant upon trial he must be discharged as to the complaint then under inquiry.[34]

9.28 If on a preliminary hearing the defendant says that he is guilty of the offence charged, the judicial officer must order that he be committed for sentence in either the Supreme Court or the District Court.[35] In the meantime he may be remanded in custody or released on bail.

9.29 Where a defendant is committed for trial, the judicial officer may bind the witnesses examined at the preliminary hearing to appear at the court at which the defendant is to be tried.[36] If a witness refuses to enter into a recognisance to appear at the trial he may be held in custody until the trial unless in the meantime he enters into the recognisance.[37]

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30 *Justices Act*, s 102.
31 Id, s 103.
32 Id, s 105.
33 Id, s 107. This issue may also be raised at the end of the prosecution case: id, s 106. These provisions are discussed further in paras 9.30 and 9.31 below.
34 As this discharge does not raise a plea of autrefois acquit fresh committal proceedings can be instituted in respect of the same offence: *R v Manchester City Stipendiary Magistrate; Ex parte Snelson* [1978] 2 All ER 62.
35 *Justices Act*, s 114.
36 Id, ss 124 and 125.
37 Id, s 126.

(m) The requirement that the evidence given at the preliminary hearing is sufficient to put the defendant upon trial

9.30 Under section 106 of the *Justices Act*, where a preliminary hearing is held, the judicial officer must at the end of the evidence offered by the prosecution order the defendant, if he is then in custody, to be discharged if he is of opinion that the evidence is not sufficient to put the defendant upon trial for any indictable offence. The defendant is thus discharged without the need to present his evidence, should he have intended to do so. The Commission suggests that the section be amended so as also expressly to apply to a defendant who has been released on bail. Further, sections 102 and 105 of the *Justices Act*, which are the principal provisions prescribing the procedure to be followed at a preliminary hearing, do not in terms make allowance for the judicial officer to consider at the end of the prosecution case whether or not there is sufficient evidence to put the defendant upon his trial. The Commission suggests that these latter sections be redrafted to clarify the matter.

9.31 Section 107 of the *Justices Act* provides for the case where the judicial officer is of the opinion that the evidence adduced at the preliminary hearing is "sufficient to put the defendant upon his trial for an indictable offence". This decision can, of course, only be made after the defendant has presented his evidence, if any, pursuant to section 105. If the judicial officer is of that opinion he is required to order the defendant to be committed for trial. However, there is no express provision requiring the judicial officer, having heard the defendant's witnesses, if any, to discharge the defendant if he is not of that opinion. The Commission suggests that such express provision be made. In this case and the case referred to in the previous paragraph this could be done by expressly requiring the judicial officer to record a finding that there was insufficient evidence to put the defendant on trial and, if the defendant is in custody, to discharge him. The meaning of the "sufficiency" formula has not, as far as the Commission is aware, been the subject of any authoritative judicial pronouncement.[38] Ward and Kelly suggest that it requires the judicial officer to decide whether there is "sufficient evidence upon which a reasonable jury, properly instructed, *could* find the defendant guilty".[39] *The Commission seeks comment* on the criteria which should apply at the two stages referred to above, and as to the manner in which those criteria might be expressed.

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38 See, however, *Re Harlock; Ex parte Robinson* [1980] WAR 260, 264 where Brinsden J stated that the function of a preliminary hearing was to ensure that a person did not stand trial unless a prima facie case was made against him.

39 M Ward and P M St L Kelly, *Summary Justice* (1983), para 11302.

(n) Ancillary matters

(i) Transmission of documents

9.32 When a defendant is committed for trial or sentence, all informations, depositions, exhibits, statements, and recognisances must be transmitted by the judicial officer to the Attorney General or to the person appointed to present indictments in the appropriate court.[40]

(ii) Admissibility of statements

9.33 Where a statement complying with section 69 of the *Justices Act*[41] has been tendered in evidence at a preliminary hearing it is admissible as evidence, before any court of competent jurisdiction, to the like extent that a deposition of the person who made the statement would be so admissible.[42] It has been held that a statement tendered where there is no preliminary hearing is tendered *to be used in evidence* for the purpose of the trial or sentencing of the defendant but not "tendered *in* evidence" and accordingly is not admissible to the like extent as a deposition.[43] Such a result is not likely to have been intended by Parliament, particularly as a party may object to a statement in which case it cannot be tendered. *The Commission would welcome comments* on whether or not a statement tendered where no preliminary hearing is held should be admissible as evidence before any court of competent jurisdiction to the like extent that a deposition of the person who made the statement would be so admissible.

(iii) Adjournments and remands

9.34 If it becomes necessary to defer a hearing because of the absence of witnesses or for any other reasonable cause, the judicial officer may adjourn the hearing and remand the

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40 *Justices Act*, s 127.

41 See footnote 22 to para 9.20 above.

42 *Justices Act*, s 69(4) and (6). For circumstances in which a deposition is admissible see *Justices Act*, s 109; *Evidence Act 1906-1982*, s 107; *Criminal Code*, s 635B.

43 *R v Abbott and Hunter* [1981] WAR 130. However, such a statement may be admissible under s 635B of the *Criminal Code* "if all the parties consent and the trial Judge is satisfied that the presence of such witness is not necessary in the interests of justice".

defendant to a prison for a period not exceeding eight clear days or discharge him on bail.[44] Where the defendant is released on bail the adjournment must not exceed 30 days unless the defendant consents to such an adjournment.[45] A defendant may be brought before any justices or magistrate at any time before the expiration of the time for which he was remanded.[46]

9.35 The defendant may also be remanded to another place in or near the place where the offence is alleged to have been committed or any other place in Western Australia where any of the witnesses to be examined are situated. [47]

9.36 The object of imposing an eight day limit on the remand period for defendants in custody is to protect them from unnecessary detention. At the end of each remand period the judicial officer must decide whether to grant a further adjournment or require the case to proceed. The need for a lengthy remand period can arise at two stages of the present procedure. One arises between the defendant's first appearance in court and his election whether or not to have a preliminary hearing. The remand period in this case can be as long as six weeks. The major cause for this delay is the need to prepare statements of witnesses and serve them on the defendant. The second lengthy remand period arises where the defendant elects to have a preliminary hearing. In this case the delay can be as long as four weeks. Here the delay is caused by the need to obtain a date for the hearing.

9.37 As a defendant can be remanded in custody for a maximum of only eight days it is necessary during the two stages referred to above to bring the defendant before a judicial officer on a number of occasions before the election hearing or the preliminary hearing is held. This system has the following problems -

* It is inconvenient to defendants.[48]

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44 *Justices Act*, ss 79 and 82. *The Interpretation Act 1984*, which comes into force on 1 July, repeats the existing rule that Saturdays, Sundays and public holidays are not to be included in computing a prescribed period: s 61(1)(h).
There is no statutory limit on the period of a remand in a summary matter: *Justices Act*, s 86. However there does not appear to be the same need for a limit in such cases. They are usually straightforward and disposed of relatively quickly.

45 If the remand is for a period not exceeding three clear days, the defendant may be remanded orally: *Justices Act*, s 80.

46 Id, s 81.

47 Id, ss 83 to 85.

48 The court appearance entail confinement in lock-ups at or near the court, sometimes for a number of hours. They must also be searched on leaving the prison and on their return. This may sometimes involve a strip search: *Prison Regulations 1982-1984*, reg 78.

* It is inconvenient to the Prisons Department which must arrange for the defendant to be transported to and from the court on a number of occasions, and to the police who must guard the defendants at the court. The security problem can be acute if the remand period for larger numbers of defendants expires on a particular day of each week.

* Each hearing takes up the time of judicial officers, court officials, prosecutors and defence counsel.

9.38 It has accordingly been suggested to the Commission that the section be amended so as to provide greater flexibility in order to avoid the need for frequent remand hearings. One suggestion is that -

(a) where a defendant is already serving a sentence for another offence, it should be possible to remand him for any fixed period up to but not beyond any date on which it is expected that he will be released from custody in respect of that offence;

(b) where a defendant is not serving a custodial sentence, it should be possible to remand him, with his consent, for a period in excess of eight days but no more than 30 days.

9.39 Of the jurisdictions studied by the Commission the only one which makes a distinction between defendants serving a custodial sentence and those not so serving is England. There, a defendant in the former category may be remanded for up to 28 clear days. If it appears that he will be released before then he can only be remanded for a period ending with the date of his release from his custodial sentence.[49] Where a defendant is not serving a custodial sentence, the maximum remand period is eight days. However, he need only be brought to court every fourth remand or each time he has no solicitor acting for him. This system can only be initiated where the defendant is -

(a) before the court;

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49 *Magistrates' Courts Act* (Eng), s 131.

(b) an adult; and

(c) is legally represented in that court.[50]

9.40 The remand process has also been made more flexible in a number of other jurisdictions studied by the Commission. One approach has been to provide a maximum period of 15 days rather than eight days.[51] In others, a maximum remand period of either eight or 15 days has been provided but the defendant may be remanded for a longer period with the consent either of the defendant alone or both the defendant and the prosecutor.[52]

9.41 While the adoption of the suggestion referred to in paragraph 9.38 above or any of the approaches adopted elsewhere would overcome the cost and inconvenience arising from the present procedure there could be undesirable indirect effects.

9.42 It could be argued that frequent remand hearings provide an opportunity, particularly during the first stage referred to in paragraph 9.36 above, for the judicial officer to ensure that there is no undue delay in preparing witness statements and in bringing the matter on for hearing. One danger with removing the discipline provided by frequent reviews is that there may be a tendency for cases not to be treated with the urgency due to them. The result might be that longer delays between the initial appearance and the election hearing and between the election hearing and a preliminary hearing would become the norm and that defendants would be held in custody for a longer period than would otherwise have been the case had more regular remands been retained.[53]

9.43 The removal of a regular review procedure could disadvantage particular groups of people such as certain migrants, sailors and Aborigines who may not be able to obtain bail or to meet the conditions imposed and who may not appreciate that they can make further applications for bail or for an amendment of the conditions. Regular remand hearings provide an opportunity for a judicial officer to review the bail conditions.

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50 Id, s 128.

51 *Ordinance* (ACT), s 70.

52 *Justices Act* (SA), s 113(1); *Summary Proceedings Act* (Vic), s 68(1) and (2); *Bail Act, 1978-1979* (NSW), s 25; *Justices Act* (Qld), s 84; *Justices Act* (NT), s 113; and *Summary Proceedings Act* (NZ), s 152(3).

53 Such a result would also increase the pressure on prison accommodation.

9.44 *The Commission would welcome comments* on the extent to which the concerns referred to in the previous two paragraphs are justified and, if so, whether they outweigh the benefits which would accrue from introducing greater flexibility into the present system. Of course, it may be that, even if justified, those concerns could be overcome by introducing other procedural steps which would not diminish the new flexibility. If it is considered that more flexibility is warranted, *the Commission would welcome proposals* for an amended system, and, in particular, comment on whether or not -

(i) a distinction should be made between defendants serving a custodial sentence and other defendants in the manner referred to in paragraph 9.38 above;

(ii) the consent of the defendant and/or prosecutor should be required to a remand for a period in excess of eight days;

(iii) a remand in excess of eight days should be made only where the defendant is legally represented.

(o) Costs

9.45 At present where there is insufficient evidence to put a defendant on trial the judicial officer cannot award costs to the defendant.[54]

9.46 In a number of other jurisdictions there is power to award costs in such cases. In New South Wales, the court has a discretion to award such costs to the defendant as "seems just and reasonable".[55] There is also a discretion to award costs in New Zealand and England.

9.47 In New Zealand some guidance has been given to the court in the exercise of its discretion. The court must have regard to all relevant circumstances including whether the prosecution acted in good faith in bringing and continuing the proceedings, whether the investigation into the offence was conducted in a reasonable and proper manner and whether the behaviour of the defendant in relation to the acts or omissions on which the charge was

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54 *Gill v Pace and Hall* (unreported) Supreme Court of Western Australia, No 1789 of 1977. Nor may any fees be taken: *Criminal Code*, s 740. A defendant is not entitled to costs under the *Official Prosecutions (Defendants' Costs) Act 1973-1974* because the Act applies only to charges which are dismissed, withdrawn, struck out or a conviction thereon is quashed and not to a finding that there is insufficient evidence to put a defendant on trial: *Official Prosecutions (Defendants' Costs) Act 1973-1974*, ss 5(1) and 4(2).

55 *Justices Act* (NSW), s 41A.

based and to the investigation and proceedings was such that a sum should be paid towards the costs of his defence. [56]

9.48 In England costs may be awarded to either the defendant or the prosecution.[57] These costs are paid out of money provided by Parliament.[58] *The Commission seeks comment* on whether it should be possible to award costs to a defendant where it is found that there is insufficient evidence to put him on trial and, if so, in what circumstances. One suggestion which has been made to the Commission [59] is that if provision is made for costs to be awarded to a defendant in such circumstances, the *Official Prosecutions (Defendants' Costs) Act 1973-1974* should be extended to apply to such awards.

(p) Private prosecutions

9. 49 One question which arises is whether or not private persons should be able to commence proceedings under the *Justices Act* for indictable offences. In view of the seriousness of these offences it might be considered that prosecutions should only be commenced by the Attorney General or a person appointed by him to institute proceedings. On the other hand, it may be considered that the enforcement of the law is advanced by giving every person an opportunity to commence proceedings without relying on official law enforcement officers.

9.50 There are, in any event, restraints which would discourage abuse of this power. The procedure outlined in this chapter provides a mechanism for ensuring that a defendant is not committed for trial unless there is sufficient evidence to commit him for trial.[60] Abuse of the process would also be discouraged if the defendant were able to obtain costs in appropriate cases.[61] Even where a private person commences proceedings for an indictable offence and the defendant is committed for trial, a trial may only be held if the Attorney General presents

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56 *Costs in Criminal Cases Act 1967-1979* (NZ), s 5(2). If the prosecution was conducted by or on behalf of the Crown the costs are paid out of money appropriated by Parliament: id, s 7(1)(a). In other cases they must be paid by the informant: id, s 7(1)(b).

57 *Costs in Criminal Cases Act 1973-1982* (Eng), s 1(1) and (2).

58 Id, ss 1 and 13.

59 By Mr D P Manea.

60 Even if this procedure were abolished, the defendant could be given an opportunity to apply for a discharge of the charge on the basis that there was no case to answer: para 9.55(b) below.

61 Paras 9.45 to 9.48 above. This would not be a factor if the defendant elected not to have a preliminary hearing.

an indictment to the appropriate court[62] or the person obtains the leave of the Supreme Court to present an information against the defendant.[63]

9. 51 The fact that a person had been committed for trial may provide a basis for the Attorney General to present an indictment if he is satisfied that the case against the defendant was sufficiently strong. Although the refusal of an Attorney General to present an indictment will not necessarily lead the Supreme Court to refuse leave to an individual to present an information, it is a factor which is given great weight by the Court.[64]

9.52 In Queensland, additional limitations apply to private prosecutions. These limitations apply to a private complaint charging a person with an indictable offence (including an indictable offence triable summarily) other than a private complaint charging a person with "an offence of which injury to the person or property of the complainant is an element". [65] The expression "private complaint" means a complaint made by a person other than:[66]

> "(a) a police officer, a member of the Commonwealth Police Force, an officer of the Public Service of Queensland or of the Commonwealth, in each case acting in the execution of his duty; or
>
> (b) a person who, in making the complaint, is acting in the execution of a duty imposed on him by law or in the due administration of any Act or an Act of the Commonwealth".

9.53 The following provisions apply to private complaints as defined -

1. A summons issued on the complaint must be served on the defendant at least 14 days before the date on which it is sought to hold proceedings.[67]

2. The defendant may apply to justices for an order requiring the complainant to supply to the defendant in writing particulars of the charge in the complaint.[68] If the defendant does not then supply sufficient particulars, the justices must

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62 *Criminal Code*, s 578.

63 Id, s 720. It has been recommended that a private prosecutor should not be able to present an information against a defendant and that this provision and ss 721-728, which also relate to informations by private persons for indictable offences, should be repealed: Murray Report, 510-511.

64 *Gouldham v Sharrett* [1966] WAR 129, 136-138.

65 *Justices Act* (Qld), s 102A.

66 Id, s 102H.

67 Id, s l02B(l).

68 Id, s l02B(2).

order that the private complaint be struck out and may award costs to the defendant. [69]

3. The defendant may apply to a stipendiary magistrate for an order that the complaint be dismissed on the ground that it is -

   (a) an abuse of process;
   (b) frivolous; or
   (c) vexatious.[70]

4. Where an application for dismissal is made, the complainant is required to give security that he will pay any costs incurred by the defendant on the application which he may be ordered to pay. If security for costs is not given in any specified time or, if no time is specified, within a reasonable time, the complaint must be struck out by the stipendiary magistrate.[71]

5. There is an appeal from a decision made by the stipendiary magistrate on an application to dismiss the complaint.[72]

6. A private complaint may be dismissed if the complainant does not prosecute the complaint with due diligence.[73]

7. Where a complaint is dismissed or struck out, no further proceedings may be taken upon a private complaint charging the same offence by the same defendant.[74]

8. It is an offence to publish information in relation to a private complaint until it is established that the complaint will not be dismissed on a ground referred to in 3 above.[75]

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69 Id, s 102B(3).
70 Id, s 102C(1).
71 Id, s 102C(2).
72 Id, s 102D.
73 Id, s 102G.
74 Id, ss 102E(1) and 102G.
75 Id, s 102F.

The Commission seeks comment on whether or not similar limitations should be imposed in Western Australia.[76]

3. AN ALTERNATIVE TO THE EXISTING SYSTEM

9.54 In recent years in England, which has a system broadly similar to that in this State, doubt has been cast on the effectiveness of preliminary proceedings in ensuring that weak cases do not go to trial. The Philips Commission examined the system to test the validity of this doubt. The picture which emerged was as follows -[77]

1. The "vast majority" of defendants agree to a formal committal without a hearing.

2. Few defendants are discharged because there is insufficient evidence to put the accused on trial.[78]

3. In a large percentage of cases involving an acquittal, the trial judge ordered an acquittal before the case was put to the jury or directed the jury to acquit the defendant.[79] Studies referred to by the Philips Commission suggest that in about 20% of cases involving ordered or directed acquittals there was doubt whether the evidence was sufficient to justify the decision to prosecute at the time the decision was made. In many of the other cases the failure of the case in court was not within the prosecutor's control. The failure could be attributed, for example, to the absence of key prosecution witnesses or their failure to give evidence in a satisfactory manner.[80]

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76 The Murray Report, at 509-510, has recommended that consideration be given to imposing some limitation on the commencement of private prosecutions.

77 For an account of the study on which the findings were based see M McConville and J Baldwin, *Courts, Prosecution, and Conviction* (1981).

78 In 1978, just over 2% of persons charged with indictable offences were discharged: Philips Commission, 180, para 8.26. It must, however, be borne in mind that the vast majority of defendants did not require a hearing.

79 "Ordered acquittals" occur when the prosecution offers no evidence against the defendant. "Directed acquittals" occur when the trial judge, having heard part of the case is of the view that there is insufficient evidence to leave the case to the jury, directs the jury to acquit: M McConville and J Baldwin, *Courts, Prosecution, and Conviction* (1981), 31. In 1978, 19% of all acquittals in the crown Court were ordered by the judge and in a further 24% of all acquittals the judge directed the jury to acquit: Philips Commission, 130, para 6.18. Ordered and directed acquittals occur in about 7% of all cases heard in Crown Courts: id, 131, para 6.22.

80 Id, 131, para 6.20.

4. A significant proportion of weak cases are committed for trial which could have been weeded out at committal. That they are not seems to be attributable to a lack of effective scrutiny of the case by prosecution and defence (who may often only receive the papers on the day of the hearing).[81]

9.55 The Philips Commission concluded that committal proceedings did not provide an effective means of achieving the objective that no one should be required to stand trial in the absence of good cause. It accordingly recommended that such proceedings should be abolished[82] and replaced by a system which had the following characteristics.

(a) First, the Crown prosecutor, who would be responsible for the conduct of all criminal cases once the decision to initiate proceedings had been taken by the police, would be responsible for vetting weak cases and sending cases for trial direct to the Crown Court if he considered that there was a case to answer.[83] (In Western Australia, except for the more complex cases, the police are usually responsible for conducting cases up to and including a committal for trial or sentence. Cases are then conducted up to trial and on appeal by Crown Law officers or barristers briefed by them.)

(b) Secondly, the defendant would be given an opportunity to make an "application for discharge" to a magistrate on the basis that there was no case to answer.[84] The magistrate would be confined to a consideration of the

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81 Id, 181, para 8.26. The failure in England to weed out weak cases may also result from the fact that few committal hearings are held.

82 Similar recommendations have been made by the Law Reform Commission of Canada (Study Report (1974), Working Paper, *Criminal Procedure: Discovery*, 38) and the United States National Conference of Commissioners on Uniform State Laws: [1974] Handbook of the National Conference of Commissioners on Uniform State Laws, *Rules of Criminal Procedure*, rr 421-423, 431-432 and 481.

83 Philips Commission, 182, para 8.30. The Commission also recommended the establishment of a statutorily based prosecution service for every police force area. The prosecutor would have the title of Crown prosecutor. The United Kingdom Government issued a White Paper (*An Independent Prosecution Service for England and Wales*, Cmnd 9074, 1983) in which it announced that it intends to introduce legislation to establish an independent prosecution service: M Zander, *Police and Criminal Evidence Bill - IV - A New Independent Prosecution Service* (1983) 133 New LJ 1135.

84 Philips Commission, 181-182, para 8.28. It is not clear from the report of the Philips Commission what was meant by the phrase "no case to answer". It may have been intended to raise the same issue which can be raised at the close of the prosecution case during a trial. In this circumstance, "no case to answer" involves a consideration of whether "on the evidence as it stands [the defendant] *could* lawfully be convicted": *May v O'Sullivan* (1955) 92 CLR 654, 658. If this is the case, the issue is similar to the issue which can be raised at the conclusion of a preliminary hearing: para 9.31 above.

> prosecution's written case to check the Crown prosecutor's assessment that, on the evidence available, there was a case to answer.[85]

If a person were discharged on such an application, the discharge would have the same effect as a discharge under the present committal proceedings. The decision whether or not to make an application for discharge would be facilitated by a third element, the Philips Commission's recommendations relating to discovery. This is outlined in the following paragraph.

9.56 The Philips Commission recommended that the defendant should be entitled to receive -

(a) at a reasonable time before the trial, a copy of any statement made by any witness the prosecution proposed to call at the trial;[86]

(b) on request, statements or documents which "have some bearing on the offences charged or the surrounding circumstances of the case".[87]

9.57 Under the approach recommended by the Philips Commission it would be for the Crown prosecutor to ensure that a person was not required to stand trial unless there was sufficient evidence to put him for trial. *The Commission seeks comment* on whether or not a new system similar to that recommended by the Philips Commission should be adopted in Western Australia.

9.58 If such a system were adopted it would seem to be desirable to preserve two of the other purposes which may be achieved under the existing system. The first is the opportunity to obtain information from a person who is not prepared to supply that information voluntarily. Making provision for information to be obtained from such a person would ensure that the Crown prosecutor had information which might be important in determining whether or not a person should be indicted. This could be done by allowing the prosecutor to obtain "investigatory depositions", that is, to "take the testimony by deposition of any person

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85 Philips Commission, 182-183, para 8.31. The prosecution and the defence would be confined to making submissions on the basis of the written case.

86 Philips Commission, 177, para 8.18. The Commission concluded that the discretion whether or not to disclose additional material, such as information which the prosecution did not intend to use but which could be helpful to the defendant, should remain with the prosecution: id, 178, para 8.19.

87 Ibid.

believed to possess information concerning the possible commission of an offence".[88] The second is the preservation of evidence of a person who is unlikely to be able to attend the trial, for example, because he was a visitor to the State who intended to return to his home before the trial. This end could also be met by a deposition procedure similar to the "investigatory deposition". *The Commission seeks comment* on whether or not these purposes are worth preserving and, if so, how they should be preserved.

4. QUESTIONS AT ISSUE

9.59 The Commission welcomes comment on the following issues raised in this chapter -

Entry of plea of guilty

1. Should a defendant be permitted to plead guilty to an indictable offence at his first appearance or at some time before the prosecution is required to produce written statements?

(Paragraph 9.15)

2. If so, should this be confined to a defendant who is legally represented and if his counsel has assured the judicial officer that he has explained to the defendant the elements of the offence charged, the consequences of the plea, and that the plea is a considered one?

(Paragraph 9.15)

3. In what circumstances should a defendant be permitted to withdraw such a guilty plea when he is before the Supreme Court or District Court for sentencing?

(Paragraph 9.16)

Election in relation to an indictable offence triable summarily

4. Should a defendant who elects to have an indictable offence triable summarily dealt with by a trial on indictment be able to change that election so that it may be dealt with summarily, and if so, in what circumstances?

(Paragraph 9.17)

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88 [1974] Handbook of the National Conference of Commissioners on Uniform State Laws, *Rules of Criminal Procedure*, r 432.

Written statements

5. Should the prosecution be required to provide the defendant, before he decides whether or not to have a preliminary hearing, with the written statements of all the witnesses it proposes to call to give oral testimony at the preliminary hearing, should such a hearing be held, as well as those whose statements it intends to tender in evidence at that hearing?

(Paragraph 9.11)

6. Should the prosecution be required to provide written statements of or call as witnesses all those people it intends to call at the trial should the defendant be committed for trial?

(Paragraph 9.12)

7. Where a defendant is represented by a solicitor, should it be possible to serve the written statements on his solicitor?

(Paragraph 9.14)

8. At a preliminary hearing should the judicial officer be empowered to summarise the contents of written statements, so long as the full statement is made available to any member of the public for inspection?

(Paragraph 9.21)

9. Should provision be made for the evidence presented at preliminary hearings to be recorded or transcribed as may be done in Victoria?

(Paragraph 9.24)

10. Should a statement tendered where no preliminary hearing is held be admissible as evidence before any court of competent jurisdiction to the like extent that a deposition of the person who made the statement would be so admissible?

(Paragraph 9.33)

Sufficient evidence

11. Should sections 102 and 105 of the *Justices Act* be amended to provide expressly for the judicial officer to consider at the end of the prosecution case whether or not there is sufficient evidence to put the defendant upon his trial?

(Paragraph 9.30)

12. Where the judicial officer finds that there is insufficient evidence to put the defendant on trial, should he be expressly required to record such a finding and, if the defendant is in custody, discharge him?

(Paragraphs 9.30 and 9.31)

13. Is the term "sufficient interest" satisfactory and, if not, what criteria should apply to determining whether a person should be put upon trial?

(Paragraph 9.31)

Remands in custody

14. Should the provision for remanding a defendant in custody for eight days be amended and, in particular should -

    (a) a distinction be: made between defendants serving a custodial sentence and other defendants in the manner referred to in paragraph 9.38 above;
    (b) the consent of the defendant and/or prosecutor be required to a remand for a period in excess of eight days;
    (c) a remand in excess of eight days be made only where the defendant is legally represented?

(Paragraphs 9.34 to 9.44)

Costs

15. Should the court have power to award costs to a defendant where there is insufficient evidence to put him on trial after a preliminary hearing and, if so, in what circumstances?

(Paragraphs 9.45 to 9.47)

16. If so, should the *Official Prosecutions (Defendants' Costs) Act 1973-1974* be extended to apply to costs awarded where it is found that there is insufficient evidence to put the defendant on trial?

(Paragraph 9.48)

Private prosecution

17. Should private persons be able to commence proceedings for indictable offences?

(Paragraphs 9.49 to 9.51)

18. Should additional limitations on private prosecutions similar to those imposed in Queensland be imposed in Western Australia?

(Paragraphs 9.52 and 9.53)

An alternative to the present system

19. Should the existing system be replaced with a system similar to that proposed by the Philips Commission?

(Paragraphs 9.54 to 9.57)

20. If a new system were introduced would it be desirable to preserve the opportunity to obtain information from a person who was not prepared to supply it voluntarily or to obtain evidence from a person who is unlikely to be able to attend the trial? If so, how should this be done?

(Paragraph 9.58)

PART VII: PREVENTIVE JURISDICTION
CHAPTER 10

1. SURETIES OF THE PEACE AND SURETIES FOR GOOD BEHAVIOUR

10.1 Under the existing law, justices and stipendiary magistrates have power to require a person to enter into a surety to keep the peace or a surety for good behaviour.[1] The power to require a person to enter into a surety to keep the peace appears to be based on the Commission of the Peace[2] and the common law. The power to require a person to enter into a surety of good behaviour appears to be based on the Justices of the Peace Act 1360[3] (which became part of the law of Western Australia upon settlement)[4] and the common law.[5] Under that statute a person who is not of good fame may be required to enter into a surety of good behaviour.[6]

10.2 Until 1982 the *Justices Act* contained procedures by way of complaint for dealing with certain applications for sureties of the peace and for sureties for good behaviour. These provisions were, however, repealed when the *Justices Amendment Act (No 2) 1982*, which introduced the concept of orders to keep the peace referred to below,[7] was proclaimed. Notwithstanding the repeal of these procedural provisions, it would seem that the ancient remedies of sureties of the peace and sureties for good behaviour are still available in Western Australia.

10.3 These powers may also be used where a person is already before a court. A complainant, defendant or witness before the court may be bound over to keep the peace.[8]

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1 *R v Wright*; *Ex parte:Klar* (1971) 1 SASR 103, 127. See generally P Power, *"An Honour and Almost A Singular One"*: *A Review of the Justices Preventive Jurisdiction* (1981) 8 Mon LR 69 and B Hough, *Binding Over in the Magistrates' Court* [1983] The Law Society's Gazette 1267.

2 *Justices Act*, second schedule, First Assignment: see Appendix I to this paper.

3 34 Edw III, c 1.

4 *Rust v Smith* (unreported) Supreme Court of Western Australia, Appeal No 141 of 1979, 4 per Wallace J.

5 *R v Wright; Ex part Klar* (1971) 1 SASR 103.

6 There is also power in s 19(7) of the *Criminal Code* for a summary court instead of sentencing a convicted defendant, to discharge him upon his entering into a recognisance, with or without sureties, to keep the peace and be of good behaviour for a term not exceeding one year. The primary purpose of this provision is to provide an alternative means of dealing with a convicted person rather than to provide a means of preventing an apprehended breach of the law.

7 Paras 10.4 to 10.7.

8 *Sheldon v Bromfield Justices* [1964] 2 All ER 131 and *R v Aubrey-Flecher; Ex parte Thompson* [1969] 2 All ER 846.

2. ORDERS TO KEEP THE PEACE

10.4 Under section 172(1) of the *Justices Act*,[9] where justices are satisfied on the balance of probabilities,

> "(a) that -
> (i) the defendant has caused personal injury or damage to property; and
> (ii) the defendant is, unless restrained, likely again to cause personal injury or damage to property;
>
> (b) that -
> (i) the defendant has threatened to cause personal injury or damage to property; and
> (ii) the defendant is, unless restrained, likely to carry out that threat; or
>
> (c) that -
> (i) the defendant has behaved in a provocative or offensive manner;
> (ii) the behaviour is such as is likely to lead to a breach of the peace; and
> (iii) the defendant is, unless restrained, likely again to behave in the same or a similar manner",

the justices may make an order imposing such restraints upon the defendant as are necessary or desirable to prevent that person from acting in the apprehended manner. Such proceedings must be commenced by complaint. The complaint may be made by a police officer or a person against whom, or against whose property, the relevant behaviour was directed. [10]

10.5 Where a defendant is summoned to appear at the hearing and fails to do so, an order may be made in the defendant's absence.[11] An order may also be made without the defendant being summoned to appear, but the justices must summon the defendant to show cause why the order should not be confirmed. The order is not effective after the conclusion of such a hearing unless -

> (i) the defendant does not appear at the hearing in obedience to the summons; or
> (ii) the justices, having considered the evidence of the defendant and any other evidence adduced by the defendant, confirm the order.[12]

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9 Ss 172 to 174 of the *Justices Act* were introduced by the *Justices Amendment Act (No 2) 1982* (No 125 of 1982).

10 *Justices Act*, s 172(2).

11 Id, s 172(3).

12 Id, s 172(4).

10.6 The order made by the justices may restrain the defendant from entering premises, or limit the defendant's access to premises, whether or not the defendant has a legal or equitable interest in the premises. Before making an order in such terms, the justices must consider:[13]

> "(a) the effect of making or declining to make the order on the accommodation of the persons affected by the proceedings; and
> (b) the effect of making or declining to make the order on any children of, or in the care of, the persons affected by the proceedings."

Where an order is made, the clerk of petty sessions must serve a copy of the order on the defendant and forward a copy of the order to the Commissioner of Police and, where the complainant is not a police officer, the complainant.[14] Once the order is personally served on the defendant, it is an offence for the defendant to contravene or fail to comply with it.[15] This applies to ex parte orders as well as to orders made where the defendant has been summoned to appear.

10.7 Any order may be revoked or varied at any time by justices on application by a party and after all parties have been given an opportunity to be heard.[16]

3. DISCUSSION

(a) Orders to keep the peace

10.8 The provisions outlined in Part 2 of this chapter were introduced as a means of dealing with domestic violence.[17] They have, however, been criticised in this regard on the grounds of -

* conflict of jurisdiction;
* difficulties caused to the counselling services of the Family Court of Western Australia;
* the inappropriateness of Courts of Petty Sessions to deal with domestic violence.

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13 Id, s 172(5).
14 Id, s 172(6).
15 Id, s 173(1).
16 Id, s 174(1).
17 Western Australian Parliamentary Debates (1982) Vol 240, 3843- 3844.

10.9 **Conflict of jurisdiction:** The Courts Committee of the Law Society of Western Australia considered that the provisions may lead to a conflict of jurisdiction between a Court of Petty Sessions and the Family Court of Western Australia. For example, one party might seek an order to keep the peace from justices and the other party might seek similar redress under the Family Court's powers. It noted that the Government had set up a committee to consider reform of the laws dealing with domestic violence (including the issue of the appropriate forum to deal with such matters) and urged that one court be given jurisdiction to deal with the question of domestic violence.

10.10 **Difficulties caused to the Family Court:** Concern has been expressed to the Commission that the use of orders to keep the peace by one spouse against another has inhibited the counselling and conciliation facilities provided by the Family Court of Western Australia.

10.11 **Inappropriateness of forum:** Ms K Rooney has suggested[18] that domestic violence should be dealt with solely by the Family Court of Western Australia "where facilities for counselling, conciliation, protection and punishment could be provided".

10.12 The Courts Committee of the Law Society also criticised the procedure because an order can be made without it being necessary to establish that the summons could not be served on the defendant. This criticism was also raised during the Parliamentary debates on these provisions.[19] It seems that such a provision was considered to be desirable in the interests of providing speedy relief.[20] Once an order is made ex parte the onus is then on the defendant to show cause why the order should not be confirmed.

10.13 It is outside the Commission's terms of reference to consider whether additional provision should be made for the Family Court of Western Australia to deal with violence within the family situation (including families involving a de facto marriage). However, if such provision were made, power in some form or other to make orders would no doubt

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18 *Dealing With Domestic Violence in WA* (1983) 8 Legal Service Bulletin 205, 208. An abridged version of this article appears in the December 1983 issue of *Brief.*

19 Western Australian Parliamentary Debates (1982) Vol 240, 4287.

20 Id, 4302. In New Zealand, the power to make a non-violence order ex parte is restricted to circumstances in which the court is satisfied:

"(a) That the delay that would be caused by proceeding on notice would or might entail risk to the personal safety of the applicant or a child of the family; or

(b) That the delay that would be caused by proceeding on notice would or might entail serious injury or undue hardship": *Domestic Protection Act 1982* (NZ), s 5(1).

continue to be required to deal with other areas where there was a need to prevent breaches of the peace.

10.14 The following amendments, at least, to the existing legislation would seem to be required -

(a) Where a child is the victim of a threat or action there is no provision for anyone other than the child or a police officer to apply for an order to keep the peace in respect of the child, for example, all alleged threat by a neighbour. Provision could be made for an application for an order to protect a child to be made by other specified persons on the child's behalf.

(b) Where a person breaches an order to keep the peace he commits an offence for which a maximum penalty of six months imprisonment may be imposed.[21] There is no provision for a fine.[22] If the breach were not of a serious nature and the court did not consider that a term of imprisonment was warranted it would have to consider making either a probation order or a community service order. This unnecessarily restricts the sentencing discretion of the court. There may be cases in which a fine would be a suitable penalty and, in the Commission's view, such a penalty should be prescribed.[23]

10.15 *The Commission also welcomes general comment* on the existing legislation, its scope and the procedure. In particular, *it welcomes comment* on the procedure whereby an order can be made against a defendant without it being necessary to establish that the summons could not be served on him.

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21 *Justices Act*, s 173(1).

22 S 166 (third para) of the *Justices Act* which gives the court power to impose a fine where the penalty for an offence does not provide for a fine to be imposed would not apply because that section does not apply to penalties prescribed in the *Justices Act*.

23 A similar result would be achieved if s 166 (third para) of the *Justices Act* were amended so that it applied to penalties prescribed in the *Justices Act* paras 7.6 and 7.7 above.
The present position may have resulted from a drafting oversight. The penalty of six months imprisonment is the same as that in the South Australian legislation on which this State's legislation was based: *Justices Act* (SA), s 99(6). However, in South Australia, where a court has authority to impose imprisonment and has no specific authority to impose a fine for a particular offence, "....it may, nevertheless, if it thinks that the justice of the case will be better met by a fine than by imprisonment, impose a fine not exceeding two thousand dollars": id, s 75(7).

(b) Sureties of the peace and sureties for good behaviour

10.16 These ancient remedies, which are apparently still available in Western Australia,[24] have been criticised. One commentator[25] has written that:

> "...the precise scope of the recognisance entered into...is indeterminable and obscure. The person bound knows that he should refrain from the activity which gave rise to the proceedings, but his undertaking is broader; it is 'to keep the peace and be of good behaviour.' Not only does he not know what exactly is included in that phrase, even if he seeks legal advice it would not be of much help in defining its scope. The uncertainty associated with binding-over is most disturbing in cases of public order.
>
> If a person is bound over because of his past participation in and future intent to lead a march of political protesters, such an order might have an undue chilling effect on his freedom of assembly. If he is not a civil disobedient who believes in breaking the law as a form of protest, he will have to be very careful, and maybe even abandon all protest activities. He does not know what he can do and what he cannot do, owing to the nebulous and amorphous character of the recognisance. It can, therefore, be assumed that in many cases the person who has entered into a recognisance would like to be on the safe side and not engage in conduct which might later be declared a breach. It must be realised that the forfeiture of the recognisance is not the only consequence which might flow from his conduct. As this conduct might be a crime in itself, he may also be prosecuted for its commission."

In the light of the above, the Commission suggests that they should be expressly abolished.[26]

4. QUESTIONS AT ISSUE

10.17 The Commission welcomes comment on the following issues raised in this chapter -

Orders to keep the peace

1. If provision were made for the Family Court of Western Australia to deal with violence within the family situation, should orders to keep the peace be retained to deal with other areas in which there was a need for the prevention of breaches of the peace? If so, is the present legislation satisfactory in this regard?

(Paragraph 10.13)

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24 Para 10.2 above.

25 A D Grunis, *Binding-Over To Keep The Peace And Be of Good Behaviour in England and Canada* [1976] Public Law 16, 40-41.

26 In para 2.3 above the Commission suggested that one basis of the power to require persons to enter into a surety to keep the peace, the concept of the General Commission of the Peace, should be abolished. If it were abolished, but it was considered to be desirable to retain sureties to keep the peace it may be necessary to re-enact that power.

2. In particular -

(a) is the procedure for seeking such orders satisfactory and, if not, how should it be altered?

(Paragraphs 10.12 and 10.15)

(b) should other specified persons, as well as the police, be able to apply for an order to keep the peace to protect a child?

(Paragraph 10.14(a))

(c) should the penalty for breaching an order to keep the peace include a fine and, if so, what should be the maximum fine?

(Paragraph 10.14(b))

Sureties of the peace and sureties for good behaviour

3. Should provision for sureties of the peace and sureties for good behaviour be retained?

(Paragraph 10.16)

PART VIII : UNREPRESENTED DEFENDANTS
CHAPTER 11

1. INTRODUCTION

11.1 The Commission was also asked to consider and report on the question whether any alterations are desirable in the procedure of Courts of Petty Sessions in cases where defendants are not legally represented. This matter was initially referred to the Commission as a separate project, Project No 42, but has now been subsumed in this project.

11.2 The method of trial in Courts of Petty Sessions is accusatorial and this is reflected in the procedure. The assumption is that each party will marshal and present his own case in a competent way. This involves bringing forward all the relevant evidence, as well as pointing out any weaknesses in the evidence given for the other side. It also involves drawing the attention of the court to any matters of law or special defences which may be available, such as insanity. If a defendant is convicted it is further expected that he will draw to the attention of the court all the relevant issues and personal factors which should be considered in arriving at an appropriate sentence.[1] The role of the magistrate or justices is limited. It is to preside at the trial, to intervene as little as possible and only to clarify points that are unclear.[2] Subject to the duty to ensure that the defendant has a fair trial,[3] they are not under a duty to assist an unrepresented defendant. Thus the present system relies heavily on both sides being adequately equipped to present their cases. To the extent that they are not, the court will be handicapped in dealing with and deciding cases and injustice may result. If a defendant is represented there is likely to be less chance of an error and more chance that a trial will be conducted fairly. Once a person has been erroneously convicted, it is difficult and may be expensive to have the matter reviewed on appeal. Where a decision is reversed on an appeal the defendant will usually be awarded costs. If the prosecution is an "official prosecution " the costs will generally be determined in accordance with the scale of costs prescribed under the *Official Prosecutions (Defendants' Costs) Act 1973-1974* in respect of both the trial in the Court of Petty Sessions and the appeal. These costs are paid either out of the Consolidated Revenue Fund or by a local authority, depending on who instituted the prosecution. The

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1 The court may, and often does, require a probation officer to prepare a pre-sentence report. Para 11.29 below raises the issue whether such reports should be compulsory in certain circumstances.

2 *Jones v National Coal Board* [1957] 2 All ER 155, 158-159.

3 Para 11.21 below.

actual costs incurred by the defendant's solicitor may, however, have been more than the sum awarded as between the parties (the scale was last set in 1979) and the defendant may be charged the difference between the actual costs and the sum awarded under the *Official Prosecutions (Defendants' Costs) Act 1973-1974*. Where a defendant appeals against sentence and, for example, a sentence of imprisonment is reduced to a fine usually no order for costs is made and each side bears its own costs.

11.3 When the Commission was given the project concerning unrepresented defendants, legal assistance was not as widely available as it is now. Legal assistance is now available through the Legal Aid Commission (though legal aid is not usually available in Courts of Petty Sessions) which also provides a duty counsel service in some courts. The Duty Counsel Service operates at a number of courts including the Courts of Petty Sessions at East Perth, the Central Law Courts, Fremantle, Rockingham, Midland, Northam and Kalgoorlie. This service provides preliminary advice as to the plea to enter, advice as to the availability of legal aid, representation on applications for bail and adjournments and pleas of guilty and addresses in mitigation. In addition, the Aboriginal Legal Service provides legal assistance for Aborigines.

11.4 In 1981 the Western Australian Office of the Australian Bureau of Statistics carried out a survey of complaints commenced before or during September 1979 and finalised in September 1979. According to this statistical survey, most people who appear in Courts of Petty Sessions are not represented. In September 1979 5,688 persons were convicted by Courts of Petty Sessions.[4] Only in 811 (14.26%) of these cases were the defendants represented (whether by a private solicitor or counsel, the Legal Aid Commission or the Aboriginal Legal Service).[5] Many of the convictions were, of course, concerned with minor or trivial matters. Nevertheless, 210 persons who were convicted during that month were imprisoned without having been legally represented and of these 58 received terms of imprisonment of three months or more. [6]

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4 Australian Bureau of Statistics, Western Australian Branch, *Surveys and Associated Work Undertaken in Connection with The Terms of Reference of the inquiry Into The Rate of Imprisonment* (1981), Table 1.1.1.

5 This information was extracted from information collected for the Dixon Report. The table in which this information is compiled (*Table 13: Number of Distinct Persons Convicted and Related Penalties – Penalty Imposed According to Offence, Legal Representation and Defendant's Plea*) is on file with the Commission.

6 This information was extracted from information collected for the Dixon Report. The table in which this information is compiled (Table 12: *Number of Distinct Persons Convicted - Maximum Term of Imprisonment Imposed According to Legal Representation of Defendant)* is on file with Commission.

11.5 The study by Newby and Martin contains information on the provision of legal representation in Courts of Petty Sessions in two country towns: Narrogin and Gnowangerup.[7] In these towns 67.4% of defendants were not represented. The percentage of Aborigines who were represented was higher than that for non-Aborigines, 36.6% and 27.5%, respectively.[8] Newby and Martin noted that there were marked differences in representation in the two towns. For example, 94.1% of Aborigines appearing in court in Gnowangerup were not represented. In Narrogin, on the other hand, 67.3% of Aborigines had some form of legal representation, the majority being represented by the Aboriginal Legal Service.[9] This, difference no doubt is largely explained by the fact that Narrogin, apart from being the base for a stipendiary magistrate, is the base for a solicitor and field officer of the Aboriginal Legal Service. There are also private legal practitioners residing in that town. There are no officers of the Aboriginal Legal Service or private practitioners in Gnowangerup.

2. STUDIES OF THE EFFECTS OF AND THE DESIRABILITY OF REPRESENTATION

11.6 Although studies have been carried out to determine whether or not there is any relationship between legal representation and the outcome of the proceedings it is necessary to approach them with caution because of the multiplicity of factors involved. One study in New South Wales found that, in each year studied, the acquittal rate for represented defendants was significantly higher than for unrepresented defendants.[10] However, a significant increase in the level of representation between 1976 and 1977 was not associated with any significant increase in the overall acquittal rate.[11] The study found that the higher overall acquittal rate for represented defendants was partially accounted for by the fact that:[12]

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7 The study covered charges which first appeared in the courts concerned over a two year period between 1 July 1978 and 30 June 1980: Newby and Martin, 3.
This study was part of a larger study involving Courts of Petty Sessions in a further five towns: Broome, Halls Creek, Kununurra, Midland and Wyndham. A preliminary report on this larger study was presented to an Australian Institute of Criminology Seminar on Aborigines and Criminal Justice in August 1983. Statistics in that report (p 9) for the seven towns indicate that of defendants who appeared in court in the seven towns 75.21% were unrepresented. The percentage of Aborigines who were represented was higher than that for non-Aborigines, 27.07% and 18.18%, respectively. However, of the 1,048 Aborigines who were represented, 756 (72.14%) were represented by Aboriginal Legal Service field officers.

8 Newby and Martin, 15.

9 Id, 15-16.

10 P Cashman, *Representation in Criminal Cases*, published in *The Criminal Injustice System* ed by J Basten, M Richardson, C Ronalds and G Zdenkowski (1982), 204. Hereinafter cited as "Cashman".

11 Id, 205.

12 Id, 206.

> "(a) represented defendants plead not guilty more often than unrepresented defendants, and
>
> (b) represented defendants who plead not guilty are acquitted more often than unrepresented defendants who plead not guilty."

The study did not attempt to deal with a number of other factors which could influence the overall acquittal rate: [13]

> "Do represented defendants plead not guilty more often than unrepresented defendants because they are represented; or are some defendants more likely to be represented because they wish to contest the proceedings against them? No doubt both possible explanations are partially correct. Some defendants may have pleaded guilty had they not been represented. Conversely, some defendants may have pleaded not guilty had they not been represented. Other defendants may have only sought or been provided with representation in situations where they wished to defend the proceedings against them."

11.7 The Commission has been able to use information collected for the Dixon Report to examine whether or not there is any relationship between representation and the outcome of the case. The Commission's study involved 5,276 charges in which a person either appeared in person or was represented.[14] Most of the complaints involved a plea of guilty. In only nine per cent of the complaints was a plea of not guilty entered.

11.8 While the survey disclosed a significant difference in the acquittal rates for represented defendants and unrepresented defendants in Western Australia it is not as great as that disclosed by the Cashman study. In Western Australia, 2.58% of charges against represented defendants resulted in an acquittal (rising to 3.57% if withdrawn complaints are included) but only 1.29% of charges against unrepresented defendants resulted in an acquittal (rising to 1.62% if withdrawn complaints are included). A major factor in this difference seems to be that unrepresented defendants are less likely to plead not guilty than represented defendants. The survey showed that while only 6.84% of charges against unrepresented defendants involved a not guilty plea, 15.80% of charges against represented defendants involved a plea of not guilty. It could not be determined from the survey whether represented defendants were more likely to plead not guilty because they had representation or whether those defendants who wished to plead not guilty were more likely to obtain legal representation. However, in country towns where there is no resident solicitor the fact that a

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13 Ibid.

14 The persons in the survey were represented by either a private practitioner, the Legal Aid Commission or the Aboriginal Legal Service.

solicitor is not readily available may be a factor which leads a person to enter a plea of guilty irrespective of whether or not he considers himself to be guilty.[15]

11.9 Although there seems to be a relationship between representation and the plea entered, once that decision has been made there does not appear to be any significant relationship between representation and the outcome of the case. In fact, an examination of the cases in which the defendant pleaded not guilty shows that the percentage of unrepresented defendants acquitted is slightly higher than that for represented defendants: 18.82% and 16.35% respectively. However, the percentage of complaints involving represented defendants which were withdrawn was higher in the case of represented defendants: 6.25% as opposed to 4.80% for unrepresented defendants. Combining these figures leads to the result that 23.62% of complaints involving unrepresented defendants who pleaded not guilty were dismissed or withdrawn while for represented defendants the figure is 22.60%. These figures differ markedly from those in New South Wales where in 1977 40% of represented defendants who pleaded not guilty were acquitted whereas only 25% of unrepresented defendants who pleaded not guilty were acquitted.[16]

11.10 In the area of sentencing a study conducted by the Australian Law Reform Commission shows that judicial officers consider that legal representation is desirable. The following table shows their response to a question asked on the matter.[17]

"Table 5A: Desirability of Making Legal Representation Available to Defendants(a)

	(i) To enable a plea of mitigation		(ii) Where imprisonment contemplated		(iii) In other situations	
Responses	% of Resp	No of Resp	% of Resp	No of Resp	% of Resp	No of Resp
Yes	71.3	(247)	81.1	(274)	74.6	(202)
No	27.8	(96)	18.3	(62)	16.2	(44)
Don't Know	.9	(3)	.6	(2)	9.2	(25)
TOTAL	100%	(346)(b)	100%	(338)(c)	100%	(271)(d)

15 In the study by Newby and Martin only 7 (or 1.4%) defendants entered pleas of not guilty in Gnowangerup (which has no resident solicitor) while in Narrogin (which has a resident solicitor) 18.7% of defendants entered a plea of not guilty: Newby and Martin, 20-21.

16 Cashman, 206.

17 Australian Law Reform Commission, *Sentencing of Federal Offenders* (Report No 15, Interim, 1980), 379.

(a) Question 12: In your opinion, should legal representation always be made to defendants appearing in your court?
    (i) to enable a plea of mitigation to be made?
    (ii) where a sentence of imprisonment is contemplated by you?
    (iii) in other situations?'
(b) Four respondents did not answer this part of the question.
(c) Twelve respondents did not answer this part of the question.
(d) Seventy-nine respondents did not answer this part of the question."

The study did not seek comments on why the judicial officers considered that legal representation was desirable. It may have been because legal representation makes the task of sentencing less difficult in that counsel is relied upon to marshal the facts and factors which are important in determining the most appropriate sentence. The judicial officer is then not confronted with the task of obtaining these from a defendant who may not be particularly articulate.

3. DISADVANTAGES SUFFERED BY UNREPRESENTED DEFENDANTS

11.11 Unrepresented defendants are considered to be at a disadvantage compared to represented defendants for a number of reasons, including the following.

(a) Unrepresented defendants do not always appreciate the nature and seriousness of the charge

11.12 The complex nature of some charges, defences or penalties makes it difficult for a lay person to appreciate the nature or seriousness of a charge. For example, the charge may be receiving stolen property. A person may believe that he is guilty of an offence even though he received stolen property innocently.[18] A defendant may also not appreciate that he has a defence to a charge. For example, a charge of assault is simply an allegation that A assaulted B. A may think that he is guilty even though he has a defence of provocation or self-defence.

(b) Unrepresented defendants do not understand the practice and procedure of the court

11.13 The Director of Legal Aid, Mr L W Roberts-Smith, wrote to the Commission advising that in his experience it " ...would be a rare defendant who had sufficient knowledge of Court procedures or the law to be aware that a plea of guilty can be withdrawn or of the possible

[18] The offence, however, actually involves receiving the property knowing it to be stolen: *Criminal Code*, s 414.

advantages of electing trial by jury, or that though a plea of guilty is entered, the prosecution will still adduce evidence [for the purpose of sentencing]." The Commission agrees.

(c) Unrepresented defendants do not understand the sentencing process

11.14 Where an unrepresented defendant is convicted or pleads guilty he may not be aware of the matters to raise when presenting a plea in mitigation or of the possibility or desirability of obtaining a pre-sentence report. Mr Roberts-Smith pointed out that unrepresented defendants often remain silent where an explanation might have resulted in leniency. This may be especially the case of some groups of defendants who most need to speak out.

(d) Unrepresented defendants may submit to pressure to plead guilty

11.15 In evidence to the Philips Commission in England, "Justice", the British Section of the International Commission of Jurists, suggested that certain factors may lead to pressure on a defendant to plead guilty even though he may know or believe that he is innocent.[19] A defendant may believe that the courts are likely to pass a lighter sentence after a plea of guilty than after a contested trial either because this act shows remorse or because it saves public time and money. He may believe that the courts are more likely to accept police evidence whatever he says, or he may wish to dispose of the matter quickly without having the delay which occurs if a plea of not guilty is entered. A defendant may act on the advice of a police officer to plead guilty in the expectation that a particular sentence is likely to be imposed.

4. PROTECTION OR ASSISTANCE AVAILABLE AT PRESENT

(a) Introduction

11.16 Although it has been recognised that unrepresented defendants suffer disadvantages, courts in Australia have declined to create a "right to counsel". There are, however, a number of circumstances in which it has been recognised that judicial officers should play some role in protecting unrepresented defendants.

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19 *The Truth and the Courts* (1980), 6-7, para 19.

(b) The rules in Cooling v Steel

11.17 In South Australia in *Cooling v Steel*[20] Wells J set out a number of rules to be followed by a court when an unrepresented defendant appears before it. These rules have been commented on favourably or applied in cases in Western Australia.[21] The rules are -

1. Before the defendant's plea is taken, the court should ensure that the defendant understands the nature of the charge.[22] The defendant should be told briefly and simply with what he is charged.

2. The court should make the defendant appreciate that the plea is entirely a matter for his own independent decision, that he is entitled to legal advice and representation, and that he may ask for a reasonable adjournment to seek that advice or representation.

3. If the case is adjourned and the question of bail arises, the defendant should be made clearly aware of what bail is, that he can apply for bail, what matters a court takes into account and that he can make representations in support of his application.

4. Where the case is proceeded with, the defendant should be informed of the seriousness of the charge, and of the penalties that may be imposed.

5. Where a plea of guilty is entered by the defendant -

   (i) it should be made clear that the defendant may put matters in mitigation and that he may call witnesses or produce other relevant material for the court;
   (ii) before the prosecutor places the facts before the court, the defendant should be informed that he is entitled to dispute or comment upon the facts alleged by the prosecutor;
   (iii) if the defendant disputes any of those facts, the court should be quick to recognise any denials or explanations by the defendant that suggest that he should not have pleaded guilty, in which case a plea of not guilty should be entered.[23]

6. Special consideration should be given to Aborigines whose understanding of court procedure is slight or to people who may have an imperfect understanding of the English language.

7. In general, the court should ensure that the defendant is appraised of his rights and his duties at all times, and be vigilant to keep the proceedings free of error or misunderstanding.

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20 (1971) 2 SASR 249, 250-252.

21 *Jones v Holmwood* [1974] WAR 33, per Wallace J and *Draper v Norbury* (unreported) Supreme Court of Western Australia, Appeal No 345 of 1982, 22 April 1983.

22 See also *R v Inglis* [1917] VLR 672, 675 and *Thomason v Martin* [1964] WAR 136.

23 See also *Slater v Marshall* [1965] WAR 222.

(c) Statutory safeguards

11.18 Apart from this common law duty, section 49(1) of the *Aboriginal Affairs Planning Authority Act 1972-1982* provides that: [24]

> "In any proceedings in respect of an offence which is punishable in the first instance by a term of imprisonment for a period of six months or more the court hearing the charge shall refuse to accept or admit a plea of guilt at trial or an admission of guilt or confession before trial in any case where the court is satisfied upon examination of the accused person that he is a person of Aboriginal descent who from want of comprehension of the nature of the circumstances alleged, or of the proceedings, is or was not capable of understanding that plea of guilt or that admission of guilt or confession."

11.19 In the case of children, section 20(4a) of the *Child Welfare Act 1947-1982* provides that a Children's Court, when hearing a complaint of an indictable offence brought against a child, must not accept a plea of guilty entered by a child unless:

> "(a) the child is represented at the hearing by counsellor solicitor; or
>
> (b) the court is satisfied that the child received legal advice before entering the plea."

(d) Undue pressure to plead guilty

11.20 In Queensland it has been held that where an unrepresented defendant is charged by a police officer, the judicial officer should inquire from the defendant whether anyone connected with the police made a suggestion that he should plead guilty. If the judicial officer does not receive a prompt and convincing disclaimer from the defendant he should suggest to the defendant that he plead not guilty and emphasise the impropriety of such advice.[25] In *Di Camillo v Wilcox*,[26] Hale J said that this was "excellent advice".

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24 See *Smith v Grieve* [1974] WAR 193.

25 *Heffernan v Ward* [1959] Qd R 12, 15-16; *Hallahan v Kryloff*; *Ex parte Kryloff* [I960] QWN 18; *Robinson v Hankins*; *Ex parte Hankins* [1966] Qd R 383.

26 [1964] WAR 44,49.

(e) Fair trial

11.21 So far as the conduct of a trial is concerned it has recently been reiterated that a judicial officer should ensure that a trial is conducted fairly. In *MacPherson v R*, a case involving an unrepresented defendant, Mason J stated that:[27]

> " ...the trial judge is bound to ensure that an accused person has a fair trial. To that end he is under a duty to give the accused such information and advice as is necessary to ensure that he has a fair trial....A trial in which a judge allows an accused to remain in ignorance of a fundamental procedure which, if invoked, may prove to be advantageous to him, can hardly be labelled as 'fair."

An unrepresented defendant therefore should not be kept in ignorance of the "rules of the game" even if the court is not obliged to tell him how to play the game. The court has a duty to give the accused advice or information concerning the right to give evidence, the right to cross-examine witnesses, the right to remain silent and the right to test the admissibility of evidence.[28] Gibbs CJ and Wilson J stated that a court is also under a duty to exclude evidence tendered against the accused which is not shown to be admissible and, in particular, where there is a real question as to the voluntariness of a confession that the court has a duty to satisfy itself as to the voluntariness of the confession.[29]

(f) The "McKenzie friend " procedure

11.22 One means by which an unrepresented defendant could be assisted is by the use of the procedure which was approved in a civil case, *McKenzie v McKenzie*,[30] in England in 1970. This procedure still appears to be available in that jurisdiction. In this case it was held that any person may attend a trial of a person as a friend of a party and may assist that person by taking notes, making suggestions and giving advice. He does not, however, take part in the proceedings as an advocate and he need not have any legal qualifications. This procedure does not seem to be used in Courts of Petty Sessions in Western Australia. The procedure can, however, be abused and has been the subject of criticism. In New South Wales, in *Re B*, Moffitt P said:[31]

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27 (1981) 55 ALJR 594, 602. Judgment was given in similar terms by Gibbs CJ and Wilson J (598) and Brennan J (607).

28 Id, 602, per Mason J.

29 Id, 598.

30 [1970] 3 All ER 1034.

31 [1981] 2 NSWLR 372, 385-386.

> "This is a device which was adapted from a decision in England in a civil case considered to be exceptional...and applied here as a technique in criminal cases usually on the trial of hardened criminals where the accused would appear to defend himself with the advantages of that course, but have a person with legal experience, who may or may not be admitted to practice 'briefed' or employed by some group, body or person, to 'appear' and conduct the case in some way by being in court and progressively give directions or advice for its conduct. The McKenzie friend, being behind the scenes, would bear no responsibility for any impropriety in the conduct of the case and his or her part would not be apparent and subject to control or criticism. This procedure was initially permitted by some judges, but came to be seen as what it appears to be, namely an abuse of the court's procedures and was stopped."

In a subsequent case, *R v Smith*[32] it has been reported that the New South Wales Court of Criminal Appeal held: [33]

> "An accused has no absolute right to have the assistance of a 'McKenzie's friend' at his trial. A trial judge could, if he chose, permit such assistance as a matter of indulgence either in respect of the entirety of the proceedings or in respect of some particular part of the proceedings. In the light of experience it seems likely that trial judges would only consider granting such permission in extraordinary circumstances."

5. STEPS WHICH COULD BE TAKEN TO IMPROVE THE POSITION OF UNREPRESENTED DEFENDANTS

11.23 Defendants appear in Courts of Petty Sessions without legal representation for a number of reasons. Some could afford to obtain representation if they chose to do so but fail to do so or do not consider it necessary to do so. Others cannot afford to obtain it or do not know how to go about obtaining it for reasons such as language difficulties or the remoteness of the area in which they live. To a large extent, the disadvantages suffered by unrepresented defendants can only be overcome by improving the availability of legal representation. This is a matter beyond the purview of this paper. However, other means by which the position of unrepresented defendants could be improved are discussed below.

(a) Providing more information as to the offence

11.24 At present the complaint need not contain or be accompanied by any details of the facts alleged in support of the charge, information which might alert the defendant to the

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32 Court of Criminal Appeal, NSW, 7 Oct 1982, No 221/81.

33 [1983] *Australian Current Law*, 35:116.

various elements of the offence. One means of increasing the defendant's appreciation of the nature of the charge would be to require, as was suggested above,[34] that the complaint be accompanied by a summary of the facts upon which the charge is based.

(b) Prosecution should make a brief statement of case before a plea is entered

11.25 One reason for the suggestion that a complaint should contain more information about the alleged offence is to increase the defendant's appreciation of the nature of the charge. This could also be achieved if the prosecution were required to make a brief statement outlining the prosecution's case before the defendant was required to plead. Such a statement might serve to ensure that an unrepresented defendant[35] who wished to enter a plea of guilty unequivocally admitted all the elements of the offence charged and accepted all of the facts read to the court which were material to the elements of the offence or to the determination of the appropriate sentence.

(c) Should judicial officers be required to provide more assistance?

11.26 At present a judicial officer is required to provide some assistance to an unrepresented defendant[36] though he generally does not play an active role in the conduct of the hearing. It may be asked whether an express obligation should be imposed on a judicial officer to play a role in the conduct of a case beyond that of ensuring that a trial is conducted fairly,[37] for example, by examining or cross-examining witnesses and, where necessary, calling witnesses.[38] However, this seems undesirable. Such an obligation would tend to require the officer to fill the role of defence counsel, a role which it would be difficult to fulfil without jeopardising his primary role as final arbiter on questions of law and fact. As Murphy J stated in *McInnis v R*:[39]

> "A judge's assistance to an unrepresented accused does not make up for lack of counsel. In an adversary system, it is not his function to assist one party. An attempt to

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34 Para 4.4.

35 It would also be of value, where a defendant is represented, particularly where he is represented by a duty counsel who may of necessity only have had a hurried consultation with the defendant before the hearing.

36 Para 11.21 above.

37 Ibid.

38 In *R v Apostilides* (unreported) High Court of Australia, 19 June 1984, 15, it was stated that:
"Save in the most exceptional circumstances, the trial judge should not himself call a person to give evidence."

39 (1979) 143 CLR 575, 592.

> do so generally serves only to gloss over procedural injustice; how can a judge assist effectively without having conferred with the accused and his witnesses in circumstances in which the accused has the protection of the confidentiality rule?"

(d) Minimum standards for the treatment of unrepresented defendants

11.27 In South Australia the rules in *Cooling v Steel*[40] provide a minimum standard for the treatment of unrepresented defendants, particularly before a plea is entered. Although these rules have been favourably commented upon in Western Australia, there does not appear to be any specific requirement for them to be observed in this State. Moreover, as they are expressed in a South Australian case, it may be that justices in this State are unaware of all of them.[41] Minimum standards along the lines of those expressed in *Cooling v Steel* could be developed and statutorily prescribed. The provision of statutory standards would not only help to ensure that unrepresented defendants were treated fairly but would tend to promote the uniform application of the standards throughout the State.

(e) Providing information to defendants

11.28 While it may be unnecessary for defendants to many minor complaints to have legal representation it may be difficult to convince other people, even on serious allegations, of the desirability of obtaining legal advice and representation. One means of alerting people as to the desirability and sources of legal advice or assistance and providing information about court procedures and the right to apply for bail would be by a pamphlet accompanying each summons or given to each person on arrest. The pamphlet could advise on -[42]

(1) entitlement to legal advice and representation and the desirability of obtaining it;

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40 Para 11.17 above.

41 Ch 7 of the *Handbook For Justices* by P Nichols contains advice for justices on the taking of a plea and, in particular, on the need to ensure that the defendant understands the charge and that a plea of guilty is unequivocal.
When proclaimed, the *Bail Act 1982* (WA) will place a statutory obligation on the court to consider a defendant's case for bail whether or not the defendant makes application for it: s 5. To this extent rule no 3 of the *Cooling v Steel* rules will become statutory in this State.

42 Justice, the British Section of the International Commission of Jurists, has recommended that a pamphlet containing similar information be given to unrepresented defendants: *The Unrepresented Defendant in Magistrates' Courts* (1971), 39, para 121.

(2) the availability and the nature of the services provided by the duty counsel service;

(3) the availability of legal aid and how to apply for it from the Legal Aid Commission or the Aboriginal Legal Service;

(4) court procedure, for example, the order of events in the trial, giving evidence, calling witnesses, asking for adjournments, that if he pleads guilty or is convicted that he may call witnesses or produce other relevant material for the consideration of the court, asking for time to pay a fine or applying for costs if he is successful;[43]

(5) his right to apply for bail if he is in custody. [44]

(f) Pre-sentence report

11.29 Under section 8 of the *Offenders Probation and Parole Act 1963-1983* a court may require the Director, Probation and Parole Services, to cause to be prepared and submitted to the court a report containing such information with respect to any convicted person as the court requires. Where an unrepresented defendant is convicted and the court contemplates imposing a sentence of imprisonment, an obligation could be placed on the court to obtain a pre-sentence report. The Dixon Report contains a similar recommendation in respect of persons who had not previously served a term of imprisonment and persons under the age of 21 years.[45] It was suggested in the Dixon Report that it would not be necessary for such reports to be in writing.[46] However, an oral report would be more difficult to analyse and criticise than a written report, particularly for an unrepresented defendant. To avoid offenders being held in custody pending the receipt of a pre-sentence report, it was recommended that bail should not be refused except in special circumstances.

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43 The Commission understands that the Legal Aid Commission is giving consideration to publishing a pamphlet setting out this sort of information.

44 In its report on *Bail* (1979), the Commission recommended that a bail information form should be provided to every defendant who is taken into custody. The Commission also recommended that this form should inform a defendant of the procedure relating to bail: Report, 49-50, paras 5.18 and 5.19. The *Bail Act 1982* (s 8) provides for the implementation of these recommendations.

45 Dixon Report, 181.

46 Oral reports are given now in some cases: *Probation Annual Report 1982-1983*, 6.

6. QUESTIONS AT ISSUE

11.30 The Commission welcomes comment on the following issues raised in this chapter -

1. Should the prosecution be required to make a brief statement of case before a plea is entered?

   (Paragraph 11.25)

2. Should judicial officers be required to provide more assistance to unrepresented defendants?

   (Paragraph 11.26)

3. Should minimum standards for the treatment of unrepresented defendants be developed and prescribed in legislation?

   (Paragraph 11.27)

4. Should a pamphlet be prepared to inform defendants of their rights, privileges and court procedure?

   (Paragraph 11.28)

5. Should a court be required to obtain a pre-sentence report where it contemplates imposing a sentence of imprisonment on an unrepresented defendant?

   (Paragraph 11.29)

PART IX: QUESTIONS AT ISSUE
CHAPTER 12

12.1 The Commission welcomes comment (with reasons where appropriate) on any matter arising out of the terms of reference or this paper, and in particular on the following -

JUSTICES OF THE PEACE

Limitation on jurisdiction of justices

1. Should the existing practice whereby -

   (i) justices do not conduct trials where the defendant pleads not guilty;

   (ii) justices do not conduct preliminary hearings of indictable offences;

   be statutorily confirmed?

   (paragraph 2.17)

2. Should any further limitation be placed on the jurisdiction of justices? If so, should this be by providing that -

   (i) justices should not be permitted to impose a term of imprisonment where a person has pleaded guilty;
   (ii) justices should not be permitted to issue search warrants and warrants for the arrest of a person?

   (paragraphs 2.18 to 2.25)

Age limit

3. Should any statutory limitation be placed on the judicial functions which justices may perform once they reach a certain age and, if so, what should that age be?

   (paragraphs 2.14 and 2.15)

Abolition of the concept of the General Commission of the Peace

4. Should the concept of the General Commission of the Peace be abolished?

(paragraph 2.3)

5. If so, should justices be appointed by a warrant under the hand of the Governor?

(paragraph 2.3)

Appointment and supervision of justices

6. Should a committee be established to recommend to the Governor the appointment of individuals as justices and to supervise their training and performance?

7. If justices retain a judicial role should they be -

(i) reimbursed for expenses incurred in attending to preside over a court;
(ii) paid an allowance for doing so?

(paragraph 2.29)

Mayors and shire presidents

8. Should the mayor of a city or town or the president of a shire continue to be appointed a justice merely by virtue of his office?

(paragraph 2.10)

9. Should the jurisdiction of justices who hold office by virtue of their position of mayor or president continue to be confined to the magisterial district or districts in which the municipal district of the city, town or shire is situated?

(paragraph 2.10)

Members of Parliament

10. Should it be possible for Members of Parliament to be appointed justices of the peace?

(paragraph 2.6)

Masters of the Supreme Court

11. Should the Masters of the Supreme Court hold office ex officio as a justice of the peace?

(paragraph 2.5)

Removal of justices from office

12. Should a justice be removed from the office by law if he or she -

(i) becomes bankrupt or insolvent, applies to take the benefit of any law for the benefit of bankrupt or insolvent debtors, compounds with his or her creditors, or makes an assignment of his or her salary for their benefit;

(ii) is convicted of an offence that, in the opinion of the Governor, shows him or her to be unfit to hold the office of a justice;

(iii) is admitted to an approved hospital under the *Mental Health Act 1962-1979*?

(paragraphs 2.12 and 2.13)

Civil actions against justices

13. So far as civil actions against justices arising out of the performance of their duties are concerned, is there any need to amend sections 222-232 of the *Justices Act*?

(paragraph 2.30)

Imperial statutes relating to justices of the peace and other

14. Should any of the imperial statutes listed in Appendices II and III of this paper be retained?

(paragraph 2.31)

COURTS OF PETTY SESSIONS

The Court

15. Should the Court of Petty Sessions be formally constituted?

(paragraph 3.2)

16. Should a new court merging Courts of Petty Sessions and Local Courts be established?

(paragraphs 3.3 to 3.6)

17. Should there be one court or a number of courts established at specified places throughout the State?

(paragraph 3.7)

18. Should places for holding the court be fixed?

(paragraphs 3.8 to 3.10)

19. Should courts be held in police stations?

(paragraph 3.11)

20. Should it be possible to appoint clerks of petty sessions without confining their appointment to a particular magisterial district?

(paragraph 3.13)

21. Should clerks of petty sessions have power to issue warrants of execution or commitment?

(paragraph 3.14)

Jurisdiction and composition of the court

22. What should be the jurisdiction of the court?

(paragraph 3.21)

23. What should be the composition of the court in the case of –

(i) an indictable offence triable summarily;

(ii) civil or administrative matters?

(paragraphs 3.26 and 3.27)

24. Should it be possible for a court to be constituted by more than one stipendiary magistrate?

(paragraph 3.23)

25. Should the jurisdiction of a single justice be confined to circumstances in which the defendant elects to be dealt with by a single justice?

(paragraphs 3.24 and 3.25)

26. If not, is the present formula for conferring jurisdiction on one justice, namely "whenever no other Justice usually residing in the district cannot be found at the time within a distance of sixteen kilometres" satisfactory?

(paragraph 3.25)

27. If this formula is retained, should a duty be placed on a court official to investigate whether no other justice "can be found" within the prescribed distance?

(paragraph 3.25)

Review of decisions of justices by a stipendiary magistrate

28. Should provision be made for an appeal from the decision of a court constituted by justices to one constituted by a stipendiary magistrate and, if so, what should be the scope of such an appeal?

(paragraphs 3.28 to 3.31)

29. Should all sentences of imprisonment imposed by justices be reviewed by a stipendiary magistrate and, if so, what should be the nature of the review and the procedure?

(paragraph 3.32)

Open court and reporting of proceedings

30. Should the circumstances in which it is possible to exclude a person from a summary trial be limited to cases in which it is necessary to do so in the interests of justice or to protect the reputation of a victim of a crime?

(paragraph 3.35)

31. Should the place at which a preliminary hearing is held be deemed to be an open court but that the presiding officer should be able to make an order excluding members of the public where the interests of justice require and also to protect the reputation of a victim of a crime?

(paragraph 3.36)

32. Should the power to prohibit the publication of a report of a preliminary hearing be extended to allow for prohibition of the publication of a report to protect the reputation of a victim of a crime?

(paragraph 3.37)

33. Should the legislation go further by expressly limiting the information which may be published relating to a preliminary hearing as is the case in England?

(paragraphs 3.40 and 3.41)

34. Should express provision be made for the exclusion of witnesses from a hearing except to give evidence?

(paragraph 3.42)

35. Should there be express power to exclude a defendant who misbehaves?

(paragraph 3.43)

36. Should the presiding judicial officer have express power to order the physical removal from the courtroom of all persons who have disobeyed an order to leave?

(paragraph 3.44)

Contempt of court

37. Should there be any extension of the court's power to deal with contempts, and if so, what should it be?

(paragraphs 3.45 to 3.47)

38. Should the penalty for interrupting proceedings in Courts of Petty Sessions be increased and, if so, what penalty should be provided?

(paragraph 3.48)

39. Should the court have power to remit the penalty, either wholly or in part, if the offender apologises?

(paragraph 3.49)

COMMENCEMENT OF PROCEEDINGS

Complaints

40. Should all complaints be required to be in writing?

(paragraph 4.3)

41. Should it be required that, once a summons or warrant has been issued, the complaint be lodged in the nearest Court of Petty Sessions by the justice?

(paragraph 4.3)

42. Should the complaint and summons contain or be accompanied by a summary of the facts upon which the allegation that an offence was committed is based or state that the defendant may apply to the complainant for such a statement before he enters a plea?

(paragraph 4.4)

43. Should a court have power to grant leave to lay a complaint more than six months (or any other prescribed period) from the time when the matter of complaint arose?

(paragraph 4.5)

44. Should the provision in the *Criminal Code* applicable to indictable offences, however tried, that charges for distinct offences may be joined where they "form or are a part of a series of offences of the same or a similar character", apply also to simple offences?

(paragraph 4.10)

45. Should express provision be made for more than one accused person to be charged in a complaint and, if so, in what circumstances?

(paragraph 4.12)

46. If such a provision were enacted, should defendants apply for separate trials?

(paragraph 4.12)

Issue of summons or warrant

47. Should a justice other than the justice who received the complaint be able to issue a summons or warrant in respect of that complaint?

(paragraph 4.14)

Service of a summons

48. Should the provisions for service of a summons be amended to provide for service -

(a) by bringing it to tile defendant's notice if he refuses to accept it; or

(b) where it may be left with some person at his last known place of abode, requiring that that person be or appear to be not less than sixteen years of age?

(paragraph 4.16)

Defendants arrested on warrant

49. Where a defendant is arrested on a warrant should it be necessary to serve a copy of the complaint on him?

(paragraph 4.19)

Withdrawal of warrant

50. Should there be express power to withdraw a warrant?

(paragraph 4.20)

Arrest without warrant and complaints

51. Where a person has been arrested without warrant and is charged with an offence, should proceedings be commenced by filing the complaint in the appropriate court and by serving a copy of the complaint on the defendant?

(paragraph 4.22)

Infringement notice procedures

52. Should a standard infringement notice procedure be provided in the *Justices Act*?

(paragraphs 4.34 and 4.35)

53. If so, should either of the existing road traffic models be adopted?

(paragraphs 4.23 to 4.32)

54. Should the infringement notice procedure be confined to relatively minor regulatory offences?

(paragraphs 4.36 and 4.37)

55. Should the infringement notice procedure be confined so that it is only used to impose a fine, and not a term of imprisonment?

(paragraph 4.37)

MATTERS PRELIMINARY TO THE HEARING

Pre-trial hearings and disclosure of information

56. Should a procedure for conducting pre-trial hearings be introduced?

(paragraphs 5.5 to 5.8)

57. If so, what matters should it be possible to deal with at a pre-trial hearing?

(paragraph 5.6)

Summoning witnesses and requiring the production of documents

58. Should a person merely required to produce any document or writing in his possession or power (and not to give oral evidence) be permitted to produce the document or writing to the clerk of petty sessions?

(paragraph 5.10)

59. Should the circumstances in which a person may be summoned to give evidence be limited by requiring that the judicial officer authorised to issue the summons be satisfied that the person sought to be summoned -

(i) is likely to give material evidence or to have in his possession or power any article required for the purpose of evidence;
(ii) will not appear voluntarily?

(paragraphs 5.11 to 5.13)

60. Should express provision be made for a person who has been summoned to appear as a witness to apply to the officer who issued the summons for an order setting the summons aside?

(paragraph 5.14)

61. Should the manner in which a witness summons may be served be changed so that it may be served by -

(i) delivering a duplicate of the summons to the witness personally or by its being brought to his notice if he refuses to accept it;

(ii) leaving it for him at his last known or usual place of residence or of business with some other person, apparently a resident of or employed at that place, and apparently not less than sixteen years of age; or

(iii) sending it to him by certified mail addressed to him at his last known or usual place of residence or of business?

(paragraphs 5.15 and 5.16)

62. Should the law relating to the grant of bail to a person sought to be made a witness or who has failed to appear at an adjourned hearing who has been arrested be clarified by adopting provisions similar to those in Victoria or England?

(paragraphs 5.17 to 5.19 and 5.23)

63. Should the requirement to supply a person summoned to appear with conduct money be abolished?

(paragraph 5.21)

64. Should an offence of failing to attend at the hearing in response to a witness summons be created in lieu of the existing provision for a fine to be imposed "then and there...in his absence"?

(paragraph 5.22)

THE HEARING

Entry of plea

65. Should a defendant have a right to a written copy of the complaint before he enters his plea?

(paragraph 6.2)

66. Should section 138 of the *Justices Act* relating to the entry of a plea be amended to provide expressly for a plea of guilty or not guilty to be entered and for other pleas to be made?

(paragraph 6.4)

67. Where a defendant will not or does not enter a plea, should the court be expressly empowered to order a plea of not guilty to be entered on his behalf?

(paragraph 6.4)

Practice at the hearing

68. Should section 141 of the *Justices Act* be amended by repealing that part dealing with examining witnesses in reply where the defendant gives evidence other than as to his general character?

(paragraph 6.5)

Representation

69. Should there be express provision that a police officer may conduct proceedings on behalf of another officer and that an officer of a government department or authority may conduct proceedings on behalf of another officer or the department or authority?

(paragraph 6.6)

Representation of a corporation

70. Should express provision be made with regard to the representation of a corporation and, if so, what form should such a provision take?

(paragraph 6.8)

Evidence of persons not present in court

71. Should procedures such as those in Ontario and England be provided for obtaining evidence from a person who cannot be present in court?

(paragraphs 6.11 and 6.12)

Amendment of complaint, summons or warrant

72. Should the power to amend a complaint, summons or warrant expressly apply also to a defect therein, in substance or in form?

(paragraph 6.13)

73. Should there be any amendment to the provisions relating to a variation between a complaint, summons or warrant and the evidence in support thereof or defect of substance or form therein and, if so, how should the provisions be amended?

(paragraphs 6.14 to 6.17)

Adjournment sine die

74. Should there be express power to adjourn a hearing sine die?

(paragraph 6.18)

Other adjournments

75. Should there be express power to adjourn a hearing in other circumstances and, if so, in what circumstances?

(paragraph 6.19)

Bringing matter on for hearing

76. Should express provision be made for bringing a matter on for hearing before the date set down for a hearing or the recommencement of an adjourned hearing or where a matter has been adjourned sine die?

(paragraph 6.21)

Adjournment after determination of a matter

77. Should section 86 of the *Justices Act* be amended to ensure that a case may be adjourned after the determination of the matter?

(paragraph 6.23)

Withdrawal of a complaint

78. Should it be possible to withdraw a complaint?

(paragraphs 6.24 and 6.25)

Dismissal of a complaint

79. Should a dismissal of a complaint where the complainant does not appear operate as a bar to subsequent proceedings with respect to the same offence?

(paragraph 6.27)

Ex parte proceedings

80. Should the procedure provided in section 135 of the *Justices Act* be replaced with a provision similar to that contained in section 56A of the *Transport Act l966-1982*?

(paragraphs 6.28 to 6.38)

81. Should the court's power to impose a penalty in the absence of a defendant be further restricted so that the following penalties could not be imposed in the absence of the defendant -

(a) a disqualification from holding or obtaining a licence, registration, certificate, permit or other authority; or

(b) a large fine?

(paragraph 6.32)

82. Should it be possible to provide evidence at an ex parte hearing by means of a written statement rather than an affidavit?

(paragraph 6.39)

83. Should a defendant who pleads guilty in writing and who does not intend to appear at the hearing be given an opportunity to request the court to grant him time to pay any fine which may be imposed?

(paragraph 6.31)

84. In any case, should a defendant be given at least 14 days in which to pay the fine?

(paragraph 6.31)

Onus of proof

85. Should the burden of proof of a defence based on any exemption or exception or proviso placed on a defendant be changed from a legal burden to an evidential burden?

(paragraphs 6.46 to 6.50)

86. Should the legal, or as the case may be evidential, burden be confined to circumstances where -

(i) the prosecution faces extreme difficulty because the defendant is likely to have peculiar knowledge of the facts in issue; or

(ii) proof by the prosecution of a peculiar matter in issue would be extremely difficult or expensive but could be readily and cheaply provided by the defence?

(paragraphs 6.48 to 6.50)

MATTERS ANCILLARY TO THE COURT'S DECISION AND OTHER MATTERS

Recording the court's decision

87. Should the court or clerk of petty sessions be required to draw up orders which are not to be immediately executed or make a minute or memorandum of the decision?

(paragraph 7.4)

88. Should there be an express provision requiring the defendant to be given notice of the penalty imposed?

(paragraph 7.5)

Orders involving imprisonment

89. Should the provision permitting a court to impose a fine where an Act other than the *Justices Act* provides for the imposition of a term of imprisonment be amended to include a provision in the *Justices Act* itself?

(paragraph 7.7)

90. Should this provision also be amended to provide for a fine not exceeding say $1,500 instead of $500?

(paragraph 7.6)

Payment of fine to victim of crime

91. Should section 145 of the *Justices Act*, which provides that justices may order that the fine or part thereof be paid to the victim of an assault, be retained?

(paragraph 7.13)

Payment of fine or penalty

92. Should section 171 of the *Justices Act* and the *Fines and Penalties Appropriation Act 1909* be repealed and replaced with a single provision?

(paragraphs 7.14 and 7.15)

93. Should the period which a clerk of petty sessions must retain a sum paid by way of a fine or penalty before it is paid to any person other than the Crown be extended?

(paragraph 7.16)

Compensation and restitution orders

94. Are the proposals in the Murray Report for amendment of the provisions relating to compensation and restitution orders satisfactory?

(paragraphs 7.19 and 7.20)

Costs

95. Should a scale of costs, allowances and other expenses be provided for Courts of Petty Sessions?

(paragraphs 7.27 and 7.28)

96. Should provision be made for the taxation of costs in Courts of Petty Sessions?

(paragraphs 7.29 and 7.30)

Indictable offences triable summarily

97. Should section 593 of the *Criminal Code*, which provides that a number of procedural provisions of the *Criminal Code* apply to the summary trial of indictable offences in Courts of Petty Sessions, be repealed?

(paragraph 7.31)

Sureties for witnesses and appellants

98. Should Part VI of the *Bail Act 1982* relating to sureties also be applied to sureties for witnesses and appellants?

(paragraph 7.33)

Rules of court

99. Should procedural matters be dealt with in rules rather than in a statute to a greater extent than at present?

(paragraph 7.38)

100. Should a Rules Committee be established to keep the practice, procedure and administration of Courts of Petty Sessions under review and to recommend any changes it considers desirable?

(paragraph 7.39)

SUMMARY PROCEEDINGS AND MENTALLY DISORDERED PERSONS

Fitness to stand trial

101. Should Courts of Petty Sessions have express statutory power to deal with the question of fitness to stand trial?

(paragraph 8.5)

102. How should a defendant be dealt with if he is found to be incapable of understanding the proceedings?

(paragraph 8.6)

103. Should the judicial officer considering the question of fitness to stand trial on account of the defendant's mental condition have power to obtain a psychiatric report?

(paragraph 8.18)

104. If so, should a psychiatric report obtained under such a power be admissible against the defendant at his trial?

(paragraph 8.19)

Section 36 of the Mental Health Act 1962-1979

105. Should the power contained in section 36 of the *Mental Health Act 1962-1979* be retained?

(paragraph 8.12)

The defence of insanity

106. Should there be an express provision to enable a Court of Petty Sessions to record a finding that a person is not guilty under section 27 of the *Criminal Code*?

(paragraph 8.14)

107. What powers should a Court of Petty Sessions have to deal with a person who is found to be not guilty under section 27 of the *Criminal Code*?

(paragraphs 8.15 and 8.16)

INDICTABLE OFFENCES

Entry of plea of guilty

108. Should a defendant be permitted to plead guilty to an indictable offence at his first appearance or at some time before the prosecution is required to produce written statements?

(paragraph 9.15)

109. If so, should this be confined to a defendant who is legally represented and if his counsel has assured the judicial officer that he has explained to the defendant the elements of the offence charged, the consequences of the plea, and that the plea is a considered one?

(paragraph 9.15)

110. In what circumstances should a defendant be permitted to withdraw such a guilty plea when he is before the Supreme Court or District Court for sentencing?

(paragraph 9.16)

Election in relation to an indictable offence triable summarily

111. Should a defendant who elects to have an indictable offence triable summarily dealt with by a trial on indictment be able to change that election so that it may be dealt with summarily, and if so, in what circumstances?

(paragraph 9.17)

Written statements

112. Should the prosecution be required to provide the defendant, before he decides whether or not to have a preliminary hearing, with the written statements of all the witnesses it proposes to call to give oral testimony at the preliminary hearing, should such a hearing be held, as well as those whose statements it intends to tender in evidence at that hearing?

(paragraph 9.11)

113. Should the prosecution be required to provide written statements of or call as witnesses all those people it intends to call at the trial should the defendant be committed for trial?

(paragraph 9.12)

114. Where a defendant is represented by a solicitor, should it be possible to serve the written statements on his solicitor?

(paragraph 9.14)

115. At a preliminary hearing should the judicial officer be empowered to summarise the contents of written statements, so long as the full statement is made available to any member of the public for inspection?

(paragraph 9.21)

116. Should provision be made for the evidence presented at preliminary hearings to be recorded or transcribed as may be done in Victoria?

(paragraph 9.24)

117. Should a statement tendered where no preliminary hearing is held be admissible as evidence before any court of competent jurisdiction to the like extent that a deposition of the person who made the statement would be so admissible?

(paragraph 9.33)

Sufficient evidence

118. Should sections 102 and 105 of the *Justices Act* be amended to provide expressly for the judicial officer to consider at the end of the prosecution case whether or not there is sufficient evidence to put the defendant upon his trial?

(paragraph 9.30)

119. Where the judicial officer finds that there is insufficient evidence to put the defendant on trial, should he be expressly required to record such a finding and, if the defendant is in custody, discharge him?

(paragraphs 9.30 and 9.31)

120. Is the term "sufficient evidence" satisfactory and, if not, what criteria should apply to determining whether a person should be put upon trial?

(paragraph 9.31)

Remands in custody

121. Should the provision for remanding a defendant in custody for eight days be amended and, in particular should -

(a) a distinction be made between defendants serving a custodial sentence and other defendants in the manner referred to in paragraph 9.38 above;
(b) the consent of the defendant and/or prosecutor be required to a remand for a period in excess of eight days;
(c) a remand in excess of eight days be made only where the defendant is legally represented?

(paragraphs 9.34 to 9.44)

Costs

122. Should the court have power to award costs to a defendant where there is insufficient evidence to put him on trial after a preliminary hearing and, if so, in what circumstances?

(paragraphs 9.45 to 9.47)

123. If so, should the *Official Prosecutions (Defendants' Costs) Act 1973-1974* be extended to apply to costs awarded where it is found that there is insufficient evidence to put the defendant on trial?

(paragraph 9.48)

Private prosecutions

124. Should private persons be able to commence proceedings for indictable offences?

(paragraphs 9.49 to 9.51)

125. Should additional limitations on private prosecutions similar to those imposed in Queensland be imposed in Western Australia?

(paragraphs 9.52 and 9.53)

An alternative to the present system

126. Should the existing system be replaced with a system similar to that proposed by the Philips Commission?

(paragraphs 9.54 to 9.57)

127. If a new system were introduced would it be desirable to preserve the opportunity to obtain information from a person who was not prepared to supply it voluntarily or to obtain evidence from a person who is unlikely to be able to attend the trial? If so, how should this be done?

(paragraph 9.58)

PREVENTIVE JURISDICTION

Orders to keep the peace

128. If provision were made for the Family Court of Western Australia to deal with violence within the family situation, should orders to keep the peace be retained to deal with other areas in which there was a need for the prevention of breaches of the peace? If so, is the present legislation satisfactory in this regard?

(paragraph 10.13)

129. In particular -

(a) is the procedure for seeking such orders satisfactory and, if not, how should it be altered?

(paragraphs 10.12 and 10.15)

(b) should other specified persons, as well as the police, be able to apply for an order to keep the peace to protect a child?

(paragraph 10.14(a))

(c) should the penalty for breaching an order to keep the peace include a fine and, if so, what should be the maximum fine?

(paragraph 10.14(b))

Sureties of the peace and sureties for good behaviour

130. Should provision for sureties of the peace and sureties for good behaviour be retained?

(paragraph 10.16)

UNREPRESENTED DEFENDANTS

131. Should the prosecution be required to make a brief statement of case before a plea is entered?

(paragraph 11.25)

132. Should judicial officers be required to provide more assistance to unrepresented defendants?

(paragraph 11.26)

133. Should minimum standards for the treatment of unrepresented defendants be developed and prescribed in legislation?

(paragraph 11.27)

134. Should a pamphlet be prepared to inform defendants of their rights, privileges and court procedure?

(paragraph 11.28)

135. Should a court be required to obtain a pre-sentence report where it contemplates imposing a sentence of imprisonment on an unrepresented defendant?

(paragraph 11.29)

APPENDIX I
THE SECOND SCHEDULE OF THE JUSTICES ACT

Elizabeth the Second, by the Grace of God, etc.
To A.B. of
C.D. of
etc.

First Assignment. - Know Ye, that We have assigned you, and each and every of you, to be, Our Justices to keep Our Peace in [the Magisterial District in] Our State of Western Australia [and its Dependencies], either alone or with anyone or more of Our Justices that hereafter shall be appointed in Our said State and its Dependencies [or the said District], and to keep and to cause to be kept all laws, for the preservation of the Peace, and for the quiet rule and good government of Our people, in Our said State and its Dependencies [or the said District] according to the form and effect of the same, and to punish all persons offending against them, or any of them, in the said State and its Dependencies [or the said District], as by the said laws is provided, and to cause to come before you all persons within Our said State and its Dependencies [or the said District] who use threats to any of Our People, to find security for keeping the peace or for their good behaviour towards US and Our People: And if they refuse to find such security, then to cause them to be safely kept until they find such security:

Second Assignment. - We have also assigned you, and each and every of you, either alone or with anyone or more of such Justices to be appointed as aforesaid, to inquire the truth concerning all manner of crimes, misdemeanours, and offences, concerning which Our Justices of the Peace may lawfully or ought to inquire, by whomsoever and in what manner soever done, perpetrated, or attempted in Our said State and its Dependencies [or the said District]: And upon all complaints before you to issue such process against the persons charged until they are taken or surrender themselves, as may by law be issued.

Third Assignment. - We have also assigned you, and each and every of you, either alone or with anyone or more of such Justices to be appointed as aforesaid, to have, exercise, and discharge all other the powers, authorities, and duties which under or by virtue of any law of Our Realm or of Our said State belong or appertain to the office of Justices of the Peace in or for Our said State.

And therefore We command you and each and every of you that you diligently apply yourselves to keep and cause to be kept the peace and all laws of Our Realm and of Our said State, and that at certain days and places duly appointed for these purposes, you make inquiries into the premises and hear and determine all and singular the matters aforesaid, and perform and fulfil the duties aforesaid, doing therein what is just according to the laws of Our Realm and of Our said State: And we command Our Sheriff and other officers of Our said State to aid you by all lawful means in the performance and due execution of the premises.

In testimony whereof, We have caused these Our Letters to be made Patent, and the Great Seal of Our said State to be hereunto affixed.

Witness Our Trusty and Well-beloved, etc., etc., etc., Governor, etc., at this day of in the year of our Lord one thousand nine hundred and

APPENDIX II

IMPERIAL STATUTES RELATING TO JUSTICES OF THE PEACE*

1327 1 Edw 3, c 16
1330 4 Edw 3, c 2
1344 18 Edw 3, c 2

These statutes provide for the assignment of men to keep the peace. In view of the provisions in the *Justices Act* for the appointment of Justices they could be repealed. These statutes have either been repealed and replaced or repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), ss 5 and 8). The first and third statutes were repealed in Victoria by the *Imperial Acts Application Act 1980-1981*, s5. The second statute was repealed in Victoria by the *Imperial Acts Application Act 1922*, s 7. In the Australian Capital Territory it has been recommended that they be repealed (ACTLRC, 26-27). In South Australia and Papua New Guinea it has been recommended that the first and third statutes be retained (SALRC , 4-5 and O'Regan, 18-19, respectively).

1346 20 Edw 3, c 3

This statute requires those appointed to be justices to take an oath. In view of the provisions in the *Justices Act* relating to the appointment of justices it could be repealed. This statute has been repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7). In South Australia it has been recommended that this statute be repealed (South Australian Law Reform Committee, *Inherited Imperial Law Regarding The Crown* (Report No 65, 1981), 6).

1360 34 Edw 3, c 1

This statute makes provision for the appointment of justices of the peace and for their jurisdiction, including a provision relating to a surety for good behaviour. This provision is still the basis of the power to require sureties for good behaviour in Western Australia together with the common law. If it were not considered to be necessary to retain this provision the whole of this statute could be repealed. In New South Wales this statute has been repealed and replaced with a provision empowering the Governor to appoint justices and empowering justices "to restrain offenders and to take of them or of persons not of good fame surety for their good behaviour" (*Imperial Acts Application Act 1969-1980* (NSW), ss 5, 29 and 30). This statute has been repealed in Victoria (*Imperial Acts Application Act 1980-1981* (Vic), s 5). The power to require a person to give a surety to keep the peace or be of good behaviour has been re-enacted (*Summary Proceedings Act* (Vic), s 150A). In the ACT it has

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* There have been reports in a number of jurisdictions relating to these statutes, as follows -
New South Wales Law Reform Commission, *Application of Imperial Acts* (LRC 4, 1967), hereinafter cited as "NSWLRC".
Law Reform Commission of the Australian Capital Territory, *Imperial Acts in Force in the Australian Capital Territory* (1973), hereinafter cited as "ACTLRC".
R S O'Regan, *English Statutes in Papua New Guinea* (1973), hereinafter cited as "O'Regan".
G Kewley, *The Imperial Acts Application Act 1922* (1974-1975).
Victorian Statute Law Revision Committee, *Imperial Acts Application Act 1922* (1978) and *Imperial Acts Application Bill, Imperial Law Re-enactment Bill and the Constitutional Powers (Requests) Bill* (1979).
Law Reform Committee of South Australia, *Inherited Imperial Statute Law With Regard to Proceedings In Summary Jurisdiction* (Report No 58, 1981), hereinafter cited as "SALRC".

been recommended that this statute be repealed (ACTLRC, 27). In South Australia it has been recommended that this statute be retained because it is the authority for the appointment of justices and the basis of the power to require sureties for good behaviour (SALRC, 5). In Papua New Guinea it has been recommended that this statute be retained (O'Regan, 18-19).

1389 13 Rich 2, c 7

This statute provides for the types of persons to be appointed as justices of the peace. It could be repealed. In South Australia it has been recommended that this statute be repealed (SALRC, 6). It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

1390 14 Rich 2, c 11

This statute provides for the appointment of justices of the peace and for the payment of wages to them. It may not apply in Western Australia. If it does apply, it could be repealed. In South Australia it has been recommended that this statute be repealed (SALRC, 6). It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

1414 2 Hen 5, c 1

This statute deals with the appointment of justices. It may not apply in Western Australia. If it does apply, it could be repealed. In South Australia it has been recommended that this statute be repealed (SALRC, 6). Insofar as it was in force it has been repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

1433 2 Hen 6, c 6

This statute provides that proceedings before justices shall not be discontinued by the issue of a new commission of the peace. It could be repealed but a similar saving provision should perhaps be re-enacted. In South Australia it has been recommended that this statute be repealed but with a saving provision (SALRC, 6). It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

1439 18 Hen 6, c 11

This statute provides that no person shall be assigned to be a justice unless he holds lands or tenements of the value of twenty pounds per annum. It could be repealed. In South Australia it has been recommended that this statute be repealed (SALRC, 6-7). It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

1487 4 Hen 7, c 12

This statute deals with the manner in which justices must execute their commission and provides remedies for people aggrieved by the justices' acts or omissions. It could be repealed. In South Australia it has been recommended that this statute be repealed. It was considered

that the present law adequately covered the matter dealt with by the statute (SALRC, 7). It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

1547 1 Edw 6, c 7, s 4

This section provides that the elevation of a justice to the position of duke, earl etc does not abate his commission. It could be repealed. Its repeal has been recommended in the ACT (ACTLRC, 31). It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repealed in Victoria (*Imperial Acts Application Act 1980-1981* (Vic), s 5).

1553 1 Mary, sess 2, c 8

This statute provides that a sheriff shall not act as a justice during his term of office. It could be repealed. In South Australia it has been recommended that this statute be repealed (SALRC, 7). It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

1732 5 Geo 2, c 18

This statute prescribes qualifications for justices. In South Australia it has been recommended that this statute be repealed (SALRC, 9). It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

1745 18 Geo 2, c 20

This statute provides for the qualifications of justices. In South Australia it has been recommended that this statute be repealed (SALRC, 10). It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

1753 26 Geo 2, c 27
1766 7 Geo 3, c 21
1823 4 Geo 4, c 27

It seems that at the time these statutes were enacted one clause of the Commission of the Peace required that only justices learned in the law should be "of the quorum" and that only those justices should exercise judicial powers. The first statute provides that a warrant should stand though it did not express that the justice who issued it was of the quorum. The second statute provides that acts required to be done by one or more justices of the quorum are valid even though done by justices not of the quorum. Both statutes could be repealed. The third statute allows justices in places having a limited number of justices to act though they are not of the quorum. It could be repealed. It has been recommended that the first statute be repealed in South Australia (SALRC, 11) and the Australian Capital Territory (ACTLRC, 43). These statutes have been repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), s 8). These statutes have been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

1760 1 Geo 3, c 13
1766 7 Geo 3: c 9

Under these statutes justices are relieved from taking oaths on the demise of the Crown. As there is no legislation relating to the demise of the Crown in this State perhaps these statutes should be retained. These statutes have been repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), s 8). It has been recommended in the Australian Capital Territory that the first statute be repealed and replaced with modern legislation (ACTLRC, 43). It has been recommended in South Australia that the first statute be retained until the Committee reports on demise of the Crown legislation (SALRC, 11-12). These statutes have been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

1778 18 Geo 3, c19

This statute deals with the payment of costs to parties, constables and to witnesses in relation to work of justices out of Sessions. It could be repealed. It has been recommended in South Australia that this statute be repealed (SALRC, 12). It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repelled in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

1788 28 Geo 3, c 49 (amended by 18211 & 2 Geo 4, c 63)

This statute provides for justices appointed for one county to act in relation to matters arising in an adjoining county. It may not apply in Western Australia. If it does apply, it could be repealed. In so far as it was in force in New South Wales it was repealed (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

1803 43 Geo 3, c 141

This statute provides protection for justices in the execution of their duty. It has been superseded by sections 222-232 of the Justices Act and could be repealed. It has been recommended in South Australia that this statute be repealed (SALRC, 13-14). It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

APPENDIX III
MISCELLANEOUS IMPERIAL STATUTES

QUARTER SESSIONS

1362 36 Edw 3, c 12

This statute fixes times for holding Quarter Sessions. It could be repealed. In South Australia it has been recommended that this statute be repealed (SALRC, 5). It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

1388 12 Rich 2, c 10

This statute deals with sessions of the peace and in particular Quarter Sessions. It could be repealed. In South Australia it has been recommended that this statute be repealed (SALRC, 5). It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

1694 5 & 6 Will & Mary, c 11 (made perpetual by 1697 8 & 9 Will 3, c 33)

This statute deals with the abuse of the writ of certiorari for the purpose of delaying proceedings at Quarter Sessions. It could be repealed. In South Australia it has been recommended that this statute be repealed but with a saving of the change in the law brought about by the statute (SALRC, 8). It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

1732 5 Geo 2, c 19

This statute deals with Quarter Sessions Appeals. It could be repealed. In the Australian Capital Territory it has been recommended that this statute be repealed (ACTLRC, 40). It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

1814 54 Geo 3, c 84

This statute fixes the time for holding the Michaelmas Quarter Sessions. It may not apply in Western Australia. If it does apply, it could be repealed. Insofar as it was in force in New South Wales it was repealed (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

1819 59 Geo 3, c 28

This statute empowers Courts of Quarter Sessions or General Sessions to form a court to sit apart from them in order to deal with the court's business. It could be repealed. In South Australia it has been recommended that this statute be repealed (SALRC, 14). It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

IMPRISONMENT IN COMMON GAOL

1403 5 Hen 4, c 10

This statute provides that justices are not to imprison other than in a common gaol. It may not apply in Western Australia. If it does apply, it could be repealed. insofar as it was in force in New South Wales it was repealed (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

1413 15 Hen 4, c 10

This statute provides that justices of the peace should not imprison any person except in a common gaol. It could be repealed. In South Australia it has been recommended that this statute be repealed (SALRC, 6). It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

OTHERS

1740 13 Geo 2, c 18, s 5

In an action against a justice of the peace, section 5 places a time limit of six months on an application for certiorari and requires that notice be given to the justices against whose order the writ is sought. Generally the *Rules of the Supreme Court 1971-1984* place a time limit of six months on an application for certiorari (0 56 r 11(1)). It could be repealed. It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

1741 15 Geo 2, c 24

This statute enables justices of a liberty (that is, a market) or corporation to commit offenders to a house of correction. It may not apply in Western Australia. If it does apply, it could be repealed. This statute has been repealed in New South Wales (*Imperial Acts Application Act 1969-1980* (NSW), s 8). This statute has been repealed in Victoria (*Imperial Acts Application Act 1922* (Vic), s 7).

APPENDIX IV

FORM FOR COMPLAINT AND SUMMONS FOR A SIMPLE OFFENCE

Western Australia JUSTICES ACT, 1902 3.-COMPLAINT	**CHARGE BY SUMMONS** **DEPT** **MDL No.** **BRIEF No.** **DATE OF BIRTH**	CHARGE No. COURT OF PETTY SESSIONS PERTH

ORIGINAL

THE COMPLAINT OF

_____ _____
christian names surname

OF: _____ IN THE SAID STATE OF WESTERN AUSTRALIA

OCCUPATION: _____ SWORN (OR MADE) AT _____

THIS_____ DAY OF _____ 19 _____ before the undersigned, one of Her Majesty's Justices of the Peace

for the said State (or the Clerk of Petty Sessions, _____ PERTH _____ in the said State) who says

THAT ON THE _____ DAY OF _____ 19 _____. AT: _____

NAME OF DEFENDANT:
christian names surname

(a) Nature of offence or subject matter

(a):

Section _____ Subsection/Clause _____ Act/Reg/Bylaw_____

Signature of Complainant Signature of J.P. or C.P.S.

NAME OF DEFENDANT:
christian names surname

OF:
no. and street town /locality postcode

to appear in the COURT OF PETTY SESSIONS, 30 ST. GEORGE'S TERRACE PERTH, in the said State

on FLOOR LEVEL NUMBER on THE DAY OF 19 AT O'CLOCK IN THE NOON

Summons signed at **in the said State, on the day and year first mentioned above**

RECORD OF COURT PROCEEDINGS

Adjournments etc:

DEFENDANT Yes REPRESENTED PLEA: Guilty FINDING Proven
PRESENT: No BY: Not Guilty Not Proven

PENALTY: FINE $ DEFAULT: IMPRIS DAYS
COSTS $ EXECUTION CLERK'S RECORD

OTHER ORDER:			
Magistrate (or J.P.)			

Western Australia JUSTICES ACT, 1902 JUSTICES (FORMS) REGULATIONS, 1982 2A. SUMMONS TO THE DEFENDANT UPON COMPLAINANT	**CHARGE BY SUMMONS** **DEPT** **MDL No.** **BRIEF No.** **DATE OF BIRTH**	CHARGE No. COURT OF PETTY SESSIONS PERTH

SERVICE COPY

THE COMPLAINT OF

_____
christian names surname

OF: _____ IN THE SAID STATE OF WESTERN AUSTRALIA

OCCUPATION: _____ SWORN (OR MADE) AT _____

THIS_____ DAY OF _____ 19 _____ before the undersigned, one of Her Majesty's Justices of the Peace

for the said State (or the Clerk of Petty Sessions, _____ PERTH _____ in the said State) who says

THAT ON THE _____ DAY OF _____ 19 _____. AT: _____

NAME OF DEFENDANT:
christian names surname

(a) Nature of offence or subject matter

(a):

Section _____ Subsection/Clause _____ Act/Reg/Bylaw_____

THESE ARE THEREFORE TO COMMAND THE DEFENDANT: _____
christian names surname

OF: _____
no. and street town/locality postcode

to appear in the COURT OF PETTY SESSIONS, 30 ST. GEORGE'S TERRACE PERTH, in the said State

on FLOOR LEVEL NUMBER ____ on THE _____ DAY OF _____ 19 ____AT _____ O'CLOCK IN THE _____ NOON

Summons signed at **in the said State, on the day and year first mentioned above**

Signature of J.P. or C.P.S.

INDORSEMENT OF SERVICE

On the ……. day of ……..19 ……

at ……., I served the within-named …….

……. with the within summons by delivering a duplicate of it to

him personally [or by leaving a duplicate of it for him with ……...

at ……., his last known place of abode].

(Signature)……..

(Date) …….

OR

(Applicable only for offences against Acts, Regulations, Rules, Bylaws or Orders referred to in or prescribed under Section 56A of the Justices Act.)

2. I, the complainant, or a person authorised in writing by the complainant, do hereby certify

that I did on the …….day of ……. 19 ……,

despatch by prepaid registered post numbered…… to

……. at ……

……..

his last known place of residence/business, a duplicate of the within summons.

(Signature)……..

(Date) …….

Western Australia JUSTICES ACT, 1902 JUSTICES (FORMS) REGULATIONS, 1982 2A. SUMMONS TO THE DEFENDANT UPON COMPLAINANT	**CHARGE BY SUMMONS** **DEPT** **MDL No.** **BRIEF No.** **DATE OF BIRTH**	CHARGE No. COURT OF PETTY SESSIONS PERTH

DEFENDANT'S COPY

THE COMPLAINT OF

_____
christian names surname

OF: _____ IN THE SAID STATE OF WESTERN AUSTRALIA

OCCUPATION: _____ SWORN (OR MADE) AT _____

THIS_____ DAY OF _____ 19 _____ before the undersigned, one of Her Majesty's Justices of the Peace

for the said State (or the Clerk of Petty Sessions, _____ PERTH _____ in the said State) who says

THAT ON THE _____ DAY OF _____ 19 _____. AT: _____

NAME OF DEFENDANT:
christian names surname

(a) Nature of offence or subject matter

(a):

Section _____ Subsection/Clause _____ Act/Reg/Bylaw_____

THESE ARE THEREFORE TO COMMAND THE DEFENDANT: _____
christian names surname

OF: _____
no. and street town/locality postcode

to appear in the COURT OF PETTY SESSIONS, 30 ST. GEORGE'S TERRACE PERTH, in the said State

on FLOOR LEVEL NUMBER ____ on THE _____ DAY OF _____ 19 ____AT O'CLOCK IN THE NOON

Summons signed at **in the said State, on the day and year first mentioned above**

Signature of J.P. or C.P.S.

The alternatives open to you are:-

a) To enter a PLEA OF NOT GUILTY by completing the appropriate section on the reverse side of this summons and returning it to the Clerk of Petty Sessions to reach him prior to the hearing date above. (It should be received by the Clerk no later than 3 days prior to that date). If you plead not guilty you do not have to attend Court and your case will be adjourned to a subsequent date when you and your witnesses will be required to attend. You will be advised in writing of the date fixed for hearing.

b) To enter a PLEA OF GUILTY by completing the appropriate section on the reverse side of this summons and returning it to the Clerk of Petty Sessions to reach him prior to the hearing date. (It should be received by the Clerk no later than 3 days prior to that date). There will be no need for you to attend unless you wish to address the Court on mitigation of penalty. You may also forward with the summons any written explanation or other information you believe is relevant to the charge.

c) If you are in doubt as to what action you should take it is suggested that you should seek legal advice from a lawyer or from the Legal Aid Commission.

If you fail to take the action outlined in a) or b) and you fail to appear at Court the complaint against you may be dealt with in your absence. You may be liable for additional costs if witnesses are called by the complainant.

NOTE (a) IT IS YOUR RESPONSIBILITY TO ASCERTAIN ANY PENALTY AND/OR CANCELLATION/SUSPENSION OF LICENCE WHICH MAY BE IMPOSED BY THE COURT AGAINST YOU AT THE TIME AND DATE OF HEARING SHOWN HEREON.

(b) A TERM OF IMPRISONMENT CAN NOT BE IMPOSED BY THE COURT IN YOUR ABSENCE AND IT WOULD BE NECESSARY FOR YOU TO BE BROUGHT BEFORE THE COURT FOR SUCH A SENTENCE TO BE GIVEN.

SECTION A

PLEA OF NOT GUILTY

Should you desire to plead not guilty please endorse this summons in the place provided hereunder "I plead not guilty" and give your address for service of notices, sign and date where indicated and then return to the Court of Petty Sessions mentioned on the front of this form to reach it prior to the hearing date (it should be received by the Court no later than 3 days prior to that date).

NOTE: (1) IF YOU PLEAD NOT GUILTY IN THE MANNER MENTIONED ABOVE THE MATTER WILL NOT PROCEED ON THE DATE SET OUT IN THIS SUMMONS AND IT WILL NOT BE NECESSARY FOR YOU TO ATTEND AT THE COURT. A TIME AND DATE WILL BE APPOINTED BY THE COURT FOR DETERMINATION OF THE MATTER AND YOU WILL RECEIVE REASONABLE NOTICE, IN WRITING, OF THE DATE OF HEARING.

(2) YOU AND YOUR WITNESS WILL BE REQUIRED TO ATTEND THE COURT ON THE DATE NOTIFIED TO YOU FOR HEARING. OTHERWISE THE MATTER MAY BE DEALT WITH IN YOUR ABSENCE ON THAT DATE.

I understand the English language/or these provisions have been explained to me and I understand the plea I am making.

PLEA: _____
(in your own handwriting)

ADDRESS FOR SERVICE OF NOTICES IS: _____

SIGNED: _____

Date: _____

The following information may be provided to assist the Clerk of Petty Sessions in listing your case for hearing.

a) Will you be represented by a lawyer? _____
b) If so, what is his name _____
and his firm's name _____
c) How many witnesses (including yourself) do you propose to call? _____
d) Are there any comments you wish to make regarding a suitable hearing date?

_____

SECTION B

PLEA OF GUILTY

Should you desire to plead guilty to this summons please endorse in the place provided hereunder "I plead guilty", sign and date where indicated and then return it to the Court of Petty Sessions at the Court mentioned on the front of this form to reach it prior to the hearing date (it should be received by the Court no later than 3 days prior to that date). The effect of doing so will be that, unless advice is received by the Court prior to the hearing date that you wish to withdraw the plea, the Court dealing with the complaint may proceed to hear and determine the complaint in your absence as though you were present and had pleaded guilty. You may also forward with the summons any written explanation or any other information you believe is relevant to the charge.

NOTE: (a) IT IS YOUR RESPONSIBILITY TO ASCERTAIN ANY PENALTY AND/OR CANCELLATION/SUSPENSION OF LICENCE THAT MAY BE IMPOSED BY THE COURT AGAINST YOU AT THE TIME AND DATE OF HEARING SHOWN HEREON.

(b) A TERM OF IMPRISONMENT CANNOT BE IMPOSED BY THE COURT IN YOUR ABSENCE AND IT WOULD BE NECESSARY FOR YOU TO BE BROUGHT BEFORE THE COURT FOR SUCH A SENTENCE TO BE GIVEN.

I understand the English language/or these provisions have been explained to me and I understand the plea I am making.

PLEA: _____
(in your own handwriting)

☐ I WILL NOT BE ATTENDING COURT

☐ I WILL BE ATTENDING COURT

(Indicate which)

SIGNED: _____

Date: _____

Western Australia JUSTICES ACT, 1902 JUSTICES (FORMS) REGULATIONS, 1982 2A SUMMONS TO A DEFENDANT UPON COMPLAINT	**CHARGE BY SUMMONS** **DEPT** **MDL No.** **BRIEF No.** **DATE OF BIRTH**	CHARGE No. COURT OF PETTY SESSIONS PERTH

DEFENDANT'S EXTRA COPY

THE COMPLAINT OF

_____
christian names surname

OF: _____ IN THE SAID STATE OF WESTERN AUSTRALIA

OCCUPATION: _____ SWORN (OR MADE) AT _____

THIS_____ DAY OF _____ 19 _____ before the undersigned, one of Her Majesty's Justices of the Peace

for the said State (or the Clerk of Petty Sessions, _____ PERTH _____ in the said State) who says

THAT ON THE _____ DAY OF _____ 19 _____. AT: _____

NAME OF DEFENDANT:
christian names surname

(a) Nature of offence or subject matter

(a):

Section _____ Subsection/Clause _____ Act/Reg/Bylaw_____

THESE ARE THEREFORE TO COMMAND THE DEFENDANT: _____
christian names surname

OF: _____
no. and street town/locality postcode

to appear in the COURT OF PETTY SESSIONS, 30 ST. GEORGE'S TERRACE PERTH, in the said State

on FLOOR LEVEL NUMBER ____ on THE _____ DAY OF _____ 19 ____AT _____ O'CLOCK IN THE _____ NOON