SECTION

3

Evidence

Section 3: Evidence

3.1

Aspects of the Law of Evidence

INTRODUCTION

Considering the law of evidence

The law of evidence governs the reception and use of information in legal proceedings where the arbiter of fact is bound by the rules of evidence.[1]

The law of evidence is best considered as a collection (even a mish-mash) of principles, rules and discretions, which have developed over a number of years and in the light of different rationales.[2]

In considering the law of evidence, the different approach taken in civil and criminal proceedings should also be borne in mind. There are a number of distinguishing features.

Firstly, in criminal proceedings, the law of evidence must be considered in relation to the role of the jury. It has often been said that in some respects the law of evidence requires the jury to undertake an exercise in mental gymnastics (for example, when admitting evidence against one accused, but not a co-accused). Tension also arises because of a concern by judges that, in their decisions on evidentiary matters, they do not usurp the function of the jury.[3]

When considering criminal evidence, the role and use of directions and warnings to the jury should also be considered. In many areas of criminal evidence, directions and warnings are used. In at least one area of the common law (evidence as to identification of an offender) discretions and warnings are used instead of any real exclusionary rules.

A final complicating feature, in relation to criminal evidence, is the importance of a fair trial and the concern to protect the accused from undue prejudice. That concern can manifest itself in rules that keep from the jury evidence

which the public might consider being relevant. Classic examples may include similar fact evidence, and prior convictions generally. It may be asked whether there is an inconsistency between entrusting juries to try cases of the most serious, complicated and technical kind, while at the same time using a number of evidentiary rules which keep material from the jury, because the law (in effect) has decided that juries cannot be trusted to properly use the information they would otherwise receive. Whether for this, or other reasons, the Law Reform Commission of Western Australia ('the Commission') is concerned that there may be an attitude (perhaps prevalent in the community) that the laws of evidence 'conspire' to keep matters from the public in general and juries in particular.[4]

It may be, of course, that these views are misplaced. It may be that an educative exercise needs to be embarked upon, rather than making changes to the laws of evidence. The concern, however, should be borne in mind.

The scope of this topic and matters to be considered

The Commission is conscious of the potential breadth of this topic. A review of the entire law of evidence (or even much of the law of evidence) is beyond the scope of this review. Many entire law reform exercises have related to but one aspect of the law of evidence.[5] Here, the topic forms just one part of a wider review of the civil and criminal justice system.

The Commission is also conscious of the comprehensive review of the law of evidence undertaken by the Australian Law Reform Commission, leading to its interim report,[6] final report[7] and culminating in the *Evidence Act 1995* (Cth).[8] The Commission is also mindful of the fact that attempts to reform the law of evidence (with the notable exception of the work of the Australian Law Reform Commission) have often been piece-meal in nature, and that this should be avoided as much as possible. The Commission does not necessarily agree with the description of one commentator that the law of evidence 'has been added to, subtracted from and tinkered with for two centuries until it has become less of a structure than a pile of builders' debris';[9] but the Commission does accept that wide ranging reform is preferable, where appropriate.

For these reasons, and after consultation, the Commission considers that the following key issues warrant consideration:

1. the existing rule against hearsay, especially in comparison with the Commonwealth *Evidence Act*;
2. the existing rules relating to the admissibility of documentary evidence, especially in comparison with the Commonwealth *Evidence Act*; and
3. the possible repeal of the *Evidence Act 1906* (WA) in favour of the *Evidence Act 1995* (Cth).

In considering these matters, the Commission approaches questions of reform on the basis that the laws of evidence should:

- be designed to assist the substantive law by guiding the fact-finding process;
- be as simple to state, and as easy to apply, as possible;
- be guided by the rationale underpinning the particular rules;
- have some element of flexibility and discretion, in order to be applied to the variety of factual situations which inevitably will arise; and
- in criminal cases, take into account the collective experience and judgment of the jury.

The laws of evidence, the 'truth' and keeping matters from jurors

The last matter mentioned should be expanded upon. As mentioned in the introduction, a key concern in criminal proceedings in an adversarial system is that the rules of evidence may 'conspire' to keep relevant evidence from jurors. Concern is sometimes expressed[10] that the rules of evidence keep juries from getting at the 'truth'.

Two matters often raised in this context are:

1. the perceived benefits of an inquisitorial system; and
2. the approach taken in the adversarial system to evidence of prior convictions and bad character generally.

The issue of getting to the 'truth' can, of course, raise philosophical issues of what truth is and whether criminal trials are an attempt to find the truth, or rather to arrive at a decision which is just. The Commission does not propose to address these matters here. Instead, the Commission wishes to deal with the issue at its most basic level, which is the concern that useful evidence is kept from jurors.

Inquisitorial v adversarial system

A discussion of the inquisitorial (or civilian) approach to the reception of information, as against the adversarial system's use of the law of evidence, is dealt with in sub-section 1.3.

The question of which 'system' encourages the attainment of 'truth' is by no means capable of an easy answer. As discussed in sub-section 1.3,[11] there are a number of arguments either way. One argument is that the inquisitorial system does not have exclusionary rules of evidence, and for that reason may be seen to encourage the greater reception of information, and so a greater likelihood of arriving at the 'truth'. On the other hand, the potential for delay, the absence of a prosecutorial authority as the presenter of the evidence, the general powerlessness of the accused person, and particularly the inability of an accused to cross-examine witnesses, may tend the other way.

Suffice it to say here, the suggestion that a move to an inquisitorial system will increase the likelihood of the 'truth' being arrived at, is by no means free from doubt.

Evidence of bad character

The second area often focussed upon the question of bad character, and particularly prior convictions. Again, a full discussion is beyond the scope of this sub-section, but the issue can briefly be addressed.

The concern often expressed is that jurors are prevented from hearing about an accused's prior convictions, and so prevented from arriving at the 'truth'. Implicit in the criticism is that knowledge of the prior convictions would have assisted the jury in determining whether an accused was guilty or not of the crime with which he or she was charged. The nature of the criticism is often that knowledge of the prior convictions would have enabled the jury more easily to conclude that the accused was in fact guilty of the crime with which he or she was charged.

One justification often advanced for preventing evidence of this kind from going to the jury is that jurors would give excessive weight to the prior convictions.[12] However, a number of arguments to the contrary may be advanced. Firstly, as mentioned in the introduction, jurors have been entrusted to try matters of the most serious and complicated kind. A suggestion that jurors ought not receive some evidence because they would be incapable of properly using it, warrants close scrutiny. Secondly, in other areas, 'dangerous' evidence is admitted, but made the subject of a judicial direction or warning.[13]

However, in the Commission's view, there are a number of misconceptions in this area of the law, which tend to cloud the issues.

The first misconception is that the law of evidence systematically prevents evidence of prior convictions in all cases. This is not so. In fact, evidence of prior convictions is potentially admissible in a number of circumstances, for example, by one co-accused against another co-accused; where an accused puts his or her own character in issue by adducing evidence of his or her own good character; where an accused 'throws away the shield' by his or her attack on the character of prosecution witnesses;[14] where evidence of a prior violent relationship is necessary to prevent the jury from being misled;[15] where the requirements of similar fact evidence are met; or, more generally, in a variety of circumstances where the probative value of the evidence is sufficiently strong.

Any suggestion that evidence of prior convictions or bad character is never permitted, or systematically rejected, is not correct.

The next matter which should be considered is why it is said that precluding evidence of prior convictions, in cases where that does occur, prevents jurors from receiving valuable evidence.

The express (or implied) assertion tends to be that if jurors had been aware of an accused's prior convictions, they would more easily have reached the

conclusion that the accused committed the offence. The validity of this reasoning needs to be scrutinised.

The reasoning, like much if not all reasoning about relevance, is based upon a generalisation.[16] That generalisation, at its simplest, is that:

> A person who once committed a criminal offence is likely to have later committed another criminal offence.

When that underlying generalisation is made clear, the validity of the reasoning is by no means clear. With a little more detail, the generalisation could be expressed as follows:

> A person who has once committed a criminal offence, of whatever kind, for whatever reason, and regardless of when the offence was committed and the stage of that person's life at the time, is likely to have later committed another criminal offence, whether related or not and regardless of the time between the two.

This generalisation illustrates the potential for evidence of this kind to be unhelpful, and even to hinder, rather than aid, the attainment of 'truth'.

For these reasons, the present approach which rejects evidence of prior convictions unless fairness dictates that the evidence should be permitted, or there is a particular reason why the evidence would assist, has much to commend it.

In the Commission's view, the stronger objection to the rules of evidence preventing jurors from receiving useful evidence arises where the law is overly technical and inflexible. The hearsay rule, discussed below, provides one example.

In the Commission's view, an approach which stresses reliability and involves flexibility and discretion, is likely to assist jurors to receive the material which will assist them in performing their function.

For these reasons, the Commission approaches questions of reform on the basis set out above, including the need for flexibility and discretion, and the need to take into account the collective experience and judgment of the jury.

THE RULE AGAINST HEARSAY

Statement of the rule

In Western Australia, the rule against hearsay is largely governed by the common law.[17] The rule against hearsay is an exclusionary rule. It does not arise for consideration unless the evidence is relevant. If the evidence is relevant, it is inadmissible if it is hearsay, unless it falls within one of the recognised exceptions.

Somewhat surprisingly for a rule of such antiquity, the rule against hearsay has never been fully formulated judicially in Australia.[18] At common law the rule has been stated as follows:

> An assertion, other than one made by a witness while testifying in the proceedings, is inadmissible as evidence of any fact asserted.[19]

The rule is often stated, with a little more explanation, as follows:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.[20]

Rationale for the rule

The rationale for the rule has often been stated, and is usually one or of a combination of the following:

1. It is not the best evidence.
2. It is not delivered on oath.
3. The truthfulness and accuracy of the maker of the statement cannot be tested by cross-examination.
4. The light which the demeanour of the maker of the statement would throw on his or her testimony is lost.
5. The hearsay evidence of statements made by a third person is, especially where the third person is not available as a witness, easily fabricated and, even when fabricated, difficult to disprove.
6. The length and cost of legal proceedings could be intolerably increased if evidence of statements made outside the witness box by third persons were generally admissible as evidence of the truth of the matters alleged in them.[21]

In the Commission's view, there are two key rationales. Firstly, the evidence is unreliable because (among other reasons) it has not been tested by cross-examination. Secondly, the absence of cross-examination can lead to a form of procedural unfairness for the party against whom the evidence is sought to be led, because he or she is faced with a statement which can be extremely difficult to challenge in the absence of its maker.[22]

Criticisms of the common law position

The criticisms of the common law rule have been well traversed, and it is not proposed to repeat the criticisms in any detail here. As is said in *Cross on Evidence* at the commencement of examination of the rule:[23]

> The rule against hearsay is one of the oldest, most complex and most confusing of the exclusionary rules of evidence. Lord Reid has said it

> 'is difficult to make any general statement about the law of hearsay which is entirely accurate'.[24] One of the reasons is that its definition and the ambit of exceptions to it, are both unclear. Its exercise often tells against the reception of apparently satisfactory evidence. Objections to it have been said to be based on the far from unattractive fallacy that 'whatever is morally convincing, and whatever reasonable beings would form their judgements and act upon may be submitted to the jury.[25]

Wrongful reception and rejection of evidence

Perhaps the simplest way of encapsulating the criticisms is that the application of the rule (and its exceptions) has been widely considered to lead to the improper reception (or rejection) of evidence in a number of cases, some of which are seen to have led to injustice. The examples are well known and include, among the many: the rejection of evidence of records of engine numbers;[26] the exclusion of evidence of out of court confessions of others to the crime with which the accused is charged;[27] and the rejection of evidence, in cases concerning the supply of drugs, of numerous telephone calls made to the house in question seeking drugs.[28] Moreover, as those examples reveal, the rule can operate (in criminal cases) both to the detriment of the accused and the Crown.

Nor, of course, has Western Australia been immune from the difficulties. The problem of the admissibility of 'third party' confessions, is still resonating today,[29] and more recent examples also exist. Issues such as the admissibility of 'third party' confessions are not easily resolved. On the one hand, evidence that another person has confessed to a crime is clearly evidence which a jury might consider highly probative. On the other hand, there are understandable concerns that if hearsay evidence of this nature could be given, unhelpful and distracting evidence of this kind might often be received in criminal trials.[30] The difficulty here may be the inflexibility of the present approach to this aspect of the hearsay rule which excludes, as a matter of course, evidence of this kind.

Two recent decisions highlight another difficulty inherent in the rule. Both *Perich*[31] and *Clementi*[32] concerned preliminary rulings on the admissibility of relationship evidence between the accused and the deceased. In *Clementi* the accused was charged with murder; in *Perich* with wilful murder. In both cases, in accordance with well known authority, it was held that evidence of a past violent relationship was admissible.[33] However, in both cases, evidence of what the deceased had told others about this issue was ruled inadmissible on the basis that it was hearsay.[34] The difficulty in the strict application of the rule against hearsay to cases such as this, where the maker of the statement is dead — and died allegedly at the accused's hand — is obvious. But, as the law stands in Western Australia, the decisions are correct.

An overly technical approach

A second basic criticism of the rule is that the rationales underpinning it have been forgotten in favour of an overly technical approach both to the rule

itself and to its exceptions. The approach to the *res gestae* exception provides one example. In Australia, at common law, the leading decision remains *Vocisano v Vocisano*.[35] The case concerned a statement made by a person at the scene of and shortly after a road accident, that he was driving the motor vehicle involved. It was held, notwithstanding these matters, that regardless of whether the statement was unlikely to have been concocted, it was the contemporaneous involvement of the speaker at the time the statement was made which was necessary for the application of the exception. It was held that as there was no sufficient contemporaneity the evidence was rightly excluded.[36]

The English approach, based on the decisions in *Ratten v The Queen*[37] and *R v Andrews*[38] stands in stark contrast. In these decisions, the Privy Council and the House of Lords held that approximate but not exact contemporaneity sufficed, as the key was whether the event was so unusual or startling or dramatic as to dominate the thoughts of the speaker, so that the utterance was instinctive, and the possibility of concoction or distortion could be disregarded. In the light of the rationale underpinning the rule, this reasoning is undoubtedly correct. *Vocisano* is an unfortunate example of technicality overriding commonsense reasoning and the rationale behind the rule and the relevant exception.[39]

The inadmissibility of implied assertions

Further difficulties have also arisen because of the common law's approach to implied assertions.

An implied assertion is simply an assertion which implies a fact, although it does not expressly state it. The statements 'Daddy was there' or 'I spoke to Daddy' are express assertions. The statement 'Hello, Daddy' impliedly asserts the same thing.

There were common law cases which supported the admissibility of implied assertions.[40] However, a number of decisions have since made clear that implied assertions are within the scope of the hearsay rule, and so are inadmissible (subject to any exceptions to the rule).[41]

In the Commission's view, there is a difference in principle between express and implied assertions, which favours the admission of implied assertions. That difference is based on the fact that because an implied assertion is less likely to have been intended, and more likely to have been spontaneous, it is also less likely to have been concocted and more likely to be reliable.[42]

It is true that the risks of inaccurate perception, recollection, recall and narration will be present, but those risks are present (at least to some extent) even in relation to non-hearsay evidence, and the person repeating the statement can be challenged about them. What cannot be challenged, of course, is the

truthfulness of the original assertion, but this is of less concern when the assertion was implied, for the reasons mentioned above.

However, there remains a difficulty in relaxing the present law. That difficulty is twofold. Firstly, implied assertions are, by their very nature, potentially ambiguous. It is therefore difficult to adopt a blanket exclusionary or inclusionary approach. Some flexibility is needed. The second difficulty is, that while express assertions remain subject to exclusion under the hearsay rule, great practical difficulties would be created in then adopting a different approach to implied assertions. With express assertions prima facie inadmissible but implied assertions admissible, technical arguments about which of the two existed in any case would abound. As Mason CJ said in *Walton,* such an approach 'would lend itself to artificial and confusing distinctions',[43] and would do so in an area where quite enough of both already exist.[44]

However, if the rule against hearsay in relation to express assertions was relaxed, it would then be both opportune and advisable for implied assertions to be admitted, where appropriate.

The lack of trust in jurors

A further basic difficulty with the rule (in criminal proceedings) is that it can appear to be based upon distrust of juries, or at least give jurors little credit for commonsense. Jurors are likely quite often to conduct their day to day affairs on the basis of hearsay. Now, undoubtedly, the basis on which those day to day affairs are conducted should not necessarily suffice in a court of law. The point remains, however, that the use of hearsay evidence is hardly something beyond the realm of experience of the juror, let alone the collective experience of the jury. As Toohey J said in *Pollitt v The Queen:*[45]

> If applied rigidly, the rule can assume an unreality which gives little credit to the common sense of juries.[46]

The move towards reform

The High Court indicated in a succession of cases that a more flexible approach might be appropriate in relation to the hearsay rule.[47] However the High Court also made clear in *Bannon v The Queen*[48] that a cautious approach would be taken to any significant changes to the common law, and, in particular, the move towards the reception of hearsay evidence on the basis that it was necessary and reliable.[49] It was also made clear that although such a move might be beneficial, further care should be taken in light of the fact that the legislature was implementing its own reforms (in the Commonwealth *Evidence Act*).[50]

The overwhelming majority of submissions supported reform,[51] the area is ripe for reform and the opportunity should be taken.

The hearsay reforms implemented by the Commonwealth Evidence Act

The Commonwealth *Evidence Act* substantially reformed the common law relating to hearsay.[52] The changes are well known and have been examined in detail elsewhere, including by reference to the common law in Western Australia.[53] In short, the Commonwealth *Evidence Act* retained the basic approach of the common law, whereby hearsay is excluded, subject to exceptions.[54] However, the rule against hearsay has been substantially relaxed, and the exceptions to the rule rationalised.[55]

Many of the major problems identified in the operation of the common law have also been rectified. Unintended implied assertions are not caught by the hearsay rule;[56] the difficulty in *Myers v DPP* has been overcome;[57] third party confessions may be admitted where appropriate;[58] technicality is reduced[59] and the approach accepts that juries are capable of dealing with evidence of this kind.[60] The problems encountered in receiving evidence of assertions made by a deceased as to a violent relationship should also be overcome, in appropriate circumstances.[61] The changes are also based upon the key rationales underpinning the rule against hearsay — namely reliability, and the importance of the evidence being tested where possible.[62]

Fundamental (and appropriate) distinctions are also drawn between first and second hand hearsay and between civil and criminal proceedings.[63] Necessary safe guards are also provided for in the form of discretions,[64] warnings[65] and in provisions requiring notice to be given to the other party.[66]

This is not to say that the Commission has had no reservations about the changes to the hearsay rule, particularly those relating to prior inconsistent statements[67] and to the law relating to expert evidence.[68]

The Commission was concerned that by virtue of section 60 of the Act, prior inconsistent statements may be adduced as evidence of the truth of what was then said. That would be a considerable change to the common law position and one with which the Commission would have some difficulty. However, the decision of the High Court in *Lee v The Queen*[69] has provided welcome clarification.

The second area in which the Commission has had (and to some extent still has) reservations is in the area of expert evidence, and in particular, the factual material on which expert evidence is based.

The basis for expert opinion should be expressly stated and, where factual in nature, should be able to be tested.[70]

The Commission has some concerns that the combined application of sections 60, 76 and 77 of the *Evidence Act* may potentially detract from this position,[71] and the recent decision of the Full Federal Court in *Quick v Stoland Pty Ltd*[72] would appear to confirm this view.[73] The Commission also notes, however,

that practically speaking, parties are likely to adduce and prove by direct evidence (where possible) the factual basis for any expert opinion, amongst other things due to considerations of the weight to be attached to that evidence. The Commission is also mindful that discretions are available in relation to the reception of any evidence of this kind.[74]

Summary of the Commission's views

Subject to the above concerns, in the Commission's view the reforms to the law relating to hearsay brought about by the Commonwealth *Evidence Act* are appropriate, and a considerable improvement on the existing common law in this State.

Further consideration should be given to the effects of the reforms to hearsay brought about by the Commonwealth *Evidence Act*, particularly in relation to expert evidence.

In drafting any new Evidence Act, the provisions of the Commonwealth *Evidence Act* relating to hearsay should be adopted as substantially as is appropriate following the review.

DOCUMENTARY EVIDENCE

The importance of reforming the law regarding the admissibility of documents should not be underestimated.

The importance of documentary evidence

As Sir Harry Gibbs has said:[75]

> The view which Jeremy Bentham expressed in his *Treatise on Judicial Evidence* that 'it is obvious that oral testimony has a great superiority over written testimony' has gone the way of many other 19th Century attitudes. Nowadays no judge or jury will be likely to regard the statements in a document as inferior to the oral testimony; on the contrary, in many cases, a document will thankfully be accepted as providing that solution to the resolution of conflicting evidence which observation of the demeanour of the witness by itself could not provide. Such reliance upon documentary evidence is not irrational, for given honesty in its original preparation, a document has, comparatively, qualities of permanence and immutability which tend to render it more reliable than oral evidence. At the same time technological change has led to a great increase in the number and variety of documents used in connection with business, commercial and legal transactions. Modern inventions, such as computers and word processors, by replacing human effort, have made it so much easier to produce more and longer documents that they are produced liberally and sometimes indiscriminately, and often in forms unknown until quite recently - telexes, faxed documents, tapes, computer disks and so on. As an obvious consequence, the law of evidence, in its application to documents, has assumed an increasing practical importance, particularly in civil, but also in criminal cases;

and further:

> One hope for reducing the length and cost of trials (both criminal and civil) lies in the judicious use of documentary evidence. The employment

> (where possible) of documentary rather than oral evidence, the proper marshalling of the documentary evidence and the prompt production and admission of relevant documents can do much to reduce the length of a trial, particularly in civil commercial cases and criminal cases involving fraud, but to a greater or lesser extent in all cases.

The Commission entirely agrees.

The provisions of the WA Evidence Act

A number of provisions of the Western Australian *Evidence Act* are designed to facilitate the admission of documents into evidence, notably, section 79C[76] which provides:

> (1) subject to sub-section (2), in any proceedings where direct oral evidence of a fact or opinion would be admissible, any statement in a document and tending to establish the fact or opinion shall, on production of the document, be admissible as evidence of that fact or opinion if the statement —
>
> (a) was made by a qualified person; or
>
> (b) directly or indirectly reproduces or is derived from one or other or both of the following-
>
> (i) information in one or more statements, each made by a qualified person;
>
> (ii) information from one or more devices designed for, and used for the purpose of recording, measuring, counting or identifying information, not being information based on a statement made by any person;
>
> (2) where a statement referred to in sub section (1) is made by a qualified person or reproduces or is derived from information in a statement made by a qualified person, that person must be called as a witness unless –
>
> (a) he is dead;
>
> (b) he is unfit by reason of his bodily or mental condition to attend or give evidence as a witness;
>
> (c) he is out of the State and it is not reasonably practicable to secure his attendance;
>
> (d) all reasonable efforts to identify or find him have been made without success;
>
> (e) no party to the proceedings who would have the right to cross-examine him requires him to be called as a witness;
>
> (f) having regard to the time which has elapsed since he made the statement and all the circumstances, he cannot reasonably be expected to have any recollection of the matters dealt with in the statement;
>
> (g) having regard to all the circumstances of the case, undue delay, inconvenience or expense would be caused by calling him as a witness; or
>
> (h) he refuses to give evidence.
>
> (3) This section makes a statement admissible notwithstanding –
>
> (a) the rules against hearsay;

(b) the rules against secondary evidence of the contents of a document;
(c) that the person who made the statement or the person who made a statement from which the information in a statement is reproduced or derived is a witness in the proceedings, whether or not he gives evidence consistent or inconsistent with a statement; or
(d) that the statement is in such a form that it would not be admissible if given as oral evidence, but does not make admissible a statement which is otherwise inadmissible.

(4) Notwithstanding sub sections (1) and (2) in any criminal proceedings a statement in a document which was made in the course of or for the purpose of:
(a) the investigation of facts constituting or being constituents of the alleged offence being dealt with in the proceedings;
(b) an investigation which lead to the discovery of facts constituting or being constituents of the alleged offence;
(c) the preparation of a defence to a charge for any offence; or
(d) the preparation of the case of the prosecution in respect of any offence,
shall not be rendered admissible as evidence by this section.

(5) For the purposes of this section a court may-
(a) for the purpose of deciding whether or not a statement is admissible as evidence, draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances;
(b) in deciding whether or not a person is fit to attend or give evidence as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner;
(c) for the purposes of this section a court may, in its discretion, reject a statement notwithstanding that the requirements of this section are satisfied with respect thereto, if the court is of the opinion that the probative value of the statement is outweighed by the consideration that its admission or the determination of its admissibility –
(i) may necessitate undue consumption of time; or
(ii) may create undue prejudice, confuse the issues, or in proceedings with a jury mislead the jury.

Further provisions relate to the weight then to be attached to a statement rendered admissible by section 79C and other matters.[77]

Section 79C was a valuable attempt at simplifying the rules relating to documentary evidence.

However, difficulties have remained. That an academic record could be inadmissible,[78] and that as recently as last year, issues could arise in a criminal

trial as to the admissibility of prison records as to visitors to a prison[79] are illustrative of some of the difficulties. The decision in *Connell v The Queen (No. 6)* [80] provides further testimony to the difficulties created in cases based largely on documentary evidence, where section 79C and its related provisions are to be relied upon. Were it not for the approach taken to section 79C in *Connell* the provision would be entirely unworkable.[81]

Even as they stand, however, the provisions have still been the subject of considerable criticism.[82]

It has been pointed out on numerous occasions that there are no specific provisions in Western Australia relating to business records generally, and that this is most unsatisfactory.[83] The provisions that do exist are inferior to the then Part IIIA of the *Evidence Act 1905* (Cth) — which itself has been significantly improved by the *Evidence Act 1995* (Cth).

In comparing section 79C with Part IIIA of the *Evidence Act*, KJ Martin QC had this to say:

> In practical terms [section 7(b) of the *Commonwealth Evidence Act 1905*] greatly reduces the burden of formality of proof, in relation to the admission into evidence of statements in civil cases in the Federal Court. It is not uncommon in New South Wales, (where the same regime applies) and the Federal Court, to see a case commenced with subpoenas duces tecum issued to business entities being called on and answered. This is followed by the required business documents and files being produced, and counsel immediately tendering the subpoenaed documents as provided (strictly it is the statements therein), because on their face, they clearly satisfy the test of being a record of a business, in accordance with the provisions of section 7(b). This can all occur in rapid fire fashion.... By way of contrast, section 79C of the *WA Evidence Act*, following the English model, is pedestrian in comparison.[84]

The Commission endorses these views, and considers that they apply, at least equally (if not more so) in comparing the Western Australia provisions with the Commonwealth *Evidence Act.*

The relevant provisions in the Commonwealth *Evidence Act* make further improvements,[85] which have been examined elsewhere.[86] However, a number of specific advantages should be mentioned, including the abolition of the original evidence rule[87] that copies, transcripts, computer generated records, extracts of business records and copies of public documents are admissible to prove their contents[88] and that photocopies and faxes are presumed to be authentic by sections 146 and 147 unless there is sufficient evidence to raise a doubt about this presumption. The pre-conditions to the admissibility of representations in business records have also been greatly simplified.[89] Amongst other things, there is no 'qualified person' requirement.

A number of safeguards are also provided, including a request process where a party may request that a person who has been concerned with the production or maintenance of a document be called. Where reasonable requests are not complied with, it is open to the court to order that the evidence not be admitted.[90]

It is unnecessary to consider the Commonwealth Act in any further detail. Its predecessor was clearly preferable to the applicable provisions in Western Australia, and the Commonwealth *Evidence Act* makes a number of further procedural and substantive improvements.

Proposal

The law of evidence in Western Australia, insofar as it relates to documentary evidence, should be based as substantially as possible on the provisions of the Commonwealth *Evidence Act 1995,* subject to the following proposal.

In the Commission's view, it is possible for one further improvement to be made. That relates to the admissibility of documents which have been discovered, as dealt with in sub-section 2.6 dealing with discovery and interrogatories.

In particular, where documents have been discovered, so that the parties have had an opportunity to consider them, there seems no reason in principle or practice why, as a general rule, the documents cannot then automatically be tendered into evidence.

Proposals

The rules of evidence and/or procedure should be amended so that discovered documents may automatically be tendered into evidence, unless the authenticity of the document is disputed.

The operation of the relevant provisions of any new *Evidence Act* to the admissibility of documents should be subject to this requirement.

WHETHER THE WA EVIDENCE ACT SHOULD BE REPEALED IN FAVOUR OF THE COMMONWEALTH EVIDENCE ACT

The Western Australian *Evidence Act* came into existence in 1906, and has been the subject of a number of ad hoc amendments since then. Even a cursory examination of the Act will reveal that there are a wealth of evidentiary principles not provided for within it. Nor has it been the subject of a systematic review since its inception.[91] In contrast, the Commonwealth *Evidence Act* was the culmination of an extensive period of consultation and review of the

Australian laws of evidence. As Justice Smith (who was intimately involved in the process) has written:

> There can be few pieces of legislation that have undergone such an exhaustive preparation and consideration.[92]

A number of submissions were also made which supported the replacement of the Western Australian *Evidence Act* with the Commonwealth *Evidence Act* provisions.[93]

In the Commission's view, there are considerable advantages in this State now adopting the provisions of the Commonwealth *Evidence Act*. These advantages include those flowing from improvements made in the Commonwealth *Evidence Act* (for example, regarding hearsay and documentary evidence as outlined above) but also from codification and greater uniformity.

A summary of differences between WA law and the Commonwealth Evidence Act

While a full review of the differences is beyond the scope of this sub-section, the following aspects of the Commonwealth *Evidence Act* warrant mention:[94]

- A witness attempting to refresh his or her memory does not necessarily have to use a document made when the events were 'fresh in his or her memory'.[95]

  Lengthy delays often occur prior to trial. If a witness can be assisted in correctly recollecting events, it is appropriate that this occurs — both in fairness to the witness and in order to assist the arbiter of fact. In circumstances where the witness's recollection and the basis of that recollection can also be tested in cross-examination, there appears little justification for the strictness of the traditional approach.

- The rule in *Walker v Walker*[96] (requiring the tender of documents 'called for') is abolished.[97]

  The rule provides that, generally speaking,[98] if a party questioning a witness calls for a document to be produced, and the document is produced, the opposing party may tender the document, as evidence of the truth. Calling for documents is a legitimate tactic in testing the evidence of a witness in cross-examination. The rule in *Walker v Walker* discourages this appropriate testing of evidence, and was ripe for reform.

- Cross-examination of a party's own witness is permitted if the witness gives 'unfavourable' evidence (based upon, but not the same as, the common law regarding 'hostile' witnesses).[99]

  This topic is dealt with in sub-section 3.2: 'Curtailing Irrelevant or Unduly Protracted Cross-Examination and Testimony'. The change is appropriate,

but the Commission also poses the question whether, in limited circumstances, parties could invite the judge to call a witness and permit each party to cross-examine.

- A trial judge may disallow leading questions in cross-examination in appropriate circumstances.[100]

  This discretion appears appropriate, amongst other things, where there are vulnerable witnesses who are likely to agree in cross-examination to leading questions even if the propositions being put are not correct.[101]

- The 'original documents' rule for proving the contents of documents is abolished, and replaced by a more flexible system.[102]

- The hearsay rule is substantially modified in both civil and criminal proceedings.[103]

- The 'ultimate issue' and 'common knowledge' rules in respect of opinion evidence are abolished.[104]

  The ultimate issue rule prevented expert witnesses from giving opinions about the very issue upon which the court was called to decide.[105] The rule invited arid and technical debate about whether evidence was or was not within the rule.[106] It also led to tribunals of fact not receiving the full assistance of the opinion which the expert could give. In circumstances where the opinion can be tested, and the ultimate decision remains with the tribunal, it is difficult to see why a duly qualified expert should not be permitted to give a complete opinion.

  The common knowledge rule was that expert evidence was not admissible if the matter was one of common knowledge. The attempt to confine expert evidence in this way is understandable and can be seen, in jury cases, as an attempt to respect jurors' collective experience and judgment. At the same time, there were apparent conflicts in the decided cases about what was or was not a matter which justified expert evidence.[107] In any case, any evidence will be tested by jurors in light of their experience and common sense. Further, if the evidence truly is a matter of common knowledge, it can be dealt with by admission,[108] may be accepted on judicial notice, and may not need to be the subject of evidence in any event.

- 'Tendency and coincidence' evidence (the new names for 'propensity' and 'similar fact' evidence) is not admissible unless it has 'significant probative value' and notice is given,[109] and cross-examination regarding a matter relevant only to credibility is only permissible if it has 'substantial probative value'.[110]

  These matters were discussed above, in dealing with the concern that the laws of evidence may prevent the jury from getting at the truth. The

point was made that the problem is not so much the product of these rules, but rather other technical rules which adopt an inflexible approach and ignore the reliability and proposed use of the evidence.

These provisions make clear the importance of reliability and the usefulness of the evidence, and appear appropriate. The Commission is not without some reservations about the provisions, if they are intended to broaden the circumstances in which evidence of this kind is admitted. However, it has been suggested that this is not the case.[111] This matter should be clarified in any new Evidence Act. Similarly, the present coincidence rule, while essentially sound, could usefully be clarified in any new Act.[112]

- In practical terms, the 'finality' rule for cross-examination of collateral matters is abolished.[113]

  The collateral evidence rule is to the effect that, generally speaking[114] answers to questions put in cross-examination about collateral matters must be taken as final.

  The rule is a sensible one based on the pragmatic desire to limit excessive cross-examination about minor issues.[115] It is also arguably necessary in light of the breadth of the inclusionary approach to the reception of evidence based on relevance. Any significant move away from the rule would need to be carefully considered. However, the provision in the Commonwealth *Evidence Act* confines the matters to which questions can be directed to, and confines them to matters about which further questions ought ordinarily be permitted.[116] The general discretions in the Act, including the discretion to exclude evidence if it might cause or result in undue waste of time will also apply.[117]

- It is made clear that the test for legal professional privilege is a dominant purpose test.[118]

  The change from a sole purpose test to a 'dominant purpose' test is supported. The sole purpose test[119] is unnecessarily strict and the rationale for the privilege — which is the proper functioning of the legal system and the importance of freedom of communication between legal advisers and their clients — is met by a dominant purpose test.

  However, two matters merit further consideration. The first is the position in relation to communications with third parties for the purpose of obtaining legal advice where litigation was not pending or anticipated. Under the Commonwealth *Evidence Act* these communications would not be privileged. In principle, it is at least arguable that legal professional privilege should extend to these circumstances.[120] The second matter is in relation to the correct test for legal professional privilege at the discovery stage. There has been a difference of authority on this point in relation to the

Commonwealth *Evidence Act* provisions. In *Adelaide Steamship v Spalvins*[121] the Full Court of the Federal Court unanimously held that the correct test at the discovery stage was a 'dominant purpose test' in light of the Commonwealth *Evidence Act* provisions. However, late last year, in *Esso Australia Resources v Commissioner of Taxation*[122] a Full Court (of five judges) of the Federal Court held by a 3/2 majority that the correct test for claiming legal professional privilege in relation to the production of discovered documents was the sole purpose test. The court also held that while there was power pursuant to the *Federal Court Rules*[123] to make an order excluding discovered documents from production on the basis that the documents met the dominant purpose test set out in the Act, to exclude from production the documents on the sole basis that they met the dominant purpose test would not be a proper exercise of the power.

Logic, principle and pragmatism suggest that the test for legal professional privilege should be the same throughout the legal process. Any provision in parallel legislation in this State should make clear that the dominant purpose test or the sole purpose test applies at each stage.

- The admission of computer produced evidence is facilitated.[124]

- Various procedural safeguards are included, particularly as to the giving of notice, for example, in relation to documentary evidence, hearsay and tendency and coincidence evidence (propensity and similar fact evidence).[125]

- A number of new discretions are created which include consideration of the necessity of the evidence and the efficiency of proceedings.[126]

- It is possible for the rules of evidence to be waived in appropriate circumstances, including by consideration of unnecessary expense and delay.[127]

Important changes are also made in relation to criminal proceedings, including:

- The trial judge may comment on a failure by the defendant to give evidence (but the comment 'must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned');[128]

  This provision operates only to allow uncontradicted evidence to be more easily accepted than contradicted evidence and rational explanations of evidence within the knowledge of the defendants, but not given by the defendant, to be more easily discarded.

  A discussion of the right to silence is dealt with in sub-section 4.2.

- The voluntariness rule of admissibility of confessions is abolished, replaced by provisions which focus on extreme misconduct,[129] reliability,[130] fairness[131] and 'improperly or illegally obtained evidence';[132]

  The voluntariness aspect of the common law rules of evidence is largely replaced by sections 84, 85 and 90. The Commission's view is that there is little impact in this change.

- Where a defendant adduces evidence of good character in a 'particular respect' the prosecution may only rebut that evidence with evidence of bad character in that respect;[133]

  At first blush, this provision appears to lead to potential unfairness in that an accused may compartmentalise his or her character and so obtain the benefit of evidence of some good character, without putting his or her own character in issue. The Commission's view is that any parallel legislation in this State should not allow an accused to give any evidence of good character without putting his or her general character in issue.

- Identification evidence is not admissible unless an identification parade is held (with various exceptions, including where it was reasonable not to have held such a parade)[134]

  This approach is a welcome improvement to the common law. The common law approach was, in essence, to allow evidence of any kind of identification, subject to warnings and directions.[135] At the same time, however, the common law made clear its preference for identification parades as the preferred means of identification.[136]

  There was a certain incongruousness between these two positions, which made the area appropriate for reform. Providing that identification evidence should generally be by identification parade, appears to the Commission to be entirely appropriate.[137]

- Corroboration requirements are abolished, replaced by a warning procedure for 'evidence of a kind that may be unreliable'.[138]

  The factors singled out in section 165 as requiring a corroboration warning are likely to be contentious. It should be remembered on the one hand that the trial judge retains a discretion as to whether to give the warning in any case[139] but on the other hand that the factors listed are not exclusive.[140]

  One of the listed factors is unsigned records of interview.[141] In Western Australia, there is a regime by which evidence of any admission by an accused person in relation to a serious offence shall not be admissible unless it was recorded on videotape, or there is a reasonable excuse or exceptional circumstances.[142] This requirement is preferable to permitting confessions to be recorded in writing subject only to the possibility of a

discretionary corroboration warning. However, where unsigned interviews are relied upon, the existence of a discretionary warning may be appropriate.

The Commission is reluctant to support any requirement that a corroboration warning be given in the case of complainants in sexual assault cases and particularly in relation to the evidence of children in sexual assault cases.[143] It should also be made clear that no warning should be given in relation to any failure to make a complaint, or recent complaint, in sexual offence cases.[144] Because section 165 of the Commonwealth *Evidence Act* is not exclusive, warnings are at least potentially available in relation to each of these matters, and the age of the witness is specifically referred to in section 165(1)(c).

In the Commission's view it should be made clear in any parallel legislation that there should be no corroboration warning in any of these circumstances.

Other advantages of the Commonwealth Evidence Act over the WA Evidence Act (and law)

The following appear to be clear advantages in favour of the *Commonwealth Evidence Act*:

1. It is more comprehensive.
2. It was drafted in light of an overriding policy framework which included concerns as to expedition and cost.[145]
3. It contains a number of considerable improvements to the law of evidence, including those relating to hearsay, documentary evidence and the taking of evidence generally.
4. It recognises the significance of the use to which the evidence may be put.[146]
5. It acknowledges, and seeks to benefit from, modern advances in technology.[147]
6. It contains a number of useful discretions.[148]
7. It seeks to reduce surprise in litigation by providing for the giving of notice in various circumstances.[149]
8. It provides for the rules of evidence to be waived in appropriate circumstances.[150]

The valuable general discretions to exclude evidence, and to limit the use of evidence include:

Section 135

> The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:
> (a) be unfairly prejudicial to a party; or
> (b) be misleading or confusing; or
> (c) cause or result in undue waste of time.[151]

Section 136

> The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:
> (a) be unfairly prejudicial to a party; or
> (b) be misleading or confusing.

As mentioned, there is also a potentially useful provision relating to the waiver of rules of evidence in appropriate circumstances:

Section 190(1)

> The court may, if the parties consent, by order dispense with the application of any one or more of the provisions of any one or more of:
> (a) Division 3 [general rules about giving evidence], 4 [examination in chief and re-examination] or 5 [cross-examination] of Part 2.1; or
> (b) Part 2.2 [documents] or 2.3 [other evidence – including 'views']; or
> (c) Parts 3.2 to 3.8 [hearsay; opinion; admissions; evidence of judgments and convictions, tendency and coincidence; credibility; and character],[152]
> in relation to particular evidence or generally.

Section 190(2)

> In a criminal proceeding, a defendant's consent is not effective for the purpose of subsection (1) unless:
> (a) the defendant has been advised to do so by his or her lawyer; or
> (b) the court is satisfied that the defendant understands the consequences of giving the consent.

Section 190(3)

> In a civil proceeding, the court may order that any one or more of the provisions mentioned in subsection (1) do not apply to evidence if:
> (a) the matter to which the evidence relates is not genuinely in dispute; or
> (b) the application of those provisions would cause or involve unnecessary expense or delay.

Section 190(4)

> Without limiting the matters that the court may take into account in deciding whether to exercise the power conferred by subsection (3), it is to take into account:
> (a) the importance of the evidence in the proceeding; and
> (b) the nature of the cause of action or defence and the nature of the subject matter of the proceedings; and
> (c) the probative value of the evidence; and
> (d) the powers of the court, if any, to adjourn the hearing to make another order or to give a direction in relation to the evidence.

These discretions, and the ability to waive the operation of some of the rules of evidence, are substantial additional favourable features of the Act over the common law.

Returning, then, to the Commission's approach to the reform of the law of evidence, the Commonwealth *Evidence Act*:

1. is designed to assist the fact finding process;
2. is simply stated and as easy to apply as could reasonably be hoped for;
3. is guided by (appropriate) rationales which are stated;
4. is capable of appropriately flexible operation, including providing for the use of discretions and waiver of the rules; and
5. in criminal cases, takes into account the collective experience and judgment of the jury.

In the Commission's view, adoption of the provisions of the Commonwealth *Evidence Act* would be likely to result in proceedings which were less expensive and more efficient, but no less likely to produce a just result. It would also bring with it the advantages of (substantial) codification and increased uniformity.

The additional avantage of codification

It is acknowledged that even the Commonwealth *Evidence Act* is not a 'codification' in the strict sense in that it does not cover the entire field of the subject legislated upon, so as to be an exclusive and self-contained source of the relevant law.[153] However, it is clear that the Act contains much of the law, and certainly far more of the law than does the Western Australian *Evidence Act*. As Justice Smith has stated:

> In a practical sense the Act will operate as a code. Thus, in dealing with evidentiary problems in the relevant courts, it will be necessary to look to the statute for the answer. It will not be relevant to look to the common law and prior statute law (and to cases interpreting those statutes) unless the previous law has not been changed, or to do so would assist to understand the changes that have been made or terminology employed. The experience of the US Federal Rules (of Evidence) suggest that the Act will become a 'pocket bible' and the law, therefore, more accessible.[154]

This code-like quality brings with it a number of advantages.[155] They include making the law easier to administer and increasing the likelihood that it is internally consistent.

The additional advantage of greater uniformity

In modern society with its ease of transportation and communication, and its incidence of national and multi-national corporations, different procedural rules between one State of Australia and another should also be avoided. This is all the more so in Australia in light of the likely existence of cross-vesting legislation.[156]

Even as matters presently stand it is sometimes open for the same case to be heard in the State courts of Western Australia or the Federal Court of Australia sitting at Perth. Litigants will sometimes have a choice as to where to institute proceedings. On other occasions, that decision will be made for them by the court.[157] Further problems can arise when civil proceedings are commenced first, and criminal proceedings follow.[158] It is grossly inefficient for what is essentially the same case, being conducted in the same State, to be prepared and conducted under two different evidentiary regimes.

With the growth of reciprocal admissions of legal practitioners between jurisdictions, and the increasing mobility of lawyers within Australia generally, greater uniformity in the laws of evidence between States also has distinct advantages.

Since the introduction of the Commonwealth and New South Wales *Evidence Acts*, a substantial body of case law has also arisen which illustrates the application of the provisions, provides further insight into the scheme and operation of the Act, and will further assist any implementation of like provisions in this State.[159]

Retaining beneficial local laws

In the light of the wide-ranging nature of the changes made by the Commonwealth *Evidence Act*, it is unlikely that each and every change will be seen as an improvement to the existing law in Western Australia.[160] Nor is it to be expected (or has it been achieved) that each and every provision of the Western Australian *Evidence Act* (or other relevant legislation[161]) has found a place in the Commonwealth *Evidence Act*. Some beneficial local provisions do not have counterparts in the Act.

One example is the special provisions in the Western Australian *Evidence Act* relating to the evidence of children and special witnesses.[162] These provisions were introduced by the *Acts Amendment (Evidence of Children and Others) Act 1992* (WA), which was based on the recommendations of the Commission.[163]

The Act introduced a new competency test; abolished corroboration requirements and warnings for child witnesses; provided for the use of closed-circuit television, screens and video-taped evidence; and legislated for support persons, child communicators and the cross-examination of child complainants by unrepresented accused. The *Justices Act 1902* (WA) was also amended to limit the circumstances in which children could be called to give evidence and be cross-examined at preliminary hearings.[164]

It may be argued that section 26 of the Commonwealth *Evidence Act* (relating to the court's control over the questioning of witnesses) or section 11 of the Commonwealth *Evidence Act* (relating to the general power of the court to control the conduct of a proceeding) would enable these provisions to be

given effect, but the position is far from clear and the specificity of the Western Australian provisions is preferable.

Another example is the specific protection afforded to complainants in sexual assault cases by virtue of section 36A of the Western Australian *Evidence Act* and following. Again it could be argued that sections 41 and 103 of the Commonwealth *Evidence Act* could be used to achieve the same result, but again the Western Australian provisions seem preferable.

However, the Commission is of the view that the majority of the changes made by the Commonwealth Act are positive and that for this reason, and the reasons of substantial codification and uniformity outlined above, Western Australia should enact parallel legislation.

Proposals

Parliamentary counsel should review the Commonwealth *Evidence Act*, the Western Australian *Evidence Act* and related Western Australian legislation.[165]

Parliamentary counsel should draft legislation based as substantially as possible on the Commonwealth *Evidence Act*, while retaining positive features of the law of evidence of Western Australia.

The *Evidence Act 1906* (WA) should be replaced by an Act as substantially in accordance with the *Evidence Act 1995* (Cth) as possible, but retaining any positive features of the law of evidence of Western Australia.

Following that process, the *Evidence Act 1906* (WA) should be repealed.

ANCILLARY MATTER: RESOLVING DISPUTES ABOUT EVIDENCE PRIOR TO TRIAL

It is also generally accepted that, wherever possible, disputes about evidence should be resolved before trial. To the extent that witness statements are ordered to stand as (or substantially as) evidence-in-chief, the ability to resolve disputes about evidence before trial will be enhanced.

The Commonwealth *Evidence Act* provides for *voir dires*,[166] and also provides that the power of a court to control the conduct of a proceeding is not affected by the Act.[167]

In Western Australia, pre-trial hearings to determine admissibility of disputed evidence have been successfully conducted.[168] In the Commission's view, this practice should be encouraged wherever appropriate.

Proposals

The Commission proposes that the rules of court, evidence and procedure should be reviewed to ensure that satisfactory provision is made for the resolution of disputed evidentiary matters prior to trial.

To the extent satisfactory provision has not already been made, the Commission proposes that specific provisions to this effect should be included in any new Evidence Act.

CONCLUSION

The case in favour of the enactment in this State of parallel legislation to the *Evidence Act 1995* (Cth) is strong.

Amongst other things, the Commonwealth *Evidence Act* makes major improvements to the existing law in this State regarding hearsay, and the admissibility of documents — the two areas of evidence about which most concern was expressed to the Commission in the course of this review.

The Act also makes a number of other substantial improvements to the existing law of evidence in this State, many of which have been touched upon in this sub-section. Those changes are based on sound rationales and are also consistent with the Commission's key considerations in reforming the law of evidence, in that they:

- are designed to assist the substantive law by guiding the fact-finding process;
- are simple to state and easy to apply;
- are guided by the rationale underpinning the particular rules; and
- have some element of flexibility and discretion, in order to be applied to the variety of factual situations which inevitably will arise; and
- in criminal cases, take into account the collective experience and judgment of the jury.

Enacting parallel legislation based on the Commonwealth *Evidence Act*, would also carry with it the considerable advantages of codification and uniformity. In particular, there would then be one evidentiary regime in this State, not two. In light of the transferability of lawyers and litigation, and the desire to litigate as inexpensively and expeditiously as possible, these are considerable advantages.

Not all the changes brought about by the Commonwealth *Evidence Act* are clearly preferable and the Commission's view is that some of the changes should not be introduced in this State. The existing law in this State also contains a number of positive additional features which do not find a place in the Commonwealth *Evidence Act* including special provisions relating to the video taping of confessions, the taking of evidence of children, and the

protection of complainants in sexual assault cases. For these reasons, the Commission's key proposals are that although parallel legislation be enacted, the Commonwealth *Evidence Act* first be reviewed and that positive features of the existing law in Western Australia be retained.

A consistent danger in attempting to reform the law of evidence is to make further piece-meal reform to an area of law where this has already frequently occurred. The benefit of piece-meal reform, particularly to the law of evidence, is questionable. The benefit which would be derived from adopting the substantial reforms proposed in this sub-section should be significant.

SUMMARY OF PROPOSALS

For convenience, the proposals summarised below do not appear in the same order as they appeared in this sub-section.

1. Parliamentary counsel should review the Commonwealth *Evidence Act*, the Western Australian *Evidence Act* (and related Western Australian legislation),[169] with a view to enacting parallel legislation to the Commonwealth *Evidence Act.*

2. Prior to drafting the new Evidence Act, further consideration should be given to the effects of the reforms to hearsay brought about by the Commonwealth *Evidence Act*, particularly in relation to expert evidence.

3. In drafting the new Evidence Act, the provisions of the Commonwealth *Evidence Act* relating to hearsay should be adopted as substantially as is appropriate following the review.

4. The law of evidence in Western Australia, insofar as it relates to documentary evidence, should be based as substantially as possible on the provisions of the *Evidence Act 1995* (Cth), subject to Proposals 5 and 6.

5. The rules of evidence and/or procedure should be amended so that discovered documents may automatically be tendered into evidence, unless the authenticity of the document is disputed.

6. The operation of the relevant provisions of any new Evidence Act to the admissibility of documents should be subject to this requirement.

7. As part of the review process, the rules of court, evidence and procedure should be reviewed to ensure that satisfactory provision is made for the resolution of disputed evidentiary matters prior to trial.

8. To the extent satisfactory provision has not already been made, specific provisions to this effect should be included in any new Evidence Act.

9. The key changes brought about by the Commonwealth *Evidence Act* should be reviewed in light of the existing law of evidence in this State and, in particular, the matters discussed under the heading 'Some of the Differences between Western Australian Law and the Commonwealth *Evidence Act*' above.[170]

10. Subject to the matters referred to above, parliamentary counsel should draft legislation based as substantially as possible on the Commonwealth *Evidence Act*, while retaining any positive features of the law of evidence of Western Australia.

11. Following that process, the *Evidence Act 1906* (WA) should be repealed.

ENDNOTES

1 This potentially raises the question of whether more or fewer legal tribunals in this State should be bound by the law of evidence. The Commission considers this matter to be beyond this reference. A further potential issue is the effect of provisions requiring tribunals to act in accordance with equity and good conscience (rather than the laws of evidence), as to which, see, for example: Cross, Byrne and Heydon, *Cross on Evidence* (1996) para [1050] and following. The Commission does not propose considering this matter.

2 The history of the law of evidence, and its different rationales, is beyond the scope of this sub-section. At different times entirely different rationales have held sway and had a fundamental effect on the framing of the law of evidence. The different rationales have included those of Gilbert, Bentham, Stephen and Thayer. At the risk of over simplification, those rationales have been summarised as follows. Gilbert attempted to subsume all rules under a best evidence rule. Bentham believed that the use of such rules were illogical and indefensible and that no binding rules should exist. He believed in a system of free proof, subject only to the limitations of irrelevancy, superfluousness, vexation, expense and delay. Stephen looked for a coherent rationale and found it in the principle of relevancy. Thayer, building on Stephen, worked on a mixed group of exceptions to the principle of free proof and arguably provided the basic starting point for the modern law: William Twining, *Rethinking Evidence: Exploratory Essays* (1990) 185-196.

3 See for example the discussion in *M v The Queen* (1994) 181 CLR 487 regarding the appropriate test to apply when considering whether a verdict is unsafe or unsatisfactory.

4 Evan Whitton, *The Cartel: Lawyers and Their Nine Major Tricks* (1998) and recent talks provide one example of this view. Press reports, and public reaction, to the release of information about Arthur Greer's criminal record following his first trial, also provide a striking example in the history of criminal proceedings in this State.

5 See, for example, the Law Commission (UK), *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant,* Consultation Paper No 141 (1996) and the Scottish Law Commission, *Evidence: Report on Hearsay Evidence in Criminal Proceedings,* Report No 149 (1995).

6 ALRC, *Evidence,* Interim Report No 26 (1985).

7 ALRC, *Evidence,* Report No 38 (1987).

8 And the *Evidence Act 1995* (NSW).

9 See P Harvey, *The Advocate's Devil* (1958) 79, as cited in Heydon, above n 1.

10 And was expressed in some submissions to the Commission.

11 See 'The Advantages and Disadvantages of the Adversarial System in Criminal Proceedings', sub-section 1.3.

12 See, for example, Sir Daryl Dawson, 'Recent Common Law Developments in Criminal Law' (1991) 15 *Criminal Law Journal* 5, 13-14 and cases referred to therein.

13 Evidence as to identification being one clear example: see *Domican v The Queen* (1992) 66 ALJR 285.

14 See, in this State, s 8 (1) (e) and (f) of the *Evidence Act 1906* (WA).

15 For example, *O'Leary v The King* (1946) 73 CLR 566; and *Wilson v The Queen* (1970) 123 CLR 334.

16 For discussion of the role of generalisations in matters of proof, see Anderson and Twining, *Analysis of Evidence* (1991) 63-69 and 367-383 and Graham Roberts, *Evidence, Proof and Practice* (1998) 26-45.

17 Hearsay in relation to documents is touched upon in the *Evidence Act 1906* (WA), s 79C.

18 *Cross on Evidence,* above n 1, para 31010.

19 Ibid paras [1260] and [31010], approved by the House of Lords in *R v Sharp* [1988] 1 All ER 65, 68; cf Mason CJ in *Walton v The Queen* (1989) 166 CLR 283, 290; and cf *Bannon v The Queen* (1995) 70 ALJR 25, 35 (Dawson, Toohey and Gummow JJ).

20 *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, 969; referred to, for example, in *Pollitt v The Queen* (1992) 66 ALJR 613, 618 (Brennan J) and 639 (McHugh J).

21 *Pollitt v The Queen* (1992) 174 CLR 558, 593-594 (Deane J). See also Australian Law Reform Commission, above n 6, 661-681 and Australian Law Reform Commission, above n 7, [139]; Stephen Guest, 'The Scope of the Hearsay Rule' (1985) 101 *Law Quarterly Review* 385, 401-404; CR Williams, 'Issues at the Penumbra of Hearsay' (1987) 11 *Adelaide Law Review* 113, 114-116.

22 The Australian Law Reform Commission, above n 6, [675] stressed hearsay evidence's significant unreliability; McHugh J stated the rationale solely in terms of the lack of reliability in *Pollitt v The Queen*, above n 20, 639: 'the objection to hearsay evidence is that it is unreliable – the declarant is not subject to cross-examination and his or her truthfulness and powers of memory, recall, perception and narration cannot be tested'; and Brennan J referred to the inability to test the evidence (and to reliability) at 619.

23 *Cross on Evidence,* above n 1, [31001].

24 *Myers v Director of Public Prosecution* [1965] AC 1001, 1019.

25 *Wright v Tatham* (1838) 5 Cl & Fim 670, 690; 7 ER 559, 566 (Coleridge J).

26 *Myers v Director of Public Prosecution*, above n 24.

27 *Reg v Blastland* [1986] AC 41; *Re Van Beelen* (1974) 9 SASR 163; *R v Szach* (1980) 23 SASR 504; *Wade v Gilroy* (1986) 83 FLR 14; *Re Greatorex* (1994) 74 A Crim R 496. The High Court declined the opportunity to reconsider this aspect of the rule in *Bannon v The Queen*, above n 19, 25. The House of Lords has recently reconsidered the rule, but only in so far as it relates to the evidence of a co-accused: *Reg v Myers* [1997] 3 WLR 552.

28 *R v Harry* (1988) 86 Cr App R 105, a decision which Laughton LJ described as revealing somewhat strikingly what many members of the public would regard as the absurdities of the Law of Evidence; *R v Kearley* [1992] 2 All ER 345; but cf *Woodhouse v Hall* (1980) 72 Cr App R 39.

29 The alleged 'confessions' of Eric Edgar Cooke, and the effect which the admission into evidence of those confessions may have had on the trials of *Beamish* and *Button*, have been the subject of public concern, supported by the former Chief Justice, Sir Francis Burt: see for example, 'Injustice: Top Judge Slates Beamish Decision', *The West Australian,* 9 January 1999.

30 See the discussion in *Bannon v The Queen*, above n 19, 25.

31 (Unreported, Supreme Court of Western Australia, Walsh J, MCR 328 of 1994, Library No 950395, 12 July 1995).

32 (Unreported, Supreme Court of Western Australia, Heenan J, No 196 of 1995, Library No 960065, 13 February 1996).

33 Relying on cases including *O'Leary v The King*, above n 16 and *Wilson v The Queen*, above n 16.

34 In *Clementi*'s case, this included evidence of what the deceased had told her son only days before her death (but not sufficiently proximate to the death to fall within the *res gestae* exception).

35 (1974) 130 CLR 267.

36 Ibid 273 (Barwick CJ, with whom Stephen & Jacobs JJ agreed).

37 [1972] AC 378.

38 [1987] AC 281.

39 And while Mason CJ expressed his entire agreement with the approach in *Ratten* in *Walton v The Queen*, above n 19, 293-294, the joint judgment of Wilson, Dawson and Toohey JJ continued to favour the *Vocisano* line: see p 304.

40 For example, *Woodhouse v Hall*, above n 28 – where telephone calls to gambling houses to place

bets were admitted to assist in proving that there was a gambling house (a matter not expressly stated); and *Ratten v The Queen,* above n 37,where the expression 'get me the police' (which necessarily contains the implied assertion 'I need the police') was admitted (albeit it was allowed in as part of the *res gestae* in any event).

41 *R v Kearley* [1992] 2 WLR 656; *Walton v The Queen*, above n 19, 292; *R v Benz* (1989) 168 CLR 110, 143 and *Pollitt v The Queen*, above n 20; cf *Walton v The Queen,* above n 19, 292 ff (Mason CJ).

42 See Mason CJ in *Walton v The Queen*, above n 19, 292-293; Guest, above n 21; Williams, above n 21; and cf Ashworth and Pattenden, 'Reliability, Hearsay Evidence and the English Criminal Trial' (1986) 102 *Law Quarterly Review* 292.

43 See above n 19.

44 See, for example, *Cross on Evidence*, above n 1, paras [31001] and [31015].

45 Above n 20, 635.

46 See also the comments of Lord Griffiths in *R v Kearley*, above n 41, 659; and more generally, *Harriman v The Queen* (1989) 167 CLR 590, 605-607.

47 See, especially, the comments of Mason CJ in *Walton v R,* above n 19, 293 and of Deane J in *Pollitt v The Queen,* above n 21, 595-596, see also, pages 566, 609-611 and 620-622; see also *R v Benz*, above n 41, 117-118, 121 and 143-144.

48 Above n 19.

49 See the Canadian approach in cases such as *R v Kahn* (1990) 59 CCC (3d) 92,104-106; *R v Smith* (1992) 94 DLR (4th) 590, 600-604; *R v Finta* (1994) 88 CCC (3d) 417, 526-528 and *R v Edwards* (1994) 91 CCC (3d) 123, 138.

50 See *Bannon v The Queen*, above n 19, 45-46 (McHugh J).

51 Including written submissions to the LRCWA: J Shannon (17 August 1998), B Watterson (25 August 1998), C Burke (28 August 1998), M Gething (31 August 1998), Wheeler J (28 August 1998), Law Society of WA (13 October 1998) - (in its preliminary view that the Commonwealth *Evidence Act* should be adopted); the Aboriginal Legal Service (in also agreeing that uniform Evidence Law should be adopted); Legal Aid (through Mr Lindsay); Registrar Harding (District Court); Mr Heath SM (Local Court and Court of Petty Sessions); Mr JR McKecknie QC (Director of Public Prosecutions).

52 See the *Evidence Act 1995* (Cth) Pt 3.2, ss 59-75; and Stephen Odgers, *Uniform Evidence Law* (2nd ed, 1997).

53 For general comparisons of the Commonwealth *Evidence Act* and the common law, see for example, Odgers, ibid; Justice TH Smith and OP Holdenson 'Comparative Evidence – The Uniform Evidence Acts and The Common Law' (1998) 72 *Australian Law Journal* 363; and the Honourable Justice Beazley, 'Hearsay and Related Evidence – A New Era? (1995) 18 *University of New South Wales Law Journal* 39; and for comparisons between the Commonwealth *Evidence Act* and the existing law in Western Australia see, for example, John Chaney, 'Recent Developments in the Law of Evidence' in Law Society of Western Australia (eds), *A Practical Seminar on Evidence* (27 September 1994); and John Chaney, 'Hearsay and Admissions: Parts 3.2 and 3.4 of the *Evidence Act 1995* (Commonwealth)' in Law Society of Western Australia (eds), *The Federal Evidence Act* (26 October 1995).

54 *Evidence Act 1995* (Cth) ss 59, 60 and following.

55 *Evidence Act 1995* (Cth) pt 3.2 generally in relation to the relaxation of the rule, and in relation to the rationalisation of the exceptions, see, for example, s 65(2)(b) abrogating *Vocisano v Vocisano*, above n 35, s 65(2)(c) – representations made in circumstances which make it highly probable that the representation is reliable; and s 65(2)(d) extending the common law as to the admissibility of statements against interest (both by removing the requirement that the maker of the statement be dead and by increasing the matters which may be said to be against interest).

56 By virtue of the definition of 'representation' and 'previous representation' in the dictionary to the *Evidence Act 1995* (Cth), where representation includes '(a) an express or implied representation (whether oral or in writing)', and s 59(1).

57 By virtue of the *Evidence Act 1995* (Cth) s 70.

58 By virtue of s 65 of the *Evidence Act 1995* (Cth).

59 See *Evidence Act 1995* (Cth) pt 3.2 generally, and see, for example, the approach to res gestae in s 65(2)(b) and the general approach based on reliability in s 65(2)(c).

60 See *Evidence Act 1995* (Cth) pt 3.2 generally.

61 See, for examples, *Evidence Act 1995* (Cth) s 65(2)(b) and (c).

62 See *Evidence Act 1995* (Cth) pt 3.2 generally; the difference in approach where the maker of the statement is available or unavailable, and the emphasis on reliability, eg in s 65(2)(c).

63 See *Evidence Act 1995* (Cth) pt 3.2 generally.

64 See *Evidence Act 1995* (Cth) ss 135-137.

65 See *Evidence Act 1995* (Cth) ss 165(1)(a).

66 *Evidence Act 1995* (Cth) s 67(1) requires reasonable notice to be given of the intention to adduce evidence under ss 63(2), 64(2) and 65(2), (3) and (8).

67 By virtue of *Evidence Act 1995* (Cth) s 60 and query whether the same concern would then also arise in relation to the evidence of recent complaint in cases regarding sexual offences.

68 By virtue of *Evidence Act 1995* (Cth) s 60 with ss 66 and 77.

69 (1998) 157 ALR 394; (Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ).

70 See *Pownall & Others v Conlan Management Pty Ltd and Another* (1995) 12 WAR 370, and the cases there relied upon including *R v Turner* [1975] QB 834; *R v Abadom* [1983] 1 WLR 126 and *Ramsay v Watson* (1961) 108 CLR 642. Cf the decision of the Full Federal Court in *Quick v Stoland Pty Ltd* (1998) 157 ALR 615.

71 See the discussion by the Hon Justice Beazley, above n 53, 42-43, 57 and 66.

72 (1998) 157 ALR 615.

73 The High Court's decision in *Lee v The Queen*, above n 69, 1490 may provide some comfort, but the position is far from certain.

74 Including, for example, by virtue of *Evidence Act 1995* (Cth) s 135.

75 In his foreword to RA Brown, *Documentary Evidence in Australia* (2nd ed, 1996) v-vi.

76 But there are other provisions including *Evidence Act 1995* (Cth) ss 72-76, 79, 80-81, 82 and following (including as to banker's books).

77 See *Evidence Act 1995* (Cth) ss 79D, 79E, 79F and 79G.

78 *Trewin v Picknoll* (1992) 9 WAR 523.

79 *R v John Wayne Hobby and Anor* (Unreported, S Ct of WA, Scott J, Library No. 980280, 15 April 1998).

80 (1994) 12 WAR 133.

81 Ibid 187-195.

82 Notable among them, the criticisms of KJ Martin QC, 'Documentary Evidence' in Law Society of Western Australia (eds), *A Practical Seminar on Evidence* (27 September 1994).

83 Amongst others, the submissions to the LRCWA of the Honourable Justice Owen made this point.

84 Above n 82, 23-25.

85 See *Evidence Act 1995* (Cth) pt 2.2 regarding proof and authentication of documents; pt 3.2 dealing with business records, and pt 4.3 regarding facilitation of proof.

86 Including by the Honourable Justice Beazley, above n 53; and in relation to Western Australian Law by McKerracher, 'Documents, Opinions and Facilitation of Proof; Parts 2.2, 3.3 and 4.3 [of the Commonwealth *Evidence Act*]' in Law Society of Western Australia (eds), *The Federal Evidence Act* (26 October 1995).

87 *Evidence Act 1995* (Cth) s 51.

88 *Evidence Act 1995* (Cth) s 48.

89 See eg *Evidence Act 1995* (Cth) ss 48(1)(e), 69 and 147.

90 See *Evidence Act 1995* (Cth) ss 166-169.

91 Unlike, for example, the WA *Criminal Code* which was comprehensively reviewed by and modified as a result of the work of Michael Murray QC.

92 Writing in the foreword to Odgers, above n 52, (v). The history of the project is dealt with in that foreword generally. See also Honourable Justice Beazley, above n 53, 39-40, and the Australian Law Reform Commission's Interim Report 26 and Final Report 38, above n 6 and n 7.

93 These included the submissions of the Law Society of WA (Preliminary Views – 13 October

1998); the Aboriginal Legal Service; M Gething, written submission to the LRCWA (Perth, 31 August 1998); and those of a number of members of the Western Australian legal profession at a public meeting held in Perth (28 July 1998).

94 See Odgers, above n 52, xxii-xxiv.

95 *Evidence Act* 1995 (Cth) s 32.

96 (1937) 57 CLR 630.

97 *Evidence Act* 1995 (Cth) s 35.

98 But not, for example, if the witness had used the document to refresh their memory.

99 *Evidence Act* 1995 (Cth) s 38.

100 *Evidence Act* 1995 (Cth) s 42.

101 Examples include indigenous Australians and children. As to the latter, see, for example, Marion Dixon, 'The Credibility of Children as Witnesses: Memory, Suggestibility, Fact and Fantasy' (May 1993) 20(4) *Brief* 34, 37-38.

102 *Evidence Act 1995* (Cth) Pt 2.2, as discussed above; *Walker v Walker,* above n 96.

103 *Evidence Act 1995* (Cth) Pt 3.2, as discussed above.

104 *Evidence Act 1995* (Cth) s 80.

105 *Grismore v Consolidated Products* (1942) 5 NW (2d) 646; *R v Palmer* [1981] 1 NSWLR 209; *Grey v Australian Motorists and General Insurance Co Pty Ltd* [1976] 1 NSWLR 669.

106 For example, an expert could not testify about whether a party was negligent: *Hollington v F Hewthorn & Co Ltd* [1943] KB 587, but could testify as to breach of an industry standard: *Thannhauser v Westpac* (1991) 104 ALR 485.

107 Cf eg *Clark v Ryan* (1960) 103 CLR 486 and *Weal v Bottom* (1966) 40 ALJR 436.

108 On the pleadings in a civil matter, or by formal admission in a criminal trial.

109 *Evidence Act 1995* (Cth) Pt 3.6.

110 *Evidence Act 1995* (Cth) s 103.

111 Odgers, above n 52, 158-159.

112 Ibid 161-162.

113 *Evidence Act 1995* (Cth) s 106.

114 Odgers, above n 52, [17580].

115 See sub-section 3.2: 'Curtailing Irrelevant or Unduly Protracted Cross-Examination and Testimony'.

116 For example, evidence that tends to prove that a witness is biased or has a motive for being untruthful, and the like: *Evidence Act 1995* (Cth) s 106.

117 *Evidence Act 1995* (Cth) s 135(c).

118 *Evidence Act 1995* (Cth) ss 118 and 119.

119 From *Grant v Downs* (1976) 135 CLR 674.

120 Cf *Baker v Campbell* (1983) 153 CLR 52, Mason J at 75 (dissenting).

121 (1998) 152 ALR 418.

122 (1998) 159 ALR 664, (Full Federal Court, 22 December 1998).

123 *Federal Court Rules* O 15 r 15 .

124 *Evidence Act 1995* (Cth) ss146, 147, and the admissibility of documents, including business records is also considerably improved (as discussed above).

125 See *Evidence Act 1995* (Cth) ss 49, 50, 67, 100 and 177.

126 *Evidence Act 1995* (Cth) ss 135 and 136.

127 *Evidence Act 1995* (Cth) s 190.

128 *Evidence Act 1995* (Cth) s 20.

129 *Evidence Act 1995* (Cth) s 84.

130 *Evidence Act 1995* (Cth) s 85.

131 *Evidence Act 1995* (Cth) s 90.

132 *Evidence Act 1995* (Cth) s 138.

133 *Evidence Act 1995* (Cth) s 110.

134 *Evidence Act 1995* (Cth) ss 113 – 115.

135 *Alexander v The Queen* (1981) 145 CLR 395; *Domican v The Queen*, above n 14.

136 *Alexander v The Queen,* above n 135.

137 It is also consistent with the approach in England under the *Police and Criminal Evidence (PACE) Act 1984.*

138 *Evidence Act 1995* (Cth) ss 164 and 165.

139 *Evidence Act 1995* (Cth) s 165(2).

140 *Evidence Act 1995* (Cth) s 165(1).

141 *Evidence Act 1995* (Cth) s 165(1)(f) based upon *McKinney v The Queen* (1991) 171 CLR 468.

142 *The Criminal Code* (WA) s 570D.

143 Corroboration warnings in relation to the evidence of children have been abolished by the *Evidence Act 1906* (WA) s 106D.

144 *Evidence Act 1906* (WA) s 36BD.

145 As set out in the ALRC Final Report, above n 7, and summarised in Odgers, above n 52, xxv and see for example, *Evidence Act 1995* (Cth) s 135(c).

146 See, for example, the discretion provided for in *Evidence Act 1995* (Cth) s 136.

147 Including *Evidence Act 1995* (Cth) ss 146, 147.

148 Including *Evidence Act 1995* (Cth) ss 135-137.

149 Including, as mentioned above, in relation to documentary evidence (ss 49, 50) and hearsay (s 67), *Evidence Act 1995* (Cth).

150 *Evidence Act 1995* (Cth) s 190.

151 Note this discretion is in addition to the general discretion in criminal proceedings to refuse to admit evidence on the basis that its probative value is outweighed by its prejudicial effect: *Evidence Act 1995* (Cth) s 137.

152 But not, for example, relevance, identification evidence, or privileges.

153 *Cross on Evidence,* above n 1, [1720] and see also [1815]. The Act also expressly provides for the preservation of some provisions of the law of the States: ss 9-11 Commonwealth *Evidence Act.*

154 The Honourable Justice Smith, 'Evidence Act 1995 – An Overview' (1995) 18 *University of New South Wales Law Journal* 1 (Paper presented at the College of Law, Sydney, 8 April 1995) [18], referred to in Odgers, above n 52, xxi-xxii.

155 Compare in the context of a codified criminal law; the advantages of codification discussed by Graeme Scott QC in 'A Model Criminal Code' (1992) 16 *Criminal Law Journal* 350; and Matthew Goode, 'Codification of the Australian Criminal Law' (1992) 16 *Criminal Law Journal* 5, and Frank J Remington, 'The Future of the Substantive Criminal Law Codification Movement: Theoretical and Practical Concerns' (1988) 19 *Rutgers Law Journal* 867.

156 The original cross-vesting scheme which survived the decision of the High Court of Australia in *Gould v Brown* (1998) 72 ALJR 375 was struck down by that Court recently in *Re Wakim, exparte McNally* (1999) 163 ALR 270. However the Federal Attorney-General, Mr Daryl Williams QC, has indicated steps will be taken to allow cross-vesting to continue.

157 By virtue of an application under any cross-vesting schemes or because an issue has arisen in the proceedings which is subject to the exclusive jurisdiction of the Federal Court, or otherwise.

158 The submission of M Gething (31 August 1998) raises the situation where the case is first tried in the Federal Court in civil proceedings, with evidence adduced pursuant to the *Evidence Act 1995* (Cth), but a prosecution is then commenced in respect of the same matter, where evidence will need to be adduced in accordance with the *Evidence Act 1906* (WA).

159 The cases collected in Odgers, above n 52, highlight this fact.

160 Some concerns in relation to hearsay and expert evidence, for example, have been noted, and a number of additional matters of concern have been noted above in the summary of some of the differences between Western Australian law and the Commonwealth *Evidence Act*.

161 Such as the *Justices Act 1902* (WA).

162 *Evidence Act 1995* (Cth) s 106A ff.

163 LRCWA, *Report on the Evidence of Children and Other Vulnerable Witnesses,* Project No 87 (1991).

164 Marion Dixon, 'Out of the Mouths of Babes: A Review of the Operation of *Acts Amendments (Evidence of Children) Act 1992'* (1995) 25 *The University of Western Australia Law Review* 301.

165 Related legislation will include, for example, the *Justices Act 1902* (WA).

166 *Evidence Act 1995* (Cth) s 189.

167 *Evidence Act 1995* (Cth) s 11.

168 For example, pursuant to s 611A of the *Criminal Code.*

169 Related legislation will include, for example, the *Justices Act 1902* (WA).

170 See pp 618-623.

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3.2

Curtailing Irrelevant or Unduly Protracted Cross-examination and Testimony

INTRODUCTION: THE NATURE OF THE PROBLEM AND ITS POSSIBLE CAUSES

Irrelevant or unduly protracted evidence-in-chief or cross-examination increases the time and expense of litigation without assisting justice to be done in the particular case. This, in turn, can delay other actions coming on for trial, thereby affecting other prospective litigants. Ultimately, delay affects the general interest of the community in legal proceedings being resolved as inexpensively and expeditiously as possible.

After consultation, it is the view of the Law Reform Commission of Western Australia ('the Commission') that the potential causes of the problem include at least the following:

(i) The representation of the parties;

(ii) The calibre and conduct of counsel;

(iii) The legal framework (including any failure to delineate the issues, and the operation of the rules of evidence); and

(iv) Judicial fear of intervention.

ADDRESSING THE PROBLEM

Unrepresented parties

Self-represented litigants are likely to lead to longer trials as they may:

- not appreciate what is relevant;
- not appreciate evidentiary rules generally;
- be less likely to be constrained by any duty to the court; and
- be more likely to use the forum for venting their frustrations or a personal attack upon, or vilification of, another (often the other party).

The Commission is conscious that for some or all of these reasons, self-represented litigants may extend the time taken in examination-in-chief and cross-examination. The Commission considered a range of possible proposals to eradicate or ameliorate these problems. Potential proposals included:

- removing or limiting the right of parties to appear on their own behalf;
- requiring, where there is a self-represented litigant, there be a judicial explanation of the issues in the case;
- requiring, where a party is self-represented, that there be a brief judicial explanation of the rules of evidence; and
- recommending a practice where before a matter goes to trial involving a self-represented litigant, that party spend time with an officer of the court receiving basic instructions as to the court process and examination and cross-examination.[1]

In the end, however, the Commission has not favoured putting forward any of these proposals. It is not possible, or appropriate, to prevent a litigant from representing himself or herself. The reality is that there will continue to be self-represented litigants, particularly in the lower courts and in less serious matters. Further, once a litigant has decided to appear in person no 'on-the-spot' training, or explanation, is likely to result in any significant improvements, and any possible improvement must be weighed against the time and expense which would be involved.

In the light of these realities, the Commission's view is that judicial control of the examination-in-chief and cross-examination by self-represented litigants is most likely to be effective. Greater judicial intervention in the case of self-represented litigants may also be justified in the interest of ensuring a fair trial and a just process and result.[2]

The issue of judicial intervention is dealt with later in this sub-section.

There is, however, one modification which the Commission considers could be made. It relates to the cross-examination of complainants by self-represented litigants in criminal cases. Complainants are usually protected by a number of professional, ethical and legal obligations imposed on the lawyers questioning them. Evidentiary limitations on questioning also exist (which lawyers, but not self-represented litigants, are likely to be familiar with and understand).

For these reasons, it would be appropriate for self-represented defendants or accuseds to be required to address their questions to complainants through the judge. [3] It is accepted that this may lead to some lengthening of the cross-examination. However, when combined with appropriate judicial intervention and control, the effect is likely to be limited, and in any case, is arguably accepted in light of the matters which have been referred to.

Proposal 1

The rules of court and/or the relevant legislation should be amended to provide that self-represented litigants shall direct all questions in cross-examination of complainants to the judge, and question the complainant through the judge.

The calibre and conduct of counsel

Incompetent or ill-prepared counsel are likely to lead to unduly protracted examination and cross-examination because they:

- may not know what to ask or, if they do know, may not have the capacity to ask it; and
- do not know what is important, so wish to cover everything.

It is also conceivable that some counsel unduly prolong their examination for tactical reasons, or because of excessive zeal.

A United States judge explained one possible explanation for the latter phenomenon, as follows:

> It would seem that early in the career of every trial lawyer, he or she has lost a case by leaving something out, and thereupon resolved never again to omit even the most inconsequential item of possible evidence from any future trial. Thereafter, in an excess of caution the attorney tends to overtry his case by presenting vast quantities of cumulative or marginally relevant evidence.[4]

Once again, a variety of possible proposals were considered including:

- advocacy training;
- a requirement that counsel be of a minimum level of experience in different kinds of cases or jurisdictions;
- abolition or modification of the principle in *Rondel v Worsley* and *Giannarelli v Wraith*[5]; and
- references to barristers' areas of expertise in Bar Directories.

It was also suggested to the Commission that the structure of legal aid and DPP briefs may contribute to a lack of preparation.[6]

The Commission acknowledges this possibility but is not in a position to analyse this matter in this sub-section.

The Commission encourages advocacy training, and the expression of expertise where justified. However, as a matter of practical reality, (and arguably all the more so in a fused profession), incompetent or ill-prepared counsel and intentionally excessive or unintentionally over-zealous counsel, will always exist and cannot be eliminated.

Again, then, judicial intervention seems to hold the key. Amongst other things, the Commission notes in this regard that arguments for increased judicial intervention on the basis of incompetent counsel have been advanced.[7]

The legal framework

The time required in examination-in-chief and cross-examination could potentially be dramatically reduced by two measures: first, a clear delineation of the issues, and second, the use and exchange of witness statements.

Delineation of the issues

Other sub-sections deal with pre-trial procedures and delineation of the issues. Suffice it to say that the clearer the issues are, the clearer the evidence required to be led (and tested) should be. The earlier the issues are delineated, the greater the time also available for preparation of the case, and consideration of necessary witnesses and matters to be addressed.

The importance of early and clear delineation of the matters in issue should not be underestimated.

Use of witness statements

Other sub-sections also deal with the use of witness statements. Again, however, the advantages warrant mention here.[8]

The use of a witness statement self-evidently reduces the time required for the examination-in-chief. It may be ordered that the statement stand as the examination-in-chief, or, in appropriate cases, a small number of additional questions may be permitted to meet new and unanticipated issues, or for some other reason in the interests of justice.

The exchange of witness statements will also allow preparation regarding cross-examination, and responsive evidence generally. Objections to the admissibility of evidence-in-chief may also then be dealt with prior to trial.

This should reduce the length of examination and cross-examination, and increase the efficiency of the trial, with no detrimental effect on the trial process or the interests of justice. In fact, because the ability to bring on unanticipated evidence would be reduced, parties should have notice of the evidence to be met and the opportunity for a fair trial should be enhanced. Further, where there is a lengthy delay prior to trial, the early preparation of witness statements would also assist witnesses to recollect events and so assist the court.

For these reasons, the use and exchange of witness statements is becoming increasingly common not only in Australia but throughout the common law world.[9]

The Commission is conscious of the countervailing argument that the preparation of witness statements increases the cost of litigation. This argument must be balanced against the reality that proofs of evidence are

already routinely prepared. It must also be weighed against each of the other advantages referred to above, not only to the fairness of the trial, but also (by virtue of increased efficiency) to the judicial system, other prospective litigants and the community as a whole.

Proposal 2

The practice of exchanging and using witness statements should strongly be encouraged.

The rule in Browne v Dunn

The rule of practice known as the rule in *Browne v Dunn*[10] may be seen, unlike many other rules of evidence, to lengthen rather than shorten the course of evidence by imposing requirements on cross-examination .

This is because when considered in an over simplified and shorthand way it can be taken as requiring that a party put the entirety of its case to the witnesses called by the other party in the course of their cross-examination. Were this the true consequence of the rule, it would certainly require reconsideration. However, this has never been, and is not, the way the rule operates.

A statement of the rule

In stating the rule, *Cross On Evidence*[11] adopts the formulation of Hunt J in *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation*:

> It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn.[12]

Important limitations on the application of the rule immediately appear. Firstly, the rule does not apply if 'notice has already clearly been given'. Secondly, all that is required is that the 'nature of the case' be put. These limitations upon the rule have existed since the rule was first enunciated, as a consideration of *Browne v Dunn* itself demonstrates.

The decision in Browne v Dunn

The 'rule' in *Browne v Dunn* has existed since 1894, and has been extensively applied and discussed.

Lord Herschell, LC enunciated the rule as follows:

> Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by *some questions* put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter *altogether unchallenged*, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach the witness you are bound whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue, but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, *I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it.* All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has *not had any opportunity of giving an explanation* by reason of there having *been no suggestion whatever* in the course of the case that his story is not accepted.[13]

As this extract illustrates, the rule has, from the beginning, been seen as a rule of professional practice, based upon fairness to the witness. Further, it has always been clear that the potential unfairness lay in the possibility of a witness who was not given the opportunity to deal with a point, later being contradicted on it. For this reason, as the above passage makes clear, adherence to the rule was never seen to be necessary in circumstances where the witness already had notice of the issue.

Lord Halsbury was 'entirely of the same opinion' and stated:

> I cannot too heartedly express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To

> my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although *not one question* has been directed either to their credit, or to the accuracy of the facts they have deposed to. [14]

Lord Morris stated that he entirely concurred with the judgments of the Lord Chancellor and Lord Halsbury, although he was cautious about expressing a hard and fast rule. He also pointed to cases in which the rule would not need to be adhered to:

> My Lords, there is another point upon which I would wish to guard myself, namely, with respect to laying down any hard-and-fast rule as regards cross-examining a witness as a necessary preliminary to impeaching his credit... *I can quite understand a case in which a story told by a witness may have been of so incredible and romancing a character that the most effective cross-examination would be to ask him to leave the box*.

And further:

> I therefore wish it to be understood that I would *not concur* in ruling that it was necessary, in order to impeach a witness's credit, *that you should take him through the story which he had told, giving him notice by the questions that you impeached his credit.*[15]

Clearly Lord Morris was not only anxious to be seen not to be laying down any hard and fast rule, but also to explain why the rule would not always arise. His Lordship further indicated that even in following the rule it was not necessary to take a witness through the story which had been told in order to comply with it.

The final law lord, Lord Bowen, did not address the point.

From its inception, then, the rule:

(i) was relatively circumscribed in its operation;

(ii) only applied where no notice of the disagreement had been given; and

(iii) even when applicable did not require the questioner to take the witness through his or her evidence, so long as the disagreement was made clear.

The application of the rule in modern times

While retaining its emphasis on fairness, the rule has been further clarified over time in light of the needs of modern litigation and litigants.

In particular, it has been made clear that the rule will be satisfied so long as notice has been given (whether in cross-examination or otherwise) of the disputed aspects of the case.

As Hunt J said in *Allied Pastoral Holdings Pty Ltd v Federal Commission of Taxation:*

> In many cases, of course, Counsel for the party calling the witness in question will be alert to the relevance of the other material in the case to be relied upon for the challenge to the truth of the evidence given by his witness or to the credit of that witness, and in those circumstances counsel will be able to give his witness the opportunity to deal with that other material in his own evidence in chief.[16]

Modern authorities hold that the necessary notice may be found in the pleadings, in an opening address, or in the manner in which the case is conducted.[17]

As Tamberlin J put it in *Raben Footwear Pty Ltd v Polygram Records Inc:*

> In commercial litigation, including intellectual property matters, where issues are clearly defined, there will often be no point in formally challenging every aspect of the evidence which is contested. There will often be a large number of matters in respect of which it will be apparent from the pleadings and particulars there is clearly a contest. Where this is the case the principle need not be applied in an unduly technical way.[18]

Finally, even when notice has not been given in any of these ways, it has also been confirmed that the rule, when properly understood, does not require a lengthy recitation of each and every matter of the witnesses evidence which is not, or will not, be accepted:

> *Browne v Dunn* does not require performance of the tedious exercise of specifically challenging in cross-examination every individual matter which is not being accepted as true — provided that otherwise it is apparent that it is not being accepted as true.[19]

Comment on the application of the rule in modern times

In the Commission's view, the modern application of the rule accords with both fairness and efficiency. The spirit and intention of the rule remains, but the rule is also being applied in accordance with modern concerns about the efficient and expeditious resolution of litigation.

When the rule is properly understood, the Commission considers that it contributes to the fairness of proceedings and to the attainment of justice. Further, the Commission does not consider that the rule, when properly understood, causes irrelevant or unduly protracted cross-examination.

The application of the rule in the Local Court and the Court of Petty Sessions

Two decisions of the Supreme Court of Western Australia hold that the rule in *Browne v Dunn* does not apply in proceedings before a magistrate. In the light of the Commission's view as to the appropriateness of the rule, these decisions warrant scrutiny.

The first of these is *Maines v Roy*[20] which concerned a charge under the *Police Act* of resisting a police officer in the execution of his duty. The charge had been dismissed due to lack of evidence that the police officer was on duty. The complainant appealed to a single judge of the Supreme Court. In order to establish that the police officer was on duty, evidence had been given that the police officer reasonably suspected the respondent of conveying or having on his person something which had been stolen. No basis for that suspicion, or its reasonableness, was given in evidence. In that context, the reference to the rule in *Browne v Dunn* was as follows:

> As was conceded by the appellant in argument, the rule in *Browne v Dunn*, making it necessary to put an opponent's witness in cross-examination of the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings, is not available in proceedings before a magistrate.[21]

The court then went on to state that the absence of such cross-examination did not assist the Crown in discharging the onus upon it to prove an offence beyond reasonable doubt, and concluded that the evidence below had not sufficed and that the appeal should be dismissed.

The passage quoted above is the entire reasoning on the *Browne v Dunn* point. As is apparent, it was a 'concession' by counsel for the complainant, in argument. No authority is cited for the proposition that the rule does not apply in proceedings before a magistrate and no examination of the principle took place, as is understandable in the context of the decision.

The second decision is *Sotomayor v Kelly*[22] which concerned another appeal from the Court of Petty Sessions, this time against a conviction for a road traffic offence. One of the appeal grounds alleged that the finding of the court below was against the evidence or the weight of the evidence. Counsel for the Crown argued against this appeal ground, in part based on *Browne v Dunn*. That argument was rejected as being not open on the basis of *Maines v Roy*. In the relevant passage Owen J stated:

> There were, however, some aspects of the appellant's evidence on this issue which were not put to the police witnesses in cross-examination. Counsel for the Crown submitted that in accordance with the rule in *Browne v Dunn*, those portions of the

> appellant's evidence ought to be disregarded. However, I accept that the law in this State is that the rule in *Brown [sic] v Dunn* does not apply to proceedings in the Magistrate's Courts: see *Maines v Roy*. Accordingly, that issue does not arise.

It can be seen that this decision simply adopted the conclusion in *Maines v Roy,* which in turn was based on a concession of counsel, without any further analysis of the rule.

Neither decision considered the rule itself, or indicated why it was that the rule should not apply in the Magistrate's Courts.

The Commission doubts the correctness of these decisions and considers that this aspect of the application of the rule in *Browne v Dunn* in Western Australia is in need of reform.

The Commission can see no reason in principle why the rule ought not apply in the Court of Petty Sessions and the Local Court. It is true that there is a greater likelihood of self-represented litigants in these courts, but that is a matter which can be taken into account when applying the rule on a case by case basis, and in particular when considering the consequences of any breach of the rule. In any case, the court may properly assist a self-represented litigant by inviting him or her to put any disputed matters to witnesses for the other side. Further, not all parties in these courts are self-represented and the Commission can see no justification for not applying the rule in these circumstances.

A number of serious charges are now heard in the Court of Petty Sessions in this State including charges under the *Occupational Safety & Health Act 1984* (WA) and the *Mines Safety & Inspection Act 1994* (WA). By reason of the seriousness of the charges, the complexity of some of the issues, and the corporate nature of many of the defendants, the parties are often represented. Furthermore, the potential penalties for breaches of the Acts are considerable.[23]

For these reasons, the Commission considers that the rule in *Browne v Dunn* should apply in the Magistrate's Courts, but that the consequences for a failure to follow the rule should be tailored to meet the individual circumstances of the case, including whether a party is self-represented or not.

Summary on the rule in Browne v Dunn

The Commission does not consider that any change is required to the rule in *Browne v Dunn*.

Proposal 3

There should be no change to the rule in *Browne v Dunn.* The rule in *Browne v Dunn* should apply in the Court of Petty Sessions and the Local Court, albeit the consequences for a failure to follow the rule should be tailored to meet the individual circumstances of the case, including whether a party is self-represented or not.

The rule in Jones v Dunkel

The rule in *Jones v Dunkel*[24] is explained in *Cross on Evidence*:[25]

> [T]he unexplained failure by a party to give evidence, to call witnesses, or to tender documents or other evidence may, not must, in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted that party's case.[26]

The traditional rule would not call for any particular discussion in a topic dealing with curtailing irrelevant or unduly protracted testimony. The potential application of the traditional rule might lead to a party calling a witness it may otherwise not have called, but would not ordinarily lead to unduly protracted examination. Amongst other things, a party seeking to avoid a *Jones v Dunkel* inference could simply call a witness and effectively make him or her available for cross-examination with little, if any, examination in chief. In addition, a number of sensible features of the rule operate to lessen the requirement that witnesses unnecessarily be called.[27] In particular, the rule does not operate to require a party to call witnesses to give merely cumulative evidence, particularly if the evidence of earlier witnesses has not been challenged. In these circumstances, a failure to call witnesses would not satisfy the foundation for the drawing of the *Jones v Dunkel* inference, which is a fear of the evidence which the witness would give.[28]

However, the principle is relevant here because it has been extended in a number of Australian cases to apply, at least potentially, to the failure by a party calling a witness to ask that witness questions in examination-in-chief.[29]

For this reason the rule in its extended form may contribute to longer examination-in-chief and requires consideration.

The rationale for the rule is explained in *Jones v Dunkel* itself. Approving a statement from Wigmore on Evidence, Windeyer J endorsed the following rationale for the rule:

> The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some

> evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which made some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.[30]

When one considers the rationale behind the *Jones v Dunkel* inference, the extension of the principle to a failure to examine a witness who has already been called, is entirely justified. While a failure to call a witness at all leads to a number of potentially competing generalisations, to be considered alongside the generalisation of fear of the evidence the witness could give, far less competing generalisations are available once the party has already been called.

Indeed, as was pointed out in *Milliman v Rochester Ry Co*,[31] approved by Handley JA in *Commercial Union v Ferrcom*:

> [T]he rule is as applicable to a case in which a party fails to interrogate a friendly witness, so situated as to be presumed to have knowledge of the existence or non-existence of the vital facts in issue, as it is to the case of a failure to produce such a witness. Indeed, … the omission to interrogate a friendly witness in respect to facts presumably within his knowledge is more significant than the failure to call such a person as a witness and … the presumption that the testimony would not have been favourable to the party's case is stronger than the one which arises from the failure to produce such a person as a witness.[32]

The extension of the principle in *Jones v Dunkel* to a failure by a party to examine in chief its own witness on a salient point, appears to the Commission to be entirely in accordance with principle.

The Commission is not concerned that the extended principle in *Jones v Dunkel* will, of itself, unduly extend examination in chief.

Firstly, the inference will not necessarily be open in every case, for similar reasons to those already discussed in relation to the failure to call a witness. In particular, it is unlikely that the drawing of the inference would be appropriate when dealing with cumulative evidence, and multiple witnesses able to give evidence about the same point. Further, the additional examination-in-chief, of a witness already to be called, in order to avoid the drawing of an adverse inference, is likely to be minimal. In any case, to the extent to which the availability of the inference encourages greater preparation for examination-in-chief, the attainment of justice may be aided without any consequential additional time or expense. Finally, to the extent to which witness statements will stand as evidence in chief (or as evidence in chief, subject only to a limited ability to ask further questions) the extended application of the rule is also unlikely to produce undue examination-in-chief.

Summary on the rule in Jones v Dunkel

For these reasons, the Commission does not consider that the rule in *Jones v Dunkel*, extended to apply to a failure to examine in chief a party's own witness about a relevant matter, requires any change. Nor does the Commission consider that the extended application of the rule will lead to any undue examination-in-chief, of itself.

Proposal 4

There should be no change to the basic rule in *Jones v Dunkel*, or its extended application to the questioning of witnesses.

Judicial intervention to control examination and cross-examination

The Commission considers that judicial intervention holds the key to avoiding excessive examination and cross-examination.

The Commission considers that a culture of judicial reticence has arisen over the years, due in part to two judicial policies, themselves linked to related legal principles.

The first policy may be described as the policy of non-interference.[33] This policy is related to the precept of the importance of a fair trial, and the notion that it is for the parties rather than the judge to conduct their litigation. The second policy may be described as the policy of detachment or aloofness.[34] This policy is informed by the principles relating to actual or anticipated bias, and the importance of judicial independence.

No doubt both policies and their underlying principles are also linked to the overall concern, often quoted, that justice must not only be done but must be manifestly and undoubtedly seen to be done.[35]

There are sound reasons why these policies should be respected.[36] Amongst other things, they can be seen as a necessary concomitant of judicial independence. Further, the very essence of the judicial function is to bring an objective, dispassionate and independent mind to an issue disputed by the parties. In criminal proceedings, there is also a concern that comments or intervention by the trial judge may impinge upon the role of the jury as the arbiter of fact. These concerns include the risk that jurors may give excessive weight to any interventions by the trial judge, in light of the fact that those interventions may appear to be clothed with the cloak of judicial imprimatur.

These matters can readily be accepted. The issue is then what, if any, role judicial intervention has to play in controlling excessive examination and cross-examination. To consider that issue, it is necessary briefly to trace the traditional approach, and then consider the more modern approach.

The traditional approach

The traditional approach is exemplified by the following remarks in *Ratten v The Queen*:

> Under our law a criminal trial ... is a trial, not an inquisition: A trial in which the protagonists are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility. The judge is to take no part in that contest, having his own role to perform in ensuring the propriety and fairness of the trial and in instructing the jury in the relevant law.[37]

The particular concerns which arise in criminal proceedings are touched on further below. It should not be thought, however, that the traditional approach was limited to criminal proceedings: see for example the decision in *Government Insurance Office (NSW) v Glasscock*.[38]

Even within this traditional approach, however, there was room for judicial intervention. In *Ratten* what was said was expressed as being 'subject to the rules of evidence, fairness and admissibility' and the judge's role in 'ensuring the propriety and fairness of the trial'. And in *GIO v Glasscock*, Mahoney JA acknowledged that 'it will be appropriate for a judge to ensure that unnecessary time is not wasted or cost incurred' and 'justice will, of course, require that court proceedings be effective, efficient and timely: if they are not, they are apt to produce injustice'.[39]

As long ago as 1940, there was clear judicial recognition that control of cross-examination may be required. In *Vassiliades v Vassiliades* , Lord Wright said:

> Now cross-examination is one of the most important processes for the elucidation of the facts of a case, and all reasonable latitude should be allowed, but the judge always has a discretion as to how far it may go, or how long it may continue. A fair and reasonable exercise of his discretion will not generally be questioned by an appellate court.[40]

Jones v National Coal Board

Even *Jones v National Coal Board*, regarded as the quintessential example of the traditional approach, needs to be seen in context. The case is remembered more for its rich illusions, of judges descending into the arena and having their vision clouded by the dust of conflict;[41] and the overspeaking judge as no well-tuned cymbal,[42] than for the principle there laid down.

An examination of the decision in *Jones v National Coal Board* clearly reveals that it was the degree of intervention, rather than intervention of itself, which caused concern. It is also clear that the Court considered that judicial intervention was appropriate in a number of circumstances, including those impacting upon examination and cross-examination of witnesses.[43]

Consider the following passage:

> No-one can doubt that the Judge in intervening as he did, was actuated by the best motives. He was anxious to understand the details of this complicated case, and asked questions to get them clear in his mind. *He was anxious that the witnesses should not be harassed unduly in cross-examination, and intervened to protect them when he thought necessary.* He was anxious to investigate all the various criticisms that had been made against the board, and to see whether they were well founded or not. Hence, he took them up himself with the witnesses from time to time. *He was anxious that the case should not be dragged on too long, and intimated clearly when he thought that a point had been sufficiently explored. All those are worthy motives on which Judges daily intervene in the conduct of cases, and have done for centuries.*
>
> Nevertheless, we are quite clear that the interventions, taken together, were far more than they should have been.[44]

Further, it was said, when discussing the judge's role:

> The Judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; *to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition;* to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies.[45]

Jones v National Coal Board, while often seen to epitomise the traditional approach, in fact made clear on a number of occasions the appropriateness of a judge intervening in the examination of witnesses. Later cases have served to confirm this view.

The move to greater involvement

In considering the history and role of judicial intervention, the Commission has been greatly assisted by the writings of the Honourable Justice Ipp.[46] Justice Ipp referred to what he described as 'the unmistakable trend, throughout the common law world, towards increased intervention by Judges in the trial process'.[47] He went on to describe the contributing factors as including 'both long-term political and social movements and more immediate pressures'.[48] In particular, he referred to the changing role of judicial responsibility:

> Judicial responsibility is no longer seen as a function of state power; nor as a function of the prestige and independence of the judiciary itself. Rather it is now regarded as the function of an institution that serves the community. This view requires the judiciary to combine impartiality with openness and responsiveness to the individual members of society, at whose service only the system of justice must work.[49]

As Sir Anthony Mason has said extra-judicially:

> We must recognise that the Courts are institutions which belong to the people and that the Judges exercise their powers for the people.[50]

Sir Anthony went on to specifically discuss the possibility, and indeed the expectation, that trial judges would be expected to limit cross-examination which was prolonged unnecessarily.[51]

Of the many factors at play, one paradigm shift appears to have occurred. That is the shift from considering justice as it applies to individual participants in a particular case, in isolation, to a consideration not only of those factors but also justice as it applies to all potential litigants and the community which the courts are designed to serve.

It is this shift in thinking which, amongst other things, is behind the notions of case management now entrenched in this State and elsewhere in Australia. It is a concept which was recognised by the High Court in *Sali v SPC Ltd*[52] and reinforced in *Queensland v JL Holdings*.[53]

The assessment of the appropriate limits to judicial intervention to curtail excessive examination and cross-examination must be considered against this paradigm shift.

FURTHER LIMITATIONS ON JUDICIAL INTERVENTION

One limiting factor is often seen to be the decision in *Jones v National Coal Board*, discussed above. It is clear that the decision, while setting limits on appropriate judicial intervention, was never intended to prevent judicial intervention to curtail excessive questioning.

A second limitation arises from the concern of judges, particularly in the context of criminal trials, not to evince actual or perceived bias.

Concerns about bias

The actuality and appearance of impartial justice is central to the administration of justice.[54] This concern can lead to a reluctance to interfere in proceedings, even to the extent of controlling examination and cross-examination. There are a number of sound reasons for judicial care be taken.[55]

Equally, however, there has been a growing recognition that judicial intervention may be required, notwithstanding concerns about bias.[56] As Kirby A-CJ put it in *Galea v Galea*:

> Whilst patience is a judicial virtue, so also is a concern about justice, the efficient conduct of proceedings, and the avoidance of unnecessary delay, including to other litigants awaiting their hearing.

Very few of the decided cases in relation to bias relate to interference by a judge in the course of examination or cross-examination. And, as has been explained above in relation to *Ratten v The Queen* and *Jones v National Coal*

Board, the cases clearly support intervention in relation to examination and cross-examination in appropriate circumstances. In the end, it is not the fact of intervention but the degree of intervention and the effect of that intervention on a fair trial.[57]

Moreover, considerable guidance to judges is now available from the decided cases. For example, the judgment of Dawson J in *Re Mr Justice Kealy and Anor* provides a number of helpful comments on the restraints and standards to be adopted by trial judges.[58] Those restraints and standards include the following:

1. The judge must not as a matter of fact show bias, the test of bias being 'whether in all the circumstances the parties or the public might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the matter before him'.[59]
2. The judge must be careful to use language which is not open to misconstruction; this standard is based upon the principles of procedural fairness and of the right of a party to a fair trial.
3. Subject to exceptions which must be rare, no statement should be made by the judge before the conclusion of the proceedings, to indicate that he has taken a final view of any point in issue.
4. The judge must not intervene excessively with comments (and by analogy, questions) from the bench, especially when the scale of his interventions may be such as to deprive counsel of the opportunity to put his or her case coherently and in the matter in which he or she wishes to put it.
5. At the same time, it would be wrong for the judge to remain completely silent throughout the trial 'with the result that his ... views about the issues, problems and technical difficulties involved in the case remain unknown' until they emerge as final conclusions in his judgment.[60]

In the end, then, the appropriateness of judicial intervention, including intervention in the examination of witness, is a matter of degree. However, the governing principles are clear, and considerable guidance is available. In these circumstances, the Commission does not consider that concerns about actual or perceived bias prevent appropriate intervention to control examination and cross-examination, either as a matter of legal principle or practice.

Intervention in criminal proceedings

In the context of intervention in criminal proceedings, additional concerns have been expressed. [61]

Perhaps the most important distinction is that in a criminal trial it is the jury, and not the judge, which is the tribunal of fact.[62]

Any consideration of judicial intervention in the context of criminal trials can also only take place in the context of the fundamental precept that no person shall be convicted except after a fair trial.[63]

As the cases reveal, the precept manifests itself in many ways, including in relation to legal principle[64], practice[65] and the conduct of trials generally[66]. The precept will inform acceptable involvement in examination and cross-examination, as it informs all other aspects of the criminal trial.

Problems have sometimes[67] although not always[68] been caused by excessive questioning by a judge in the course of a criminal trial. In these circumstances there is an obvious concern that the jury may be unduly swayed by questions from the judge, due to the appearance of judicial imprimatur.

When a judge asks questions of a witness, there is a risk that the fact of intervention or the nature of the intervention may impinge upon the jury's function of deciding upon questions of fact. This is because in intervening in this way the trial judge may, inadvertently, suggest to the jury whether or not the witness' evidence should be believed.

The position is not necessarily the same when considering the ability of a judge to control excessive questioning. This does not necessarily connote any view as to the evidence which should or should not be believed. The role of the judge, in controlling the proceedings and ruling on questions of law, and the role of the jury, as the arbiters of fact, are less likely to be in conflict when the questioning by counsel is clearly excessive.

As Sir Anthony Mason has said:

> The judge will be expected to give closer attention to the definition of issues, to simplify the proof of any essential issues, the acceptance in evidence and exchange of witness' statements, the possibility of dispensing with oral evidence, where appropriate, *and to limiting cross-examination*. The possibility of adopting similar initiative procedures in jury trials, including criminal trials, is more difficult. The growing length of criminal trials, itself a matter of concern, may well require the judge to play a more active role. First, the judge may be required to identify before trial the precise issues which are to be raised by the defence and, where possible, to rule in advance of trial on questions of evidence and procedure. *Secondly, the trial judge will be expected to limit cross-examination if it emerges that cross-examination of witnesses is being prolonged unnecessarily. In the context of a criminal trial, it is not as easy to limit cross-examination – no judge wants to engage in a running fight with counsel – but there are some cases in which firm judicial action is justified.* [69]

Naturally, any intervention of this kind would need to be handled with care, due to the importance of a fair trial, and the split functions of the judge and

the jury. However, in the Commissions' view, there is nothing in the fundamental precept of a fair trial, or the different functions of the judge and the jury, which prevents a trial judge from controlling excessive examination and cross-examination, where appropriate.

Summary of judicial intervention

In all but excessive cases, and subject always to the importance of a fair trial, judicial intervention to control excessive examination and cross-examination is appropriate, and both the so-called "traditional" line of authorities, and more modern authorities support this view. Moreover, the limitations on intervention are well known and sound.

The Commission does not consider that the present law prevents judges from intervening to control excessive examination and cross-examination. On the contrary, the Commission considers that the present law makes clear that intervention is permitted, in appropriate circumstances.

Proposal 5

There should be no changes to the principles in *Jones v National Coal Board*, or the rules relating to reasonable apprehension of bias, as they relate to judicial intervention to control excessive examination and cross-examination.

THE POWER TO INTERVENE

For the reasons discussed above, the Commission considers that while there are legal principles which limit the degree of judicial intervention, intervention is permissible. The Commission considers it appropriate for judges to have the power to intervene in proceedings to control, amongst other things, excessive examination and cross-examination, in appropriate circumstances.

The issue is then whether Western Australian courts are vested with sufficient power to intervene as appropriate. A related issue is also whether the power provided for is sufficiently clear to provide judges with the confidence to intervene where appropriate.[70]

The Evidence Act 1906 (WA)

The *Evidence Act 1906* (WA) applies to all legal proceedings in Western Australia, where the tribunal of fact is bound by the rules of evidence.

The Act contains a number of relevant provisions, particularly in relation to cross-examination.

Section 25 provides:

> (1) If any question put to a witness upon cross-examination relates to a matter not relevant to the proceeding, except insofar as it

affects the credit of the witness by injuring his character, it shall be the duty of the court to decide whether or not the witness shall be compelled to answer it, and the court may, if it thinks fit, inform the witness that he is not obliged to answer it.

(2) In exercising this discretion, the court shall have regard to the following considerations —

(a) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court as to the credibility of the witness on the matter to which he testifies;

(b) such questions are improper if the imputation they convey relates to matters so remote in time, or of such character, that the truth of the imputation would not affect, or would affect in a slight degree only, the opinion of the court as to the credibility of the witness on the matter to which he testifies;

(c) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence....

Section 26 provides:

(1) The court may forbid any question it regards as -

(a) indecent or scandalous, although such question may have some bearing on the case before the court, unless the question relates to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed; or

(b) intended to insult or annoy, or needlessly offensive in form, notwithstanding that such question may be proper in itself.

There is also a special regime for the protection of complainants in sexual offence cases which prohibits evidence relating to sexual reputation,[71] or sexual disposition[72] and provides that the leave of the court must be obtained before adducing evidence relating to sexual experiences of the complainant of any kind. Specific reference is then made to the factors which should be considered by the court in determining whether or not to grant leave.[73]

The Evidence Act 1995 (Cth)

The Commonwealth *Evidence Act* does not presently, of course, apply to all judicial proceedings in Western Australia although, significantly, it does apply in relation to proceedings in the Federal Court. In light of the Commission's proposals in sub-section 3.1 regarding the law of evidence, it is convenient to refer to these provisions here. There are a number of relevant provisions, relating to both examination-in-chief[74] and cross-examination.[75]

Section 37 allows leading questions in examination-in-chief or re-examination in certain circumstances.

A number of other provisions limit the form or content of cross-examination. Section 41 of the Act, for example, addresses a similar concern as section 26 of the Western Australian *Evidence Act*, namely misleading, unduly annoying, harassing, intimidating, offensive, oppressive or repetitive cross-examination. There are also provisions in relation to cross-examination as to credibility.[76]

Unlike the Western Australian *Evidence Act*, there is also a general discretion to exclude evidence for reasons including those related to inefficient use of time.

Section 135 provides:

> The Court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:
> (a) be unfairly prejudicial to a party; or
> (b) be misleading or confusing; or
> (c) *cause or result in undue waste of time*.[77]

For present purposes, it is sufficient to note that, like the Western Australian *Evidence Act*, the Commonwealth *Evidence Act* specifically empowers judges in relation to the control of examination and cross-examination (at least in some respects), and is somewhat more extensive than the Western Australia *Evidence Act.*

Supreme Court Rules

Order 34 of the *Supreme Court Rules 1971* makes specific provision for judicial control over the time spent at trial in relation to a number of matters, including the examining of witnesses.

Order 34 rule 5A provides:

> 5A (1) a Judge may at any time by direction-
> (a) limit the time to be taken in examining, cross-examining or re-examining a witness;
> (b) limit the number of witnesses (including expert witnesses) that a party may call on a particular issue;
> (c) limit the time to be taken in making any oral submission;
> (d) limit the time to be taken by a party in presenting its case;
> (e) limit the time to be taken by the trial;
> (f) amend any such limitation.
>
> (2) In deciding whether to make any such direction, a Judge shall have regard to these matters in addition to any other matters that may be relevant:
> (a) the time limited for a trial must be reasonable;
> (b) any such direction must not detract from the principle that each party is entitled to a fair trial;
> (c) any such direction must not detract from the principle that each party must be given a reasonable opportunity to lead evidence and cross-examine witnesses;
> (d) the complexity or simplicity of the case;

(e) the number of witnesses to be called by the party;
(f) the volume and character of the evidence to be lead;
(g) the state of the Court lists;
(h) the time expected to be taken for the trial; and
(j) the importance of the issues and the case as a whole.

This provides clear power for judicial intervention. This rule also applies to the District Court.[78]

In the Commission's view, the existence and clarity of this rule are beneficial, and it should be retained.

However, the Commission has reservations about the expression of relevant factor (2) (g) 'the state of the Court lists'. In the Commission's view this factor should be amended to make clear that it is not simply the state of the lists, but the effect that has on the interest of prospective litigants and the community as a whole. (This may well be the intention behind the factor, and if so, no harm can come from amending the factor to make this clear).

Proposal 6

Order 34 rule 5A of the Rules of the Supreme Court should be retained, but the reference in Order 34 rule 5A(2)(g) to 'the state of the Court lists' should be deleted, and Order 34 rule 5A(2)(g) should be amended to read 'the interest of prospective litigants, and the community, in proceedings being resolved expeditiously and without undue expense and delay'.

Local Courts Act and *Rules*

There are very limited references in the *Local Courts Act 1904* (WA) to the conduct of the trial.[79] There are no provisions specifically dealing with the power of the court to intervene to control excessive examination or cross-examination.

The *Local Court Rules 1961* also only contain limited reference to the conduct of the trial and the taking of evidence.[80]

The only specific reference to control of examination is in Order 22 rule 9 headed 'Disallowance of Vexatious Questions in Cross-examination', which provides:

> The magistrate may in all cases disallow any question put in cross-examination of any party or other witness which may appear to him to be vexatious, and not relevant to any matter proper to be enquired into in the action or matter.

It is doubtful whether this order adds anything to section 26 of the Western Australian *Evidence Act*.

There is certainly no provision equivalent to Order 34 rule 5A of the *Rules of the Supreme Court*. The Commission considers it advisable to make clear that magistrates hearing matters in the Local Court have the same power to intervene to control excessive examination and cross-examination as judges in the District and Supreme Courts.[81] This is also advisable in light of the fact that, unlike in the District and Supreme Courts, there are significant difficulties in arguing that there is any inherent jurisdiction in the Local Court allowing intervention of this kind.[82]

Proposal 7

The Local Court Rules 1961 should be amended by adding a rule based on Order 34 rule 5A of the rules of the Supreme Court, with any appropriate modifications.

Justices Act 1902 (WA)

In general terms, the *Justices Act 1902* (WA) applies in relation to proceedings in the Court of Petty Sessions. It contains a number of provisions which relate to the taking of evidence.[83] With the exception of section141, however, there are no provisions specifically dealing with judicial intervention to control excessive examination and cross-examination. Section 141 headed 'Practice as to Examination etc of Witnesses', provides:

> The practice before justices upon the hearing of a complaint of a simple offence or other matter shall, in respect of the examination and cross-examination of witnesses be in accordance as nearly as may be with the practice for the time being of the Supreme Court upon the trial of an issue of fact in an action at law.

For the same reasons given in relation to proceedings in the Local Court, it is preferable that a clear power to intervene to control excessive examination and cross-examination be provided for. In expressing this proposal, the Commission is conscious of the special place of criminal proceedings, and of the care which needs to be taken before intervening in those proceedings to control excessive examination. In making this proposal, however, the Commission is also conscious of the fact, firstly that in the Court of Petty Sessions, unlike the superior courts, the magistrate is the tribunal of fact, and secondly that the rules canvassed above in relation to appropriate judicial intervention will apply.

Proposal 8

The *Justices Act* should be amended to provide for a limited power of judicial intervention to control excessive examination and cross-examination, in appropriate circumstances and subject to the interests of justice and the right of a defendant to a fair trial.

ANCILLARY MATTERS

The calling of 'unfavourable' witnesses

A further problem which the Commission wishes to raise for discussion relates to the calling of a witness, who may assist the court, but whom neither party is entirely comfortable about calling (and may not even consider him or her to be a witness of truth in all respects).

In this situation, parties may be placed in the invidious position of deciding whether to run the risk of a *Jones v Dunkel* inference, or to call a witness whose evidence may be both untruthful and harmful to their case. There is also a reluctance to call such a witness due to the difficulty, if things do go badly, in declaring the witness 'hostile'. Further, even if the witness is called and declared 'hostile', the potential benefit of his or her evidence is then effectively lost. Nor, at common law, is a judge empowered to call a witness of his or her own accord.[84]

For these reasons, a court may not receive the benefit of a potentially useful witness, and decisions may be reached without the benefit of all available evidence.

An issue therefore arises as to whether it should be possible for a witness to be called either by the judge, or by a party, on the basis that neither party desires to call the witness, but that the evidence may assist the court.

The Australian Law Reform Commission expressed its view as follows:

> Where a party calls a witness who gives evidence in part unfavourable to that party it is not possible for that party to effectively cross-question the witness unless the witness is declared 'hostile'. In that situation it is unlikely that a witness will be declared 'hostile'. The unfavourable evidence will usually be seen as indicating honesty. Further, it is rare in any event for a court to declare a witness hostile. The law, therefore, can prevent such evidence being tested. This may adversely affect the fact-finding process and the fairness of the trial. Another consequence is that the present law discourages the calling of witnesses. There are times when a party's cause would be assisted if that party could call the opposing party to give evidence. This is not usually done.… A further disadvantage of the present law is that the court may be deceived by a corrupt or dishonest witness and the party concerned may be prevented from revealing the deception.[85]

In light of these concerns, the Australian Law Reform Commission recommended that the law relating to 'hostile' witnesses be abrogated. These recommendations formed the basis of section 38 of the Commonwealth *Evidence Act*. This provision makes it easier for a party to (in effect) have a witness declared 'hostile' and then enables the party calling the witness to cross-examine the witness before the opposing party does. This has occurred in a number of cases, apparently with some success.[86]

In sub-section 3.1 on the law of evidence, the Commission proposes that the Western Australian *Evidence Act* be repealed, and be replaced by an Evidence

Act based as substantially as possible on the provisions of the Commonwealth *Evidence Act*. These provisions would then apply. The Commission also considers, however, that an alternative or additional approach may be possible. This approach is for a party, with the agreement of the other party, or on good cause otherwise being shown, to request that the judge call a witness and allow both parties to cross-examine.

This may limit debate about whether any one party or the other is entitled to the benefit of the Commonwealth *Evidence Act* provisions and would also obviate the need to attempt to lay a framework for the making of such an application in the initial examination. The power may well be sparingly used but may be of benefit.

Question 1

Should a trial judge be permitted on the agreement of the parties, or on good cause being shown by one of the parties, to call a witness and enable that witness to be cross-examined by both parties?

Permitting jurors to ask questions or raise matters to be addressed

In trials by jury, there is presently no formal provision for questioning by jurors, or the raising of issues by jurors, until all the evidence has been taken, the witnesses have been excused and the trial judge's summing up has occurred. This is too late for jurors' queries to be addressed, at least by the calling of evidence. It may also lead to speculation by jurors and to disenchantment with the process.

In coronial inquests with juries in Western Australia[87] the practice was different. Jurors could both ask questions and indicate matters that they wished to be addressed. The Commission understands that this process worked well and sometimes assisted the parties to limit the issues and the evidence as a result.

In criminal trials, obvious concerns arise as to the extent to which these processes should be permitted. To take one example, questions reflecting prejudice or pre-judgment may lead accuseds to be concerned about whether they were receiving (or had received) a fair trial. On the other hand, however, the trial judge could correct any misapprehensions or misunderstandings. The jury is also the arbiter of fact and should be assisted in undertaking its task. In proceedings before magistrates, magistrates are permitted to ask questions or direct attention to issues of concern; so, too, may judges presiding over jury trials. It may then be asked why jurors should be prevented from doing so. It may particularly be asked why jurors are only permitted to ask questions — once all the evidence has been taken — when it is arguably too late for any matters they raise to be addressed.

Any concerns about jurors being permitted to raise questions or issues should be carefully scrutinised. Any fear about what the questions or issues raised by jurors might reveal does not sit easily with the magnitude of the task which has been entrusted to them. As mentioned, any misunderstanding or inappropriate reasoning may also be corrected, before it has the opportunity to irremediably infect a juror's reasoning.

Any questions or issues should, of course, be directed first to the judge, who should consider whether they might be appropriately dealt with, and if so, when.

Even if questions were seen to be unacceptable, the Commission queries whether jurors could not at least raise issues of concern which they wished to be addressed.

Question 2

Should jurors be permitted to ask questions and raise issues through the judge, subject to the judges' power to rule on whether and when those questions or issues are raised in open court and dealt with by the witness or the parties?

CONCLUSIONS

In our adversarial system, the importance of examination of witnesses, and particularly the testing of that evidence by cross-examination, should not be underestimated. As the High Court has recently stated: 'confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial'.[88]

However nothing in that significance justifies excessive examination or cross-examination. Excessive examination and cross-examination increase the time and expense of litigation, without assisting justice to be done in the particular case. It can also delay other actions coming on for trial, so affecting other prospective litigants, access to justice generally, and the general interest of the community in litigation being conducted as inexpensively and expeditiously as possible.

The causes of excessive examination and cross-examination are likely to include the representation of the parties; the calibre and conduct of counsel; the legal framework (including any failure to delineate the issues, and the operation of the rules of evidence), and judicial fear of intervention.

It is likely that the use of witness statements and the clear delineation of the issues involved in the case will assist in overcoming the problem. However,

in the Commission's view, the key to overcoming the problem lies in judicial intervention at trial. For this reason, this sub-section examined in detail the legal principles and practices seen to encourage excessive examination and cross-examination, and impede judicial intervention.

Having examined these matters, the Commission considers that, when properly understood, the relevant legal principles do not encourage excessive examination or cross-examination, or prevent judicial intervention where appropriate. The Commission therefore does not propose making any change to these principles.

However, to avoid any doubt, and to encourage judicial intervention where appropriate, the Commission proposes a number of amendments to legislation and rules of court, to make it clear that judicial power to intervene exists, and should be exercised in appropriate cases.

When the relevant principles are properly understood, and the power to intervene clearly provided for, there will be nothing in the existing law which prevents the problems of excessive examination and cross-examination from being overcome.

SUMMARY OF PROPOSALS

1. The rules of court and/or the *Evidence Act* should be amended to provide that self-represented litigants shall direct all questions in cross-examination of complainants to the judge, and question the complainant through the judge.

2. There should be no change to the rule in *Browne v Dunn.*

3. The rule in *Browne v Dunn* should apply in the Court of Petty Sessions and the Local Court, albeit the consequences for a failure to follow the rule should be tailored to meet the individual circumstances of the case, including whether a party is self-represented or not.

4. There should be no change to the basic rule in *Jones v Dunkel*, or its extended application to the questioning of witnesses.

5. There should be no changes to the principles in *Jones v National Coal Board*, or the rules relating to reasonable apprehension of bias, as they relate to judicial intervention to control excessive examination and cross-examination.

6. Order 34 rule 5A of the *Rules of the Supreme Court* should be retained, but the reference in Order 34 rule 5A(2)(g) to 'the state of the Court lists' should be deleted.

Order 34 rule 5A(2)(g) should be amended to read 'the interest of prospective litigants, and the community, in proceedings being resolved expeditiously and without undue expense and delay'.

7. The *Local Court Rules 1961* should be amended by adding a rule based on Order 34 rule 5A(2)(g) of the *Rules of the Supreme Court*, with any appropriate modifications.

8. The *Justices Act* should be amended to provide for a limited power of judicial intervention to control excessive examination and cross-examination, in appropriate circumstances and subject to the interests of justice and the right of a defendant to a fair trial.

SUMMARY OF QUESTIONS POSED

1. Should a trial judge be permitted on the agreement of the parties, or on good cause being shown by one of the parties, to call a witness and enable that witness to be cross-examined by both parties?

2. Should jurors be permitted to ask questions, and raise issues through the judge, subject to the judge's power to rule on whether and when those questions or issues are raised in open court and dealt with by the witness or the parties?

ENDNOTES

1 For example, with the assistance of a pre-prepared video, akin to videos sometimes shown to prospective jurors.

2 DA Ipp, 'Reforms to the Adversarial Process in Civil Litigation – Part II' (1995) 69 *Australian Law Journal*; 790, 804; and 'Judicial Intervention in the Trial Process' (1995) 69 *Australian Law Journal* 365, 369-70.

3 The Commission favours the creation of the office of the Public Defender. If a public defender were available, the judge could direct that cross- examination questions be put by the Public Defender, even if a defendant preferred to otherwise represent him/herself.

4 *United States v Reaves* 636 F Supp 1575, 1578 (ED Ky 1986), (Burtelsman J), quoted by Ipp J in 'Reforms to the Adversarial Process in Civil Litigation', above n 2, 808.

5 [1969] 1 AC 191; (1988) 165 CLR 543

6 The concern was based on the fact that 'getting up' charges are included in the first day's fee, and that this provides little incentive for extensive preparation.

7 Ipp, 'Reforms to the Adversarial Process in Civil Litigation – Part II', above n 2, 802-803; and 'Judicial Intervention in the Trial Process', above n 2, 370-371.

8 A number of submissions supporting the use of witness statements were received, including the written submission of John Cream dated 25 August 1998.

9 See Ipp, 'Reforms to the Adversarial Process in Civil Litigation – Part II', above n 2, 797-798.

10 (1894) 6 R 67.

11 JD Heydon, *Cross on Evidence* (1996) para [17435].

12 [1983] 1 NSWLR 1, 16.

13 *Browne v Dunn,* above n 10, 70-71 (emphasis added).

14 Ibid 76-77 (emphasis added).

15 Ibid 79 (emphasis added).

16 *Allied Pastoral Holdings Pty Ltd v Federal Commision of Taxation,* above n 12, 23.

17 *Seymour v Australian Broadcasting Commission* [1977] 19 NSWLR 219, 224-5, 236; *Jagelman v FCT* (1995) 31 ATR 467, 472-3; *Raben Footwear Pty Ltd v Polygram Records Inc* (1997) 75 FCR 88, 101.

18 *Raben Footwear*, above n 17.

19 *R v Sokvari* (Unreported, New South Wales Court of Criminal Appeal, Allen and Simpson JJ, 20 November 1995). Note Allen J with whom Gleeson CJ and Simpson J agreed.

20 *Maines v Roy* (1990) 1 WAR 509.

21 Ibid 516 (Nicholson J).

22 *Sotomayor v Kelly* (1991) 13 MVR 553, 557.

23 For example, contraventions of the *Occupational Safety & Health Act* or the *Mines Safety & Inspection Act* carry maximum penalties of $200 000: *Occupational Safety and Health Act* s 19(7); and *Mines Safety & Inspection Act* s 9(8).

24 (1959) 101 CLR 298.

25 Heydon, above n 11, para [1215].

26 This accurately states the principle which arises from the High Court decisions in *Insurance Commissioner v Joyce* (1948) 77 CLR 39; *Jones v Dunkel*, above n 24; *Lopez v Taylor* (1970) 44 ALJR 412; and *Brandi v Mingot* (1976) 12 ALR 551. A useful pithy statement of some aspects of the rule is that of Owen J in *Bank of WA v Ocean Trawlers* (1995) 16 ACSR 501, 521.25-45, and a useful general discussion of the basis of the rule and the way in which it should be applied is that of Mahoney J in *Fabre v Arenales* (1992) 27 NSWLR 437, 443-449.

27 See the discussion in *Cross On Evidence,* above n 11, 1087 – 1090 [1215].

28 *Jones v Dunkel*, above n 24, 320 – 321 (Windeyer J).

29 *Commercial Union Assurance Co v Ferrcom Pty Ltd* (1991) 22 NSWLR 389, 418-419(Goldberg J at first instance), and *White v Flower & Hart* (1998) 170 ALR 169, 226-228.

30 *Jones v Dunkel*, above n 24, 320-321.

31 3 App Div 109; 39 NYS 274 (1896) (a decision of the Appellate Division of the Supreme Court of New York).

32 *Commercial Union Assurance Co of Australia v Ferrcom Pty Ltd*, above n 29, 418-419.

33 See eg, *Ratten v The Queen* (1974) 131 CLR 510, 517 and *Jones v National Coal Board* [1957] 2 QB 55, 63-64; *Yuill v Yuill* [1945] P 15, 20.

34 *Jones v National Coal Board*, above n 33; *R v Watson, ex parte Armstrong* (1976) 136 CLR 248.

35 *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 (Lord Hewart CJ).

36 A number of which are canvassed by Kirby P in *The Council of the Municipality of Burwood v Harvey*, (Unreported, Supreme Court of NSW, Court of Appeal, CA 40269 of 1993, 3 April 1995).

37 *Ratten v The Queen* above n 33, 517 (Barwick CJ, with whom McTiernan, Stephen and Jacobs JJ agreed).

38 (1991) 13 MVR 521, 535-536 (Handley JA) and (Mahoney JA), 530.

39 Ibid 529-530.

40 *Vassiliades v Vassiliades* (1941) 18 Cyprus LR 10, 22.

41 *Jones v National Coal Board*, above n 33, 63, referring to *Yuill v Yuill* [1945] P 15, 20.

42 Ibid 64, referring to Lord Bacon's *Essays or Counsels Civil and Moral. Of Judicatur*e.

43 Ibid 63-65.

44 Ibid 63 (emphasis added).

45 Ibid, 64. (emphasis added).

46 Of the Supreme Court of Western Australia; see, for example, Ipp, 'Judicial Intervention in the Trial Process', above n 2, and 'Reforms to the Adversarial Process in Civil Litigation – Part II', above n 2.

47 Ipp, 'Reforms to the Adversarial Process in Civil Litigation', above n 2, 804.

48 Ibid.

49 Ibid.

50 From 'The Role of the Courts at the Turn of the Century' (1993) 3 *Journal of Judicial Administration* 156, 166, quoted by Ipp J in 'Judicial Intervention in the Trial Process', above n 2, 366.

51 See Ipp, 'Judicial Intervention in the Trial Process', above n 2, 376.

52 (1993) 67 ALJR 841, 849 (Toohey and Gaudron JJ).

53 (1997) 189 CLR 146.

54 *Galea v Galea* (1990) 19 NSWLR 263, 277 (Kirby A-CJ, with whom Meagher JA agreed); *Vakauta v Kelly* (1989) 63 ALJR 610; *Grassby v The Queen* (1989) 63 ALJR 630.

55 A number of which are discussed by Kirby P in the *Council of the Municipality of Burwood v Harvey,* above n 36.

56 See the discussion of Kirby P, ibid.

57 *Council of the Municipality of Burwood v Harvey,* ibid.

58 *Re Mr Justice Kealy and Anor; ex parte Ansett Transport Industries (Operations) Pty Ltd and Ors* (1990) 64 ALJR 495 summarised in a practice note by JG Starke QC in (1990) 64 ALJ 666-667.

59 *Grassby v The Queen* (1989) 168 CLR 1, 20.

60 See *Vakuata v Kelly* (1989) 167 CLR 568, 571.

61 See for example the discussion by Ipp in 'Judicial Intervention in the Trial Process', above n 2, 372; and see the discussion on this point by Kirby P in *The Council of the Municipality of Burwood v Harvey,* above n 36. See also *Whitehorn v The Queen* (1983) 152 CLR 657, 675 (Dawson J).

62 See eg, *R v R* (1989) 18 NSW LR 74, 85 (Gleeson CJ).

63 Amongst others, *Barton v The Queen* (1980) 147 CLR 75; *Jago v District Court* (NSW) (1989) 168 CLR 23, 29 (Mason CJ), 56-57 (Deane J); *R v Glennon* (1992) 173 CLR 592, 606, 623; *Dietrich v The Queen* (1992) 177 CLR 292. For a helpful discussion of the move towards this fundamental precept, see Sir Anthony Masons' keynote address to the Fifth International Criminal Law Congress 'Fair Trial' (1995) 19 Crim LJ 7; and KP Dugan, 'Reform of the Criminal Law with Fair Trial as the Guiding Star' (1995) 19 Crim LJ 258.

64 For example in relation to a number of rules of evidence, including confessions: *Cleland v The Queen* (1982) 151 CLR 1, 9; *Carr v The Queen* (1988) 165 CLR 314, 338; illegally obtained evidence: *Ireland* (1970) 126 CLR 321 and *Bunning v Cross* (1978) 141 CLR 53; identification: *Alexander* (1981) 145 CLR 395, 346; similar facts: *Sutton v The Queen* (1984) 152 CLR 528, 547; and cross-examination as to bad character: *Matusevich v The Queen* (1977) 137 CLR 633, 647 and *Donnini v The Queen* (1972) 128 CLR 114.

65 For example, *Wilde v The Queen* (1988) 165 CLR 365, 375 (Deane J), regarding joinder of charges; *Jago v District Court (NSW)* regarding staying proceedings on the grounds of abuse of process.

66 For example, judicial involvement in a trial where the accused is unrepresented: *MacPherson v The Queen* (1981) 147 CLR 512.

67 Eg, *Mercer* (1993) 67 A Crim R 91, 94 (Hunt CJ at CL with whom Grove and Sully JJ agreed).

68 See eg, *R v Maher* (1986) 83 FLR 332, 341 (Queensland Court of Criminal Appeal).

69 'The Role of the Courts at the Turn of the Century' (1993) 3 *Journal Judicial Administration* 156, 160-161 (emphasis added), quoted in Ipp, 'Judicial Intervention in the Trial Process', above n 2.

70 See, for example, the discussion by Ipp in 'Reforms to the Adversarial Process in Civil Litigation – Part II', above n 2.

71 *Evidence Act 1906* (WA) s 36B.

72 *Evidence Act 1906* (WA) s 36BA.

73 *Evidence Act 1906* (WA) s 36BC(2). Amendments to the *Evidence Act* were made following a report by Graeme Scott QC, later Justice Scott of the Supreme Court of Western Australia.

74 *Evidence Act 1995* (Cth) s 37 and following.

75 Eg, *Evidence Act 1995* (Cth) ss 26, 41, 103, 104, 135, 136.

76 Eg, *Evidence Act 1995* (Cth) ss 102, 103, 104.

77 (Emphasis added). The commentary in Stephen Odgers, *Uniform Evidence Law* (2nd ed, 1997) [135.5] explains that the provision is designed to ensure that exclusion on the basis of 'undue waste of time' only occurs in 'extreme circumstances'.

78 *District Court of Western Australia Act 1969* ss 52 and 87, and *District Court Rules.*

79 *Local Courts Act 1904* (WA) s 70 relates to trial but is of limited significance for present purposes and s78 provides that the rules of evidence observed in the Supreme Court shall be applicable.

80 *Local Courts Act 1904* (WA) O 20 relating to evidence and O 22 relating to trial.

81 It is arguable that the *Local Courts Act* s 35 which provides that 'the several rules of law enacted and declared by the *Supreme Court Act 1935*, shall be in force and receive effect in Local Courts, so far as the matters to which such rules relate shall be respectively cognisable by such courts', may have this effect. The matter is certainly not as clear as it could be, however, particularly when no provision is made in the *Local Court Rules* for control of excessive examination and cross-examination.

82 See *Grassby v The Queen* (1989) 168 CLR 1, 16-17 (Dawson J, with whom Mason CJ, Brennan, and Toohey JJ. Deane J (on this issue) agreed; *Walsh v Giumelli* [1975] WAR 114, 116. Cf *Sparks v*

Bellotti [1981] WAR 65, Lavan ACJ 66-67, Wickham J 68-69, and Wallace J 70-71, drawing a distinction between inherent jurisdiction on the one hand, and the Court's inherent power to determine its own procedure on the other.

83 Including, for example, *Justices Act 1902* (WA) ss 69, 73, 77, 89, 103, 105, 109-112, 141, 237.

84 *Whitehorn v The Queen* (1983) 152 CLR 657; *R v Apostolides* (1984) 154 CLR 563.

85 ALRC, *Evidence,* Interim Report No 26 paras [294] – [296]; see also paras [623]-[624].

86 TH Smith and OP Holdenson in 'Comparative Evidence: The Unhelpful Witness' (1998) 72 *Australian Law Journal* 720, 723-725.

87 Under the former *Coroner's Act 1920* (WA).

88 In *Lee v The Queen* (1998) 72 ALJR 1484, 1489 (Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ).

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3.3

Expert Evidence

INTRODUCTION

The opinions of experts have been received into evidence by common law courts for centuries.[1] Over the years, fields of expertise have expanded and expert evidence has proliferated. These days opposing experts are as much a part of the litigation process as opposing parties, solicitors and counsel. Indeed, growth in the use of expert evidence has reached the point where uncontrolled expert evidence has been described as one of the major generators of unnecessary cost in civil litigation.[2] Consequently, any review of the time and resources consumed by the litigation process must look closely at the practice and procedure for admission of expert evidence.

This sub-section considers the topic of expert evidence as part of a general review of the capability of the civil litigation process in Western Australia to deliver simple, cost effective and prompt resolution of disputes so that the court system may be fair and accessible to all. The issues involved are not unique to Western Australia. In recent years a number of common law jurisdictions have considered a range of reforms related to expert evidence and this sub-section draws upon that debate to identify the principal issues for consideration.

This sub-section is divided into four parts. The first part is a summary of the principal issues. The second part summarises various proposals that have been advanced to address those issues. The third part considers the debates that arise in a consideration of whether the various proposals should be adopted. The fourth part sets out a number of specific proposals being considered for recommendation by the Law Reform Commission for introduction in Western Australia.

THE PRINCIPAL ISSUES

Experts as partisans

There appears to be a consensus that one of the significant problems with the process of civil litigation within the adversarial system is that it produces expert testimony that is not impartial.[3] The following comments are illustrative of the point:

(a) Under the present system experts are inevitably to an extent partisan. They are paid by the side which calls them, and quite apart from monetary considerations they commonly feel a sympathetic interest in that party's cause.[4]

(b) That experts' remuneration comes from the parties for whom they testify is in itself a powerful factor in aligning them with their source of funds and in militating at least at the subconscious level an identification with the cause of their employer.[5]

(c) There is widespread agreement with the criticisms I made in the interim report of the way in which expert evidence is used at present, especially the point that experts sometimes take on the role as partisan advocates instead of neutral fact finders or opinion givers.[6]

(d) This tendency of expert witnesses to express opinions too freely or in accordance with the perceived interest of the party calling them will, of course, be familiar to everyone here today.[7] It is exacerbated these days by the high fees paid to experts and by the increasing importance in academic circles of fees earned from extra-university activities.[8]

(e) [A] survey of 12 Australian judges identified that all 'had encountered partisanship in expert witnesses. Three-quarters of the Judges said that this phenomenon constituted a problem for the quality of fact-finding in their Court.[9]

(f) [A]t the American trial bar,... expert witnesses are known as 'saxophones'. This is a revealing term, as slang often is. The idea is that the lawyer plays the tune, manipulating the expert as though the expert were a musical instrument on which the lawyer sounds the desired notes....[10]

(g) [A]n expert is not like an ordinary witness, who hopes to get his expenses, but he is employed and paid in the sense of gain, being employed by the person who calls him. Now it is natural that his mind, however honest he may be, should be biased in favour of the person employing him, and accordingly, we do find such bias...Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them.[11]

(h) There is also a perception that there are experts 'for hire'.[12]

It is important to distinguish between the tendency for experts to become partisan on the one hand, and on the other, a conflict of expert testimony

which reflects a genuine divergence of opinion amongst experts. The latter is an important part of the adversarial system. It is a mechanism by which the court may be presented with the range of scientific opinion.[13] It is the role of the court to determine the opinion which should be reflected in any judgment by the court.

> It is axiomatic that expert opinion adduced by one party is likely to be contradicted by no less expert opinion called by his adversary. The existence of conflict in the expert testimony does not paralyse the decision making process. It is the function of the tribunal of fact to decide which witnesses, expert or lay, it will accept.[14]

For this reason, conflicts between the opinions expressed by experts have long been part of the adversarial system.[15] Reform should not be directed at removing conflict between the testimony of experts. Rather it should ensure that a partisan posture does not lead to a distortion of the extent of genuine conflict between the opinions of experts.

Intractable opinions

The existing system is said to discourage opposing experts from adopting a co-operative approach with a view to narrowing the areas of disagreement. The present system is also criticised for discouraging experts from making concessions once their reports have been provided. It is said that differences between the opinions of experts become intractable.

Awareness of obligations to the court

There appears to be a view, especially on the part of judges, that experts are not made aware of their obligations to the Court. The obligations of experts when giving evidence have been recently summarised by Cresswell LJ in *The 'Ikarian Reefer'*[16] where his Lordship said:

> The duties and responsibilities of expert witnesses in civil cases include the following:
>
> 1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to formal content by the exigencies of litigation.[17]
> 2. An expert witness should provide independent assistance to the Court by way of objective, unbiased opinion in relation to matters within his expertise.[18] An expert witness in the High Court should never assume the role of an advocate.
> 3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his included opinions.[19]
> 4. An expert witness should make clear when a particular question or issue falls outside his expertise.
> 5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one.[20] In cases where an expert witness, who has prepared a report, could not assert that the report contained the truth, the whole

truth and nothing but the truth without some qualification, that qualification should be stated in the report.[21]

6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's experts report, or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.
7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.[22]

Increasing technicality in expert evidence

Concerns have been expressed that where expert evidence is very technical or falls within an area in which the judge has no expertise or familiarity then resolving a conflict between the testimony of experts is extremely difficult. In such circumstances, conflicts between experts may be decided on the basis of the apparent authority or demeanour of the expert in delivering evidence rather than a critical analysis of the basis for the opinion. Judges, in most cases, do not have access to their own expert advice in order to assist in forming a judgment. The process is not assisted by the manner in which experts are required to present their evidence — either in a question and answer format (with a barrister leading the presentation) or in a detailed written report.

However, the use of court-appointed experts to assist judges is seen to give rise to other problems.[23] The expert may tend to present the mainstream scientific position and tend to scientific conservatism.[24] Also, experts have an opportunity to influence the judge and to usurp the judicial role in a manner that is inconsistent with the adversarial system. Court-appointed experts may also act as a filter through which the judge views the other evidence in the case.[25]

Unnecessary duplication

In preparing cases for trial it is usual for each party to engage its own expert. The result may be an unnecessary duplication of expertise and additional expense. The existing litigation process does not provide a mechanism by which parties may, from the outset, be encouraged or even required to engage a single expert.

Junk science

There is a considerable body of literature concerning the rules which should be applied by the court in order to determine whether an opinion is sufficiently reliable for it to be admissible as expert evidence. In Australia, the common law position was summarised by the High Court in *Clark v Ryan.*[26]

> On the one hand...it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment on it without such

> assistance. In other words, when it so far partakes of the nature of a science as to require a course of previous habit or study, in order to attain of a knowledge of it...while on the other hand, it does not seem to be contended that the opinions of witnesses can be received when the inquiry is into a subject-matter, the nature of which is not such as to require any particular peculiar habits or study in order to qualify a man to understand it.[27]

In the United States the debate has polarised around the approaches of the United States Supreme Court in *Frye v United States*[28] and *Daubert v Merrell Dow Pharmaceuticals*.[29] The decision in *Daubert* is seen to have changed the approach of the courts to the reception of expert evidence in that country in that:

> [T]he previous reliance by United States courts upon scientific community acceptance for determining appropriate standards for the admission of scientific knowledge claims was replaced by a series of considerations which are primarily concerned with assessing the 'internal' practices of science. The new emphasis seems to concentrate upon an evaluation of scientific method by Judges.[30]

The proliferation of commentary in the United States has been extreme, perhaps reflecting the extent of the expert 'industry' in that country.[31] The implications for Australia have been considered in a series of articles.[32] The issue raised is whether the courts should scrutinise claims by witnesses expressing opinions to ensure that they do so on the basis of a 'field of expertise' in order to exclude what is colloquially referred to as 'junk science' from the courtroom. Under the existing system, there is no scrutiny of the expertise of the witness or the credibility of the 'science' upon which the evidence is based until the evidence is presented in court. Substantial time and expense may be incurred only to have the evidence rejected or considered to be of little weight.

Poor presentation

Some complaint has been directed at the quality of experts' reports.[33] There is no system for training or accreditation of experts in particular fields. The quality of instructions provided to experts in order to ensure that they understand the nature of their role and the questions to be addressed by them has also been criticised.[34] The available evidence is that judges are of the view that there is room for improvement in the presentation of expert evidence.[35] This may be due to the procedures which courts require experts to use when presenting their evidence.

Ineffective cross-examination

In an adversarial system effective cross-examination is the means by which flaws in expert opinions may be revealed and the independence of the expert assessed. There is no doubt that cross-examining experts is no easy skill to develop.[36] Again, such evidence as is available in Australia suggests that judges are of the view that cross examination of experts is often poorly executed

making the judge's task of determining conflicts in expert testimony more difficult.[37]

Others have questioned whether cross-examination is an effective tool for narrowing the dispute between experts and resolving differences between the opinions of experts. Cross-examination is effective, it is said, only to show that the opinion is biased, based on incorrect facts or erroneous.[38]

The basis rule

In Australia, the common law requires the facts upon which an expert opinion is based to be proved by admissible evidence.[39] Thus, where a valuer gives evidence of an opinion on value that is based upon hearsay evidence of particular or specific transactions that evidence must be proven.[40] Difficult issues arise where the expert opinion is based partly on admissible evidence and partly on inadmissible evidence.[41] Considerable time and expense may be incurred in proving the basis for an expert opinion in circumstances where it is usual in commercial practice to rely upon such hearsay material to make substantial decisions. For example, a question arises as to whether the courts should require valuers to prove each of the comparable transactions upon which they rely, when commercial practice acts on the basis of their opinions without such proof. This is especially so where the costs of doing so are out of proportion to the significance of the issue in the case or the value of the subject matter of the dispute between the parties. There is a fine line between an opinion based on general industry knowledge (which is admissible) and an opinion based upon knowledge of a number of specific transactions (which is not admissible unless those transactions are proved). A question arises as to whether the court should have a general discretion to admit expert evidence based upon hearsay in such circumstances.

The common knowledge and ultimate issue rules

The courts have long been concerned with the risk that experts may take the place of the trier of fact (whether jury or judge). They have guarded against witnesses giving evidence as to the 'ultimate issue'. The rule gives rise to considerable difficulties in circumstances where the legal standard to be applied is capable of being the subject of expert opinion. For example, issues as to the cause of an accident or the conduct which may be 'negligent' may be the subject of expert opinion. These difficulties have been considered in a number of decided cases.[42] The rule is productive of debate which can reduce to a sterile discussion about whether experts can use words such as 'negligent' or 'insane' when giving evidence.

Traditionally, experts have been prevented from adducing evidence of matters which are in the 'common knowledge' of the decision maker. The rule has been qualified by the High Court to a considerable degree by its decision in *Murphy v The Queen*,[43] where the test has been reformulated as one concerning whether the evidence would provide assistance to the decision maker.

Both rules prescribe standards which are uncertain. The conceptual distinctions upon which they are based are often difficult to apply and, in practice, tend to operate as discretionary principles. In those circumstances the issue arises as to whether they should be replaced by a discretion.

Access to justice

The time and expense incurred in preparing and receiving expert evidence, together with the delays which may result due to the complexities which arise in testing a dispute between experts have given rise to concerns that the process denies many litigants access to justice. Lord Woolf reported as follows:

> A large litigation support industry, generating a multi-million pound fee income, has grown up among professions such as accountants, architects and others, and new professions have developed such as accident reconstruction and care experts. This goes against all principles of proportionality and access to justice. In my view, its most damaging effect is that it has created an ethos of what is acceptable which has in turn filtered down to smaller cases. Many potential litigants do not even start litigation because of the advice they are given about cost, and in my view this is as great a social ill as the actual cost of pursuing litigation.[44]

Separately, there are the issues which arise due to an inequality of resources. Often defendants, particularly in negligence cases, have access to in-house expertise and large financial resources which create an imbalance between the parties. Questions have been raised as to whether parties who are pursuing a claim against corporations with access to substantial expertise should be able to seek an order requiring the corporation to provide an expert opinion as to the circumstances.[45] The adversarial system presupposes a contest between two parties. Where court procedures, such as the resort to expert evidence, may be used by one party in the expectation that the other may have insufficient resources to respond, there is the potential for injustice.

Finally, there is an issue of proportionality. The costs incurred should be in proportion to the subject matter of the dispute.

PROPOSALS FOR CHANGE

The proposals for change to the practice and procedure of the civil courts concerning expert evidence fall into three broad categories.

Firstly, there are proposals for constraints to be imposed upon the right of the parties to call expert evidence in order to reduce cost and to ensure fairness. The constraints suggested include:

- limits upon the number of expert witnesses,
- appointment of all experts by the court,
- a requirement that wherever possible the parties be limited to single experts in each relevant field of expertise,
- constraints upon the cross-examination of experts,

- the exercise of a gatekeeper role by the courts to keep junk science out of the courtroom, and
- increased use of expert assessors instead of experts called by the parties.

Secondly, there are proposals which are designed to reinforce the obligation of experts to give evidence that is impartial. These include:

- education and training of experts and lawyers,
- disclosure to the court of all instructions to experts,
- declarations by experts that they have adhered to the obligations of experts to the court, and
- requiring opposing experts to meet to try and narrow the areas of difference between them.

Thirdly, there are proposals which are designed to reduce the time spent in dealing with technical objections to the admissibility of expert evidence. These proposals relate to rules which require the basis for expert testimony to be proved, rules that experts should not give evidence as to the ultimate issue and rules which prevent experts giving evidence as to matters that are common knowledge.

The range of proposals which have been raised for consideration are set out below.

Constraints upon the right to call expert evidence

Single experts

Lord Woolf in his Final Report concluded that every effort should be made to appoint single experts. However, he noted that resistance to his proposals on single experts was particularly strong.[46] It appears that some of the opposition may not have distinguished between Court appointed experts (who come under the control of the judge and who may act as a filter on the way the judge views the evidence) and single experts (who act on the instructions of the parties and who may be cross-examined by the parties). Lord Woolf used the term 'neutral expert' to distinguish the latter from the former. Lord Woolf concluded:

> It needs to be understood that a neutral expert, under the system I am proposing, would still function within a broadly adversarial framework. Wherever possible, the expert would be chosen by agreement between the parties, not imposed by the Court. Whether appointed by the parties or by the Court, he or she would act on instructions from the parties.
>
> The appointment of a neutral expert would not necessarily deprive the parties of the right to cross-examine, or even to call their own experts in addition to the neutral expert if that were justified by the scale of the case. Anyone who gives expert evidence must know that he or she is at risk of being subjected to adversarial procedures, including vigorous cross-examination. This is an essential safeguard to ensure the quality and reliability of evidence.[47]

Interrogation of experts

In some jurisdictions there is a procedural right for one party to state a question for written response by another party's expert. Provided the right is subject to the supervision of the Court and an obligation upon the party stating the question to pay the costs associated with providing the response, such a right assists in narrowing the issues in dispute between experts. It may also mean that a party will be content to accept the evidence of an expert put forward by the other party once the opinion of that expert on all issues is known. Such a right also protects against the problem of expert reports failing to give a complete statement of the opinion of the expert.

Changes to presentation of expert testimony

A procedure, used in some arbitrations and in the Australian Competition Tribunal, by which experts are empanelled to participate in a discussion of the issues the subject of expert evidence has been raised as an alternative to cross-examination.[48] The proposal is advanced as one that reduces time wasted in cross-examination and that focuses attention on the real issues more effectively. However, experts may not have the skills of advocacy to expose defects in the reasoning of others. There are also problems with judge and counsel observing a dialogue between experts in which technical jargon is not translated into language which enables a judgment to be reached as to the expert evidence that should be accepted.

Another suggestion is that experts should be allowed to make a presentation or speech outlining their opinions instead of evidence-in-chief in the usual way (by question and answer) or receiving evidence-in-chief solely by way of written report. Such procedures would enable experts to present their opinions in a manner with which they were more familiar and assist the court where the evidence was of a highly technical character.

Also, there is an increasing recognition that much of the 'expert evidence' presented to courts is in fact advocacy. Experts are often able to bring to bear a method of reasoning based upon a particular scientific discipline which assists the court in considering the issues in dispute. This is increasingly the case where causes of action are based upon legislative provisions which are in turn informed by particular expertise. For example, Part IV of the *Trade Practices Act* is economic regulation informed by the theories of economists. Town planning laws import subjective standards concerning amenity which draw upon other fields of expertise. When specifying workplace standards the legislature may enshrine in statute concepts which are familiar to engineers and workplace safety experts. In all such cases, the issue to be decided by the court becomes a question of mixed fact and opinion.

In the context of competition law, Professor Brunt has written extensively on these issues. She states:

> A large part of the expertise of the economist...lies in his method of analysis; his ability to abstract the relevant facts from the overwhelming

> proliferation in nature (or the legal record) and his ability to arrange those facts in causal sequences for the tasks of explanation and prediction. Whether judge or counsel seek to analyse 'the facts', using the 'principles' of economics, they are attempting to use not just a legal analysis but an analysis of mixed economics and law.[49]

In such circumstances it makes sense to receive submissions from economists by way of argument rather than receive their evidence in the usual way. The same reasoning applies to other fields of expertise where the 'evidence' is really submission.

In a copyright case in New South Wales, Street J said:

> The expert evidence in a suit such as the present fills a somewhat unusual role. It is almost as if each side calls an expert to argue out with counsel in examination in chief and cross-examination the similarity or dissimilarity which that particular expert sees between the plans and the houses. By attending the progress of this argumentative process between counsel and expert the court is enabled to perceive and more readily to appreciate the points of similarity and dissimilarity. In this way the tendering of expert evidence is of value in exposing the facets of the ultimate question to which the expert evidence is directed.[50]

The Federal Court's power to receive submissions from experts and, in appropriate cases, allow experts to act as advocates rather than witnesses may address some of the issues referred to above.[51]

The court as gatekeeper

The proliferation of categories of 'expertise' being advanced before the courts has produced proposals whereby the court should review the expertise of witnesses to exclude 'junk science' from the court room. In Australia, the courts have tended to accept evidence which is put forward by experts as representing a recognised discipline without scrutinising the degree of 'science' or experience supporting the expertise. The formulation of rules which would be applied by the courts in order to test the claim to expertise is one way of approaching the issue. Another more general approach is to require the leave of the court before any expert evidence is adduced.

It has also been suggested that parties should be required to state in their pleadings the topics upon which they propose to adduce expert evidence and the court should then decide whether such evidence is required and even appoint experts from a court list.

Court approval of experts

In order to ensure that the quality of expert evidence is such that it will assist the court in resolving disputes there have been proposals for approval or accreditation of experts before they can give evidence to the court.[52] Such proposals would allow experts to give evidence on an occasional basis. However, where experts give evidence on more than two or three occasions

they would be required to be accredited before they could give expert evidence to the court in further cases. One of the difficulties with such a requirement is that the obligation to maintain an accreditation may discourage some experts from agreeing to give evidence. Further, it may reinforce the growing body of professional experts thereby depriving the courts of access to experts who choose not to join the ranks of professional witnesses. Further, there is no reason why professional bodies may not take on such an accreditation role without formal court sanction or oversight.

Reinforcing the obligation for experts to give impartial evidence

Oath

Expert witnesses, like witnesses of fact, take an oath to tell the truth. It has long been recognised that the usual oath is not particularly apposite when it comes to opinion evidence being given by experts.[53] By way of contrast, in the French inquisitorial system experts swear an oath to 'assist the administration of justice on their honour and conscience'.[54]

Of course, there are well established duties and responsibilities of experts.[55] The legal obligation to give truthful evidence gives rise to an obligation to express opinions which are genuinely held and based upon all the information known to the expert. Qualifications to the opinion should not go unstated and the opinions expressed should not stray outside the field of expertise of the witness.[56]

However, concerns about whether experts properly understand the nature of their duty to the court in giving evidence have lead to proposals to require a more expansive form of declaration to be provided by experts when giving evidence.[57] The Federal Court of Australia has recently published a practice direction containing guidelines for expert witnesses in proceedings in the Court.[58] The practice direction says that practitioners should give a copy of certain guidelines to any expert witness they propose to retain for the purpose of giving a report and giving evidence in a proceeding. The guidelines include the following:

> At the end of the report the expert should declare that '[the expert] has made all the enquiries which [the expert] believes are desirable and appropriate and that no matters of significance which [the expert] regards as relevant have, to [the expert's] knowledge, been withheld from the Court'.

The drafting suggests that the declaration should be personalised by inserting the name of the expert making the declaration. The use of such a form of declaration is a means of reinforcing the obligations of an expert when providing evidence to the court. Lord Woolf has recommended the adoption of a more comprehensive declaration in the United Kingdom.[59] However, the Chairman of the Academy of Experts in that country has described the declaration as 'unwanted and unnecessary'.[60]

Training and education

There have been proposals that lawyers and experts be required to undergo further training in the skills of cross-examination and preparation and presentation of expert evidence in order to ensure that unnecessary evidence is not led and expert evidence is presented as efficiently as possible. The training would also reinforce the professional obligations of lawyers and experts and their respective duties to the court.

Full disclosure by experts

In response to concerns that experts are being encouraged to adopt a partisan approach by their communications with lawyers and, as a result, are not presenting a complete picture of the various opinions which may be held by competent experts in the field, there are proposals that experts should be required to disclose all of their instructions when filing their report. Experts would also be obliged to state any other opinions which would be recognised within their fields of expertise as being reasonably open. That is, opinions which a reasonable and competent expert may hold that differ from the opinion held by the expert providing the report should be disclosed.

Pre-trial conferences between experts

There have been various proposals requiring experts to meet to try and resolve any differences between them. This is already a common feature of directions made by the courts in Western Australia.[61]

Limits on the numbers of experts

There have been proposals for rules of court enabling judges to place an absolute limit on the number of expert witnesses who may be called by each party. Two types of limits have been proposed: firstly, a power to direct that the total number of experts on any issue be limited to a specified number; and secondly, a power to direct that there be only one expert for each party in a nominated field of expertise.

In small disputes it has been proposed that there be an arbitrary limit of generally one expert (maximum of two) for each party with no oral evidence and with no cross-examination.[62]

Absolute limits upon the number of experts give rise to issues of fairness. It is likely that there will always be cases of sufficient complexity or novelty to justify a number of experts. Nevertheless, there can be substantial unfairness and accessibility issues that arise from the exercise of the '*right*' of a party to have an unconstrained ability to call expert evidence. Deep pockets can be used to stifle access to the courts through resort to an armory of experts.

It is noted that the courts in Western Australia already have the power to restrict the number of expert witnesses.[63] However, the power can only be exercised upon application by a party.

Court appointed experts

The courts have long had the power to appoint experts to submit reports to the court or to assist the judge in a trial or hearing. However, judicial surveys

indicate that judges are reluctant to exercise such powers and generally hold to the view that the power is an extraordinary one.[64]

In Western Australia the court has power 'on the application of any party' to appoint an expert to report to the court.[65] The court may order the cross-examination of the expert[66] and fix the expert's remuneration.[67] If such an order is made, any party can call one other expert witness to give evidence on the question reported on by the court expert.[68]

The court also has power to appoint a specially qualified assessor to assist the judge to understand the evidence at a trial or hearing or to hear any question or issue of fact.[69]

Various proposals have been made to increase the use of court-appointed experts. Indeed, the President of the Litigation Reform Commission in Queensland has proposed that parties have no right to call expert witnesses in civil proceedings with all experts being nominated and appointed by the court generally from a list kept by the court.[70] However, the use of court appointed experts has been seen to be inconsistent with the adversarial system of litigation and has given rise to a substantial body of literature.[71]

Concerns about the effect of court appointment of experts upon the adversarial nature of civil litigation do not always differentiate between experts appointed to assist the judge (assessors) and experts appointed by the court to prepare a report in the usual way and be subject to cross-examination (experts). In the former case, there is considerable potential for the expert to have an influence upon the judge which is inconsistent with the adversarial system. However, in the latter case the opinion of the expert is subject to the same scrutiny as any other witness. The aspect of such appointments that is inconsistent with the adversarial system lies in the constraint upon the parties to lead evidence from experts of their own choosing. However, the fact that the experts report to the court is seen as reinforcing the duties of the expert to the court to give impartial evidence.

The appointment of experts by the court gives rise to difficult issues relating to remuneration of the expert and the development of procedures by which the expert may be instructed by all of the parties to the litigation. Also, if fees are limited then the report of the expert may not be comprehensive.[72] One of the great benefits of the adversarial system is that it creates an incentive to the parties to bring a complete record of the available evidence before the court.

It is significant that the proposals of Lord Woolf in the United Kingdom focused upon court control of the use of expert evidence by the parties and reforms to *encourage* single experts, rather than upon increased use of court-

appointed experts,[73] and proposing new court rules under which no expert evidence could be adduced without the leave of the court.

Peer review

Submissions to the Law Reform Commission of Western Australia emphasised the fact that expert evidence was not subject to the same scrutiny as journals submitted for publication. It was suggested that opinions in journal articles which have been through the rigour of peer review should be able to be relied upon in preference to the direct expert evidence.[74] There may be potential for judges to order that the statements of experts be provided to other experts for review. However, in most civil cases the adversarial system imposes significant constraints upon experts expressing opinions which cannot be substantiated through cross-examination, the obligation to disclose the substance of the opinion and the basis for it and the right of a party to adduce countervailing evidence.

Evidence law reform

In New South Wales and in the Federal Court where there has been evidence law reform, the admissibility of opinion evidence will depend upon the exercise of a discretion by the court balancing the prejudice and probative value of the opinion evidence.[75] Within that balance, the extent to which the opinion has been demonstrated to be based upon relevant expertise will be material.[76]

Also, it appears that under the evidence reforms in New South Wales and the Federal Courts, judges have a discretion to admit expert evidence which is based upon hearsay material and the ultimate issue rule.[77]

THE PHILOSOPHICAL DEBATE

Experts as advisers and witnesses

The adversarial system encourages parties to exploit procedural advantages. Although legal practitioners have an overriding duty to the court as its officers, the precise ambit of their duty is often unclear when applied to the issues of day to day practice. Further, the processes by which the outworkings of the lawyer's duty to the court are inculcated into the profession are, at best, diffuse. There is no body charged with reinforcing the obligations which may be manifest by a proper consideration of the duty. Oversight of the profession is limited to extreme cases of defalcation. The incentives to learn and apply the obligations which assist in the prompt and efficient resolution of disputes through the involvement of lawyers as officers of the court in the litigation process are relatively weak.

On the other hand, there are powerful incentives to reinforce the coexistent and sometimes competing duty to act in the best interest of the client. The threat of litigation for breach of duty, the proliferation of education and compliance programmes designed to turn the tide of rising professional indemnity insurance premiums and the commercial pressure from clients with competitive alternatives for legal representation combine to reinforce the use of procedural advantage by lawyers seeking to advance the interests of their clients.

In the context of expert evidence these issues are magnified. Often lawyers are the only means by which the duties to the court of the expert witness are communicated to the expert. In Western Australia there is no professional forum in which matters relating to the preparation and presentation of expert evidence may be debated. There is no established channel of communication between judges and experts of the kind that exists between judges and lawyers. Experts may be unfamiliar with the concept of an overriding obligation to the court and are unlikely to receive training in the application of this obligation to their role as expert adviser and witness.

These problems are compounded because experts may be engaged by a particular party to provide advice in relation to the dispute as well as give expert testimony. Also, experts may advise the client in other business contexts. It is easy for the line between adviser and independent expert to become blurred.

Lawyers have long recognised this difficulty in their own practice. In most common law jurisdictions there exist independent barristers whose fees are met by the solicitor, not by the client. As a result, there is a very strong tradition of counsel providing independent advice uncoloured by incentives to serve the interests of the client. Also, there is an established rule that a lawyer should not act as counsel in a proceeding in which the lawyer may be required to give evidence as to a contentious fact of relevance to the dispute.

By contrast, experts may be engaged to act both as advocate and witness. They are members of a flourishing litigation support industry in which the commercial incentive continually reinforces a partisan approach. Experts may, and often do, become part of the 'team' engaged to present a party's case as favourably as possible. The significance of this expert witness culture should not be underestimated. The following extract from a paper by Justice Cooper of the Federal Court is instructive:

> [C]lear evidence exists in Australia and the United Kingdom that expert shopping occurs whereby expert opinions are sought and instructions and material manipulated until an expert report favourable to the parties seeking the report is obtained. The communication between the lawyers and the expert, being the instructions and material facts disclosed or the assumptions the expert is instructed to make, are sought to be kept secret from the opposing party in the tribunal of fact on the basis of legal professional privilege.[78]

Justice Cooper, in his paper, highlights the magnitude of that problem by referring to a copyright infringement case in which the expert was cross-examined concerning an article entitled 'The Expert Witness: Partisan With a Conscience' which he had published in the Journal of the Chartered Institute of Arbitrators. The article included the following:

> How should the expert avoid becoming partisan in a process that makes no pretence of determining the truth that seeks only to weigh the persuasive effect of arguments deployed by one adversary or the other?
>
> ...the man who works the Three Card Trick is not cheating, nor does he incur any moral opprobrium, when he uses his sleight (sic) of hand to deceive the eye of the innocent rustic and to deny him the information he needs for a correct appraisal of what has gone on. The rustic does not have to join in; but if he chooses to, he is 'fair game'.
>
> If by an analogous 'sleight (sic) of mind' an expert witness is able to present the data that they seem to suggest an interpretation favourable to the side instructing him, that is, it seems to me, within the rules of our particular game, even if it means playing down or omitting some material consideration.
>
> ...Thus, there are three phases in the expert's work. In the first he has to be the client's 'candid friend', telling him all the faults in his case. In the second he will, with appropriate subtlety, be almost what the Honorary Editor's American counsel; called 'a hired gun' so that client and counsel when considering the other side's argument can say, with Marcellus in Hamlet, 'Shall I strike at it with my partisan?' The third phrase, which happens more rarely than is acknowledged in much of the comment on expert witness work, is when the action comes to court or arbitration.
>
> Then, indeed, the earlier pragmatic flexibility is brought under a sharp curb (sic), whether of conscience, or fear of perjury, or fear of losing professional credibility.

Justice Cooper records that following cross-examination, the expert came under significant criticism by the trial judge.[79]

Professor Williams of Monash University has expressed similar views in an address to the Australian Academy of Forensic Sciences:

> In the area of expert evidence, I believe the adversary system works poorly and requires modification. Under the present system experts are inevitably to an extent partisan. They are paid by the side which calls them and quite apart from monetary considerations they commonly feel a sympathetic interest in that party's cause. Each side is free to choose which experts to call, and this inevitably leads to a degree of 'expert shopping'.[80]

In addition, it may be that the manner in which experts are used to assist in the resolution of disputes in the court system results in a body of expert opinion that is socially constructed. Whereas scientific institutions produce views that are recognised as orthodox by those with power and influence within the community of experts, the remuneration of experts and the interests of divergent groups of litigants reinforces polarised views amongst experts. Judges seek to discern opinions which reflect the established views of the scientific community. The questions the court seeks to answer concern matters

such as the usual or acceptable practices in an industry, or the assessment of the prevailing view as to mental condition, or the generally held prognosis as to disability, or the causal relationship between an event and an injury. However, the process of litigation and the proliferation of interest groups tend to undermine the systems which would otherwise produce a recognisable orthodoxy in opinion in the various fields of expertise that might express opinions to answer these questions. The social influences (including the adversarial system of litigation) which reinforce divergent expert opinions must be recognised.

> The polarisation of expert opinion into rival versions of reality supportive of the interests of competing groups in wider society can be explained by the carrier effect. When experts disagree on some esoteric point, the rest of society generally ignores them. However, if there is a dispute between rival groups in the wider society and a relevant expert opinion gets a hearing in that forum, one of the wider groups may adopt and 'carry' that opinion if it thinks it is in its interest to do so. Rival groups will then become carriers of opposing expert opinions. The rival experts will then attach themselves to their respective carrier groups. The expert receives social recognition and often material rewards as a result of the adoption of her or his opinion by a carrier group, while the position of the carrier group in its dispute with rivals is reinforced by the definition of reality supplied by the expert. If the carrier groups are of roughly equal status, the effect merely serves to polarise and focus expert opinion on the social interest of the carriers. But if the carrier groups are unequal in political and economic power, a theory may appear to be superior not because of any intrinsic merit, but because of its pragmatic applicability to the social interests of the dominant and successful carrier group.[81]

These observations have significance for issues of fairness and access to justice.[82]

If there is to be a significant reduction in disputation as a result of competing experts then the incentives within the system have to reward and encourage experts who are open and independent in the views they express. A change in the attitude of lawyers and their clients has to be effected. The process should encourage the parties to use single experts wherever possible. There needs to be a sharp distinction between the expert acting as advocate and the expert giving independent evidence.

It is important to recognise that experts who have provided advice to one of the parties to a dispute are unlikely to be accepted by other parties as the single expert. Also, the process of participating in the litigation team for a particular party (and thereby receiving information subject to legal professional privilege) is likely to create difficulties in seeking to narrow the field of dispute between opposing experts. In any event, there is likely to be a conflict of interest where an expert has participated in the process of giving advice to

the client. That conflict should be recognised as a very real basis for challenge to the reliability of any opinion expressed by the witness. At present, it is difficult to adequately explore the extent of that conflict in cross-examination due to the protection of legal professional privilege.

Experts may be engaged to assist in formulating a claim, advising a client as to the range of opinion that may be held, identifying the facts needed in order to express an opinion, preparing the case for trial and providing a critical review of the expert evidence of the other parties. The process may involve inquiries as to the range of expert opinion that may be held on a particular issue. All these activities are necessarily partisan. In the best traditions of the adversarial system, they are undertaken in order that the party's case may be advanced as strongly as possible. They may require the expert to understand the party's case and receive much information that is privileged. Significantly, all of these activities are duplicated by those representing opposing parties.[83] This is the way the common law system ensures that all relevant evidence is before the court. If the expert is involved in this process then his or her role is as an advocate.

However, in such cases, when it is necessary for the expert evidence which the party proposes to lead in support of its case to be disclosed, the party has a choice. It can engage the services of another expert, prepare a formal brief and obtain a written report; or it can engage the expert who has been involved with the legal team to prepare the report.

Current practice commonly involves the expert in preparation of the case and the provision of an 'independent' expert report.

The question arises whether the current practice has become established because there is no obligation on the part of experts to avoid a conflict of interest. Because discussions with experts are protected from disclosure by legal professional privilege, solicitors are encouraged to communicate more fully with experts concerning the interests of their client and the arguments which support their client's case. Communications with experts may be contrasted with communications with witnesses of fact who are generally free to discuss their communications with other parties due to the absence of circumstances giving rise to a quality of confidentiality about the communications.

It may be a necessary incident of the adversarial system that a party be able to engage in full and frank communications with experts who have been engaged to advise the party as to its prospects and to prepare its case in consultation with solicitors. However, it is not a necessary incident that the expert who has been the adviser should then be allowed to be called to give evidence by that party and present it as an 'independent' expert opinion uninfluenced by privileged communications.

Under existing evidence law, an expert is in the same position as a witness of fact when it comes to facts observed by the expert. He or she may be subpoenaed to give evidence by an opposing party and can be seen beforehand and give a proof.[84] It is generally accepted that legal professional privilege attaches to confidential communications between solicitor and expert — though not to the chattels or documents on which the expert's opinion is based, or to the opinion of the expert itself.[85] The privilege may be waived as a matter of law where the communication has provided the foundation for the opinion expressed by the expert or where the picture would be misleading or partial if the communication was not disclosed.[86] Thus, otherwise privileged communications must be disclosed if they are necessary to properly understand the expert's evidence.[87] The privilege does not extend to advice sought by the client from other advisers (such as accountants) in respect of the conduct of litigation. It is only where the communication is to instruct a lawyer that the privilege arises.

Undoubtedly it is desirable that both the experts who give evidence and the opinions which they express should be independent. In many areas the law recognises and gives effect to the principle that a person who has an obligation to represent the interests of one party can not act in another capacity that may conflict with that responsibility. Examples include the legal obligations imposed upon trustees, agents, company directors and lawyers. Aspects of the law of evidence reflect the same principle. The evidence of those who have a special interest in the dispute, such as accomplices and co-conspirators, is treated with caution. Likewise, the various bar associations prohibit counsel acting who may be a prospective witness or a party (or a director or officer of a party) to the dispute.

There are also rules to ensure that lawyers do not coach witnesses of fact.

Consistently with these established principles, one might expect experts who are called by a party to give evidence in support of that party's case to be required to be independent of the interests of that party in the litigation. An expert who has provided advice to a party concerning the conduct of the litigation as part of the team of lawyers and experts preparing the party's case for trial will usually lack such independence. With the best will in the world an expert who has participated in the process of preparing the case to be presented on behalf of a party at trial — identifying lines of argument, preparing grounds for attacking the evidence of other experts and developing a theory of the case — will have difficulty in presenting an 'independent' opinion. In such cases, receiving the evidence of the expert is not unlike receiving the submissions of counsel for the plaintiff as to the inference that may be drawn from a particular set of facts, as receiving an independent opinion as to the only inference that is open.

It must be recognised that legal professional privilege operates to reinforce partisan experts within the litigation process. It also deprives the adversarial system of any effective scrutiny of the independence of the expert. Review of the process relating to expert evidence must involve close scrutiny of the extent of protection to be afforded by legal professional privilege.

Faced with the prospect that the party's expert may be cross-examined about communications with the party and its solicitors, or the prospect that the expert's opinion may be disregarded where the expert has provided advice to the party concerning the preparation of the case, the character of communications with experts should change. The process would then require solicitors to draw a distinction between experts who are advisers and experts who are witnesses.

In most cases, there is no need to communicate with an expert as if he or she were part of the team of advisers to the client. Such communications should be discouraged. In those rare cases which are of such complexity that an expert adviser is required (in addition to an expert witness) then a separate adviser should be engaged. In most such cases, it is likely that the expert will be briefed to assist in formulating the arguments to be advanced in support of the party's case. If so, the expert should act as an advocate and be subject to the same professional obligations as solicitors and counsel when making submissions to the court.

Judicial assessment of expert opinions

The judge's perspective is vastly different to that of the lawyers and the client. The judge has no contact with the experts prior to trial. In all likelihood reports will be filed and read by the judge before the hearing. The experts give evidence. Increasingly evidence-in-chief from experts is taken in the form of written reports without any opportunity for the expert to provide an oral outline of the evidence. The experts are cross examined by counsel. The judge must resolve any inconsistencies or conflicts between the experts without the benefit of an expert to consult.

Of course, judges invariably have past experience as participants in the forensic process which leads to the presentation of expert evidence. They are suspicious of the partisan posture which they know it encourages. Yet they are ill-equipped to make the judgments which the system requires. Increasing complexity and specialisation in expert testimony makes the task difficult. As a result, judges seek to implement rules which remind experts of their overriding duty to assist the court. They seek experts whose opinions are independent of the cause of a particular party. The problem is that judges have little opportunity to supervise the emphasis of that obligation prior to trial. By then, the process, by its nature, is likely to have already caused the expert to adopt a position that is partisan to some degree.

There is a need for the process by which expert evidence is presented to the court to be subject to close judicial scrutiny from the outset. Such scrutiny is likely to resort to unnecessary expert evidence. It will also enable the judge to ensure that the process enables greater confidence to be placed in the independence of experts and their opinions.

A basis for change

Social, commercial and systematic pressures within the litigation process are major contributors to the problems usually associated with expert evidence.

Solutions to many issues identified in the use of expert evidence lie outside the adoption of a new set of procedural rules. Some changes to the system of practice and procedure may assist. However, the real solution lies in adopting processes which will produce a cultural change amongst experts, lawyers and judges concerning their roles and responsibilities in the presentation of expert opinion testimony in civil litigation.

These processes should be directed at:

(a) differentiating between the role of the expert as advocate in providing advice to a client in the preparation of a case and the role of the expert as a witness presenting clear, complete and impartial evidence to the court;

(b) enabling judges to supervise the process by which expert evidence is prepared for submission to the court to ensure that it is relevant, necessary and independent;

(c) reinforcing the expert's duty to give independent testimony to the court;

(d) articulating and promoting to lawyers the fact that their overriding duty to the court constrains the conduct in which they can engage in advancing the best interests of their client when seeking to present expert evidence;

(e) encouraging the use of a single expert witness on any issue requiring expert evidence and where there are opposing experts, encouraging every effort before trial to narrow the areas of dispute between them; and

(f) recognising the role of experts as advocates in assisting the court to resolve divergence of the opinions of experts and to apply the expert evidence to the issues in the appropriate cases.

PROPOSALS

Proposal 1

The practice and procedure of the civil courts should maintain a clear distinction between expert advisers and expert witnesses.

Many of the problems concerning the use of expert evidence in the litigation process flow from a failure to distinguish between the role of experts who may assist lawyers to prepare a case for trial and advise clients as to the merits of the case, on the one hand, and the role of experts in giving independent expert evidence, on the other hand. These two roles give rise to a conflict of a character which is carefully scrutinised by the courts in many other contexts. Indeed, it is a conflict of a kind which the law often proscribes.

Curiously, the courts have allowed experts to act both as partisan advisers and independent expert witnesses in the same dispute. This practice should be discouraged. When engaging experts in relation to a civil dispute a party (and the party's legal advisors) should be encouraged to communicate with experts in a manner that ensures independence. Court practices should encourage an expert who has been engaged by a party to give expert evidence to decline to provide advice concerning the preparation for, or prospects of success in, the litigation in the same way as counsel likely to be a witness of substance would not act for a party to a dispute. Judges should be encouraged to reject the evidence of an expert as being partisan if it can be demonstrated that the expert was involved in an adversarial role to a significant extent in preparing the case for a party.

This proposal involves a fundamental shift in understanding of the role of expert witnesses. It shapes many of the specific proposals which follow.

It is not intended that this proposal should lead to a practice whereby parties engage two experts in most cases — one to act as adviser and one to act as witness. Rather, it is intended to, and should, ensure that in most cases communications between lawyers and experts are of a character that will not compromise the independence of the expert. It should reduce the risk of the evidence of the expert being influenced by the partisan perspective that any adviser is at risk of adopting. Further, it should encourage those experts who make it their business to give expert evidence to jealously guard their independence in giving testimony. Such experts will be sought after and agreement is more likely to be secured for their appointment as a single expert.

In those rare cases where experts are needed to provide detailed advice as to the merits and to assist in preparation, two experts may be engaged. However, in such cases lawyers should soon become experienced in dealing with experts in different roles where required. Advice from an expert adviser would usually be limited to helping to identify an appropriate expert and framing the questions to be posed to the expert for an opinion to be expressed. In complicated cases, experts may assist in developing the arguments in support of the case. Experts will soon develop skills in providing such services efficiently.

In time, efficiencies resulting from maintaining a distinction between expert advisers and expert witnesses should be significant. They include:

- greater confidence by judges in the independence of the evidence of experts;
- a demand for experts recognised as 'independent', who insist upon practices in their dealings with lawyers which will not expose them to the criticism that they have a conflict of interest as a result of having advised the client;
- a reduction in the impediments to experts reaching agreement by reason of a partisan posture;
- closer scrutiny of the duties of experts and lawyers in preparing and presenting expert evidence; and
- encouragement of a practice of using single experts to be briefed by both parties to the litigation, perhaps to express different opinions on the basis of different factual assumptions.

There would be no bar to an expert who has acted as an 'adviser' to a client giving evidence. The only sanction would be the weight the court would give the evidence if it was demonstrated that the 'independent' expert had in fact been engaged to carry out significant partisan responsibilities.

Proposal 2

No expert evidence should be adduced without the leave of the court.

There are a number of reasons why the court should supervise the process by which expert evidence is presented. Firstly, it is difficult to conceive of a series of rules which would adequately address the issues that have been identified concerning expert evidence without producing unfairness in a significant number of cases. Secondly, supervision by the court during the interlocutory stages requires the parties to consider and justify the positions which they adopt concerning resort to expert evidence (whether there should be single experts for each issue) prior to trial. Thirdly, the court is able to develop a practice (which will then become known within the legal profession) as to the circumstances in which particular orders will usually be made. Fourthly, supervision enables the court to protect parties against the burden of unnecessary resort to expert evidence and to ensure that the expert evidence is kept in proportion to the subject matter of the dispute. Fifthly, although the court has a range of powers concerning expert evidence, many require an application by a party before the power can be exercised. A requirement for leave coupled with a power for the court to make directions would provide considerable opportunity for the court to ensure that the interests

of justice were being served by the resort to expert evidence in any particular case. Sixthly, a requirement for leave enables the court to ascertain whether the evidence is actually of an expert character before significant costs are incurred in preparing reports as to matters which are best left to the decision maker as matters of common sense or common knowledge.

Consistently with the proposals set out below, the directions of the court when giving leave to adduce expert evidence should encourage single expert witnesses in each field where expert evidence is relevant to a dispute.

Proposal 3

The practice of the court should encourage single experts.

The court should encourage the use of single experts in each field of expertise as is relevant to a case. A number of the proposals made below are designed to ensure that the court has sufficient powers to encourage the parties to use single experts. The proposal by which expert evidence may only be adduced with leave of the court will enable the court to develop a practice of encouraging single experts. It is expected that where leave is sought, the court will require the parties to demonstrate why a single expert should not be appointed and to direct that the parties bring in lists of proposed experts if they are unable to agree. If leave is to be granted then it will include terms as to who is to meet the costs of the expert pending resolution of the dispute by agreement or judgment. This overcomes the difficulties associated with who pays for court-appointed experts.

These powers will enable the court to supervise the costs in relation to expert evidence and ensure that they remain in proportion to the subject matter of the dispute and that unfairness is not caused by unequal financial resources of the parties.

Where leave is given on the basis of a single expert, the directions would usually state the question upon which the expert is to express an opinion. The expert could express the opinion on the basis of a joint letter of instruction from the solicitors for the parties or on the basis of letters of instruction from each of the solicitors noting where an opinion may differ on the basis of the different instructions. The expert may be authorised to receive additional instructions in conference with the solicitors for all parties present. The expert may seek further instructions from the parties by letter. Where those additional instructions are relied upon the expert should be directed to record the instructions in the report. Otherwise the original letters of instruction should be appended to the report. Once the report is submitted there should be a

further directions hearing in which parties may seek leave to adduce evidence from another expert or a supplementary report from the single expert.

Both parties should have the right to cross-examine the single expert in all cases.

In appropriate cases the court may give leave to each party to adduce evidence from its own independent expert.

If the court is concerned to ensure that the expert is not a 'hired gun' then it may direct that a party engage an expert from an approved list.

Rules of court should be developed reflecting these principles. The general thrust of the court's practice should reflect the approach outlined by Lord Woolf concerning single experts.[88] Ongoing discussion between judges, lawyers and experts should be encouraged to refine the practice.[89]

Due to the significant effect which such directions may have upon the evidence which a party may otherwise seek to lead at trial and the need to ensure that pre-trial directions do not result in parties being refused leave to adduce evidence which the trial judge subsequently determines is necessary for the party to advance its claim, applications for leave should be heard by a judge in chambers.

In time, the courts will develop a general practice which should encourage agreement as to the directions that may apply in the event that the court grants leave.

The court's ability to order costs, to ensure that parties who do not co-operate in the appointment of single experts bear the costs associated with their decisions, should also be used to reinforce a shift towards the use of single experts.

The use of court-appointed experts as judicial advisors should continue to be limited to special cases. The risk of unfairness to parties as a result of communications between the expert and the judge, which may deprive the party of the opportunity to make submissions or to lead other evidence or to present an alternative viewpoint, is too great.

Proposal 4

Where a party calls its own expert to give evidence there shall be a waiver of legal professional privilege in respect of all communications with the expert.

The courts guard against the use of legal professional privilege to present an incomplete picture to the court. Where a party chooses to call its own expert adviser as its witness there is a considerable risk that the evidence given by the expert will be partisan in character. However, where an expert has been involved in the preparation of the case of a party for trial, legal professional privilege operates to prevent proper investigation of the independence of the expert. Information provided during such communications which may have influenced the opinion of the expert can not be explored during cross-examination.

A party who *chooses* to call an expert should be in the same position as a party who chooses to rely upon the content of a privileged document. There should be no opportunity to claim that the opinion of the expert stands unaffected by communication with the party's lawyers when the judge is unable to assess the degree to which the independence of the opinion of the expert has been compromised by participation in that process. Otherwise, the adversarial system by which evidence is tested is severely compromised. At present, experts are able to assert independence without proper inquiry into the extent to which the witness is at risk of presenting a partisan perspective. Judges are circumspect about such independence, but are prevented by legal professional privilege from hearing evidence of the precise extent of the expert's role as adviser.

The partiality of experts is one of the major issues raised concerning the present system for adducing expert evidence. It is proposed that where a party calls its own expert[90] to give evidence that there be a waiver of legal professional privilege in respect of all communications with the expert. This will ensure that lawyers take proper steps to avoid communications which could lead to the independence of the expert being compromised. Otherwise, the privilege will remain and could not be extinguished by another party to the litigation compelling the expert to give evidence.

Properly understood, the proposal will not undermine legal professional privilege. The only way there can be waiver is by the conduct of the party concerned. Where an expert adviser is subpoenaed at the request of an opposing party then the existing rules will continue to apply.

Importantly, the proposal will provide accountability in the communications between lawyers and independent experts. Effective cross-examination will soon ensure that communications with independent experts are of a character that maintains independence.

Proposal 5

All expert witness statements shall contain a detailed declaration in a form required by the court.

In order to ensure that experts are aware of their obligations to the court to give complete, impartial evidence, free of any obligation to advance the interest of a party to the litigation there should be a requirement that experts sign a detailed declaration which confirms their compliance with those obligations at the time of filing their statements. Examples are to be found in the Practice Direction of the Federal Court and the Report of Lord Woolf.

Proposal 6

The present practice whereby the substance of the expert evidence upon which a party proposes to rely must be disclosed prior to trial should continue, but the filing of comprehensive written reports by experts should be discouraged.

The preparation of comprehensive written reports by experts is productive of enormous cost. Such reports contribute to high litigation costs because:

- there is a culture which justifies fees by the length and detail of reports;
- they result in the full detail of the evidence which would be led at trial being provided when a disclosure of the substance is all that is required to prepare for trial and to evaluate the merits of the case for settlement;
- they often cloud rather than clarify the issues;
- they produce an expansive, but often infertile, field for cross-examination;
- they expand cross examination by operation of the rule by which the evidence of one witness must be put to another where they contradict each other;
- they are reviewed by solicitors, counsel and the party on whose behalf they are filed thereby adding considerably to the cost of litigation;
- they are productive of objections as to form and admissibility;
- they encourage responsive reports that deal with every issue raised when many issues may fall away prior to trial and during the trial process;
- they consume substantial judicial time in their consideration prior to and during trial and in preparation of reasons for decision;
- they delay disclosure of material which may assist in settling the dispute; and
- they replace oral testimony which may otherwise be a more effective process by which to explain the basis for the expert opinion and to assist judges in identifying the issues as to which expert evidence may be relevant.

Written statements of experts before trial should be confined to a statement which contains:

(a) the substance only of the expert opinion of the expert;

(b) the factual basis for the claim to expertise;
(c) a concise statement of the facts or assumptions upon which the opinion is based;
(d) an outline of the reasoning in support of the opinion; and
(e) a detailed declaration concerning the contents of the report (as proposed above).

These recommendations would continue to require the substance of expert evidence and any calculations, analysis or examination upon which the opinion is based to be disclosed. However, the obligation would be to provide a summary in the nature of particulars, rather than setting out the evidence of the expert word for word in a written report. This practice is productive of substantial cost, particularly in commercial cases.

Proposal 7

Experts should be given an opportunity to present their opinion and reasoning orally.

Experts should usually be given an opportunity to present their opinions and reasoning at trial in a manner which they usually adopt in their day to day practice, (rather than by question and answer or written statement) provided that the content of any oral statement would be confined by the written statement which had been filed, unless leave is given to supplement the statement. The emphasis would be upon a formal presentation to the court with the object of communicating the opinion and its basis as efficiently as possible. Directions would usually be made before trial confining the time that may be used in making oral presentations.

Many experts are used to presenting their opinions orally and an opportunity to do so is likely to assist in communicating the basis for the opinion and place in context the cross-examination which follows. The use of oral presentations is to be preferred to the high costs of preparing detailed written reports which can be difficult for judges to penetrate in order to expose the real issues in dispute.

Proposal 8

The courts should have power to receive expert submissions.

The testimony of expert witnesses should be confined to the expression of opinions on the basis of clearly stated assumptions or the statement of principles on which the process of reasoning of a particular field of expertise

is based. However, where an expert is used to provide a framework of reasoning to assist in deciding the case or interpreting a statute, or is used to provide argument (based upon the principles deposed to by expert witnesses) to assist the decision maker to decide between competing expert opinions, then the views of the expert should be received as submissions. This is especially the case where legislation has been enacted which adopts tests which have their origins in particular expert disciplines.

Where experts are allowed to make submissions they should be required to adhere to the same obligations as counsel, disclosing any countervailing authority or view which is on point and refraining from making submissions that mislead the court. Judges should state these obligations to experts who may be unfamiliar with them. Training should be required for experts who adopt such a role.

Proposal 9

There should be power to require an expert to answer questions from other parties upon payment of the reasonable costs of answering the question.

One of the reasons why opposing parties call experts on the same issue is because there is no opportunity to interrogate the expert briefed by another party to express an opinion based upon an alternative assumption as to the facts or upon an issue within the field of expertise of the expert upon which the other party does not propose to lead evidence. In such cases, it should not be seen to be inconsistent with the adversarial process for the court to order the expert to express an opinion in response to a specific question provided the costs of doing so are met by the party seeking the order. There is no property in a witness and the expert who gives evidence should not be seen to be an advocate for the party who intends to call the expert.

Proposal 10

Where opposing witness statements are filed, each expert should be required to certify that he or she has considered the other opinions that have been expressed, specify the matters with which the expert agrees and state that otherwise the expert does not agree.

Proposal 11

An Expert Evidence Forum should be established.

There is no established channel of communication between judges, lawyers, experts and parties to litigation concerning the process by which expert evidence is prepared and presented to the courts. There is no body which encourages those who participate in the process of litigation to improve the practices and procedures relating to expert evidence. There is no forum in which the duties and responsibilities of the various participants may be promoted and reinforced. Information on such duties and responsibilities is not readily accessible. There is no professional body which provides training for lawyers in instructing experts and cross-examining experts at trial.

In some jurisdictions there are academies of experts for the forensic sciences. There have been proposals to enlist their support in communicating to experts their duties and responsibilities. However, such bodies have the interests of experts to represent. What is needed is a forum in which there can be debate as to the nature and extent of the duties and responsibilities of experts as well as training in the forensic skills required to present and test expert evidence in court proceedings.

A secretariat which stood outside the interest of any particular group with responsibility to co-ordinate conferences, publish information and convene working parties, would provide an inexpensive means by which to create a forum in which communication could take place concerning issues related to expert evidence. This would enable best practice in matters relating to expert evidence to be advanced on an ongoing basis. The judges and the professional associations could be expected to support such a forum at very little cost and provide the expertise required, provided there was administrative support.

The forum would enable an ongoing dialogue concerning the way the obligations of lawyers and experts to the court could be translated into practical guidelines. It could be an avenue for promotion of the other changes proposed by this sub-section.

Proposal 12

Fees should be introduced on the filing of expert statements.

Under the proposals outlined above, expert evidence could not be adduced without leave. Where leave is given, a statement of the substance of the expert opinion of the expert (together with a statement the facts upon which the opinion is based and an outline of the reasoning in support of the opinion) must be filed and served.

It is proposed that, where leave is given, a fee will be payable on filing each expert statement. The court will have power to direct that the fee be waived

where there have been directions made for a single expert statement on each topic for expert opinion or where the court is satisfied that other parties to the litigation have failed to cooperate in the filing of a single expert statement (in which case the fee may be directed to be paid by the other party) or where the fee would operate as a significant barrier to access to the courts.

There are three reasons for the fee. Firstly, it will encourage parties to appoint single experts to give evidence and discourage unnecessary resort to expert evidence. Secondly, it will ensure that the costs associated with court supervised conferences between experts where there are opposing expert statements filed are met (at least in part) by the parties who cause such costs to be incurred. Thirdly, it will establish a fund which can be used to defray the costs of the secretariat to the Expert Evidence Forum.

Proposal 13

The provisions of the Commonwealth *Evidence Act* relating to expert evidence should be adopted.

The Federal Court and the courts in New South Wales apply the provisions of Evidence Acts which deal with the admission of expert evidence.

As noted above, they have replaced the common law rules in a number of instances with general discretions. The reforms were introduced after a comprehensive consideration of the common law rules. There are compelling reasons as to why uniform evidence laws should apply in the courts in Australia. Where expert evidence is concerned their introduction would result in cost savings as a result of disputes which may produce a procedural advantage for one party but which do not assist in the administration of justice. Further, they allow judicial discretion to be brought to bear to ensure that substantial costs are not expended in proving matters which are out of all proportion to their significance for the dispute between the parties.

SUMMARY OF PROPOSALS

1. The practice and procedure of the civil courts should maintain a clear distinction between expert advisers and expert witnesses.

2. No expert evidence should be adduced without the leave of the court.

3. The practice of the court should encourage single experts.

4. Where a party calls its own expert to give evidence there shall be a waiver of legal professional privilege in respect of all communications with the expert.

5. All expert witness statements shall contain a detailed declaration in a form required by the court.

6. The present practice whereby the substance of the expert evidence upon which a party proposes to rely must be disclosed prior to trial should continue, but the filing of comprehensive written reports by experts should be discouraged.

7. Experts should be given an opportunity to present their opinion and reasoning orally.

8. The courts should have power to receive expert submissions.

9. There should be power to require an expert to answer questions from other parties upon payment of the reasonable costs of answering the question.

10. Where there are opposing witness statements filed, each expert should be required to certify that he or she has considered the other opinions that have been expressed, specify the matters with which the expert agrees and state that otherwise the expert does not agree.

11. An Expert Evidence Forum should be established.

12. Fees should be introduced on the filing of expert statements.

13. The provisions of the Commonwealth *Evidence Act* relating to expert evidence should be adopted.

ENDNOTES

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27 Ibid. See also *Bonython v The Queen* (1984) 38 SASR 45, 46-7.

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31 Ibid 49-50; Edmund & Mercer state: 'Literally hundreds of academic articles have been written with some law journals dedicating entire issues to the discussion of assessment and implications raised.'

32 S Odgers & J Richardson, 'Keeping Bad Science out of the Courtroom: Changes in American and Australian Expert Evidence Law' (1995) 18 *University of New South Wales Law Journal* 108; Freckleton, above n 9; Edmund & Mercer, above n 30.

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35 Freckleton, above n 9, 1217.

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38 Russ Scott, 'Court-Appointed Experts' (1995) 25 *Queensland Law Society Journal* 87, 88 quoting the proposal of the Queensland Litigation Reform Commission.

39 *R v Perry* (1990) 49 A Crim R 245, 249.

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48 See Cooper, above n 3. See also the procedure suggested by Sir Laurence Street, 'Practice Note' (1992) 66 *Australian Law Journal* 861.

49 Maureen Brunt, 'Market Definition Issues in Australia and New Zealand Trade Practices Litigation' (1990) 18 *Australian Business Law Review* 86, 108.

50 *Anchor, Mortlock, Murray & Woolley Pty Ltd v Hooker Homes Pty Ltd* (1971) 2 NSWLR 278, 286.

51 See the analysis by Gaire Blunt, Peter Shafron and Benedict Keneally, 'From Arnotts to QIW: A Study of Expert Evidence in Trade Practices Cases' (1994) 1 *Competition & Consumer Law Journal* 181.

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53 See *Lord Abinger v Ashton,* above n 11, where Jessel MR stated: 'In matters of opinion I very much distrust expert evidence, for several reasons. In the first place, although the evidence is given upon oath, in point of fact the person knows he cannot be indicted for perjury, because it is only evidence as to a matter of opinion. So that you have not the authority of legal sanctions. A dishonest man, knowing he could not be punished, might be inclined to indulge in extravagant assertions on an occasion that requires it'.

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56 *Re J,* above n 18.

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58 Federal Court of Australia, *Practice Direction: Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia* (15 September 1998).

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78 Cooper, above n 3, 207.

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80 Williams, above n 4, 6.

81 AJD Bellett, 'Social Issues in the Ethics of Expert Advice' (1993) 65 *Australian Quarterly* 533, 539.

82 Ibid.

83 Assuming the parties are equally resourced. The effect of unequal resources upon the fairness of the litigation system is a different issue and is dealt with below.

84 *Harmony Shipping Co SA v Saudi Europe Line Ltd* [1979] 1 WLR 1380, 1385-6.

85 *R v King's Lynn Magistrates' Court, ex parte Holland* [1993] 2 All ER 377; *Trade Practices Commission v Sterling* (1979) 36 FLR 244; *Tirango Nominees Pty Ltd v Dairy Vale Foods Ltd* (1998) 156 ALR 364.

86 *Attorney-General (NT) v Maurice* (1986) 161 CLR 475; *Tirango*, above n 85.

87 *Towney v Minister for Land and Water Conservation (NSW)* (1997) 147 ALR 402.

88 Woolf, above n 2, 140-2.

89 See Proposal 11.

90 This would apply to an expert who has been engaged by the party to provide expert advice but is then called as the party's own witness.

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SECTION

4

Criminal System

Section 4: Criminal System

4.1

An Overview of the Present Criminal Justice System in Western Australia

INTRODUCTION

The administration of criminal justice in Western Australia is dictated by a combination of legislation which allows for the prosecution of various types of offences ranging from statutory breaches through to serious crimes.

While statutory breaches are commonly investigated by government departmental officers and then prosecuted by lawyers from the Crown Solicitor's Office, criminal offences are primarily investigated and charges laid by members of the Western Australia Police Force.[1]

Depending on the nature of the offence, if challenged, the matter will go on to be prosecuted by a prosecuting Sergeant in the Court of Petty Sessions or a legally qualified prosecutor from the Office of the Director of Public Prosecutions (the 'DPP') in any court.

The DPP has a fundamental objective to bring to justice those who commit offences.[2] It may determine whether charges ought to proceed having regard to whether there is a prima facie case and whether the prosecution of an offence is in the public interest.[3]

Prosecuting counsel has no interest in securing a conviction — 'Its only interest is that the right person should be convicted, that the truth should be known and that justice should be done'.[4] The role of the prosecutor is therefore markedly different to the duty of defence counsel. It is a role necessarily directed toward attaining justice rather than a conviction in any particular case — and relieves, to some extent, the imbalance between the resources of the State and the resources of the individual in any criminal proceedings.

HISTORICAL DEVELOPMENT

Originally criminal law in Western Australia was based on common law.

In 1897, Sir Samuel Griffith, then the Chief Justice of the State of Queensland, prepared a draft criminal code. The Queensland Criminal Code, known as the Griffith's Criminal Code, was enacted in 1899 and came into force in 1900 in that state.

The Griffith's Criminal Code was in turn adopted and established in Western Australia by the *Criminal Code Act 1913* (WA) to which the Western Australian *Criminal Code* was scheduled (the '*Criminal Code*').

Understandably, both the Queensland and the Western Australian Codes have been substantially amended since they were enacted. As between themselves there are also now some significant differences although the basic principles of law remain similar in many respects.[5]

The majority of criminal matters heard by the courts are state offences under the *Criminal Code*. The common law is relied upon for matters not covered or fully explained by the *Criminal Code*. The language of the *Criminal Code* is to be interpreted according to its 'natural meaning' and the common law resorted to only in instances of ambiguity or where the words to be interpreted have acquired a technical meaning outside of the *Criminal Code*.[6] The *Criminal Code* is not, in this respect, completely self-contained.

The procedure of the criminal justice system is also not fully reflected in the *Criminal Code* alone. Evidential matters, for example,[7] are not dealt with in the *Criminal Code* nor does it accommodate all offences dealt with by the courts or define the procedure to be followed in all cases.

Associated important legislation includes the *Police Act 1892* (the *'Police Act'*), the *Justices Act 1902* (the *'Justices Act'*), the *Road Traffic Act 1974* and *Road Traffic Criminal Code 1975*, the *Misuse of Drugs Act 1981* (WA) (the '*Misuse of Drugs Act'*), the *Evidence Act 1906* and the *Criminal Practice Rules 1914*.

Each of these statutes in some respect includes provisions which impact upon the procedure to be followed by the courts in hearing criminal matters. So while offences themselves may have been largely codified in the *Criminal Code* the reality is that the system as a whole is somewhat ad hoc. There is no centralised legislation to fully govern the administration of criminal law in this state.

Similarly, the rules of evidence are variously sourced in a number of statutes. The *Evidence Act 1906* despite its name does not 'codify' the law of evidence. Legislation such as the *Road Traffic Act 1974* provides evidential rules particular to the statutory subject matter. For example, section 70 of that Act makes detailed provision for the evidence which may be given of the extent to which a person was under the influence of alcohol at a material time.

It should be noted that certain statutes such as the *Police Act* and the *Criminal Practice Rules 1914* are presently under review. The system otherwise remains unsatisfactory due to a lack of cohesion across the range of relevant legislation. This review seeks to examine and address this problem with a view to improving the efficiency of the way in which our courts operate.

TYPES OF OFFENCES

There are three types of offences. Crimes, misdemeanours and simple offences. The significant division is between indictable offences and simple offences.

Simple offences are determined summarily before a court of petty sessions[8] whereas crimes and misdemeanours are indictable offences, only some of which may be dealt with in the lower court. The remainder must be heard by the District or Supreme Courts.

Indictable offences which include a 'summary conviction penalty' may be dealt with summarily provided the person charged chooses and the Court of Petty Sessions considers that it is appropriate to do so. The maximum penalty stipulated for the offence will be lower than that which would apply if determined by a superior court.[9] Summary conviction for an indictable offence is also deemed a conviction of a simple offence only and not of an indictable offence.[10] These are an incentive to defendants to elect to have their matters dealt with summarily which in turn reduces expense to the State and delay in the dispensing of justice in other cases.[11]

JURISDICTION

The Court of Petty Sessions deals with all matters which may be dealt with in a summary manner.[12] The matter may proceed as a plea of guilty or as a full hearing. When presiding over a full hearing the magistrate decides on both the factual issues and the law concerning a particular offence.

The District Court has jurisdiction to deal with indictable matters requiring determination by a judge and a jury,[13] although in some cases an accused person may elect to have their matter heard by a judge alone — the latter alternative having been provided by legislation in relatively recent times.[14] The matter may proceed as a plea of guilty or to a full trial.

When presiding over a jury trial the judge is to decide questions of law only, while the jury is required to decide on the facts. If the judge hears a matter without a jury, like a magistrate in the lower court, he or she is to determine both questions of fact and of law.

The District Court has jurisdiction over all offences other than those for which a penalty of life imprisonment may be imposed.[15]

The Supreme Court has jurisdiction to hear all indictable offences.[16] The Supreme and District Courts therefore have concurrent jurisdiction over all offences other than those subject to a sentence of imprisonment for life

which remain the province of the superior court. This is a recent occurrence due to a significant amendment to the *District Court of Western Australia Act 1969* (WA) ('*District Court Act*') coming into force on 10 October 1996.

Prior to the amendment, section 42(2a) of the *District Court Act* provided:

> The Court has no jurisdiction to try an accused person charged with an offence described in Schedule 2.

Schedule 2 then outlined the prohibited offences being those provided for in section 186(1)(b), chapter XXXI and section 398 of the *Criminal Code*, in each respective case where the offence was committed in circumstances making the offender liable to imprisonment for 20 years. Section 186(1)(b) and chapter XXXI deal with a range of sexual offences and section 398 with attempts at extortion by threats.

The effect of the amendment is that the most serious of these types of offences are now able to be dealt with by the District Court as well as by the Supreme Court. The practical result has been that the work of the criminal sittings in the District Court has increased due to the combined effect of the prevalence of such offences, the enlarged jurisdiction and the prosecution's general preference for having such matters disposed of in the lower court.

The amendment was part of a broader program of legislative reform designed to address issues of access to justice. The concept was to increase the efficiency and fairness of the court process based on the reasoning that 'justice delayed is justice denied'.[17] This amendment was designed to help reduce a backlog of other cases in the Supreme Court by conferring upon both courts concurrent jurisdiction to deal with the full range of sexual offences.[18]

The jurisdiction of the Supreme Court includes the hearing of appeals by a single judge from the decisions of magistrates in the Court of Petty Sessions and the Court of Criminal Appeal presiding as a panel of three judges to hear appeals from trials in the District Court.

Western Australian courts also hear Commonwealth offences under the *Crimes Act 1914* (Cth).

BAIL

After arrest bail is ordinarily granted. This is a process by which an arrested person is released from custody pending trial.[19]

A defendant who is in custody awaiting an initial court appearance has a statutory right to have his or her case for bail considered as soon as practicable or else be brought before a court as soon as practicable.[20]

Those who are empowered to grant bail include:

(a) a judicial officer (meaning any person empowered to exercise jurisdiction in a court including the Children's Court);
(b) a justice (defined as a Justice of the Peace or a Magistrate under the *Justices Act*);
(c) an authorised officer (being an authorised police officer or an authorised community services officer); or
(d) an authorised police officer (namely, a police officer who holds the rank of sergeant, or a higher rank, or who is for the time being in charge of a police station or lock-up).[21]

Police bail

Bail can only be granted by the arresting police officer if he or she is an authorised officer within the Bail Act.[22] Again, bail must be considered as soon as practicable otherwise the person must be brought before the court.[23]

If the arresting officer is not authorised to grant bail, the alleged offender must be brought before the court, a justice or an authorised police officer as soon as practicable.[24]

Bail cannot be granted by anyone other than a judge of the Supreme Court, a judge of the Children's Court or a justice if the alleged offender is arrested pursuant to a warrant or is charged with murder or wilful murder.[25]

Court bail

Once a person is brought before the court subsequent to arrest, the court exercises a discretion in the granting of bail and in determining the conditions, if any, to accompany the bail. Part C of Schedule 1 of the *Bail Act* provides a number of factors for the court to consider in the exercise of its discretion.

The discretion is significantly limited in the case of serious offences (as provided in Schedule 2 of the Act) and, in the case of murder or wilful murder, may only be granted by the Supreme Court.

Conditions may attach to the grant of bail and may include an undertaking by the defendant and/or another to pay a sum of money in order to ensure the attendance of the defendant in court on a later date.

It would appear that the need to grant bail fairly and with the least delay is effectively codified by this legislation. This may be regarded as a further measure of protection and fairness for accused persons.

SUMMARY PROCEEDINGS

The procedure which follows upon arrest is dictated in part by the category of offence (that, is whether it is an indictable offence or a simple offence) and in part by decision of the defendant.

Simple offences are more straightforward from a procedural perspective. There is no choice available to an offender. Prosecution is commenced by way of a summons on complaint and may, in certain circumstances, be finally dealt with in the absence of the defendant.[26]

Indictable offences for which a defendant has elected to be dealt with summarily and simple offences heard in the Court of Petty Sessions are summary proceedings.

A complaint concerning a simple offence must be laid within 12 months of the offence.[27] This time limitation does not apply in relation to indictable offences

PRELIMINARY PROCEEDINGS

Preliminary proceedings are relevant only in relation to indictable offences for which the defendant must be dealt with by a court superior to the Court of Petty Sessions.

A person charged with an indictable offence which is to go before the District or Supreme Court must first be committed to stand trial in the superior court. The committal may occur in two ways — as a consequence of acceptance of a 'hand-up' brief or by order of a magistrate following a preliminary hearing. The person charged decides the preferred mode of committal.

The hand-up brief is to be provided to the defendant or his or her counsel prior to the day on which the defendant is required to elect whether or not to have a preliminary hearing.[28]

At the preliminary hearing the prosecution evidence is reviewed and tested before a magistrate to determine whether it is sufficient to warrant committing the accused for trial or sentence.[29]

Originally the hearing provided a review of the prosecution evidence to enable a determination of whether it was sufficient to justify committing the accused to trial.[30] Ideally the process protected an accused and the justice system from the unnecessary expense and inconvenience of a prosecution not likely to succeed. In addition, it could provide the defence with an opportunity to evaluate the evidence in order to decide whether a plea of guilty ought to be entered.[31]

Once the defendant has been committed to the District or Supreme Courts an indictment is presented. The indictment only has authority recognised by the court if prepared and/or signed by a public official such as a senior prosecutor.[32]

There is provision for private prosecution on indictment if the leave of the Supreme Court is obtained.[33]

Each count should be framed in such a way that a verdict can clearly be obtained without ambiguity. For this reason each count must refer to one

offence only.[34] This is not to say that a series of events or one set of facts giving rise to different incidents of criminal conduct cannot be included on the one indictment or complaint. This is permissible if there is a sufficient connection between the event or the incidents.[35]

A defendant may also enter the jurisdiction of the superior court without being committed where the prosecution presents an *ex officio* indictment. This is a less frequent procedure whereby the Crown chooses to proceed with a prosecution despite the magistrate discharging the accused (because the magistrate has formed the view that there is no prima facie case) or when the Crown has simply chosen to dispense with committal altogether.[36]

PRINCIPLES OF CRIMINAL PROCEDURE

The criminal justice system must strike a balance between ensuring the conviction of guilty persons and protecting accused persons from wrongful conviction.

It has been said that an accused is 'entitled' to a fair trial. The High Court has recently commented that the entitlement is '*more accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial*'.[37]

A right to a fair trial includes an examination of the admissibility of evidence which necessarily involves scrutiny of the manner in which evidence has been obtained.

Evidential rules of fairness, voluntariness and public policy apply to the admissibility at trial of responses to all police questioning regardless of the form in which the evidence is to be given.

If confessional material is obtained from the accused in the course of questioning it may not be received by the court at trial or hearing if:

(a) it was not a voluntary confession;
(b) it would be unfair to the accused to receive the evidence; or
(c) it would be contrary to public policy to receive the evidence.

If the confessional material was obtained involuntarily it must be excluded. If the confession is voluntarily made but obtained in circumstances alleged to be unfair or contrary to public policy the court has a 'discretion' as to whether or not it should be excluded from the trial.

Challenges to the admissibility of such evidence may require a *voir dire* ('trial within a trial') wherein the trial judge is required to determine factual conflicts in the context of fairness and voluntariness and rule accordingly.

Earlier concerns surrounding the contents of confessional statements made to police have largely been resolved by the use of electronic video taping procedures where available. In 1996 the *Criminal Code* was amended to

include specific provision for the use of videotaped interviews. Section 570D provides that any admissions made by an accused person on trial for a serious offence, not videotaped, are inadmissible unless there is a 'reasonable excuse' as to why the interview was not recorded.

A 'reasonable excuse' includes:

(a) the admission was made when it was not practicable to videotape it;
(b) equipment to videotape the interview could not be obtained while it was reasonable to detain the accused person; or
(c) the accused person did not consent to the interview being videotaped.

Videotaping the whole of the accused's interview with police has the effect of providing corroboration of the manner in which an interview has been conducted. This reduces the occasions on which the court is required to resolve disputes upon a *voir dire* where the fairness of the questioning would ordinarily be challenged.[38]

The required use of video taped records of interview is a definitive measure which protects suspects subject to police questioning. The trial process in turn is made more efficient as there are fewer occasions on which the admissibility of the content of confessional evidence will be challenged.

TRIAL PROCEEDINGS

At the commencement of the trial of an accused a jury of 12 men or women is empanelled.[39] Frequently, a reserve juror is also selected to replace a juror who is unable to complete his or her duties because of illness or some other reason. The reserve juror will sit with and observe the proceedings with the empanelled jurors but will be discharged when the jury retires to consider its verdict. This is a practice which reduces the risk of lost court time and resources.

Both the prosecution and defence are entitled to 'challenge' the selection of individual jurors, which right is limited to eight peremptory challenges (that is, challenges of right — section 38 of the *Juries Act*) in addition to the right to challenge for cause.[40] The accused is able to authorise his or her counsel to exercise that right on the accused's behalf. The accused retains the right to personally challenge a juror if he or she chooses despite the authority granted to his or her representative. It is the usual practice for counsel to advise the court that the accused has been specifically advised of his or her rights in this context.

Once the jury is empanelled the accused is required to plead to the counts on the indictment which are read to him or her and the response of guilty or not guilty is to be made.

If the accused stands mute a plea of not guilty will be entered.[41]

The accused may plead guilty at any time before the jury have given their

verdict whereupon the jury will be discharged[42] and the court will proceed with the sentencing of the offender in the usual manner.

If the accused maintains his or her plea of not guilty the trial will proceed. The prosecution opens its case by giving an outline of the facts to be alleged against the accused by reference to the counts on the indictment.

All prosecution witnesses are successively called to give evidence-in-chief. They are cross-examined by the defence counsel and re-examined by prosecuting counsel. Once the prosecution has presented all its evidence it closes its case and the focus of the trial turns to the defence.

At this point the defence counsel may argue that the prosecution has failed to present a prima facie case and therefore the accused has 'no case' to answer. The question to be determined by the trial judge where there is a 'no case' submission, is whether, on the evidence adduced by the prosecution, the accused *could* be lawfully convicted, not whether he *ought* to be convicted.[43] If the trial judge agrees with this submission he or she will direct the jury to enter a verdict of not guilty.

But if this submission is not raised or the trial judge does not accept the argument, the defence counsel will indicate whether the accused intends to call any evidence in support of the defence case. If evidence, other than the testimony of the accused person, is to be adduced for the defence, the accused or his or her counsel is entitled to address the jury for the purpose of opening the defence case.[44] This option is rarely taken by defence counsel possibly because there is greater reliance on the strength of the closing address to persuade the jury to favour the defence case.

The accused is not obliged to call any evidence or give evidence himself or herself. The accused can simply address the jury on the basis of the evidence proffered by the prosecution to assert that the prosecution has not discharged its evidential burden to prove its case beyond reasonable doubt.

Alternatively, the accused can call or give evidence, close its case and similarly argue that the evidential burden has not been met because a reasonable doubt is raised.

Closing addresses

Both the prosecution and defence counsel are entitled to address the jury which consists of each side suggesting a version or interpretation of the facts most favourable to their respective cases.

If the defence calls no evidence it is entitled to address after the prosecutor. If the defence does call evidence it must address first.[45]

At the conclusion of the closing address by all counsel the judge 'sums up' the case for the jury.[46] In this part of the proceedings the judge instructs the jury as to the law applicable to the case making such observations upon the

evidence as the court considers appropriate.[47] This may consist of highlighting certain aspects of both the prosecution and defence cases and may generally direct the jury as to its role and the evidentiary burden.

As with closing addresses, a judge's summing-up will vary according to the facts of each case although there are certain matters on which a jury must be directed, the absence of which could give rise to a miscarriage of justice.

In particular, a warning is required to be given to the jury by the judge if there is any material revealed during the course of a trial to suggest that the evidence of a witness may be unreliable. The judge has a duty to ensure that the jury is aware of the dangers concerning that person's evidence. The strength of the warning will depend on the circumstances of the case and the nature of the material in question.[48]

It may be that the evidence is so unreliable that it would be dangerous to convict on the strength of that testimony without corroboration for example, where the complainant is suffering a mental disorder.[49] If this is not obvious to the jury the judge is obliged to bring this to the jury's attention. Similarly, if the reliability of the confessional evidence is in doubt, it will be proper for the trial judge, in ensuring that the defence case is fairly and accurately put, to warn of the need for careful scrutiny of such evidence.[50]

The judge's overall duty is always to guard against a conviction secured other than after a fair trial. So that while warnings are to be fashioned according to the circumstances of the particular case,[51] they will always be directed towards maintaining fairness in the trial process.

At the conclusion of the summing-up the jury is directed to retire to consider its verdict. The jury is told that the verdict must be unanimous although after a period of three hours if the jury has been unable to reach a unanimous verdict a decision of not less than 10 of the jurors may be taken. If after this period 10 or more of the jurors cannot agree on their verdict, the jury may be discharged or the court may request that they deliberate further if that is considered desirable.[52]

Once the jury does return with a verdict it is discharged.

CASE MANAGEMENT

Essential to the efficient running of the criminal justice system is the use of case flow management. Order 1 of the *Rules of the District Court* adopts the case flow management principles set down in Order 1 rules 4A and 4B of the *Rules of the Supreme Court of Western Australia 1971*. These principles are positively directed toward the elimination of delay and the securing of maximum efficiency in the disposal of court business.

Western Australia has specific measures apart from case management which have the effect of increasing efficiency of the criminal justice system. Those

measures include the:

(a) pre-trial determination of legal issues;[53]
(b) availability of defence disclosures;[54]
(c) selection of reserve jurors; and
(d) provision for majority verdicts.[55]

Ongoing measures are expected to improve upon this result in the long term.[56]

APPEALS

It is central to our system of justice that an accused person is entitled to, and does receive, a fair trial according to law.

If the accused has been convicted and sentenced he or she is able to appeal against the conviction and/or sentence. Difference procedures apply according to the jurisdiction of the court appealed from.

The Crown has more limited rights to appeal and generally is unable to appeal against the acquittal of an accused.[57] Appeals against sentencing[58], stays[59] or adjournments of proceedings or quashing of indictments are, however, available to the Crown.

Legal issues may also be referred by the Attorney-General to a superior court for an advisory opinion on a question of law alone.[60] The original verdict of conviction or acquittal will not be affected by the advisory opinion. The opinion sought by this process serves only to provide guidance for future cases if the particular legal issue arises again.

The grounds upon which an appeal may be based vary widely. Usually it is asserted that a magistrate or judge has made an error in interpreting or applying the correct law with respect to an issue which arose during the course of the trial or hearing. In other cases it may be argued that there has been an error of law and of fact.[61] There may also be appeals against sentence.[62]

An appeal court may set aside or cancel the conviction obtained in the lower court. This will occur if the appellant court considers that the verdict:

(a) is unreasonable or cannot be supported having regard to the evidence;
(b) that there was a wrong decision on a question of law; or
(c) there was a miscarriage of justice.[63]

Whether or not there has been a miscarriage of justice may be decisive because even if a point raised in the appeal is determined in favour of the appellant, the court may nevertheless dismiss the appeal if it is of the view that there has been no substantial miscarriage of justice.[64] The focus is therefore on issues of justice rather than technical legal argument.

Where a conviction has been quashed the appellant court may:

(a) enter a verdict of acquittal;[65] and/or

(b) substitute with a conviction for a lesser offence;[66] or

(c) order a new trial.[67]

Justices Act appeals

Under the provisions of the *Justices Act*, matters dealt with summarily may be taken on appeal to a single judge of the Supreme Court. An initial application for leave to appeal must be made and leave granted before the judge will hear the appeal.[68] The judge is able to look afresh at the evidence in the original hearing and may even accept new evidence in order to determine the matter.

Full Court appeals

Appeals arising from trials on indictment in the District or Supreme Courts are made to the Full Court of the Supreme Court sitting as the Court of Criminal Appeal (the 'CCA').[69] A convicted person may appeal as of right to the CCA on a question of law alone but must obtain leave to appeal if the ground of appeal involves a question of fact alone, a question of mixed fact and law or any other ground which is regarded as a sufficient ground of appeal.[70]

Ideally, the requirement for leave to appeal in *Justices Act* appeals and Full Court appeals other than on questions of law alone ought to allow the Court to, at least in part, control the character of matters before it to exclude frivolous appeals. This ought in turn to enhance court efficiency and use of court resources.

ENDNOTES

1 *Director of Public Prosecutions Act 1991* (WA): Statement of Prosecution Policy and Guidelines ('DPP Policy Statement') Guideline 9.
2 Ibid, Guideline 18
3 Ibid, Guidelines 16 & 17.
4 Ibid, Guideline 53 quoting CS Kenny, *Outlines of the Criminal Law: The Proper Role of Prosecuting Counsel.*
5 See E Colvin, S Linden & L Bunney, *Criminal Law in Queensland and Western Australia* (2nd ed) (1998) 4-8.
6 *Stuart v The Queen* (1974) 134 CLR 426, 437.
7 See below.
8 See *Justices Act 1902* (WA) s 4.
9 See *Criminal Code 1913* (WA) s 5 or the expanded meaning of the term 'Summary Conviction Penalty' and ss 317 and 318 for examples of the inclusion of the term.
10 Ibid s 673.
11 The term 'summary' simply describes a manner of dealing with matters expeditiously and without ordinary incidental formalities: *Dowson v McGrath* (1956) 58 WALR 27, 32.
12 *Justices Act 1902* (WA) s 20.
13 *District Court of Western Australia Act 1969* (WA) s 46.
14 *Criminal Code 1913 (WA)* s 651A (commenced 23 December 1994 — s 14, Act No 82 of 1994); *District Court of Western Australia Act 1969* (WA) s 46.
15 *District Court of Western Australia Act 1969* (WA) s 42(2)
16 *Supreme Court Act 1935* (WA) s16(1)(c)
17 *Criminal Law Amendment Bill 1996* (2nd reading) WA Parliamentary Debates, Legislative Assembly, 20 August 1996, 4058.

18 Ibid, 3016.
19 Colvin *et al*, above n 5, 541-543.
20 *Bail Act 1982* (WA) s 5.
21 *Bail Act* s 3.
22 *Bail Act*.
23 *Bail Act* s 6.
24 *Bail Act* s 6(2).
25 *Bail Act* ss 15, 16.
26 *Justices Act 1902* ss 52, 54, 135 and 136.
27 *Criminal Code 1913* (WA) s 574(2); *Justices Act 1902* (WA) s 51.
28 *Justices Act 1902* (WA) s 100.
29 *Justices Act* s 107.
30 See Colvin *et al*, above n 5, 632.
31 See Mark Pedley, 'The Problem With Court Rules and Procedure in Criminal Cases: A Prosecution Perspective' (Paper presented at the Australian Institute of Judicial Administration Conference — Reforming the Court Process for Law Enforcement: New Directions Conference, Brisbane, 3-4 July 1998) 5.
32 *Criminal Code* s 578
33 *Criminal Code* s 720
34 *Criminal Code* s 585; *Justices Act* s 43.
35 *Criminal Code* s 585; *Justices Act* s 43 — although on complaint the offences must arise substantially out of the same incident.
36 *Criminal Code* s 579
37 *Dietrich v The Queen* (1992) 109 ALR 385, 387.
38 Cf *Sell v The Queen* (Unreported, Court of Criminal Appeal, Library No 950319, Malcolm CJ, Kennedy and Ipp JJ, 22 June 1995) 17.
39 *Juries Act 1957* (WA) s 18.
40 *Criminal Code* s 628.
41 *Criminal Code* s 619
42 *Criminal Code* s 632A
43 *May v O'Sullivan* (1955) 92 CLR 654, 658-659.
44 *Criminal Code* s 637. The defence's right to open is restricted to the point at which the prosecution has closed its case. There is no such right after the prosecution opening and before the crown case is led: *R v Connell* (Unreported, Supreme Court of WA, Library No 950546, White J, 9 October 1995) 14.
45 *Criminal Code* s 637.
46 *Criminal Code* s 638.
47 '... A direction to a jury should be custom built to make the jury understand their task in relation to a particular case. Of course, it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts' See Archbold, *Criminal Pleading Evidence & Practice* (1998) [4-368] quoting Lord Hailsham LC in *R v Lawrence* [1982] AC 510, 519.
48 *Longman v The Queen* (1989) 168 CLR 79, 107: *Fleming v The Queen* (1998) HCA 68, Gleeson, McHugh, Gummow, Kirby and Callinan JJ 16.
49 *Bromley v The Queen* (1986) 161 CLR 315.
50 *McKinney v The Queen*(1991) 171 CLR 468.
51 Ibid, 475.
52 *Juries Act* s 41.
53 *Criminal Code 1913* (WA) s 611A.
54 *Criminal Code* s 611A.
55 *Juries Act 1957* (WA) s 41.
56 See Daryl Williams, 'Reforming the Court Process for Law Enforcement — New Directions Conference' (Paper presented at the Australian Institute of Judicial Administration Conference, Brisbane, 3-4 July 1998); Brian Devereaux 'A "Legal Aid" Response to the AIJA Study of Complex Trials, "The Anatomy of Long Trials" by Dr Chris Corns' (Paper presented at the Australian Institute of Judicial Administration Conference, Brisbane, 3-4 July 1998). Two of the three recommendations suggested by Brian Devereaux to improve efficiency in the criminal justice system in Australia, are practices already adopted in WA, namely, the selection of reserve jurors and provision for majority verdicts. The last, being earlier and better preparation of cases, is being addressed by some agencies and depends largely on the co-operation of participants in the system.
57 Except in the case of direction of acquittal by a judge rather than the jury — *Criminal Code* s 688(2)(b).
58 *Criminal Code* s 688(2)(d).
59 *Criminal Code* s 688(2)(a).
60 *Criminal Code* s 693A (1)-(2).

61 *Criminal Code* s 688(1)(b).
62 *Criminal Code* s 688(1a)(b).
63 *Criminal Code* s 689(1) ; cf *Justices Act* s 199(1)(b) which provides for the quashing of a conviction without particular grounds.
64 *Criminal Code* s 689(1); *Justices Act* s 199(1)(b).
65 *Criminal Code* s 689(2).
66 *Criminal Code* s 693(2); *Justices Act* s 199(1).
67 *Criminal Code* s 689(2); *Justices Act* s 199(1)(d).
68 *Justices Act* ss 184, 185, 187.
69 *Criminal Code* ss 687, 688.
70 *Criminal Code* s 688.

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4.2

The Right to Silence

INTRODUCTION

The 'right to silence' is often characterised as a single, overarching right which applies coherently to a number of different contexts. The position is otherwise. As Lord Mustill has remarked, the 'right to silence'

> arouses strong but unfocused feelings. In truth it does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute.[1]

Lord Mustill identified six different meanings for the so called 'right to silence':

(1) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other bodies or persons.

(2) A general immunity possessed by all persons and bodies [although, in Australia, not by corporations[2]] from being compelled on pain of punishment to answer questions the answers to which may incriminate them.

(3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in a similar position of authority, from being compelled on pain of punishment to answer questions of any kind.

(4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.

(5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence

addressed to them by police officers or persons in a similar position of authority.

(6) A specific immunity (at least in some circumstances) possessed by accused persons undergoing trial, from having adverse comment made on any failure
   (a) to answer questions before the trial; or
   (b) to give evidence at the trial.[3]

In Australia substantial legislative inroads have been made to the first two of the immunities referred to by Lord Mustill. Section 81 of the *Bankruptcy Act 1966* (Cth) requires a person being examined to answer questions under compulsion notwithstanding that those answers may incriminate the examinee. The answers are admissible against the examinee. There are other statutes which expressly remove the privilege but are silent as to subsequent use which may be made of answers.[4] In the sphere of corporate regulation, a person may not refuse to answer a question (or produce a document) on the ground that the answer or document may tend to incriminate the person. If the privilege is claimed, the answer given is not admissible in evidence against the person giving the answer.[5] In Western Australia the same approach is taken with a Royal Commission and a coronial enquiry.[6]

Neither the right to silence nor the privilege against self-incrimination apply to the use of real evidence relating to the physical characteristics or features of a person.[7]

In this context it should be mentioned that the privilege against self-incrimination should not be equated with the right to silence. As will be developed below, there may well be reasons other than guilt, or a risk of incrimination, that underlie a person's silence.

The rules regulating the admissibility of confessions may be seen as another manifestation of the 'right to silence'. A suspect has a right to choose whether or not to speak to the police. Statements not made voluntarily are inadmissible. The High Court has recently held that where a suspect who had refused to answer police questions had a confessional statement taped by an undercover police officer such evidence ought not, as a matter of discretion, to have been admitted.[8] The majority held that this was so because the statement was obtained in breach of the suspect's right to choose whether or not to speak.[9]

Much has been written in recent years regarding whether any aspect or aspects of the right to silence require modification. It is difficult to find any suggestion that the third and fourth immunities referred to by Lord Mustill above be removed. Any suggestion that an obligation be imposed upon a suspect to answer police questions would face very substantial obstacles in

practice as well as in principle. The practical reality — that it is not possible to force someone, in a physical sense, to answer police questions - must be recognised. The most that might be considered is to impose the threat of punishment upon someone who refused to answer police questions. All of the arguments against drawing an inference adverse to the accused from his or her exercise of the right not to answer police questions (which will be developed later in this sub-section) would apply with substantially greater force to any suggestion that to refuse to answer such questions would render a suspect liable to punishment.

Similarly, to remove an accused person's choice whether or not to give evidence at trial, in the sense of exposing an accused to punishment for refusing to do so, would substantially undermine the accusatorial nature of the criminal justice system. It would not sit well with the notion that the burden of proof remains on the Crown throughout the trial. Further, it would involve the complete rejection of the common law privilege against self-incrimination.

The real questions appear to be whether comment can be made and inferences can be drawn from the exercise, by a suspect, of his right not to answer police questions and from the exercise by an accused of the right to choose whether to give evidence.

It may be instructive to consider the history and context of the development of the right to pre-trial silence, and the right not to give evidence at trial.

Both the pre-trial right to silence and the right to silence at trial appear to have had their origins in the privilege against self-incrimination. That privilege developed as a consequence of the legal and constitutional struggles of the 17th century.[10] The compulsory interrogations adopted by the courts of Star Chamber and High Commission in the early 17th century have become legendary.[11] In the middle of the 17th century the courts of Star Chamber and High Commission, with their compulsory oath procedure, were abolished by statute. In the period not long following that, the common law courts extended the privilege of not answering questions on the grounds of self-incrimination to all witnesses.[12]

By the end of the 17th century the general prohibition on persons with an interest in the outcome of proceedings from giving evidence was extended to preclude an accused from giving evidence at trial.

Competing views have been expressed on whether the privilege against self-incrimination began with the accused as witness and was extended to other witnesses and to allegations of crime made in civil proceedings or whether the privilege against self-incrimination came from Roman canon law, was

applied to witnesses first to allegations of crime in civil proceedings and finally was extended to the accused in a criminal trial.[13]

It remained the position that the accused was incompetent as a witness, until 1898.[14] The accused did not become competent in Western Australia until the passing of the *Evidence Act* in 1906 (section 8).

It can be seen, therefore, that, at least in the 18th and 19th centuries, it is somewhat curious to refer to an accused's 'right to silence' at trial. Rather, the accused was not permitted to give evidence. Silence was obligatory. It is only in the last 100 years that the provisions of the *Evidence Act* have given an accused person an election whether to give evidence. Only in that period, therefore, has the question arisen of whether and what inferences might be drawn from an exercise of the right not to testify at trial.

The accused's disqualification as a witness was one of the foundations of the pre-trial right to silence. Another was the extremely cautious approach adopted by the courts to receiving confessions. In the 18th century the police were not an organised body. There was no effective supervision of individual officers and, police were prone to mistreat suspects to gain admissions.[15] Further, evidence of what occurred during an interrogation could not be tested in cross-examination because until the passing of the *Felony Act 1836* (UK) counsel for an accused had a right only to argue points of law and advise an accused. There was no right for defence counsel to cross-examine prosecution witnesses.

In that context it has been argued that the so-called 'Judges' rules' have been influential;[16] that once the judges advised and it became the practice that a suspect be informed that he was not required to answer questions the law was naturally led to the conclusion that a suspect's consequent decline to answer questions could not be used against him.[17]

It might be thought, therefore, that the original primary foundations of the pre-trial right to silence no longer apply (or, at the least, no longer apply with the same force). The accused is permitted to give evidence to refute or explain what was said to the police. Concerns regarding the unreliability of confessions, at least as to the accuracy of the evidence of what an accused said, must now be substantially diminished. With limited exceptions, evidence of admissions by an accused person is not admissible in Western Australia unless on video tape.[18]

Little remains today of the right to silence in England, the country in which it was generated.[19]

It may be noted that none of the immunities referred to by Lord Mustill relate to the issue of pre-trial disclosure: namely whether an accused person

may be required to disclose some aspect of his or her defence prior to the commencement of the trial.

It appears clear that at common law an accused person has no obligation to give any notice to the Crown of any 'defence' prior to the commencement of the trial. The position was recently summarised by Brennan J as follows:

> A criminal trial is the prime example of an adversarial proceeding. Its adversarial character is substantially unrelieved by pre-trial procedures designed to limit the issues of fact in genuine dispute between the Crown and an accused. The issues for trial are ascertained by reference to the indictment and the plea and, subject to statute, the Crown has no right to notice of the issues which an accused proposes actively to contest. The Crown bears the onus of proving the guilt of an accused on every issue apart from insanity and statutory exceptions. The Crown must present the whole of its case foreseeing, so far as it reasonably can, any 'defence' which an accused might raise, for the Crown will not be permitted, generally speaking, to adduce further evidence in rebuttal on any issue on which it bears the onus of proof. The Crown obtains no assistance in discharging that onus by pointing to some omission on the part of an accused to facilitate the presentation of the Crown's case or to some difficulty encountered by the Crown in adducing rebuttal evidence which an accused could have alleviated by earlier notice.... In a criminal trial, an accused is entitled to put the Crown to proof of any issue the onus of which rests on the Crown without giving prior notice of a ground on which he intends to contest the issue. If the ground be some matter of fact, an accused is entitled to abstain from giving notice of the ground until a witness is called during the trial to whom the matter of fact can and should be put....[20]

The Chief Justice of the Supreme Court of South Australia has recently raised the issue of whether the common law rule requires any statutory modification. Doyle CJ said that:

> It may be that the time has come for some limits to be placed upon the right of silence and for some obligation to be imposed upon the defence to join in the identification of and limiting of issues in criminal proceedings to an extent inconsistent with the maintenance of the right of silence. It is well known that criminal courts in Australia and in other countries are struggling to cope with the volume of work coming before them. It is equally well known that the length of trials is tending to increase. These matters are a cause for real concern. It is equally well known that the effectiveness of current methods of case flow management is limited because, among other things, under rules such as those that exist in South Australia, the court has no power to require the defence to disclose the nature and extent of the defence case.
>
> The appropriate balance between the responsibility of the court for the efficient conduct of cases before it, and so the width of its powers of case management on the one hand, and the operation of the right of silence on the other hand, is an important issue.[21]

In this light the right to silence may be divided into three important issues:

(a) whether any (and if so what) comment may be made at a subsequent trial upon the exercise by a suspect of the right not to answer questions under police investigation;

(b) the extent to which comment may be made by the judge and prosecution upon the exercise, by an accused, of the right not to give evidence at the trial; and

(c) following the laying of any charge, the extent to which an accused person is required to disclose any aspect of his or her defence prior to the commencement of the trial.

THE RIGHT TO SILENCE IN THE POLICE STATION

The law in Western Australia

The basic position in Western Australia (and at common law throughout Australia) is that no inference can be drawn against an accused by reason of the exercise by that person of their right to remain silent when questioned by a person in authority such as a police officer. The exercise of the right to silence is not to be used as a basis to infer a consciousness of guilt, nor can it be used to suggest an inference that the defence raised at trial is a new invention or is suspect or unacceptable.[22]

Prior to 1991, a number of cases in England and Australia had applied a distinction between inferring a consciousness of guilt from silence, which is impermissible, and denying credibility to a late defence or explanation by reason of earlier silence, which was permissible. The High Court rejected such a distinction suggesting that:

> the denial of the credibility of a late defence or explanation by reason of earlier silence is just another way of drawing an adverse inference (albeit less strong than an inference of guilt) against the accused by reason of the exercise of the right to silence. Such an erosion of the fundamental right should not be permitted.[23]

The High Court also suggested that even if a jury understood the distinction it was doubtful that it would observe the distinction in practice. That latter comment suggests a recognition that if a direction to a jury sufficiently departs from the jury's view of commonsense there is a risk of the jury failing to apply the direction given to it.

In some states it has been held that evidence that the police attempted to interview the accused who declined to speak to them may be led by the prosecution (notwithstanding the High Court decision in *Petty*). This has been explained on the basis that the prosecution can seek to rebut the possible suggestion by the defence that the investigation was not conducted fairly.[24] The approach has been trenchantly criticised.[25]

If an accused elects to answer only some of a series of questions posed by police the common law prohibits the drawing of an adverse inference from

the refusals to answer. However, the law does in some circumstances permit the jury to have regard to an accused's conduct or demeanour which may include a refusal to respond to particular questions as giving rise to an inference of consciousness of guilt.[26] It has recently been argued that the approach to selective silence requires some re-thinking in order to remove the danger of the jury using the silence as itself the basis for an adverse inference.[27]

The English reforms

By sections 34 to 39 of the *Criminal Justice and Public Order Act 1994* (UK) substantial amendments were made to the common law position regarding both silence of the accused when questioned by police and silence at trial. These provisions had earlier equivalents in Ireland and Singapore.[28]

Section 34 provides that:

> (1) where in any proceedings against a person for an offence, evidence is given that the accused –
>
> (a) at any time before he was charged with the offence on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
>
> (b) on being charged with the offence or officially informed that he might be prosecuted, failed to mention any such fact, being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, sub-section (2) below applies.

Sub-section (2) provides, in essence, that a court or jury may, in determining whether there is a case to answer or whether the accused is guilty of the offence charged, draw such inferences from the failure as appears proper.

It may be observed that the way in which the law regarding the interpretation of this provision has developed in England leaves a great deal in the province of the jury. It has been held that the question of what inferences are 'proper' means 'proper to a jury'.[29] The critical element of section 34 is that the fact which the accused failed to mention was, in the circumstances existing at the time, one that the accused could reasonably have been expected to mention when so questioned. The expression 'in the circumstances' is not to be construed restrictively: matters such as time of day, the defendant's age, experience, mental capacity, state of health, sobriety, tiredness, knowledge, personality and legal advice are among the relevant circumstances.[30] Reference must be made to the individual accused with his qualities, apprehensions, knowledge and such advice as he is shown to have had at the time. It is for the jury to decide whether the fact or facts which the defendant has relied

on in his defence at trial but which had not been mentioned when questioned are facts which in the circumstances the defendant could reasonably have been expected to mention. This is to be resolved by the jury in the exercise of their collective commonsense, experience and understanding of human nature. The judge should ordinarily leave the issue to the jury to decide. Only rarely would it be right for the judge to direct the jury that they should or should not draw the appropriate inference.[31]

An adverse inference under section 34 may be available not only when the fact is first disclosed at trial but also when the accused, having initially failed to mention a fact on being questioned under caution, discloses at a later stage a police questioning or in a written statement to the police.[32]

It has been held in Northern Ireland that article 3 (the equivalent of section 34) can apply — that is the accused can 'rely on a fact in his defence' even though neither he nor a witness is called on his behalf to give evidence of the fact. That would occur, for example, if defence counsel suggested a fact which assisted the accused to a prosecution witness in the course of cross-examination and the witness accepted it.[33] The boundaries of what constitutes reliance on a fact in his defence are claimed to be unclear.[34]

The standard caution used in England, in the light of the legislation is in the following terms:

> You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.[35]

There is a question as to the manner in which an accused ought be cautioned in the light of provisions such as section 34.[36] On the one hand there is a risk that the consequences of a failure to mention a fact are not made sufficiently clear to a suspect. On the other hand there may be a risk that a suspect is given an impression that there is little alternative but to answer questions put to him or her. A failure by suspects to understand the new police caution appears to have been a common experience in Northern Ireland.[37]

In some of the English cases on section 34 an accused has led evidence that the reason he remained silent when questioned by police was that he received legal advice to do so at the time. The Court of Appeal has held that that is just a matter to be left to the jury in determining whether, in all the circumstances, the accused could reasonably have been expected to mention the fact or facts later relied on at trial.[38]

The cases in Northern Ireland on the relevance of legal advice have taken a similar approach. This has been criticised on the basis that an accused may be punished for the failings of his solicitor.[39]

One of the consequences of the operation of section 34 of the English Act would appear to be that the lawyer who attends the police station may very well, if the client elects not to speak to the police, become a significant witness at the trial. The lawyer's evidence may be significant regarding whether the accused could 'reasonably have been expected to mention' the facts then relied on at trial. It has been suggested[40] that the following matters will need to be considered and then recorded, by a lawyer:

(a) the physical and mental state of the client;
(b) the general conduct of the police and the atmosphere in which the investigation is conducted;
(c) what the police allege has been said by the client before the lawyers arrive;
(d) what the police assert has been said to the client by the police;
(e) what information is made available by the police to the lawyer;
(f) what requests for information are made to the police by the lawyer;
(g) what information is given to the lawyer by the client;
(h) the client's apparent understanding of the significance of the allegation and the significance of his or her replies or failure to respond;
(i) the advice given by the lawyer to the client and the reason for that advice;
(j) the wording of any caution or explanation of the effects of these sections and any response by the client; and
(k) what was said, if anything, at the time of the charge or report from summons.

It is clear from the English cases that if an accused chooses to rely on legal advice received as one of the reasons why he could not reasonably have been expected to have mentioned to the police facts which he has relied on at trial, in doing so the accused waives legal professional privilege in regard to that advice. That would appear to open up cross-examination of the lawyer, if called, or the accused regarding all of the matters referred to in the giving of advice.[41]

These matters may be thought to pose substantial practical difficulties.

The approved specimen direction to juries[42] in cases concerning section 34 is as follows:

> If the accused failed to mention a fact when he was questioned, you must decide whether, in the circumstances which existed at the time, it was a fact which he could reasonably have been expected then to mention. The law is that you may draw such inferences as appear proper from his failure to mention it at that time. You do not have to hold it against him. It is for you to decide whether it is proper to do so.
>
> Failure to mention such a fact at that time cannot, on its own, prove guilt, but depending on the circumstances, you may hold that failure

> against him when deciding whether he is guilty, that is, take it into account as some additional support for the prosecution's case.
>
> If despite the evidence relied upon to have explained the failure (or in the absence of such evidence) you decide that the failure to mention the fact can only sensibly be attributed to the accused having no answer, or having fabricated the evidence subsequently, you may draw an adverse inference.

Section 36 of the English Act also permits an adverse inference to be drawn where an arrested person fails or refuses to explain an object, substance or mark on his person, clothing, footwear or in any place where he is at the time of his arrest. The section only applies if the suspect is told that the police believe the object, substance or mark is attributable to his involvement in a specific offence and is asked to account for the object, substance or mark. The suspect must also be told in ordinary language what the legal consequences are if there is no response to the question.

The *Quinn* case in Ireland[43] suggests that the drawing of an inference against the accused was available notwithstanding that he had asked when questioned to consult with a solicitor before he answered questions; after he remained silent at interview it was held that he could reasonably have been expected to have disclosed facts which he later relied on. The justice of such an approach has been doubted.[44]

The width of section 34 appears to permit an inference of guilt, as distinct from a conclusion that the explanation given at trial was false. An inference of guilt appears to be permitted by the specimen direction referred to above, in that it invites the jury to conclude that there was no explanation available. As will be seen, the same approach is taken as to the inferences available, under section 35, from an exercise of the right not to give evidence at trial. Whether that inference should be available, or always available, is open to doubt. It is one thing to invite the conclusion that a version of events advanced by the defence at trial, but not mentioned to the police, should be viewed with scepticism. It may be thought to be an additional step to invite the inference that there is a consciousness of guilt.

Section 34 is primarily aimed at permitting a jury to say that because a defence is raised so late it must be untrue. Bearing in mind the prosecution's burden of proof, that does not in all cases lead inevitably to guilt and conviction. It will do so in many cases, especially if the defence is one of 'confession and avoidance', such as self-defence, but the position should be different if the prosecution case is weak anyway, so that the rejection of the defence does not prove the guilt of the accused.[45]

The question of what inferences can properly be drawn has been dealt with by the Court of Appeal in Ireland where it has been held that what inferences

were proper was dictated not by the pre-existing common law but by the circumstances of the particular case applying ordinary commonsense.[46] In *McLernon*, Lord Justice Kelly suggested that in some cases a refusal to give evidence may in itself increase the weight of a prima facie case to the level of proof beyond reasonable doubt. In that case it was also suggested that the kind of inferences which would be drawn, and the strength of those inferences would depend upon the individual case and should not be restricted by judicial statements.

The same approach, relying on 'common sense' as the test, has been taken in the cases on section 35 — the effect of silence at trial, referred to in part III below.

Arguments for reform

The Runciman Commission summarised the arguments for abolishing or amending the right to silence as follows:[47]

(1) In a significant number of cases it is impossible for police to carry out an effective investigation without, at an early stage, asking suspects to explain the conduct which brought them under suspicion.

(2) The police regard it as important that in such cases innocent people should provide explanations for the facts alleged against them as soon as practicable.

(3) This is to enable suspects both to exonerate themselves and to direct attention towards the guilty.

(4) Police are seriously impeded in their investigations where a significant number of suspects refuse to answer questions.

(5) Criminals are, in the view of police, taking advantage of a feature of the criminal justice system left over from a past era when there were far fewer safeguards to protect the defendant than there are today.

Arguments for retaining the right to silence are as follows:

(1) The circumstances of police interrogation are such that there can be no justification for requiring a suspect to answer questions when he or she may be unclear about both the nature of the offence which he or she is alleged to have committed and about the legal definitions of intent, dishonesty, etc. upon which an indictment may turn.

(2) Innocent suspects' reasons for remaining silent may include, for example, protection of family or friends, a sense of bewilderment, embarrassment or outrage, or a reasoned decision to wait until the allegation against them has been set out in detail and they have had the benefit of considered legal advice.

(3) Members of ethnic or other minority groups may have particular reasons

of their own for fearing that any answers they give will be unfairly used against them.

(4) There is the risk that if the police were allowed to warn suspects who declined to answer their questions that they faced the prospect of adverse comment at trial, such a power would sometimes be abused.

(5) It is now well established that certain people (including some who are not mentally ill or handicapped) will confess to offences they did not commit.

(6) The threat of adverse comment at trial may increase the risk of confused or vulnerable suspects making false confessions.

Some of the further arguments in favour of and against reform will be mentioned below.

It is difficult to find any empirical objective analysis of the effects of the English reforms.

Some suggest the right to silence is used by the guilty.[48] At bottom, many of the arguments for reform (both of pre-trial silence and silence at trial) reflect Bentham's dictum[49] that 'Innocence claims the right of speaking, as guilt invokes the privilege of silence'.

It is also often said that professional or serious offenders are those most likely to make use of the right to silence when questioned by police.[50]

However, it is very difficult to find empirical evidence to support these conclusions.[51] The New South Wales Law Reform Commission discussion paper concluded that the available empirical evidence suggests that reliance on the right to silence does not increase the likelihood of acquittal at trial.[52]

Another argument in favour of reform is that the right to silence before trial enables the defence unfairly to 'ambush' the prosecution with a defence which has been fabricated at trial, having regard to the evidence given by prosecution witnesses.[53] However, it is difficult to find empirical support for this argument.[54]

In any event, the force of this argument may be substantially reduced if a regime of pre-trial disclosure, after an indictment is filed, is introduced.

It has also been argued that provided adequate safeguards are introduced there ought to be no objection in principle to abolition of the right to silence when questioned by police.[55] The safeguards suggested would include the following:

(a) that the police have substantial evidence calling for an answer;
(b) that evidence is put fairly to the suspect so that he knows the case he has to answer;

(c) the interview is properly recorded; and
(d) the suspect has had access to proper legal advice.

It is not clear whether there is a right to legal advice for a suspect.[56] Nor is there any publicly funded scheme (such as exists in the United Kingdom), for the provision of legal advice for suspects. Further, in Western Australia there is a very real question whether a lawyer would always be available in remote communities.[57]

The question remains, in any event, whether the safeguards referred to sufficiently address all of the arguments in favour of the existing position. These will be developed below.

Another argument, first put some time ago by Professor Rupert Cross, but recently reiterated, is that an accused may be worse off by the application of a rule of law which requires the jury to be instructed that they may not use silence out of court as an admission of guilt or as bearing upon the credit of a belated defence when such a process of reasoning is so natural and difficult to resist. A carefully worded direction which accords with commonsense might produce a fairer result.[58]

It is not possible to test, in an empirical way, whether juries may act in the way postulated in that argument. In any event it can be argued that it is up to the accused to decide whether to assume the risk that the jury will make an appropriate use of the exercise of the right to silence before trial.[59]

The primary arguments for retention in its current form of the right to silence in the police station were summarised by the Runciman Commission and are set out above. Reasons for a suspect's silence other than guilt are emphasised by many commentators as one of the fundamental reasons for the present position.[60]

It has also been suggested that the experience in Singapore does not indicate that the amendments made there in 1983 have assisted the police and prosecution, in any substantial way, in their fight against crime.[61]

Concern has also been expressed that permitting adverse inferences to be drawn from silence would place strong pressure upon suspects to answer questions without knowing the substance of and evidence for the accusations against them.[62]

A provision such as that introduced in England makes the reasons for an accused's silence at the police station one of the issues in the trial. This has the potential, in some cases at least, to add substantially to the range of relevant evidence.[63]

Conclusion

The Law Reform Commission of Western Australia proposes the following:

Proposal 1

Maintenance of the existing prohibition on any adverse comment at trial upon an accused's exercise of the right to silence under police questioning.

Proposal 2

Reform similar to the English position, so as to permit a jury to draw such inferences as appear proper from silence of the accused at the police station.

Proposal 3

More limited reform permitting a jury to infer that the defence raised at trial, and not mentioned to police, is untrue, but not permitting the inference of a consciousness of guilt.

There can be no doubt that the right not to answer questions asked by police officers provides a shield for the guilty as well as the innocent. Some of the arguments in favour of abolition or amendment of that right (as well as some arguments to the contrary) are necessarily speculative; others are not able to be supported by empirical data. In that light the question is whether a sufficient case can be made out that amendment or abolition of the right to silence will create positive benefits, without a significant increase in the risks of adverse consequences. When the potential adverse consequence is the wrongful conviction of an innocent person, some caution is needed if doubts remain.

If there is to be reform there is a question whether the range of permissible adverse inferences should be unlimited, as in England, so as to include the inference of guilt. If so, should guidance be given to juries as to when such an inference may be drawn? Or should the range of inferences be limited to denying credibility to the defence, thus reviving the distinction rejected in *Petty*? There may be difficulties with whichever of those were chosen.

The conclusion of the Runciman Royal Commission was as follows:

> In the light of all the evidence put before us, we have had to weigh against each other two conflicting considerations. One is the prospect, if adverse comment at trial were to be permissible, of an increase in the number of convictions of guilty defendants who have refused to answer police questions. The other is the risk of an increase in the number of innocent defendants who are convicted because they have made admissions prejudicial to themselves through the fear of adverse comment at trial or whose silence has been taken by the jury to add sufficient weight to the prosecution case to turn a not guilty verdict into the one of guilty....

> The majority of us, however, believe that the possibility of an increase in the convictions of the guilty is outweighed by the risk that the extra pressure on suspects to talk in the police station and the adverse inferences invited if they do not may result in more convictions of the innocent. We recommend retaining the present caution and trial direction unamended. In taking this view, the majority acknowledge the frustration which many police officers feel when confronted with suspects who refuse to offer any explanation whatever of strong prima facie evidence that they have committed an offence. But we doubt whether the possibility of adverse comments at trial would make the difference which the police suppose. The experienced professional criminals who wish to remain silent are likely to continue to do so and will justify their silence by stating at trial that their solicitors have advised them to say nothing at least until the allegations against them have been fully disclosed. It may be that some more defendants would be convicted whose refusal to answer police questions had been the subject of adverse comment: but the majority (of us) believe that their number would not be nearly as great as is popularly imagined.
>
> It is the less experienced and more vulnerable suspects against whom the threat of adverse comment would be likely to be more damaging. There are too many cases of improper pressures being brought to bear on suspects in police custody, even where the safeguards of PACE and the *Codes of Practice* have been supposedly enforced, for the majority (of us) to regard this with equanimity. As far as silence at the police station is concerned, therefore, the majority find themselves taking the same stance as the majority of the Royal Commission on Criminal Procedure (RCCP) which said, at paragraph 4.50 of its Report, that, if adverse inferences could be drawn from silence it might put strong (and additional) psychological pressure upon some suspects to answer questions without knowing precisely what was the substance of and evidence for the accusations against them. This in our view might well increase the risk of innocent people, particularly those under suspicion for the first time, making damaging statements ... on the other hand, the guilty person who knew the system would be inclined to sit it out ... If the police had sufficient evidence to mount a case without a statement from him, it would still be to the guilty suspect's defence which was capable of being shown to be such by investigation. It might just be believed by the jury despite the fact that the prosecution and the judge would be able to comment.

Any obligation imposed on the accused to reveal a defence when questioned by the police would, as a matter of fairness, seem to require at least the safeguards spelled out above. The question of the availability of legal advice may well be problematic in this regard. It may require a substantial increase in Legal Aid resources to permit such legal advice being, in a practical sense, readily available.

The matters raised above regarding the consequences at trial of the accused acting upon legal advice and remaining silent, appear to raise difficulties of a practical nature and issues of fairness.

Any concern that the right of the accused to silence when questioned by the police permits an ambush defence might be met by a regime of defence disclosure after indictment. If an obligation to disclose a defence is to be imposed, there are strong arguments that this is more appropriately done in the pre-trial process under the control of a trial court, rather than at the stage of police interview. By the time pre-trial disclosure was required by a court, the accused would be aware of the prosecution case and would have had time for reflection, taking legal advice and refreshing his memory.

SILENCE AT TRIAL

The law in Western Australia

Section 8(1)(c) of the *Evidence Act* (WA) prohibits comment by the prosecution on the failure of the accused to give evidence.

The prohibition in section 8(1)(c) is construed strictly against the prosecution.[64] It has been held that after some of the Crown witnesses had been challenged in cross-examination and the accused had not called any evidence it would be permissible for counsel for the prosecution to say: 'Certain matters were put to the witnesses for the Crown on questions of fact which were denied by them and in respect of which that is the only evidence'.

It is permissible for the prosecutor to say that the relevant evidence is x, y and z and there is no evidence to the contrary. It is impermissible to say that the Crown witnesses gave evidence to the effect x, y and z but the accused has not produced any contrary evidence.[65]

A question may arise as to whether the operation of section 8(1)(c) places limits on what a prosecutor can say requiring the making of fine distinctions not necessarily understood or applied by a jury.[66]

There is no statutory prohibition on the trial judge commenting on the failure of the accused to give evidence. The precise scope of permissible comment is not clear.

Silence does not amount to an implied admission; it is not in itself evidence of guilt. But in some circumstances (and identifying those circumstances is problematic) it may be probative in that the failure to offer an explanation (or, perhaps, a rebuttal) of facts established or suggested may indicate guilt. The majority summarised the position in *Weissensteiner* as follows:

> It is only when the failure of the accused to give evidence is a circumstance which may bear upon the probative value of the evidence which has been given and which the jury is required to consider, that they may take it into account, and they may take it into account only for the purpose of evaluating that evidence. The fact that the accused's failure to give evidence may have this consequence is something which, no doubt an accused should consider in determining whether to exercise the right to silence.... But it is not to deny the right; it is merely

> to recognise that the jury cannot, and cannot be required to, shut their eyes to the consequences of exercising that right.[67]

In Western Australia it has been held that the effect of *Weissensteiner* is that the jury ought to be told that it may take into account the failure of the accused to give evidence when considering the inferences which it was invited to draw from the facts which had been directly proved. However it is not permissible to direct the jury that it may more readily find those facts proved in a case where the accused had not given evidence.[68] The failure to explain may only be used when 'it is reasonable, given the circumstances of the case, to expect that an innocent person would offer an explanation of the events in question and an explanation has not been advanced in some way, either before or during the trial'.[69]

However the position has been put more broadly in appellate decisions in other states. In *Kanaveilomani*[70] Davies JA stated the true principle as being that where an accused fails to contradict or explain evidence adduced by the Crown which is within the power of the accused to contradict or explain and which, in the absence of contradiction or explanation would be sufficient if accepted to entitle a jury to convict, the trial judge may invite the jury to conclude that the accused's failure to do so increases the probability that that evidence is true and that whatever inference might reasonably be drawn from it may more readily be drawn.[71]

As a recent decision in Western Australia illustrates[72] the failure of an accused to give evidence to explain potentially incriminating facts can have the effect of strengthening an inference which, at the close of the Crown case, was no more likely than an available innocent hypothesis. That is said to be neither a denial of the right to silence or a reversal of the onus of proof because neither of these bears upon the situation in which the failure to explain something which would be explained by an innocent person is itself evidence.

The effect of this may be seen as an evidential burden being, in some cases, effectively placed upon the accused to explain that which calls for explanation, by giving evidence.

It has been suggested[73] that *Weissensteiner* and *Petty* are, at the least, difficult to reconcile. In *Petty* the distinction referred to above was rejected. Any adverse inference would be an erosion of the right. Yet in *Weissensteiner* the distinction (which the majority accepted to be 'a fine one') was drawn 'between drawing an inference of guilt merely from silence and drawing an inference otherwise available more safely simply because the accused has not supported any hypothesis which is consistent with innocence from facts which the jury perceives to be within his or her knowledge'.[74]

The practical reason behind the apparently different approaches taken in *Petty* and *Weissensteiner* may be that courts have more confidence in the

accused's ability to offer an explanation without disadvantage at trial than in police custody.[75]

The position elsewhere in Australia

In South Australia, New South Wales and Tasmania the prosecution is expressly prohibited from commenting to the jury on the exercise of the right to silence at trial[76]. In South Australia and Tasmania there is no statutory prohibition or regulation of comment to be made by the trial judge on the accused's silence at trial. The common law, referred to above, applies.

In New South Wales the only limit on the judge's comments on a failure to give evidence are that the comment must not suggest that the accused failed to give evidence because he was or believed that he was guilty of the offence.

In Queensland, the trial judge and the prosecution are permitted to comment on the defendant's failure to testify. The common law applies regarding the limits on what comment may be made.

In Victoria and the Northern Territory an accused's decision not to give evidence must not be made the subject of any comment by the trial judge or the prosecution.[77] Nonetheless the jury is permitted to take into account an accused's silence at trial where it is probative.[78] This position would appear to be difficult to support. The jury is permitted to take silence into account, in the limited circumstances where such silence is probative. Yet no guidance is permitted to be given by the trial judge to the jury as to what should be made, if anything, of the accused's silence. If nothing is said by the trial judge about the failure of an accused to give evidence there must be a real danger that, at least in some cases, the jury will draw adverse inferences from this. Such inferences could extend to the simple inference of guilt from the fact of a refusal to testify. There is a powerful argument that some form of judicial guidance for juries is required as to the effect of an accused's silence at trial.

The position in England

Section 35 of the *Criminal Justice and Public Order Act 1994* permits a court or jury to draw 'such inferences as appear proper' from the failure by an accused to give evidence.[79] It has been held in England[80] that the essential requirements for a satisfactory direction regarding the drawing of an inference under section 35 are as follows:

(a) the judge must tell the jury that the burden of proof remains on the prosecution throughout and what the required standard is;

(b) the judge should make it clear to the jury that the defendant is entitled to remain silent, that is his right and his choice;

(c) the jury must be told that an inference from failure to give evidence cannot alone prove guilt (expressly provided for in section 38(3) of the Act);

(d) the jury must be satisfied that the prosecution has established a case to answer before drawing any inferences from silence; and

(e) the jury must be directed that if despite any evidence relied on to explain the accused's silence, or in the absence of such evidence, they conclude that the silence can only sensibly be attributed to his having no answer, or none that would stand up to cross examination, they may draw an adverse inference.

It was said that where there is no evidence to explain an accused's silence it is not appropriate for the judge to embark on, or to invite the jury to embark on, speculative reasons consistent with innocence which might theoretically prompt an accused to remain silent.[81]

It has been held that a trial judge has a discretion to direct the jury against drawing adverse inferences if the circumstances justified it, but there would need to be an evidential basis for doing so or an exceptional factor in the case requiring that course to be taken.[82]

It can be seen at once that, like the position regarding section 34, much is left in the province of the jury as to whether and what inferences should be drawn from silence. It is also plain, from the fifth requirement set out above, that it is open to a jury to use silence to infer guilt. That has been expressly recognised in the House of Lords decision of *Murray v DPP*.[83]

The approach taken in *McLernon* regarding section 34 that courts should not set boundaries on whether and if so what inferences are available to be drawn was approved in the context of section 35.

In *Murray v DPP* the House of Lords held that having regard to the cumulative effect of the evidence against the accused the trial judge was entitled to infer that the fact that there was no innocent explanation was the reason for the accused's failure to give evidence. In so doing the court approved the approach taken by the Privy Council regarding the equivalent Singapore provision[84] that the question of what inferences are proper to be drawn is to be decided by applying ordinary commonsense. This approach was held by the European Court of Human Rights not to infringe the right to a fair trial. The right to remain silent under police questioning and at trial are not automatically infringed by permitting an accused's silence, in a situation clearly calling for an explanation from him, to be taken into account in assessing the persuasiveness of the prosecution evidence.[85] Having regard to the weight of evidence against him, the drawing of inferences from refusal, at arrest, during police questioning and at trial to explain his presence at a house was a matter of commonsense and not unfair.[86]

Arguments for reform

Many of the arguments for reform of the right to silence of an accused at trial echo the arguments for reform of the right to silence in the police station. In particular, many are rooted in the assertion that it is the guilty — those with

something to hide — who refuse to testify.[87] Again, it is difficult if not impossible to test this assertion in an empirical way. There are, however, some clear differences between the position of a suspect at the police station and an accused at trial. An accused knows the case he has to answer and has had legal advice and an opportunity for reflection; the judge can control the questioning of an accused.

Conversely, it has long been recognised by the law that there may be explanations other than a sense of guilt which lead an accused to wish to avoid cross-examination. These include 'timidity, weakness, a dread of confusion or of cross-examination, or even the knowledge of a previous conviction ... [which] might easily prevent the accused from availing himself of [the right to testify]'.[88]

Will the jury have adequate information to enable it to assess the true reasons why an accused has not given evidence? For example, what if one of the reasons was a fear of cross-examination on previous convictions?[89] Other considerations, arising from personal characteristics of an accused, may lead counsel to advise against giving evidence. Sometimes an accused's psychiatric state may be the subject of evidence which explains the failure of the accused to give evidence.[90] But it might be said that in some cases at least psychological and psychiatric characteristics of an accused falling short of identifiable medical conditions might lie behind a decision not to give evidence.

In this way the apparently commonsense, and, one suspects for a jury, appealing argument that an innocent person would declare his or her innocence at the earliest opportunity is open to some real doubt, at least as a universal proposition. The difficulties for a jury in determining whether a particular accused has reasons other than guilt for remaining silent may justify the rule which precludes the use of silence as an indication of guilt.[91]

If a jury is to be permitted to use an accused's choice not to give evidence at trial as tending to show guilt, in what circumstances should that be permitted and what should be said to the jury in this regard? The English position is that such an inference can be drawn only if, despite any evidence relied on to explain the accused's silence, or in the absence of such evidence, the jury concludes that the silence can only sensibly be attributed to his having no answer or none that would stand up to cross-examination. On that test, one might wonder whether any accused would be convicted as a result of section 35 when, without it, he would have been acquitted. It is not easy to postulate the situation in which the evidence satisfies the test required in England without also being sufficient (being, as it is, the only evidence) to establish guilt beyond reasonable doubt. Without guidance from the judge, juries may be inclined to infer guilt from silence at trial: what does the accused have to hide? Guidance and assistance to juries is required as has been suggested by the High Court.[92]

Conclusion

On the question of silence at trial the Law Reform Commission of Western Australia proposes the following:

Proposal 4

Maintain the existing position in Western Australia which permits adverse comment upon and inferences from silence at trial only in limited circumstances.

Proposal 5

Statutorily extend the scope of permissible comment to adopt the broader common law position operating elsewhere[93] in Australia, that where an accused fails to contradict or explain evidence adduced by the Crown which is within the power of the accused to contradict or explain and which, in the absence of contradiction or explanation would be sufficient if accepted to entitle a jury to convict, the trial judge may invite the jury to conclude that the accused's failure to do so increases the probability that that evidence is true and that whatever inference might reasonably be drawn from it may more readily be drawn.

Proposal 6

Adopt the English position of permitting the jury to draw such inferences as appear proper from an accused's silence.

Proposal 7

Permit the jury to have regard to an accused's silence as one of the circumstances or part of the evidence but not as in itself permitting an inference of guilt.

Proposal 8

Whatever choice is made as to the scope of permissible use of an accused's silence at trial, amend section 8 of the *Evidence Act* to permit prosecution comment upon such silence.

The English approach is to permit the jury to draw such inferences as appear proper from an accused's silence. The discussion above raises some questions as to how that works in practice. In many cases the direction given to juries in England will permit adverse inferences from silence only where the prosecution case, standing as the only evidence, will anyway prove guilt beyond reasonable doubt. On the other hand there may be significant risks in some cases that adverse inferences may be drawn from silence when reasons other than guilt underlie the choice not to give evidence.

A more modest reform might be to permit juries, in all cases, to have regard to the accused's silence at trial as one of the circumstances — part of the evidence in the case — but not in itself permitting an inference of guilt.[94] Is that distinction real? Will it be understood and applied by juries?

Juries need clear guidance about what should be made of a choice not to give evidence. If the present approach — that one cannot infer guilt itself from silence — is to be maintained, it is arguable that the direction should extend beyond what is now said to ensure that the jury appreciates that reasons other than guilt may lie behind the choice not to give evidence.[95]

It is difficult to see reasons justifying the prosecution being prohibited from commenting on the failure to give evidence. Of course, any prosecution comment must be limited to the proper use, if any, of the accused's silence in the circumstances of the case. But why, in a case such as *Weissensteiner*, should the prosecution not be permitted to comment, while the trial judge may? Indeed, in a case before a magistrate the matter must surely be able to be drawn to the court's attention by the prosecutor, or there will be a risk that it will be overlooked.

PRE-TRIAL DISCLOSURE

The position in Western Australia

In indictable offences the extent of the obligations of disclosure on the prosecution has been encapsulated in guidelines promulgated by the Director of Public Prosecutions.[96] Those obligations include the following elements:

- Generally, the Crown must disclose its case in chief, which includes witness statements and copies of any documents or other proposed exhibits.
- Any inconsistent statement of a witness must be disclosed.
- Prosecutors have limited obligations to disclose information or possible witnesses whose evidence may be exculpatory.
- A witness statement favourable to the defence need only be disclosed, in its terms, if the prosecutor considers the statement to be credible and not contentious. Otherwise the prosecutor should inform the defence of the existence of the information and its general nature.
- Police must disclose to the DPP, and certify having done so, all information which may be of assistance or interest to either the prosecution or the defence.
- That information shall be made available to the defence, upon request, subject to any claim for immunity on the grounds of public interest.
- The Crown's duty of disclosure is a continuing obligation.

The position is rather less clear in relation to summary offences. Traditionally, witness statements have not been disclosed. The defendant has had only a right to particulars of the charge, but not of the evidence by which the charge will be proved. A pilot scheme has been introduced in Western Australia, at

the Perth Court of Petty Sessions, by which, generally speaking, witness statements are disclosed by the prosecution. Strong support for that scheme has been expressed; such disclosure can often lead to a change of plea, and it facilitates the making of admissions by the defence and proper preparation by the defence.[97] It has been argued that the scheme should be extended to all prosecutions in the Court of Petty Sessions, or at least throughout the metropolitan area.[98]

The obligations of an accused (or a defendant) to disclose the defence case are, of course, very different. Subject to any statutory exceptions, an accused does not have to disclose in any way what defence or defences will be raised at trial. It is for the prosecution to anticipate what an accused may raise by way of defence, and disprove it, as part of the Crown case, beyond reasonable doubt. The position was summarised in the passage from Brennan J in *Petty* quoted above.

Some of the reasons for these differences are apparent from those passages. The Crown brings the charges; the Crown is the accuser. Further, the Crown could be expected normally to have greater power and resources available to it.

The significance of the generality of a plea of not guilty has been recently emphasised by the High Court's decision in *Krakouer*.[99] Such a plea puts the prosecution to its proof of every element. That the trial was fought on some issues (whether a conspiracy or attempt to possess amphetamines was proved) did not mean that a misdirection on a different issue (whether an intent to sell or supply had been proved if the conspiracy or the attempt was proved) gave rise to no miscarriage of justice.[100]

There have been some differences of view expressed in the courts about the relationship between the proposition that an accused need not disclose his defence and the notion of the right to silence. On the one hand, in reliance on the passage from the judgment of Justice Brennan referred to above, the Full Court of the Supreme Court of South Australia held that the right of silence is an essential part of criminal procedure so much so that a rule of Court which required pre-trial disclosure of the defence case would be invalid.[101] However, in other cases it has been doubted whether the right to silence bears upon the question of any obligation of disclosure on the part of the defence in a criminal case. In *Hamilton v Oades,*[102] Mason CJ stated that the 'so-called right not to disclose a defence is the result merely of the absence in the ordinary circumstances of any statutory requirement that defences be revealed'. More recently, the Chief Justice of the Supreme Court of Western Australia, with reference to that decision, observed that a requirement that an accused be called upon to disclose his or her defence to a criminal charge prior to the hearing of it does not necessarily infringe the right to silence or the privilege against self-incrimination.[103]

The only Western Australian statute giving rise to any obligation, on the part of an accused, to disclose any aspect of the defence, arises in relation to alibis. Section 636A *Criminal Code* requires an accused person who is to adduce evidence in support of an alibi to supply the prescribed details of the alibi to the prosecution at least 10 days before the trial date, failing which the court can adjourn the trial or discharge the jury. The prescribed details require disclosure of the details of the nature of the alibi and details of the name and address of each person called to give evidence in support of the alibi (or other information sufficient to enable such a person to be located).

The disclosure requirement for alibis goes beyond a disclosure of the substance of the defence. Plainly, the intention is that the prosecution is provided with sufficient details of proposed witnesses to enable an investigation by the police of the alibi including, if the witness is willing, the interviewing of the witness or witnesses to be relied upon as alibis. A question arises as to whether there is something in the nature of an alibi defence which puts it in a special category of its own such that justice requires the giving of a proper opportunity for investigation by the prosecution of the issue to be raised in the defence.

A substantial review has been conducted of the Criminal Practice Rules in Western Australia. A discussion draft, with an attached report, has been released for comment.[104] The draft rules include the following elements:

(a) an obligation on the part of the prosecution to provide a copy of witness statements, documents and other records, a statement of the facts proposed to be proved by the Crown and a statement specifying any particular proposition of law upon which the Crown proposes to rely; and

(b) the defence is required to provide a statement indicating which facts alleged by the prosecution will be admitted and which will be disputed; documents to which objection will be taken, with grounds; and statements of expert witnesses. It also requires the accused to file and serve a statement specifying 'any particular ground upon which it may be contended that guilt may not be proved'. The report suggests that that would contemplate the specification of 'defences' such as lack of intent, provocation, self defence and so on.

Prior to the question of the appropriate level, if any, of compulsory defence disclosure, a preliminary issue arises as to whether such disclosure should be required by the Criminal Practice Rules or by legislation. The report attached to the draft Rules argues that the proposed rules requiring defence disclosure do not infringe any common law right to silence. The analysis of Lord Mustill of the right to silence is referred to, and it is suggested that a procedural rule requiring advance disclosure of admissions which an accused is prepared to

make voluntarily, of the matters which will truly be an issue at the trial factually or as a matter of law, or even of certain evidence which the accused might call in his or her defence, does not infringe the right to silence.

However, the Full Court of South Australia has taken a contrary view.[105] It is unnecessary to attempt to resolve that conflict. The fact that there is room for argument as to the validity of rules requiring defence disclosure is enough to make it preferable for any requirement of defence disclosure to be imposed by statute.

The position elsewhere

Many other Australian states have no compulsory defence disclosure beyond alibis.[106]

A regime of compulsory disclosure was introduced in Victoria by the *Crimes (Criminal Trials) Act 1993*. The prosecution must file and serve a prosecution case statement which contains a concise account of the facts and inferences sought to be drawn from the facts. It must be accompanied by witness statements, a list and copies of exhibits and a statement of any proposition of law on which the prosecutor proposes to rely (other than general propositions relevant to all cases).

Defence disclosure is required at two stages. First, after the indictment is filed, and before the prosecution case statement, the accused must file and serve a notice stating which elements of the charge are admitted and which are not admitted. Secondly, after the prosecution case statement has been filed and served the defence response is required. The defence response must:

(a) indicate the facts and inferences contained in the prosecution case statement with which issue is taken;
(b) be accompanied by copies of the statements of any expert witnesses whom the defence intends to call at the trial;
(c) reply to any proposition of law stated in the prosecution case statement; and
(d) contain a statement of any proposition of law on which the defence proposes to rely other than any general proposition of law relevant to all cases.[107]

The defence response is not required to disclose the identity of defence witnesses other than experts, whether the accused will give evidence or any notice of alibi under the *Crimes Act*.

The prosecution, but not the defence, needs leave to introduce evidence not disclosed or departing from the case disclosed prior to trial.[108] The judge can comment on any such departure; the parties need leave to do so.[109]

The Act also permits counsel for the accused to exercise a right of reply to the prosecutor's opening speech. The purpose of the reply is to indicate the facts and inferences sought to be drawn from those facts with which issue is not taken and to outline the issues in the trial.[110]

A sentencing judge can, in imposing sentence, have regard to the defence having declined to agree to facts or elements of the offence when those were not seriously contested at trial.[111]

It has been suggested by some that, in practice, the legislation does not work successfully. In particular, accused frequently give what amount to blanket denials.[112]

A regime of compulsory disclosure has been implemented in England by the *Criminal Procedure and Investigations Act 1996*. In addition to the disclosure of the prosecution case, the Act requires 'primary disclosure' by the prosecution to the defence of certain categories the material not intended to be used at trial where, in the prosecutor's opinion, such material might undermine the case for the prosecution.[113]

Compulsory disclosure is required of an accused by the requirement to give a defence statement. The defence statement must set out in general terms the nature of the accused's defence, indicate the matters on which he takes issue with the prosecution and set out, in the case of each such matter, the reason why he takes issue with the prosecution.[114]

The defence statement triggers a secondary obligation of disclosure on the part of the prosecutor.[115]

Just how detailed the defence statement needs to be remains unclear.[116] Remarks of the Solicitor General in Parliament suggest that details of the evidence to be led by the defence or details of its proposed cross-examination are not required.[117]

It has been argued that the scheme of the English disclosure provisions is flawed in that the defence disclosure obligation arises at a time when the prosecution will not have served a detailed statement of the way in which the prosecution case will be put. In other words, the prosecution will not have served a statement setting out the facts and inferences upon which it relies.[118] In this respect, the Victorian scheme appears to be preferable. Defence disclosure is a response to the prosecution case statement.

In the event that the defence fails to make disclosure, makes late disclosure, sets out inconsistent defences in its statement, puts forward at trial a defence different from its statement, then the sanctions available to the court include comment or leave to any other party to comment, and the drawing of such inferences as appear proper in deciding on the accused's guilt.[119]

As the legislation came into operation on 1 April 1997 it is difficult to obtain detailed information as to the manner in which it is operating. A similar scheme requiring disclosure by both prosecution and defence was introduced in 1987 regarding serious fraud cases. Views have been expressed that those provisions have not produced significant benefits.[120]

It has recently been suggested that the 1996 provisions are not resulting in any efficiency gains for criminal trials.[121]

Compulsory prosecution pre-trial disclosure

There may be merit in formalising the position regarding pre-trial prosecution disclosure by the introduction of a statutory requirement to do so. That would mean the prosecution disclosure obligation was readily enforceable with identifiable sanctions.

A failure on the part of the prosecution to give proper pre-trial disclosure can be a cause of a miscarriage of justice and wrongful conviction.[122]

Full prosecution pre-trial disclosure is necessary in order to permit a fully informed decision to be made by the accused as to the plea.[123] It is also necessary to enable the defence properly to prepare for a trial.

Finally, any imposition of obligations of pre-trial disclosure on the part of the defence requires, as a matter of fairness and of practicality, full disclosure having been given by the prosecution.

In summary prosecutions there may be merit in introducing a statutory regime of prosecution disclosure along the lines of the pilot scheme operating in the Perth Court of Petty Sessions.[124]

Pre-trial disclosure by the defence

What is the goal of imposing a defence disclosure obligation? A broad goal might be identified as providing information to the prosecution enabling investigation of the matters raised by the defence. That is the approach taken in relation to alibis.

A narrower goal is to remove the inefficiencies of the prosecution anticipating, investigating and disproving matters which are not truly in issue. That goal can readily be justified by the need to avoid wasting resources in unnecessary investigation, evidence and thus trial time being spent on matters not truly in issue. This goal was identified as the appropriate goal in a submission from the Chief Justice of Western Australia.[125] Similar arguments were raised by the Chief Justice of South Australia in the passage quoted above.[126]

Any reform must take place in the framework of the prosecution bearing the proof of guilt beyond reasonable doubt and the accused's right to a fair trial. The question is whether these require the prosecution to anticipate, investigate and disprove every available issue and defence and permit the defence to put the prosecution to strict proof of every fact and document on which it seeks to rely.

In a paper to the 8th International Conference of the Society for the Reform of Criminal Law, the Chief Justice of Western Australia expressed the following view:

> The principle that an accused is entitled to a fair trial is a fundamental principle of the law. There is no infringement of that principle by recognising that not only must the trial be fair to the accused, but it must be fair to the prosecution, fair to the complainant or victim and fair from the standpoint of the public interest in maintaining public confidence in the criminal justice system. It does not seem to me that it is consistent with the concept of a fair trial that the accused should be entitled to put the prosecution to strict proof of every fact and document on which the prosecution seeks to rely, to take every conceivable objection to the admissibility of evidence and to take and argue every conceivable point.[127]

Any requirement of pre-trial disclosure on the part of an accused will occur in the context that:

(a) there will have been full disclosure of the prosecution case and its evidence;

(b) the accused will have had the opportunity to reflect and to refresh his memory from any relevant documents;

(c) the accused will have taken legal advice; and

(d) the disclosure will occur in the context of and under the control of a court.

One objection to compulsory defence pre-trial disclosure may be that it infringes an accused's right to silence.

As the comments of Chief Justice Mason of the High Court and Chief Justice Malcolm of the Supreme Court of Western Australia suggest, it is open to doubt whether the 'right to silence' really bears upon the issue of the extent of required pre-trial disclosure. In so far as it does, the degree of any infringement of that right will be significantly affected by the extent of the disclosure required.

In any event the disclosure requirements regarding an alibi have operated in Western Australia for about 15 years (and elsewhere throughout the Commonwealth for varying periods). There do not appear to be substantial concerns that the alibi disclosure requirements create an injustice.[128]

There is an important question as to the precise scope of any required defence disclosure. Nowhere is it required that the defence provide copies of its witness statements to the prosecution, or that it disclose, in terms, the substance of the evidence to be given by such witnesses. The Victorian legislation and Western Australian draft Criminal Practice Rules impose similar

degrees of compulsory defence disclosure. What is required is an identification of those facts in the prosecution case which will be in issue and (in the draft Practice Rules) a statement specifying any particular ground on which it may be contended that guilt may not be proved.

It might be said that a requirement to specify 'any particular ground upon which it may be contended that guilt may not be proved' is insufficiently specific. The question is, can the extent of required defence disclosure be more specifically stipulated? The issue must be considered in the light of the range of criminal trials and charges dealt with in the courts. The proposed rule in the draft Practice Rules would, on the face of it, require the identification of which element or elements of the offence were disputed. If specific defences or exculpatory factors were to be raised, these would need to be specified.

It is doubtful whether required defence disclosure can be more specifically stipulated without producing a scheme of specific rules applying to different individual offences. That would appear undesirable unless it were unavoidable.

To require defence disclosure beyond that which is contemplated by the draft Criminal Practice Rules is likely to result in the defence having to provide a summary of what its witnesses will say (or what it is hoped to prove through cross examination). Such a requirement would require justification of a different kind from the rationale of a scheme such as the Victorian one, or that proposed in the draft Criminal Practice Rules. Those latter regimes can be justified by the aim of having trials fought on the true issues between the parties, rather than having the prosecution required to anticipate and disprove matters which may in truth not really be in dispute at all. It is more difficult to identify arguments which would warrant requiring the defence to provide a factual (and probably legal) summary of its case as a whole. The imbalance of power and resources between the prosecution and defence might tell against an extended obligation of disclosure of that kind. Further, such an obligation may be an unjustifiable infringement of the right to silence.

An argument for a broader obligation of practical defence disclosure might be as follows. The ultimate goal of the trial process is the truth. The testing of evidence by cross-examination is an integral part of our system of attaining the truth. In that light, there should be sufficient pre-trial defence disclosure to permit the proper testing by cross-examination of evidence to be led by the defence.

One result of a scheme such as that proposed in the draft Criminal Practice Rules, at least if it operated as intended, would be that both parties would, in preparing and conducting the trial, focus upon a narrower range of issues. Some may say that to require the defence to identify what it perceives as the weak points in the prosecution case prior to trial, and thereby possibly provide the prosecution with an opportunity to remedy such weak points, is unfair.

But what is the unfairness? On analysis, it might be thought that all that is lost is the element of surprise, which may carry with it the provision of an opportunity to the prosecution to remedy a weakness. It is doubted whether giving an accused the element of surprise at trial is an essential pre-requisite of a fair trial.

Counsel for the defence routinely (although not invariably) would appear to disclose a summary of expert evidence to be given on behalf of the defence. That practice is not required by any legislation or rules of court. The practice is a recognition that the prosecution needs to be given a proper opportunity to test defence expert witnesses by cross examination. If the defence led expert evidence without notice there might well be an adjournment granted, on application by the prosecution, to enable preparation for proper cross-examination. There is no apparent reason for not incorporating the practice of disclosure of expert evidence into a statutory requirement of disclosure.

Any regime of compulsory defence disclosure will need to be supported by sufficient sanctions for non-compliance in order to be effective. The experience in other jurisdictions suggests that there is a certain level of reluctance, on the part of the defence counsel, to limit their client's options by specifying the real issue or issues in the trial. Rather, there is a preference for the approach of blanket denial.[129]

Orders for costs are not made in Western Australia on trial in indictable offences. In relation to summary offences, the South Australian Full Court has held that it is a proper exercise of discretion to refuse or limit an award of costs in favour of a successful defendant on the grounds that he declined to make disclosure of the defence prior to trial.[130]

The prospect of adverse comment by the judge and, perhaps, with leave, by the prosecution, is an obvious possible sanction for non-compliance with the disclosure requirements, or departure, at trial, from the disclosed defences. This applies in the Victorian and English regimes and has been included in the draft *Practice Rules* in Western Australia. The reasons for non-compliance may need to be identified in the absence of the jury so that, after submissions, the judge can formulate the direction (if any) on what might be made of such non-compliance or departure.

A failure to comply with the disclosure requirements, or departure at trial from the disclosed defence(s), might also give rise to a right for the prosecution to lead evidence in reply. The present strict rules against reopening by the prosecution could, in such cases, be liberalised.

All of the above relate to the question of departure, at trial, from the defence already disclosed. Can any incentives or sanctions be used to encourage accused and their lawyers to go beyond blanket denials? There may be merit

in the use of the approach taken, by way of defence disclosure, as a relevant mitigating factor in sentencing. There is no obvious reason of principle why a person who demonstrates a willingness to assist in the identification of the true issues in the trial should not have that viewed as a mitigating factor on the question of sentence. The approach taken in Victoria — that the court can take into account the defence having declined to agree facts or elements of the offence when they were not seriously contested at trial — may be a little more difficult to justify in principle. That is because it appears to involve treating the way in which the accused conducted his defence as an aggravating factor. Just as a decision to plead not guilty is not an aggravating factor, neither should the manner in which the trial is conducted be viewed as such. However, there is no reason why a willingness to do so should not be rewarded by recognition of such as a mitigating factor.[131]

A potential sanction would be the right of a trial judge to refuse to permit the defence to lead evidence, or run specific arguments at trial if these had not been disclosed. To exclude an accused person from leading certain evidence, or raising certain issues, would plainly be an extreme step to take. In the civil context the High Court has recently affirmed that case management must be a servant of and subsidiary to justice.[132] That must apply with substantially more force in the criminal context where the liberty of a citizen is at stake. It might only be contemplated in circumstances where a stringent test was satisfied, for example that the only available inference was that the accused had made a deliberate tactical choice to fail to disclose the relevant issue or defence so as to maintain the tactical advantage of surprise and prevent investigation or rebuttal by the prosecution. But if the power to exclude a defence or issue were circumscribed in that narrow fashion would the circumstances in which it fell properly to be exercised arise, and be capable of proof, sufficiently often to justify the creation of the power? That question must be asked with the recognition of the dangers, and dramatic consequences, of a mistaken exercise of such a power.

It must be recognised that the introduction of a regime of compulsory defence disclosure would have significant implications for the way in which defence lawyers prepare the defence case. What will be required is that the process of taking instructions, analysing the prosecution case and then identifying the real issues take place at a considerably earlier stage than is often the case at present. That, in turn, will have significant resource implications for legally aided defence cases. Any fair regime of compulsory defence disclosure must be premised on adequate legal representation of the accused. Indeed, it is very doubtful that any compulsory disclosure regime could justly be applied to an unrepresented accused.

There appears to be merit in the provision in Victoria for making an opening speech by defence counsel immediately following the prosecution opening.

This enables an early identification of issues for the jury so that they have a better frame work within which to view the prosecution evidence.[133] Such a speech would, of course, need to be framed bearing in mind that the accused maintains the right not to call evidence until an election to do so after the close of the Crown case.

Conclusion

The proposals for reform include the following:

Proposal 9

The introduction of a statutory requirement of disclosure by the prosecution along the lines of the existing DPP guidelines.

Proposal 10

The introduction of a statutory disclosure regime by the prosecution for summary offences along the lines of the pilot scheme operating at the Perth Court of Petty Sessions.

Proposal 11

For pre-trial disclosure by the defence, the extent of the disclosure required will be substantially determined by the identification of the proper goal of defence disclosure. Two main proposals emerge:

(a) A scheme along the lines adopted in Victoria and proposed in the draft Criminal Practice Rules in Western Australia requiring statements of expert witnesses, but not other witnesses, and a statement specifying any particular ground upon which it may be contended that guilt may not be proved. The goal of this approach is to avoid wasting resources from unnecessary investigation evidence and trial time on matters which are not truly an issue; and

(b) A requirement that the defence disclose the substance of the evidence of its witnesses. This would be based upon the broader goal of providing information to the prosecution enabling investigation of the matters raised by the defence or at least enabling proper cross-examination of defence witnesses.

Proposal 12

The range of sanctions for non-compliance with defence disclosure may include the prospect of adverse comment by the judge and, with leave, by the prosecution; a right for the prosecution to re-open its case; the use of a willingness to narrow the issues as a mitigating factor; and, perhaps, in exceptional cases, the right of a trial judge to refuse to permit the defence to lead certain evidence.

Proposal 13

The defence might be given a right, perhaps an obligation, to make an opening statement immediately following the prosecution opening identifying the issues in the case.

SUMMARY OF PROPOSALS

On the question of silence by a suspect at the police station, the Law Reform Commission of Western Australia proposes the following options:

1. Maintenance of the existing prohibition on any adverse comment at trial upon an accused's exercise of the right to silence under police questioning;

2. Reform similar to the English position, so as to permit a jury to draw such inferences as appear proper from silence at the police station; or

3. More limited reform permitting a jury to infer that the defence raised at trial, and not mentioned to police, is untrue, but not permitting the inference of a consciousness of guilt.

On the question of silence at trial the Commission proposes the following options:

4. Maintain the existing position in WA which permits adverse comment and upon and inferences from silence at trial only in the limited circumstances;

5. Statutorily extend the scope of permissible comment to adopt the broader common law position adopted elsewhere in Australia, that where an accused fails to contradict or explain evidence adduced by the Crown which is within the power of the accused to contradict or explain and which, in the absence of contradiction or explanation would be sufficient if accepted to entitle a jury to convict, the trial judge may invite the jury to conclude that the accused's failure to do so increases the probability that that evidence is true and that whatever inference might reasonably be drawn from it may more readily be drawn;

6. Adopt the English position of permitting the jury to draw such inferences as appear proper from an accused's silence; or

7. Permit the jury to have regard to an accused's silence as one of the circumstances or part of the evidence but not as in itself permitting an inference of guilt.

8. Whatever choice is made as to the scope of permissible use of an accused's silence at trial, amend section 8 of the *Evidence Act* to permit prosecution comment upon such silence.

For reform on pre-trial disclosure the Commission proposes the following options:

9. Introduce a statutory requirement of prosecution disclosure along the lines of the existing DPP guidelines; and

10. Introduce a statutory prosecution disclosure regime for summary offences along the lines of the pilot scheme operating at the Perth Court of Petty Sessions.

11. For pre-trial disclosure by the defence, the extent of the disclosure to be required will be substantially determined by the identification of the proper goal of defence disclosure. Two main proposals emerge:

(a) A scheme along the lines adopted in Victoria and proposed in the draft Criminal Practice Rules in Western Australia requiring statements of expert witnesses, but not other witnesses, and a statement specifying any particular ground upon which it may be contended that guilt may not be proved. The goal of this approach is to avoid wasting resources from unnecessary investigation evidence and trial time on matters not truly an issue; and

(b) A requirement that the defence disclose the substance of the evidence of its witnesses. This would be based upon the broader goal of providing information to the prosecution enabling investigation of the matters raised by the defence or at least enabling proper cross-examination of defence witnesses.

12. The range of sanctions for non-compliance with defence disclosure may include the prospect of adverse comment by the judge and, with leave, by the prosecution; a right for the prosecution to re-open its case; the use of a willingness to narrow the issues as a mitigating factor; and, perhaps, in exceptional cases, the right of a trial judge to refuse to permit the defence to lead certain evidence.

13. The defence might be given a right, perhaps an obligation, to make an opening statement immediately following the prosecution opening identifying the issues in the case.

ENDNOTES

1 *R v Director of Serious Fraud Office ex parte Smith* [1993] AC 1, 30.
2 *EPA v Caltex* (1993) 178 CLR 477.
3 See also *R v Swaffield* (1998) 151 ALR 98, 114 (Brennan J).
4 Eg, *Royal Commissions Act 1902* (Cth) s 6A(2).
5 *Australian Securities Commission Act* s 68, *Corporations Law* s 597(12) and (12A). Compare *National Crime Authority Act 1984* (Cth) s 30(4) and (5) as to which see Terry O'Gorman, 'Right to Silence' (Paper presented at session 24, 30th Australian Legal Convention, Melbourne, 18-21 September 1997) 17.
6 *Royal Commission Act 1968* (WA) ss 13(4), 14(2), 18(9) and 20; *Coroner's Act 1996* (WA) s 47.

7 Ipp J recently summarised the position in the Supreme Court of Western Australia in *King v The Queen* (1996) 16 WAR 540, 548-9. See also *Sorby v The Commonwealth* (1983) 152 CLR 281, 292 and *King v McLellan* [1974] VR 773, 777-8.

8 *R v Swaffield* (1998) 151 ALR 98.

9 Ibid 127-12 (Toohey, Gaudron & Gummow JJ).

10 CR Williams, 'Silence in Australia: Probative Force and Rights in the Law of Evidence' (1994) 110 *Law Quarterly Review* 629; Mark Weinberg QC, 'The Right to Silence — Sparing the Judge from Talking Gibberish' (Paper presented at session 24, Australian Legal Convention, November 1997); KH Marks, "Thinking up" about the Right of Silence and Unsworn Statements' (1984) 58 *Law Institute Journal* 360.

11 See the case of John Lilburn, explained in I Alger, 'From Starchamber to Petty and Maiden: Police Attitudes to the Right to Silence' (Paper presented at session 24, 30th Australian Legal Convention, Melbourne, 18-21 September 1997) 2.

12 Williams, above n 10, 630; Marks, above n 10, 371; S Greer, 'The Right to Silence: A Review of the Current Debate' (1990) 53 *Modern Law Review* 709, 711.

13 See Greer, above n 12; MRT MacNair, 'The Early Development of the Privilege Against Self-incrimination' (1990) 10 *Oxford Journal of Legal Studies* 66.

14 See the *Criminal Evidence Act 1898* (UK)

15 Williams, above n 10, 630-1; Weinberg, above n 10, 4.

16 See Marks, above n 10. For a history of the Judges' Rules see Alger, above above n 11, 14-16.

17 See also in this regard, *Petty v The Queen* (1991) 173 CLR 95, 101.

18 *Criminal Code* s 570D(2). See also *Crimes Act* (Cth) pt 1C which requires admissions to be tape recorded.

19 Weinberg, above n 10, 24.

20 *Petty,* above n 17, 108.

21 *R v Ling* (1996) 90 A Crim R 376.

22 *Petty*, above n 17, 99-101.

23 Ibid 101.

24 See *Reeves* (1992) 29 NSWLR 109, 115; *Coyne* [1996] 1 QdR 512; but cf *Hartwick* (Unreported, Victorian Court of Appeal, Callaway JA, 20 December 1995) 6.

25 E Stone, 'Calling a Spade a Spade: The Embarrassing Truth about the Right to Silence' (1998) 22 *Criminal Law Journal* 17, 31-2.

26 See *Woon v The Queen* (1964) 109 CLR 529; *Weissensteiner v The Queen* (1993) 178 CLR 217, 231.

27 See White 'Silence is Golden? The Significance of Selective Answers to Police Questioning in New South Wales' (1998) 72 *Australian Law Journal* 539; see also Stone, above n 25, 29-31.

28 *Criminal Evidence (Northern Ireland) Order 1988* a 3; *Criminal Procedure Code* (Singapore) s 123(1).

29 *Argent v The Queen* [1997] 2 Cr App R 27, 32.

30 Ibid 33

31 Ibid.

32 *R v McLernon* (Unreported, Northern Ireland, Belfast Crown Court, 20 December 1990).

33 Ibid.

34 J Jackson, 'Interpreting the Silence Provisions: The Northern Ireland Cases' [1995] *Criminal Law Review* 587, 590-1.

35 *Code of Practice for the Detention Treatment and Questioning a Person by a Police Officer* s 10.4.

36 See Jackson, above n 34, 591-2.

37 R Pattenden 'Inferences from Silence' [1995] '*Criminal Law Review*' 602, 609.

38 *Argent*, above n 29, 34-36. Advice given to an accused is a matter for the jury to consider but that the solicitor cannot, by his advice, preclude consideration by the jury of this issue. See also *Condron v The Queen* [1997] 1 Cr App Rep 185.

39 Pattenden, above n 37.

40 E Cape, 'The Right to Silence: Defending at the Police Station Under the New Regime' <http://personal.quip.com/elliot/cja/silence.html> (accessed November 1998).

41 See *Condron*, above n 38, 197. It may also be open to the accused to rebut the suggestion of recent fabrication by evidence that the relevant facts were communicated to the lawyer at around the time of the interview.

42 In *Condron*, above n 38, 193-4.

43 *R v Quinn* (Unreported, NICA, 17 September 1993).

44 Jackson, above n 34, 593; Pattenden, above n 37, 609.

45 See I Dennis, 'The Criminal Justice and Public Order Act 1994: The Evidence Provisions' [1995] *Criminal Law Review* 4, 15; Pattenden, above n 37, 607.

46 See Jackson, above n 34, 598-9.
47 The Royal Commission on Criminal Justice (London, July 1993) ('Runciman Report').
48 See eg, GL Davies 'Justice Reform: A Personal Perspective' (1997) 15 *Australian Bar Review* 109; see also Marks, above n 10; Williams, above n 10, 632.
49 Treatise on Evidence quoted in Weinberg, above n 10, 17.
50 Davies, above n 48, 10; Marks, above n 10, 361; John Cream, WA Police Force, written submission to LRCWA (Perth, 25 August 1998).
51 See NSW LRC 'The Right to Silence', Discussion Paper 41 (1998) 3.36–3.40; Runciman Report, above n 47, 53; Dennis, above n 45, 13-14; Greer, above n 12, 723-4.
52 NSW LRC, above n 51, 3.33.
53 See eg *R v Alladice* (1988) 87 Cr App R 380 (Lord Lane CJ).
54 See NSW LRC, above n 51, 3.46.
55 See Williams, above n 10, 647-650; Greer, above n 12, 719-720.
56 Cf *R v Swaffield* above n 8, 137 (Kirby J).
57 G Baker, written submission to the LRCWA (Nullagine WA, 7 August 1998).
58 See Weinberg, above n 10, 47; Cowdery QC, 'The Right to Silence (so called)' 5.
59 John Coldrey, 'The Right to Silence: Should it be Curtailed or Abolished' (1991) 20 *Anglo-American Law Review* 51.
60 See O'Gorman, above n 5; Alger, above n 11; Greer, above n 12; Michael Chaaya, 'The Right to Silence Reignited: Vulnerable Suspects, Police Questioning and Law and Order in New South Wales' (1998) 22 *Criminal Law Journal* 82; Jackson, above n 34; Pattenden, above n 37. See also NSW LRC, above n 50, 3.62–3.74; *Swaffield*, above n 55, 139-140 (Kirby J).
61 See MH Yeo, 'Diminishing the Right to Silence: The Singapore Experience' (1983) 6 *Criminal Law Journal* 89, 101; O'Gorman, above n 5, 19-20.
62 O'Gorman, above n 5, 28; Dennis, above n 45, 10.
63 See Coldrey, above n 59, 58.
64 *Bridge v The Queen* (1964) 118 CLR 600; *Boxer v The Queen* (1995) 81 A Crim R 299, 329.
65 *Boxer*, above n 64, 329.
66 Cf the comments of the High Court in *Petty* (1991) 173 CLR 95.
67 *Weissensteiner*, above n 26, 228.
68 *Boxer*, above n 64, 333-334.
69 *Weissensteiner*, above n 26, 242; *Pickett v Fuderer* (Unreported, Full Court, Supreme Court of WA, 27 August 1998, Lib No 980475) 6.
70 *Kanaveilomani v The Queen* (1994) 72 A Crim R 492, 500-1
71 Ibid. Compare the narrow approach of McCrossan CJ at 496. See also *R v Demeter* (1995) 77 A Crim R 462; *R v OGD*, (Unreported NSW CA, 3 June 1997). The resolution of the conflict between these authorities may require the grant of special leave to appeal to the High Court
72 *Pickett v Fuderer*, above n 69.
73 Weinberg, above n 10, 56-62; Stone, above n 25, 21-23.
74 *Weissensteiner*, above n 26, 228-9.
75 Stone, above n 25, 22-3.
76 *Evidence Act 1929* (SA) s 18(1); *Evidence Act 1910* (Tas) s 85(1)(A); *Evidence Act 1995* (NSW) s 20.
77 *Crimes Act 1958* (Vic) s 399(3); *Evidence Act 1939* (NT) s9(3).
78 *Weissensteiner*, above n 26, 224.
79 There are equivalent provisions in Ireland and Singapore: *Criminal Evidence (Northern Ireland) Order 1988*; *Criminal Procedure Code* (Singapore).
80 *R v Cowan* (1995) 3 WLR 818.
81 Ibid.
82 Ibid 823.
83 (1994) 1 WLR 1.
84 See *HawTua Tau v PP* [1982] AC 136.
85 *Murray v UK* (1996) EHRR 29, 60.
86 Ibid 63.
87 See eg Williams above n 10; Marks, above n 10; Davies, above n 48.
88 *Bataillard v The King* (1907) 4 CLR 1282, 1290-1.
89 It has been held in England that this is an insufficient reason for the judge to make no comment to the jury on the decision not to testify: *Cowan*, above n 80.
90 As in *R v Bathurst* [1968] 2 QB 99
91 See Dennis, above n 45, 12-13.

92 *Weissensteiner*, above n 26, 224-5 and 234.
93 See p 740.
94 Williams, above n 10, 631-642.
95 Compare this with the question of lies by an accused, where the judge is required to tell the jury that there may be reasons for the telling of a lie other than realisation of guilt: *Edwards v The Queen* (1993) 178 CLR 193.
96 Statement of Prosecution Policy and Guidelines 1992 (made under the *Director of Public Prosecutions Act 1991*) 57-65; Guidelines for Disclosure of Material additional to the Crown Case, 1-11.
97 Criminal Lawyers Association of WA, written submissions to LRCWA (Perth, 23 October 1998); Law Society of WA, written submissions to LRCWA (Perth, 19 October 1998).
98 Ibid.
99 *Krakouer v The Queen* [1998] HCA 43, 6 August 1998.
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104 Murray J, 'Criminal Practice Rules Review Report and Discussion Draft' (May 1998).
105 *R v Ling*, above n 21.
106 Eg, as to NSW: see JRT Wood, 'The Changing Face of Case Management: The New South Wales Experience' (1995) 4 *Journal of Judicial Administration* 121, 140; as to South Australia: see *R v Ling*, above n 21.
107 *Crimes (Criminal Trials) Act 1993* (Vic) s 11(1) and (2).
108 *Crimes (Criminal Trials) Act 1993* (Vic) s 15(1).
109 *Crimes (Criminal Trials) Act 1993* (Vic) s 11(2).
110 *Crimes (Criminal Trials) Act 1993* (Vic) s 13.
111 *Sentencing Act 1991* (Vic) s 5
112 See Kathy Mack & Sharyn Roach Anleu, 'Guilty Pleas: Discussions and Agreements' (1996) 6 *Journal of Judicial Administration* 8; Cowdery, above n 58.
113 *Criminal Procedure and Investigations Act 1996* (UK) s 31.
114 *Criminal Procedure and Investigations Act 1996* (UK) s 5(5) and (6).
115 *Criminal Procedure and Investigations Act 1996* (UK) s 7.
116 J Sprack, 'The Criminal Procedure and Investigations Act 1996: (1) The Duty of Disclosure' (1997) *Criminal Law Review* 308, 311.
117 *Hansard*, House of Commons Committee, 16 May 1996, column 66-67.
118 Sprack, above n 116, 311-2.
119 *Criminal Procedure and Investigations Act 1996* (UK) s 11.
120 Mark Aronson, 'Complex Criminal Trials: AIJA Report' (1992) 66 *Australian Law Journal* 825, 828; Santow, J 'Corporate Crime: Complex Criminal Trials – A Commentary' (1994) 5 *Current Issues in Criminal Justice* 280, 287.
121 Michael Hill QC, 'The Seduction of the Fix — Reforming Court Process for Law Enforcement – New Directions' (Paper presented at session 6, Australian Institute of Judicial Administration Conference, July 1998).
122 P O'Connor, 'Prosecution Disclosure: Principle Practice and Justice' (1992) *Criminal Law Review* 464, 473.
123 Mack & Anleu, above n 112.
124 See p 745.
125 The Hon DK Malcolm AC, written submission to the NSWLRC (11 November 1997) 4.
126 See also her Honour Judge Yeats DCJ, written submission to WALRC (Perth, 9 September 1998).
127 DK Malcolm AC, 'Complex Fraud Trials: Some Suggestions for Change' (Paper presented at the 8th International Conference of the Society for the Reform of Criminal Law, Hong Kong, 6 December 1994).
128 Although note the comments of O'Gorman, above n 5, 25 suggesting that defence alibi witnesses are at times pressured by police not to give evidence and that at other times police tell prosecution witnesses of the content and effect of the alibi evidence permitting the prosecution witnesses to add to or embellish their stories
129 See above nn 112 and 120 .
130 *R v Ling*, above n 21.
131 See Yeats, above n 126.
132 *Queensland v JL Holdings* (1997) 189 CLR 146.
133 See Malcolm, above n 125, 6.

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4.3

The Use of Alternative Dispute Resolution in the Criminal Justice System

INTRODUCTION

Dispute resolution in the criminal justice system

The process

If a 'dispute' in the criminal justice system is the commission of a criminal offence, then its resolution is the finalisation of the investigation into the commission of that offence by way of the sentence imposed on a finding of guilt (either following a plea of guilty or a trial of the evidence) or by way of dismissal of the charge by a court.

Firstly, a complaint is made to the police that an offence has been committed. The police following investigation of the complaint may lay a charge against a person accused of committing the offence and that person will be brought before a Court of Petty Sessions[1] to have the charge read and to enter a plea.

If the offence allegedly committed is a simple offence the matter will remain within the Court of Petty Sessions. Similarly if the alleged offence is an indictable offence, but one that the rules permit to be dealt with summarily at the election of the accused, the matter will remain within the Court of Petty Sessions. In each case, the accused person may enter a plea of guilty to the charge or a hearing of the evidence upon which the charge has been made will proceed to determine if the accused should be convicted of the charge.

If the offence allegedly committed is an indictable offence, then the matter will be remitted to the District or Supreme Court. If the accused should enter a plea of not guilty, then the matter will be remitted to the appropriate court for hearing after the accused has either elected a 'hand up brief'[2] or a magistrate has committed the accused[3] to take his or her trial after determining a prima facie case has been proven.

In either the District Court or the Supreme Court, if the plea of not guilty is maintained, the trial will proceed usually before a judge and jury or occasionally before a judge alone. At the conclusion of the hearing, a decision will be made after consideration of the evidence to either convict or acquit the accused of the charge.

Upon either dismissal of the charge in the Court of Petty Sessions or acquittal in the District or Supreme Courts, the accused person is released to his or her freedom and the matter is at an end. Upon conviction, the accused person will then be sentenced by either the magistrate making the determination of guilt in the Court of Petty Sessions or by the judge presiding over the trial in the superior court.

Various steps at which criminal charges are resolved

Once an accused person has been charged the matter can only be resolved by:

- sentence following a plea of guilty;
- sentence following a finding of guilt after a hearing of the evidence;
- dismissal or acquittal after a hearing of the evidence;
- withdrawal of the charge by the prosecution, or dismissal of the charge following the failure of the prosecution to produce any evidence; or
- a *nolle prosequi*[4] being entered by the Crown in relation to an indictable charge.

The history of dispute resolution in the criminal justice system

The present method of dispute resolution is dependent upon police having the authority to investigate an allegation of an offence and the subsequent laying of an appropriate charge against an accused person who is brought before the court system to be tried. The role of any victim of the offence is that of a witness.

In pre-Norman Britain, the criminal justice system was very different. The major focus was on the victim of a crime, and the community's involvement was to ensure that the accused made restitution to the victim for the wrong done. The only parties to the dispute were the victim and the offender, with the community assisting the victim to gain recompense.

However…

> William the Conqueror and his descendants had to struggle with the barons and other authorities for political power. They found the legal process a highly effective instrument in asserting their dominance over secular matters and, through their control of the courts, in increasing their political authority.
>
> To this end, William's son Henry I, issued in 1116 the Leges Henrici, creating the idea of the 'King's Peace' and asserting royal jurisdiction over certain … *coinage and crimes of* offences by which it was deemed to be violated. These included arson, robbery, murder, false coinage and crimes of violence. A violation of the King's Peace was an offence

> against his person, and thus the King became the primary victim in such offences, taking the place of the victim before the law. The actual victim lost his position in the process, and the State and the offender were left as the sole concerned parties.[5]

Another consequence of the King's jurisdiction was a movement away from restitution to the victim and towards fines payable to the state. Fines became a source of revenue and were consistent with the idea of paying a debt to society.

Hence the complainant in a criminal proceeding is not the victim who has complained of the criminal activity to the police, but the police officer who has put the charge before the court to be tried. The police officer is the representative of the Crown and in indictable matters, the matter is referred to as '*R (The Queen) v (the name of the accused)*'.

The Crown is therefore a party to the dispute and brings the action against the accused person.

Another significant change in the process of the criminal justice system today compared to earlier times is that up until the late 19th century, matters were usually disposed of by way of trial. It is only a relatively recent innovation for accused persons to enter a plea of guilty to a charge.

At least one commentator has explained this phenomenon as relating to the specialisation and professionalisation of the criminal justice system compared to the previous part-time approach to criminal justice matters. Feeley explains that:

> Transcripts of the trial court proceedings in mid-nineteenth century London reveal practices that are at odds with our image of the trial. Defendants were *not* represented by counsel; they did not confront hostile witnesses in any meaningful way; they rarely challenged evidence or offered defenses of any kind. Typically when they or occasionally someone in their behalf did take the witness stand they requested mercy or offered only perfunctory excuses or defenses....
>
> Indeed it is my contention that when it was used with great frequency, the criminal trial was one of the very few devices available to the accused to try to protect his interests. That is, the trial was relied on extensively when criminal justice was administered in a rough way, often by 'amateurs'. During this time it served to protect the interests of a largely dependent accused. But as other institutions emerged to protect these interests, the significance and frequency of the trial declined.[6]

Feeley raises these arguments in support of his view that plea bargaining has not caused the demise of the adversary process. His thesis is that trials were the only opportunity that an accused had to put his or her version to be considered compared to the present day where various pre-trial procedures allow the parties to consider the evidence before trial.

The object of this sub-section is not so much to enter into the debate of whether plea bargaining is a fair and just process to be encouraged, but to ascertain if there are appropriate avenues for the resolution of criminal charges other than by way of determination of a magistrate/judge or judge and jury. Those persons charged with a criminal offence are entitled to have the prosecution prove the charge beyond reasonable doubt. The obvious costs associated with such a process are such that we need to consider whether justice can be served by resolution of matters by any other means.[7]

Criteria by which a criminal justice system can be measured

Mack and Roach Anleu have identified the elements of an acceptable criminal justice system as being one that includes the following:

- guilt is determined by a careful evaluation of the evidence and the law;
- the accused person's decision to plead guilty, while inevitably made under constraints, is as free from improper inducements as possible;
- accused persons have adequate information and advice to be able to make a proper decision to plead guilty as early as possible;
- the process is sufficiently open and accountable to be understandable by the accused, by victims of crime, and by the public generally;
- the sentence is based on appropriate principles in light of the crime for which the accused is convicted and relevant personal characteristics; and
- scarce human and financial resources are used efficiently and effectively.[8]

Mack and Roach Anleu set out their major concerns when criminal charges are resolved by discussion and agreement instead of a trial as:

- the process is invisible, in that it takes place outside the public court and is not therefore accountable;
- the process appears to (and in some forms may actually) depend on improper inducements or coercion. Prosecutors may be too lenient or too threatening in laying or maintaining charges; defence lawyers may pressure their clients to plead guilty for reasons other than certain conviction; and judicial conduct, including emphasising a sentence discount, may be perceived as coercive; and
- the outcomes may not be accurate or appropriate. An accused who is innocent (who has an arguable defence or reasonable prospect of acquittal) may be induced to plead guilty, while an accused who is clearly guilty may receive a sentence which seems too lenient.[9]

What is aternative dispute resolution?

In the usual sense, alternative dispute resolution (ADR) requires the assistance of a neutral who aids the parties to reach a resolution of a dispute. It may be by mediation, conciliation, arbitration or other method in which the process is varied with regard to the degree of input by the neutral to the resolution of the dispute.

In a wider sense of the term it can mean, in the criminal justice system, any manner in which parties come to a resolution of a charge that is alternative to adjudication by a magistrate/judge alone or by a judge and jury.

When ADR is discussed in relation to the criminal justice system, the term 'plea bargaining' comes to the fore. The term has developed negative connotations of *bargain basement justice*.[10]

This sub-section later outlines the many processes already utilised in the criminal justice system in Western Australia that could be called ADR. However, to dispel the myths that these processes in any way resemble those called plea bargaining in the United States, some points concerning the US experience are noted.

Plea bargaining in the United States of America

The judicial system is plagued with overloading and delays and is barely coping with a staggering caseload due to the following constitutional rights:

- the accused person's right to a *speedy and public* jury trial in all criminal matters;
- not just criminal matters are afforded jury trials, but civil matters where *the value of the dispute exceeds $20*, the parties have the right to trial by jury;
- the right to the *assistance of counsel;* and
- a plea of *nolo contendere* where the defendant may assert that he or she does not want to contest the issue of guilt or innocence and thus can avoid a situation where the result of the trial can be used in civil proceedings. This can necessitate a further jury trial if civil liability is challenged.

Because of the rights afforded citizens, plea bargaining in the USA is said to be an absolute necessity.

> The entire judicial system would grind to a halt otherwise. If defendants could organise a massive exercise of their jury trial rights, they would have to be released because of the Sixth Amendment right to a 'speedy' public trial before impartial jury. Even if only another ten percent demanded a trial, the system could not work.[11]

The US Supreme Court first upheld the constitutionality of plea bargaining in 1970 saying:

> We cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the state and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.[12]

Additional reasons for the wide acceptance of plea bargaining are:

- the rules excluding evidence improperly obtained;[13] and
- mandatory sentencing.

Plea bargaining in the USA involves the accused, his or her counsel, the prosecuting counsel and the judge. There has been considerable argument as to the benefit and detriment of the system and it has been said that *plea bargaining has become a way around bad, and oppressive legislation.*[14]

Arguments supporting the US model of plea bargaining

- The settling is promoted of civil law claims, why not criminal matters?
- Juries are familiar with the system, so that when a party decides to go to trial, the perception of *he must be guilty or otherwise he would not be there*[15] is overcome;
- There is a degree of judicial control of the process;
- The defendant may have a feeling of participation, and may not resent the sentence as much;
- The defendant by entering a plea of guilty is ensuring prompt and certain application of punishment;
- Acknowledgment of guilt is the first step towards rehabilitation;
- A guilty plea may create more scope for judicial flexibility in sentencing;
- A guilty plea can avoid distress to victims in a public trial; and
- Plea bargaining may secure evidence relating to co-defendants.

Arguments against the US system of plea bargaining

- A confession is a calculated expedient, not a sign of virtue and is more likened to a reduction in price by a used-car salesman than a sign of rehabilitation.[16] Another commentator has said that 'In many courts, the guilty plea process looks more like the purchase of a rug in a Lebanese bazaar than like the confrontation between a man and his soul';[17]
- It creates a market place sense of 'huckterism and expedient venality. Justice is no longer blind, it has one eye open to the right offer';[18]
- It encourages net widening (defendants will be overcharged to allow for something to bargain away);
- It is unfair to treat two defendants who have engaged in the same conduct differently, to treat one more harshly because he stands on his constitutional rights;
- In a bargain situation, the whole truth of a matter may not be disclosed (facts relating to the offence which should be in the public arena can be hidden by agreement between the parties); and
- The risk that a prosecutor faced with an inability to prove a serious charge at trial, may accept a guilty plea to a minor offence to ensure the enhancement of his *batting average.*[19] This risk has greater proportions

where the office of the prosecutor is held by way of election rather than public service appointment. Another commentator has reported that:

> A Philadelphia … prosecutor related that in one case he reduced his guilty plea sentence recommendations by two thirds in order to induce a defendant who had a forty percent chance of acquittal to forego trial ... New York prosecutors often reduce their sentence recommendations by at least fifty percent if they believe there is a fifty percent chance of a hung jury, and by a great deal more if they believe that there is a fifty percent chance of acquittal. If the chances of acquittal are greater, the practice in both offices is to offer at least proportionally higher concessions.[20]

- Whilst the Supreme Court has approved a discounted sentence in return for a guilty plea,[21] there is the risk of over-sentencing when the defendant is convicted following a trial. The Court has been reluctant to articulate how great a sentence differential was too great;[22]
- Police morale may suffer when difficult and often dangerous police work is nullified in a bargain; and
- It may create contempt for the system.

Plea bargaining in Australia

Plea bargaining as it operates in the United States does not exist in Australia. However, there have been attempts to include the court in discussion to obtain the *judge's thinking* on sentence to aid the defence in determining whether to proceed with a 'not guilty' plea. Because of the confusion over the words *plea bargaining,* it is preferred in the Australian context to divide the term into *charge negotiation, plea negotiation and sentence indication.* These practices are discussed below.

HOW ADR IS PRESENTLY USED IN THE WA CRIMINAL JUSTICE SYSTEM

Pre-charge

Police discretion whether to charge

Upon receiving a complaint of an alleged criminal offence, police have a discretion whether to charge the accused or not. The exercise of this discretion arises from the authority of the office of constable.[23]

The courts have extended to a Commissioner of Police the right to issue directives guiding police officers in the exercise of their discretion.[24] The Western Australia Police Service has issued a document setting out the policy on the exercise of discretion to prosecute alleged offenders.[25] The policy sets out 23 circumstances to be taken into account and states that it may be in the public interest to proceed with a charge even though one or more of the points exist and that each case is to be treated on its own merits. Some of the circumstances are:

- the sufficiency of evidence and the requirements of proof;
- whether the offence is of a trivial or technical nature;
- the youth, age, physical or mental health or special infirmity of the victim, alleged offender or a witness;

- the alleged offender's antecedents;
- the obsolescence or obscurity of the law;
- whether the alleged offence is of minimal public concern; and
- the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court.

The policy further states that the discretion should be objective and *must not* take into consideration:

- the race, sex, religious beliefs, political opinions or cultural views of the alleged offender or the other person; or
- the possible political consequences of the exercise of the discretion.

Superintendent Steve Robbins of the Prosecuting Branch, in a paper presented to the Stipendiary Magistrates' Society said:

> Police judgement has received little attention in Australian Courts, police officers have not talked about it since its existence is not formally recognised; lawyers have not argued it since it is not a basis for defence; and Judges have not rationalised it since it plays no role in reasoned judgements.
>
> Police judgements not to proceed could become a hidden power, whereas decisions made by other officials in the judicial process (the Director of Public Prosecutions, Judicial officers) exercise a more public power of judgement in respect of which some reviewable record is prepared.
>
> The application of law is best exercised where such judgements are open to review. Yet that power of judgement in the hands of the individual officer is an important aspect of the police role. There is little advantage and many dangers in systematic attempts to codify criteria for the exercise of that judgement. Emphasis must be on the training and education of officers, and in the processes of supervision within the service, which address themselves directly to issues of judgement and which prepare each officer to exercise the power of the judgement wisely.[26]

Police discretion whether to divert the offender from the court process

The *Young Offenders Act 1994* allows for a young person who is alleged to have committed an offence, to attend a Family Group Conference as an alternative to appearing before the Children's Court. Where the young person concludes the plan agreed at the conference, the charge is dismissed.

Additionally, from time to time the Western Australia Police Service introduces other diversionary programmes and at the discretion of the investigating officer, an alleged offender who admits an offence can be diverted from the court process.[27] Examples of these programmes are:

- The Mirrabooka and Bunbury Police Districts cannabis cautioning programme whereby an offender is not charged with the simple offence of possession of cannabis, but instead is diverted to an educational program;

- The Traffic Education Package whereby an offender is not charged with a traffic offence, but instead is given a written package which contains a series of questions that the offender is to complete within a set time and return to the police. There is no requirement that the answers are written by the offender alone and he or she may have the assistance of family or friends to complete the test. Upon return of the successfully completed test, the matter is concluded. Should the test not be returned by the required date or not be correct, then an infringement notice is issued; and

- The Fremantle Police Diversion Pilot Project whereby an accused person who has a mental or physical disability and admits a summary offence which has caused minor damage can be diverted from the court system. In such a case, the victim is consulted and if in agreement, the offender can address the offence by reparation, by a letter of apology or by attending anger management or employment opportunity training. The project ensures that people with disabilities who commit minor offences are held accountable for their offending behaviour by encouraging them to accept responsibility for the offence and to make amends for their actions.

  > The Diversion Project is based on the concept that offenders with disabilities who commit minor offences should be diverted out of the criminal justice system and into a conference system adapted to meet their specific needs. It aims to assist identified offenders to recognise their social responsibilities and to prevent them from re-offending. The management philosophy of the project has a focus on the participatory role of the offender, the victim and the community. The pilot project was initiated for a 12 months period from October 1996 and has since been funded to operate until June 1998.
  >
  > In essence it has been agreed and consequently will be recommended that the program did offer great benefit to people with disabilities by the major stakeholders including the Police Service, the Ministry of Justice, the Disabilities Services Commission, Magistrates, Legal Aid, the Office of the Public Advocate and the Fremantle City and that it should progress.[28]

Further plans are in progress to establish a shoplifting cautioning scheme[29] and include consideration of a drug diversionary scheme through specialist drug courts.[30]

To conclude, police in Western Australia, presently use their individual discretion as to whether to charge an alleged offender with a criminal offence and whether upon admission of guilt, to divert that offender to a programme away from the criminal courts. There is no supervision of the individual officer's discretion, but each officer is required to follow the policy guidelines when exercising discretion.

Post-charge and pre-conviction

Approximately 58 000 charges are listed in the Perth Central Law Courts each year with an additional 21 000 in the Children's Court.

Summary matters — opportunity for resolution other than by adjudication

Following the entry of a not guilty plea the charge is remanded to a later date for trial. Before the trial, a number of issues may be discussed by the defendant's counsel and the prosecutor including:

- is there sufficient evidence for a likely finding of guilt on all of the charges;
- should the charge remain in the summary jurisdiction or is it necessarily remitted to the District Court;
- will the prosecution withdraw one or some of the charges and will the accused person enter a guilty plea to one or other charges;
- will the prosecution agree to omit some of the facts alleged which are disputed by the accused and the accused person enter a guilty plea to the charge; and
- will the prosecution not oppose a particular sentencing proposal being submitted by counsel for the accused person upon the entry of a guilty plea to the charge.

The negotiations are usually initiated by a telephone call from the counsel for the accused, followed by a letter containing submissions as to the weight of the evidence. Most often the negotiations are not finalised until the day of the trial, because of the need by the prosecutor to satisfy the prosecuting policy.

If the matter is not presently being considered by a court, then the police prosecutor can only make a decision in consultation with the Portfolio Head, a Regional Officer, the State Crime Commander, the Superintendent (Prosecuting) or the delegate of one of these officers. Where the hearing has already commenced, the decision to exercise the discretion is made and later reported to the appropriate officer in writing as soon as possible.[31] The need to be able to discuss the proposal concerning the charge with at least one of these senior officers must be a delaying factor in quickly resolving issues. Additionally it is usually only on the day of the trial that the prosecutor has the opportunity to speak with the witnesses to confirm the submissions by the counsel for the accused.

The prosecutor may also seek out the defence counsel's attitude to the admission of some evidence which is of a technical or scientific nature or evidence of continuity of exhibits. Again, this is not usually discussed until the day of the hearing which causes unnecessary attendance at the court for those witnesses whose evidence is essential to the prosecution but often is admitted uncontested.

The court plays no role in these discussions and proceeds to accept the plea of guilty, dismiss charges withdrawn from prosecution and hear submissions concerning sentencing.

Increasingly courts have encouraged discussion between the defence and prosecution with a view to reducing the amount of court time involved in defended hearings. The Director, Magistrates' Courts reported to a Steering Committee in November 1997 of his findings following a visit to both South Australia and Victorian courts of summary jurisdiction:

> In South Australia there are very few defended matters of less than one day duration because the negotiation processes in place resolves many of the 'smaller' disputes.[32]

Should the parties be required to discuss these issues at an earlier date with authority to make a change to the charge or the facts, then the court would be better able to anticipate which matters will proceed to a hearing thus saving court listing time.

Since November 1998, the Chief Stipendiary Magistrate has initiated a directions hearing in those summary matters where the Perth trial listing extends beyond two days. The accused and defence counsel must attend with the prosecutor. The magistrate requires the parties to assess the strength of the case and to be able to respond to detailed questioning with a view to the parties agreeing evidence to limit the length of the hearing. It has been successful in indicating a willingness of an accused to change a plea or reduce the number of necessary witnesses following a thorough review of the case.

Indictable matters — opportunity for resolution other than by adjudication

Approximately 7 000 charges (1 700 accused persons) are remitted to the District Court each year and about 1 150 charges proceed to trial. Between December 1997 and November 1998, 182 accused persons were remitted to the Supreme Court, 77 of whom proceeded to trial.

As in summary matters an approach can be made to the Director of Public Prosecutions ('DPP') who is charged with the prosecution of all criminal matters in the superior courts. This is usually initiated by counsel for the defence and followed by written submission. The DPP exercises discretion in accordance with published guidelines[33] whether or not to proceed to prosecute. When a decision has been taken not to proceed with the prosecution, a *nolle prosequi* is entered.

There has been criticism of the DPP in recent times for failing to advise the defence counsel until very late that charges will not be proceeding.[34] The criticism is two fold. Firstly, defence counsel have not been informed until the day of the trial and have therefore run up unnecessary costs to defend the matter and secondly, there is no mechanism for the DPP to adequately explain the basis for the exercise of his discretion. In these circumstances, court time scheduled for the hearing has been wasted.

If a matter is to proceed to trial, it will be listed for at least one status conference pending the indictment proceeding to trial. The status conference is presided

over by a judge in court for the parties to indicate whether or not all of the charges are proceeding to trial. Additionally the parties report any resolution of procedural issues such as whether confessional material will be challenged or the need for video taped evidence of a child. If the prosecution and defence counsel are not in agreement as to how the matter is to proceed, it is listed for a directions hearing and the dispute is adjudicated by a judge.

Eventually the matter is listed for hearing and may proceed to trial in the event that the not guilty plea is maintained. Because of the ability of the accused to enter a plea of guilty at any time in the proceedings, the court is unable to accurately assess how many of the matters listed for trial will actually proceed to trial. This is wasteful of court resources and the District Court over-lists matters of confirmed not guilty pleas at the rate of 130 per cent to try to combat this problem.[35]

It is an established sentencing principle that an accused who enters a plea of guilty to a charge, rather than pursuing his or her right to a jury trial, will benefit by way of a discount on the sentence that would have otherwise been imposed if convicted following a trial. It follows that the earlier the accused enters a plea of guilty, the greater the discount afforded. It is upon this basis, and to rationalise court resources, that the Fast Track Plea system was introduced.[36] This system has been successful in disposing of charges within a relatively short period of time. In October 1998, the Perth Registry of the District Court received 164 new committals and of those, 73 entered through the fast track system.[37]

It can be seen that whilst there is no formal system of 'plea bargaining' in Western Australia, there are opportunities for counsel for the defence and the prosecution to discuss a range of issues and the conclusion may result in a change of plea.

Post-conviction and pre-sentence

Victim offender mediation

Following a plea of guilty or finding of guilt after a trial, the court may remand an accused for a pre-sentence report to aid the court in determining the appropriate sentence to be imposed. The Community Based Corrections Officer prepares a report setting out the particulars of the offence, the personal circumstances of the offender, the available community based sentencing options and an assessment as to the offender's ability to successfully complete those options.

The Ministry of Justice Community Based Service provides a victim-offender Mediation Unit for adult and juvenile offenders and their victims. The offender can be referred to the Unit by either the court or by a community based Corrections Officer.

The service offered is one of reparative mediation, which will only proceed if both the offender and the victim wish to do so. The mediation will allow

both the victim and the offender to come to a resolution which may involve one of the following:

- an apology, either verbal or written;
- replacement of goods to similar value;
- monetary restitution;
- donation to charity of victim's choice;
- repairing damaged goods;
- return of property;
- unpaid work for victim; and
- explanation of motivation for any offence.

The mediation may be carried out face to face or at the wish of the parties on an indirect basis, with the mediator acting as a go-between to help the victim and the offender reach an agreement.[38]

The magistrate or judge *may* take the outcome of mediation into account when passing sentence. The other advantages of mediation are to allow the victim to have an opportunity to obtain meaningful compensation from the person who caused his or her loss, the offender has the opportunity to make amends thus raising his or her self esteem and the victim gains insight as to why he or she was targeted.

The court may allow diversion — and if successfully completed, that may affect sentence outcome

Where a pre-sentence report recommends that an offender be ordered to undergo some type of rehabilitative course or programme, the court may adjourn the sentence pending the outcome of that programme. Upon successful completion of the programme, the court will take the degree of success into account with other factors before finally determining the sentence.

Post-sentence

Although all decisions with regard to the disposition of a criminal charge have been made, following sentence an offender may still be offered the opportunity to attend victim-offender mediation. At this point, the main purpose is usually to reach agreement concerning the future contact between the offender and victim. An agreement reached may become a special condition of the offender's release order.

THE ISSUES INVOLVED IN ADR

What the courts say about plea bargaining (sentence indication)

In Australia

Until 1976 the Australian courts refrained from commenting on the practice of plea bargaining or assessing its implications. An unreported decision of the High Court in *R v Bruce* is regarded as the leading Australian authority on judicial plea bargaining.[39] Bruce had been charged with ten counts of forgery and ten counts of uttering. There was discussion in the judge's chambers prior to the commencement of the trial involving counsel for the prosecution and the defence and the judge was asked by both to provide an indication of the sentence he was likely to impose. The following day, upon the defence counsel outlining the circumstances of the case, the judge stated he was not prepared to guarantee a non-custodial sentence. Counsel for the Crown

suggested that a substantial fine might be appropriate and that a further charge of conspiracy might not be proceeded with. Bruce pleaded guilty, a heavy fine was imposed in combination with a good behaviour bond. In passing sentence the judge stated that he was taking into account all the circumstances surrounding the offences. A month later, Bruce and two other co-accused were presented for trial on a conspiracy to cheat and defraud charge. Bruce entered a plea of not guilty and the trial was listed to run for two months. Defence and prosecution counsel approached the judge in chambers who after hearing the prosecution opening indicated that a custodial sentence would not be appropriate for the two co-accused, but that Bruce would be viewed in a different light. After further discussion, the judge indicated he would speak to the judge in the former hearing. Counsel informed Bruce what had transpired and he reluctantly entered a plea of guilty. Following taking the plea, the judge spoke to the previous judge and each defendant was subsequently placed on a bond. In passing sentence, comment was made by the judge expressing surprise that the conspiracy charge had proceeded against Bruce.

The Attorney-General appealed the sentence in relation to Bruce at both hearings. The appeal was upheld in relation to the forgery and uttering counts and on the conspiracy count and Bruce was sentence to an effective term of three years imprisonment.

On appeal, the High Court refused Bruce's application for special leave to appeal against the Court of Criminal Appeal's decision. The issue under consideration was whether Bruce had been induced to plead guilty because he understood a non-custodial sentence would be imposed. In both cases, the indication of the judge had been conveyed to Bruce by his counsel and following that advice he had changed his plea.

Sir Garfield Barwick rejected the notion that what had taken place in the judge's chambers constituted an inducement. He said:

> I do not know that even the word 'inducement' is right… He has the benefit of his counsel there, he is advised by his counsel, and he decides on the whole including the fact that the judge has indicated what he might do.[40]

Further, Barwick CJ condemned the practice of judicial plea bargaining during the course of legal argument as '… just a device to try and get through business … *and* … absolutely undesirable'.

Since then, the Victorian case of *Marshall* has further discouraged any form of pre-arraignment sentence indication. This case was distinguished from *Bruce* on the basis that in *Marshall* everything was done in public. However, the Full Court said that objections to plea bargaining were not confined to

private discussions and that if the practice became common it would be 'clearing the lists at too great a price'. [41]

Hence no plea bargaining involving the judiciary is presently favoured in Australia at this time.[42]

In the United Kingdom

The English Court of Criminal Appeal has taken a different approach to Australia.[43] In *Turner* the court gave limited approval for plea bargaining (sentence indication) involving the judiciary and four guidelines were laid down:

- counsel for the accused must be free to give the best advice, including advice that a plea of guilty will enable the court to give a lesser sentence;
- the defendant must have complete freedom of choice to plead guilty or not guilty;
- any discussion must be between the judge and both counsel for the prosecution and counsel for the defence; and
- a judge should never indicate the sentence he is minded to impose except to say that whether the accused pleads guilty or not guilty the sentence will or will not take a particular form (eg, custodial, fine, probation).

The 1976 case of *Cain* redefined the procedural limitations and in particular the limitation of disclosure of such discussions to the accused. Later, a Practice Direction was introduced which overruled *Cain* and reinstated the *Turner* directives as the authority on plea bargaining.

Statutory approval for plea bargaining (sentence indication)

For a brief period, New South Wales had a pilot programme operating at the Parramatta District Court pursuant to the *Criminal Procedure (Sentence Indication) Act 1992* (NSW). The programme allowed an accused person to seek a formal indication of the sentence which would be imposed in the event of a plea of guilty. The indication hearing in open court proceeded with the prosecution presenting a draft indictment, a statement of alleged facts which had previously been discussed with the defence representative, copies of prosecution witness statements, a transcript of committal proceedings, the criminal record of the accused, details of custody status and information regarding the status of any co-accused. The defence counsel presented material on behalf of the accused which may have included evidential material, pre sentence reports, witnesses called on behalf of the accused and possibly even evidence from the accused personally. The indication was given promptly and the accused was required to accept or reject the indication immediately after brief consultation with defence counsel. If the plea was guilty, the accused may have been sentenced immediately or rescheduled to a sentencing hearing before the same judge[44]. Whilst apparently well received by defence counsel,[45] the scheme has since been abandoned, one reason being given that it was too resource intensive.[46]

Issues surrounding the various ADR processes

While there is no formally accepted system of negotiation in Western Australia, the DPP and Police Service have published extensive guidelines setting out the circumstances in which the prosecution is prepared to exercise a discretion not to prosecute. Many defence counsel, but not all, avail themselves of these procedures. Issues of an ethical nature remain and there are still concerns over the adoption of the practice of resolving criminal matters by means of a negotiated result.

> Plea negotiation is acceptable where both the prosecution and the defence advise the judge in writing of why the process is appropriate in this instance. The Justice must then in writing explain the reasons why it should be accepted, all records must then be made a public document.
>
> It can serve the public interest that a slightly lesser charge is accepted, rather than a trial. This is true when there are numerous charges all of the same character likely to get concurrent penalties.[47]
>
> No rational person would dispute a parking fine or minor traffic offence. It is cheaper and quicker to pay up. We are thus commencing down the road to plea bargaining, that most infamously unfair and corrupting process utilised in the USA. We should proceed with extreme caution and always be ready to turn back.[48]

An ethical dilemma remains for defence counsel to discuss the prospect of a plea of guilty to a charge, when the accused person's instructions are that he or she is not guilty. Additionally, if the accused has indicated to his or her counsel the elements of guilt to the offence, counsel is unable to positively assert the innocence of the client, merely put the prosecution to proof of the charge. To some extent in the past, particularly in the United Kingdom[49] these ethical dilemmas have been avoided artificially by counsel undertaking negotiation without being fully briefed by the instructing solicitor as to the client's plea. Over time however, this practice has fallen away and in Western Australia, considerable criminal work is undertaken by solicitors practising in the amalgam.

Usually the situation is not such that the accused had no involvement in the facts surrounding the charge, but that a defence may be available such as self defence, provocation, or accident. These are not black and white issues and are ripe for negotiation between the parties.

Charge negotiation

Matters that can be resolved by negotiation are as follows:

Where the parties negotiate concerning whether it is appropriate that all charges should proceed to prosecution, it is relevant to consider the following questions —

- is there sufficient evidence to support each charge?
- is it necessary for the number of charges to proceed, or only the more

serious as the sentence may either be adequate resulting from the more serious, or unlikely to be increased by additional minor charges? and

- is it necessary that the level of charges be maintained: does all of the evidence support the matter proceeding on indictment, or can it be adequately dealt with in the summary jurisdiction?

Where the defence is encouraged to negotiate with the prosecution over whether all charges should proceed to prosecution, a concern is raised whether the appropriate charges were initiated. The focus of this concern is that where there is a prospect of the parties entering into negotiation, that an accused will be charged with a greater number of offences, and/or offences of a more serious nature than the evidence supports.

With the prospect of net widening, the concern becomes greater where an accused may not be represented, or is represented by inexperienced counsel who may not fully utilise the system to ensure that the charges are reduced to those appropriate to the evidence. Similarly, where a particular prosecutor is reluctant to appropriately negotiate charges, the accused may well be disadvantaged.

Because of the potential for power imbalance in any such negotiations, it is of concern that negotiations proceed privately, and not on the public record or under the scrutiny of an independent official.

Plea negotiation

Plea negotiation refers to the practice of negotiation with the prosecutor concerning the facts surrounding the offence that are intended to be placed before the adjudicator. An accused may well admit an offence, but may not admit some of the facts alleged which, due to their nature, aggravate the offence and may result in a more severe penalty being imposed.

In these circumstances, the accused is prepared to trade the delay, expense of a trial and a degree of uncertainty of the outcome for the opportunity to agree the facts to be placed before the magistrate or judge and upon which the penalty will be based. The prosecutor needs to weigh up the strength of the disputed facts alleged and the likelihood of those facts being proved following a hearing.

Because of the potential for power imbalance in any such negotiations, it is of concern that negotiations proceed privately, and not on the public record or under the scrutiny of an independent official.

Sentence indication

This is when the defence counsel enquires of the prosecutor what his or her attitude would be to a particular sentencing disposition that the defence will be proposing to the court. Again, a successful resolution depends upon the experience of the defence counsel and the willingness of the prosecutor to

favourably consider the submission. Of course, the court can reject the submissions and impose a different penalty.

The court is not involved in providing an indication of sentence that may be imposed in the event that the accused enters a plea of guilty.

Procedural

It is useful from the case management perspective of the court if the counsel for the defence and the prosecution have discussed issues relating to the trial, such as:

- whether medical or scientific witnesses are required to give oral evidence, or whether such evidence can be admitted by consent;
- whether the accused is prepared to admit the evidence relating to continuity of exhibits or if this needs to be proved;
- whether other evidence can be admitted as uncontroversial, such as maps, plans and photographs; and
- whether all elements of an offence are required to be proved, or some are able to be admitted.

Discussions of this nature reduce the length of a trial considerably, saving costs to the court and legal costs to both the prosecution and the defence.

There is currently no procedure to encourage the parties to hold discussions with regard to these issues. Depending upon the experience and attitude of counsel, these negotiations may not be held at least until the parties are at the court to commence the trial. Witnesses are then inconvenienced in having attended unnecessarily and the court's scheduled time is wasted.

Runciman Report proposals for ADR

The Runciman report[50] discussed the likely opposition to compulsory conferencing to discuss pre-trial issues saying that the main problems would be:

- some practitioners and defendants may be unwilling to comply with pre-trial reviews and the sanction for failure to do so will be ineffective; and
- the process may be more cumbersome and costly without compensating gains in shortening the actual trial.

The major difficulty was noted that some defence counsel decline to provide information concerning the defence case, albeit in breach of a practice direction to do so.

The Report recommended *inter alia* that a preparatory hearing be held in matters that are listed for more than five days and the process would be commenced by an exchange of forms. The Report further recommended that the process be supported by effective sanctions for non-compliance with practice directions and that if breached, the practitioner should be the subject of comment by the court, to costs sanctions and, if necessary, to

disciplinary action by the Bar Council or the Law Society. 'Judges must have authority to ensure compliance with the rules, by statute if necessary'.[51]

The costs sanctions considered related not to a personal costs order for those costs wasted, but to a report by the court to the Legal Aid funding authority of the failure to comply with a practice direction with the desired result of counsel having his or her account curtailed.

The Report continued that where counsel reported inability to comply with requirements through inability to obtain instructions, the matter be listed for mention and if the defendant then failed to attend court, a bench warrant be issued.

With regard to the other main objection, the Report determined that a compulsory conference should not be convened in all cases, but reserved for those listed for five days or more, or at the discretion of the court.

PROPOSALS FOR CONSIDERATION

Without prejudice compulsory conference

It is apparent that discussion does take place between defence counsel and the prosecution about a range of matters including charge negotiation, plea negotiation, sentence indication and procedural matters. The problems that arise are:

- there is no compulsory requirement for such discussion to take place and it does not always happen;
- there is no timing set for any discussion and it can happen very late causing unnecessary expense to the prosecution, to the defence and to the court in being unable to more appropriately schedule hearings;
- the court is not involved in the process and is given no information about negotiations that may be taking place or even if the negotiations are appropriate. The court is only informed of agreed change in matters proceeding to hearing, often too late to be of assistance to the court's case management process;
- because the negotiation takes place in private, there is no independent body overseeing the process. There is no protection for an accused where a power imbalance exists either because he or she is unrepresented, has counsel with little experience or the prosecution counsel is intransigent; and
- there is no accountability or transparency in the process.

The Law Reform Commission of Western Australia could consider proposing procedural amendments so that a compulsory conference is convened involving the accused person, defence counsel and prosecution counsel. The convenor of the conference should be a court official, not necessarily a judge or magistrate, but a dedicated Criminal Registrar who is fully acquainted with the law relating to the charges being considered. The conference should be

held on a without prejudice basis and the convenor should encourage discussion by both counsel on a range of issues including:

- the strength or otherwise of each of the charges, given the available evidence;
- the reasonableness of all of the charges proceeding to hearing given the state of the evidence, the likely additional sentence if convicted and if appropriate, should the charge remain on indictment;
- the list of witnesses to be called both for the prosecution and the defence, the necessity for that evidence to be given orally and whether any such evidence can be admitted by the other party;
- the anticipated length of hearing; and
- any outstanding issues remaining unresolved at the conclusion of the conference, such as a need for a *voir dire,* or need for a direction from a judge, the matter to be listed for a directions hearing.

All matters resolved at the conference should be minuted, and signed by the accused and prosecution and, if necessary, a judge could issue a direction in the terms of matters agreed. Where the discussion resulted in charges not proceeding, or a plea of guilty to be entered, the matter should be listed for that to proceed as soon as possible. The court official should record only matters of agreement reached between the parties and the reasons for any change to the charges before the court. This record should be kept on a court file, but not necessarily available to the public.

The conference should be convened at a time when the defence and the prosecution counsel have had sufficient time to become fully acquainted with the file, but not so close to the trial that the court cannot take advantage of any early resolution of issues. The conference should be no later than six weeks before the trial listing. This will require a change of culture and work practices on the part of counsel for the prosecution and defence who are not usually fully acquainted with the matter until much closer to the trial

Should one or other of the counsel have a need to adjourn the conference to obtain further information prior to concluding all discussion, then the conference should be reconvened as soon as possible thereafter to ensure that matters are resolved as quickly as possible.

The conference should not be held in open court and in indictable matters, counsel should not be gowned. An informal conference would lead to better communication between the parties.[52]

Security will have to be considered in relation to some accused who are in custody. It may be possible for the accused to be present at the conference

by video conference link, so long as there is opportunity for the accused and his or her counsel to speak privately.

Consideration should be given to the role, if any, to be played by the victim at the conference. The victim is often presently consulted as a witness with regard to the strength or otherwise of the prosecution evidence and often with regard to his or her attitude to a plea to a lesser charge to obviate the need to give evidence at a hearing.[53] Defence counsel consulted on this issue were opposed to the victim being present at the conference as this could create an emotionally charged atmosphere which would be less conducive to resolution of matters.[54] However, in preparation for the conference, the prosecutor could be required to discuss appropriate issues with the victim to obtain an indication of attitude. The attitude of both the victim and the arresting officers are matters to be taken into account by the prosecution, as well as submissions by defence counsel, in determining which charges will proceed.

Concern raised by the Runciman Report that this process may use more resources without compensatory gain has been considered and rejected for the following reasons:

- the South Australian experience indicates that in the summary jurisdiction, 'smaller disputes' are being resolved by the negotiation process and there are few hearings of less than one day in length;[55]
- Status Conferences currently held in the District Court should no longer be required; and
- the new Directions Hearing process in the Court of Petty Sessions would no longer be required.

The proposal is relevant to listings in summary and indictable matters, in Perth and country areas. In indictable matters in the country, conferences can be held when the court travels on circuit or such conferences could be convened by telephone where all of the parties are not conveniently located.[56] There may be more difficulty in summary matters in having an appropriate court officer convening the conference in country courts, particularly in small country towns where there is no resident Managing Registrar. It is not inconceivable however that such a conference could be convened by the regional Registrar.

Proposal 1

A dedicated criminal registrar should convene a compulsory without prejudice conference in chambers between the prosecutor, defence counsel if any, and the accused at a time no later than six weeks prior to a trial.

Proposal 2

The parties attending the conference are required to be fully acquainted with the charges and able to discuss a list of issues previously circulated by the registrar with a view to agreeing which charges will continue to hearing in which jurisdiction and what evidence can be admitted as uncontroversial.

Proposal 3

Points of agreement reached should be minuted by the registrar and signed by the accused and the prosecutor. Any change of plea should be listed and taken as soon as possible. Where agreement cannot be reached and there is a need for a direction to be issued prior to the trial, the matter should be listed before an adjudicator as soon as possible for such direction.

Proposal 4

The court should maintain a written record of the reasons for agreement to withdraw a charge, substitute a lesser charge or enter a *nolle prosequi*. The record should not necessarily be available to the public.

Proposal 5

The registrar is to ensure that procedural fairness is afforded the accused, and ensure that all discussions take place on an appropriate footing.

Proposal 6

Should a practitioner fail to comply with the requirement to participate in a conference as directed then the registrar has the ability to report such failure to the appropriate professional complaints body for investigation of whether the failure amounts to unprofessional conduct.

Proposal 7

Consideration should be given to the necessity to amend the Professional Conduct Rules to provide the power to discipline a practitioner who fails to comply with a court direction.

Desirability of judge involvement in sentence indication

As discussed above, unlike the United Kingdom, the Australian courts have frowned upon the involvement of the court in providing an indication of the type of sentence that is likely to be imposed in the event of a guilty plea.

In New South Wales, the attempt to set up a system which provided sufficient safeguards to all involved, required enormous resources of the state to have

a sentencing hearing which did not become a sentencing hearing unless the accused then decided to plead guilty. As discussed above that scheme was abandoned as it was too resource intensive.

However, there continue to be some occasions when a judge becomes concerned that an accused remains in custody for an inordinate period on a maintained not guilty plea, particularly where country circuits do not allow for matters to be dealt with more quickly. At present, in such circumstances, it may be tempting for a court to indicate to defence counsel that a guilty plea may not prolong the incarceration of the accused. Should a dedicated criminal registrar conduct a without prejudice conference between the concerned parties, the issue of sentence in such circumstances is likely to be on the agenda for discussion and there should be no need for a judge to become involved in the process of sentence indication.

It is not suggested that the registrar will have received prior advice from a judge of sentence indication, but that where defence counsel and the prosecution discuss their attitude to sentence on a plea of guilty in this forum, the decision will have input from considerable experience of previous dispositions of the court in similar offences. The decision to plead guilty or not in these circumstances cannot be said to have been as a result of sentence indication, it is a decision taken by the accused in the light of a number of factors including sentencing precedents.

Restorative justice

The criminal justice system operates on the basis of retributive justice, whereby an offender is punished for the offence committed as being a breach of a rule of society. Additionally, the offender may also be required to pay restitution to the victim of the offence, but any order for restitution is subsequent upon the primary consideration which is punishment of the offender. By comparison, restorative justice is a concept which moves the justice system from one of punishment to one of reconciliation between the offender and the victim. It is concerned with restoring the well-being of the victim, the community and the offender.

Those who argue for restorative justice, say that retributive justice is flawed in that it is wasteful '… in fiscal terms and more importantly, in terms of human destruction and degradation, serving only to compound the problem rather than find the solution'.[57]

Restorative justice attempts to move the emphasis from guilt and punishment to responsibility and reparation. In this model justice is achieved through the offender taking responsibility for his or her actions and taking steps to make reparation.[58]

Restorative justice, as opposed to retributive justice is only offered to offenders who appear in the Children's Court and who are eligible for family group

conferencing and to a very limited extent to offenders who are post-conviction participating in victim-offender mediation after referral by a Community Based Corrections Officer.[59] An adult offender, as well as having come to an agreement with the victim concerning both restitution and retribution, additionally may be punished by the court.

Family group conferencing

Family Group Conferencing (FGC) is attended by the young person, members of their family, the victim, a youth advocate if requested by the young person, a police officer, a social worker in some cases and anyone else relevant requested by the young person. All members of the FGC must agree as to the proposed diversionary programme and its implementation. A plan of action is put forward for example, apology, reparation, community work, curfew and/or undertaking to attend school or not to associate with co-offenders and includes the particulars of required supervision. The court considers the plan before agreeing that it is appropriate. If the plan is carried out, the charge is withdrawn; if the plan breaks down, the court will impose its own sanctions.

Should adults be eligible to participate in a restorative justice model which, if successful, would divert them from the criminal justice system? The model of FGC is specific to young people, but the influence of families can still continue in varying degrees once adulthood has been reached. Family relationships may then include spouse or defacto partner, siblings, other relation, employer or friend who is concerned for the young person's well being. The importance of the FGC is in bringing together several representatives of the community to which a young person relates so as to provide a negotiated, community response.

> The object is to get the relevant community to take responsibility for helping the offender to address the wrong that has been done, repair the damage, and to affirm the offender in any remedial steps for the future. In the process the victim's needs are addressed, and the offender can be restored to a place in the community.[60]

Diversionary systems

At the present time a number of specific diversionary schemes are operating with plans for extension to cover other offences. A type of FGC for young adults would be able to extend a diversionary scheme to other offences not presently considered. This would allow more flexibility in the criminal justice system in diverting offenders and would allow a greater participation of victims in the resolution of criminal offences.

It could be used for young first offenders and be limited to minor offences, perhaps of a property nature but should not exclude offences arising out of illicit drug taking.

> Alternative Dispute Resolution would seem to be something that should be encouraged and promoted. And decriminalisation of minor offences

> would be an *excellent* idea particularly in the areas of drugs and prostitution.[61]

Proposal 8

Consideration be given to extending the FGC scheme in the Children's Court to include young adults who are not recidivist in appropriate offences.

In other states of Australia where there is a well supported system of neighbourhood mediation, for example in New South Wales, Queensland and Victoria it is possible for police to divert complaints of offences to such a mediation centre to be resolved. Where the complaint cannot be resolved by that method, the matter may progress through the court processes. This has been found to be useful where an offender and a victim are known to one another and expect to have an ongoing social relationship.

In Western Australia, although there is a small number of community based organisations which undertake dispute resolution by way of mediation, there is no state-wide body with sufficient resources to undertake the necessary research and planning that would be required to establish such a service.[62]

> There should be some form of alternative dispute resolution before charges are laid if an appropriate solution can be achieved without resort being had to the courts.[63]

Issues with restorative justice

Difficult issues emerge with a model of restorative justice, for example:

- **Co-existence with the traditional system** —
  - should restorative justice gradually try to replace traditional corrective practices?
  - should the two systems co-exist independently? or
  - should restorative practices be integrated into the present system?

  Each of these proposals requires an existing bureaucratic system to accommodate an opposing system.[64] There is also the problem of deciding which offenders should be processed by which system.

- **Community alienation** — the traditional criminal justice system operates within a highly bureaucratic framework which is specialised and professionalised and hence lacks the compassion and understanding necessary for the appropriate outcomes in restorative justice. Restorative justice therefore needs to be provided by a different system. The experience in most states appears to be that unless restorative justice is tied to the criminal justice bureaucracy, there are problems in its wide implementation. [65]

- **Net-widening** — there is a risk that a community conferencing programme, which is designed to be an alternative to more formalised and punitive intervention, takes in people who would have had less or no action against them if the programme had not been available. This is because the case may have been too hard to prove in court and may be referred to conferencing instead. Once systems are established, to justify the expenditure, they must be used and people are referred to them who may have otherwise escaped the criminal justice system.[66]
- **Diminution of the role of the state** — the state has a genuine role in encouraging appropriate behaviour and stable social relationships. If the state is absent in the restorative justice process, it may fail to deal with the greater social issues that arise.[67]
- **Public sentiment about crime** — calls for greater punishment from the community in a system adopting a restorative justice basis, may result in a reduction of levels of punishment.[68]
- **Private nature of restorative justice** — because the conference process takes place out of the public arena, it is not subject to scrutiny. Such a process can involve the ratification of the penalty by a court but such a process will not provide the same cost savings.[69]
- **Precondition of admission of guilt** — may mean that an accused person admits guilt to an offence when, upon a hearing, the facts may only support a lesser charge, with the result that an accused person agrees to a harsher sentence than is appropriate. This problem is amplified in cases of persons accused of minor offences who do not have access to legal advice or Legal Aid services.[70]
- **The development of sentencing case law may suffer** where fewer matters go to court.[71]
- **A power imbalance** detrimental to the accused may occur where he or she, particularly if not legally represented, is faced with the prosecution, the victim and a community representative.
- **A risk of undue pressure on the victim** to participate in the system, particularly where the victim and offender are related.

CONCLUSION

The major proposals raised in this sub-section relate to the involvement of the court in negotiations between the prosecution and the defence in matters proceeding to trial. These proposals assist in promoting the principles documented by Mack and Roach Anleu[72] as being essential for an acceptable criminal justice system.

SUMMARY OF PROPOSALS

1. A dedicated criminal registrar should convene a compulsory without prejudice conference in chambers between the prosecutor, defence counsel if any, and the accused at a time no later than six weeks prior to a trial.

2. The parties attending the conference are required to be fully acquainted with the charges and be able to discuss a list of issues previously circulated by the registrar with a view to agreeing which charges will continue to hearing in which jurisdiction and what evidence can be admitted as uncontroversial.

3. Points of agreement reached should be minuted by the registrar and signed by the accused and the prosecutor. Any change of plea should be listed and taken as soon as possible. Where agreement cannot be reached and there is a need for a direction to be issued prior to the trial, the matter should be listed before an adjudicator as soon as possible for such direction.

4. The court should maintain a written record of the reasons for agreement to withdraw a charge, substitute a lesser charge or enter a nolle prosequi. The record should not necessarily be available to the public.

5. The registrar is to ensure that procedural fairness is afforded the accused, and ensure that all discussions take place on an appropriate footing.

6. Should a practitioner fail to comply with the requirement to participate in a conference as directed then the registrar has the ability to report such failure to the appropriate professional complaints body for investigation of whether the failure amounts to unprofessional conduct.

7. Consideration should be given to the necessity to amend the Professional Conduct Rules to provide the power to discipline a practitioner who fails to comply with a court direction.

8. Consideration be given to extending the FGC scheme in the Children's Court to include young adults who are not recidivist in appropriate offences.

ENDNOTES

* The Law Reform Commission of Western Australia engaged Ms Margaret Jordan to prepare this sub-section. The views expressed are those of the Commission.

1 Should the accused be a person under the age of 18 years as at the date of the alleged commission of the offence, then the appearance will be in the Children's Court.

2 Brief containing all of the prosecution evidence including a copy of witness statements. Upon accepting a hand up brief, the accused waives his or her right to cross examine the prosecution witnesses at a committal hearing.

3 Following a preliminary hearing where the prosecution produces the witnesses for cross-examination by the defence.

4 A decision by the state not to proceed with the case. It is not an acquittal, and the case may be reopened at a later date. As a matter of practice, it is rarely reopened.

5 Jubilee Policy Group Interim Report, *The Intent of the Children, Young Persons and Their Families Act 1989: Restorative Justice?* 11.

6 Malcolm Feeley, 'Plea Bargaining and the Structure of the Criminal Process' (1982) 7 *The Justice System Journal* 338, 345.

7 The Shorter Trials Committee (joint committee of the Victorian Bar and the Australian Institute of

Judicial Administration) reported in 1985 that the cost of a typical trial in the Supreme Court cost the community about $1 800 per hour or $30 a minute. A trial in the County Court cost about $1,200 an hour or $20 a minute. See 'Shorter Trials: The Report' (1985) 59(10) *Law Institute Journal* 1038.

8 Kathy Mack and Sharyn Roach Anleu, 'Guilty Pleas: Discussions and Agreements' (1996) 6(1) *Journal of Judicial Administration* 8.
9 Ibid 9.
10 Peter Sallman and John Willis, 'Here and Abroad: The Judge's Role in Plea Bargaining' (1981) 6(3) *Legal Service Bulletin* 132.
11 WC Hodge, RE Harrison and GL Colgan , 'Plea Bargaining', (1981) 7(3) *Commonwealth Law Review* 1112, 1118.
12 *Brady v United States*, 397 US 742, 753 (1970).
13 See *Miranda v State of Arizona* 384 US 436 (1966); *Escobedo v State of Illinois* 378 US 478 (1964).
14 James Morton, 'Criminal Procedure' (1985) 135 *New Law Journal* 457, 467.
15 Hodge et al, above n 11.
16 Ibid.
17 Arthur Rosett, 'The Negotiated Guilty Plea' (1967) 374 *Annals* 70, 75: Professor Rosett went on to say that many guilty plea defendants, far from showing remorse, claim to be innocent once the bargaining process has been concluded. Professor Abraham Blumberg surveyed more than 700 defendants who had entered pleas of guilty. A majority of these defendants claimed that they were innocent, and only 13.1% affirmatively admitted their guilt. Quoted in Albert Alschuler, 'The Changing Plea Bargaining Debate', (1981) 69(3) *California Law Review* 652, 662.
18 Hodge et al, above n 11, 1119.
19 Alschuler, above n 17, 685.
20 Professor Welsh White, quoted in Alschuler above n 17, 715.
21 *Brady v United States*, above n 12.
22 In *Bordenkircher v Hayes* 434 US 357 (1978), the court failed to consider whether, as a matter of legitimate sentencing policy, the sentence imposed following a trial could be 10% higher, 100% higher, or 500% higher than the sentence imposed following a guilty plea.
23 *Enever v The King* (1906) 3 CLR 969 established that a police constable holds the office and exercises the power personally, not as a matter of delegation. A police officer bears the original authority and responsibility.
24 *R v Commissioner of Police of the Metropolis: ex parte Blackburn* [1968] 2 QB 118.
25 Western Australia Police Service, *Statement of Prosecuting Policy and Principles* (September 1997).
26 Steve Robbins, 'The Decision to Prosecute' (Paper presented at the The Stipendiary Magistrates Society Conference, 13 November 1998).
27 Discussion with Superintendent Steve Robbins, Prosecuting Branch (4 December 1998).
28 RD Nicholson, written submission to the LRCWA, 30 July 1998.
29 See Desmond Lane, 'The Victoria Police Shopstealing Warning Programme as Alternative Dispute Resolution' (1992) 3(3) *Australian Dispute Resolution Journal* 151 with regard to a similar programme instituted in Victoria following a pilot in Ballarat from 1985.
30 *The West Australian,* 22 December 1998, 32.
31 Western Australian Police Service, see above n 25.
32 Ministry of Justice, *Report of Review of the System of Listing Matters within the Perth Court of Petty Sessions* (1998) 7.
33 Statement of Prosecution Policy and Guidelines under *Director of Public Prosecutions Act 1991* (WA).
34 *The West Australian,* 21 November 1998, 4-5; Editorial, *The West Australian*, 6 January 1999, 14.
35 Discussion with Chief Judge Hammond (13 January 1999).
36 An accused can inform the court whilst the matter is still within the Court of Petty Sessions that he or she intends to plead guilty and an early date is set for the plea to be taken and sentence delivered in the District Court.
37 Criminal Statistics for Perth Sittings (October 1998).
38 Discussion with Margaret Wauchope (4 December 1998).
39 (Unreported, High Court of Australia, 2 May 1976): discussed in Robert Seifman, 'Plea Bargaining in Victoria: Getting the Judges' Views' (1982) 6(2) *Criminal Law Journal* 69, 76.
40 *R v Bruce* ibid, 12.
41 *R v Marshall* [1981]VR 725, 733.
42 But see the views of Justice Hempel who discusses the comments in Marshall's case saying that he does not think the difficulties are insurmountable and that a system cannot be devised which would enable preliminary sentence indications to be given in appropriate cases. These comments were made prior to the NSW scheme being trialed and later abandoned. Justice Hempel 'Plea Bargaining - A Judge's Involvement' (1985) 59 *Law Institute Journal* 1304.
43 *R v Turner* (1970) 54 Cr App R 352; *R v Cain* [1976] 1 QB 496.
44 Kathy Mack and Sharyn Roach Anleu, 'Balancing Principle and Pragmatism: Guilty Pleas', (1995) 4 *Journal of Judicial Administration* 232, 235.
45 Ibid.

46 Discussion with Chief Judge Hammond (13 January 1999).
47 John Crem, written submission to the LRCWA (Perth , 25 August 1998).
48 J Shannon, written submission to the LRCWA (Perth, 17 August 1998).
49 James Morton, 'Plea Bargaining' (1985) 135 *New Law Journal* 457,458.
50 Viscount Runciman of Doxford, *The Royal Commission on Criminal Justice* (1993) 101.
51 Ibid 106.
52 In South Australia, in indictable matters, a status conference is held on a without prejudice basis in private chambers. Judge Blaxell has reported the effect of this is that counsel tend to be more forthcoming and discuss the issues in a more realistic way: Judge Blaxwell, memo to Judge Hammond (15 November 1994).
53 A victim may welcome the opportunity of not having to give evidence, and be prepared for the prosecution to accept a guilty plea to a lesser offence, but also may consider such a proposal being tantamount to not being believed.
54 Discussion with Paul Roth, Legal Aid WA and Patrick Hogan, Law Society Criminal Committee (4 December 1998).
55 Ministry of Justice, WA Magistrates' Courts Report, *Review of the System of Listing Matters within the Perth Court of Petty Sessions* 7.
56 Once the conference procedure is established with counsel taking their responsibilities seriously, there would not appear to be any reason why it could not be convened by telephone. The Administrative Appeals Tribunal and the Federal Court allow for conferences and directions hearings to be held by telephone. In the writer's experience there does not appear to be any diminution of counsel's preparation for such a conference by telephone.
57 Michael Brown, Principal Youth Court Judge, Auckland, NZ, 'Forward' in Jim Consedine, *Restorative Justice: Healing the Effects of Crime* (1995) 8.
58 Peter Condliffe, 'The Challenge of Conferencing: Moving the Goal Posts for Offenders, Victims and Litigants,' (1998) 9 *Australian Dispute Resolution Journal* 139, 145.
59 Since the inception of the Victim-offender mediation unit in 1992, approximately 1100 offenders have been involved including post sentencing protection mediation. The numbers have increased from 47 in 1992/3 to 259 in 1997/8. Discussion with Margaret Wauchope (4 December 1998).
60 FWM McElrea, 'Restorative Justice: The New Zealand Youth Court: A Model for Development in Other Courts?' (1994) 4(1) *Journal of Judicial Administration* 33, 47.
61 B H Beyboer, written submission to the LRCWA (Attadale, 4 August 1998).
62 See sub-section 2.3 'Alternative Dispute Resolution in Civil Matters' and proposed recommendations for increased resources to community mediation centres.
63 Murray Stubbs, oral submission to the LRCWA (Kalgoorlie, 7 July 1998).
64 Peter Condliffe, 'The Challenge of Conferencing: Moving the Goal Posts for Offenders, Victims and Litigants' (1998) 9(2) *Australian Dispute Resolution Journal* 139, 146.
65 Ibid 147.
66 Ibid.
67 Ibid 148.
68 Ibid.
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70 Ibid.
71 Ibid.
72 Refer p 766.

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4.4

Joinder of Charges and Joinder of Accused

INTRODUCTION

The purpose of the provisions of the *Criminal Code of Western Australia 1913* (WA) ('the *Criminal Code*') dealing with joinder is 'to avoid the technicalities and rigid rules of criminal pleading and procedure, but not to impair the administration of criminal justice.' [1]

In *Attorney-General's Reference No 1 of 1977* [2] Jones J stated that:

> [A]s Sir Garfield Barwick once reminded us, the requirement to have a fair trial comprehends not only fairness to the accused but also fairness to the prosecution — ie to the State, the community. The community has a legitimate and a vital interest to see the law upheld and guilty persons convicted.

This discussion paper examines both the joinder of offences and the joinder of offenders with a view to suggesting reforms which will reduce expense, delay and complexity and which take into account fairness to both the offender and the State.

JOINDER OF OFFENCES

The *Criminal Code* provisions

Section 585 of the *Criminal Code* provides:

> Except as in hereinafter stated, an indictment must charge one offence only, and not two or more offences:
>
> Provided that when several distinct indictable offences form or are part of a series of offences of the same or a similar character or when several distinct indictable 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, charges of such distinct offences may be joined in the same indictment against the same person.
>
> In any such case the several statements of the offences may be made in the same form as in other cases, without any allegation of connection between the offences.

> But, if in any such case it appears to the court that the accused person is likely to be prejudiced by such joinder, the court may require the prosecutor to elect upon which of the several charges he will proceed, or may direct that the trial of the accused person upon each or any of the charges shall be had separately.[3]

The section has remained largely as it was enacted in the original Code.[4] At the time of its enactment, this section represented the current practice as opposed to the strict terms of the law.[5]

Construction

The Court of Criminal Appeal has held that section 585 of the *Criminal Code* is expressed in wide terms and should not be narrowly construed when determining the power to join counts. However, 'different and narrower considerations' arise if the court is asked to consider whether counts which have been properly joined should be tried separately.[6]

Effect of misjoinder

Misjoinder of charges is an irregularity and will not, by itself, justify setting aside a conviction. A conviction will only be set aside if it is shown that the improper joinder resulted in a miscarriage of justice.[7]

Prohibition on joinder

Section 585 of the *Criminal Code*, by way of contrast to the *Indictments Act 1915* (UK), forbids joinder subject to certain exceptions.[8]

Exceptions to the prohibition on joinder

There are three exceptions to the prohibition: namely, where several distinct indictable offences:

(a) form or are part of a series of offences of the same or similar character;

(b) are alleged to be constituted by the same acts or omissions; and

(c) are alleged to be constituted by a series of acts done or omitted to be done in the prosecution of a single purpose.

Offences of the same or similar character

A 'series' has been held to connote 'some connection between the crimes'.[9] Two alleged offences are sufficient to constitute a 'series' of offences.[10]

Offences are of the same or similar character if there is a sufficient nexus between them. This will often be the case where the offences are so connected that evidence of one offence is admissible on the trial of another.[11]

In *Sutton v The Queen*[12] the appellant had been charged with one count of attempted rape and seven counts of rape against three victims in one indictment. There were features of similarity in the offences, namely the manner in which each victim was attacked and conducted to a nearby school where the offences took place and the nature of the sexual assaults. The question which the High Court was required to consider was whether the evidence on each charge was admissible on the other charges such that the joinder of the charges in one indictment was permissible. Gibbs CJ, Brennan and Deane JJ held that the evidence on each charge was admissible on the

other charges because each of the offences was committed in a manner so strikingly similar to the others.

Subsequently in *Hoch v The Queen*[13], the High Court held that the admissibility of similar fact evidence where an accused person is charged with sexual offences against several different complainants depends on the probative force of the evidence. In cases where there is a possibility of concoction by the complainants, the probative value of the evidence is destroyed rendering evidence of one count inadmissible on the other counts.[14]

In *J v The Queen*, [15] the accused was charged with a number of sexual offences against two sisters. The accused applied for a separate trial. Seaman J found that the there was striking similarity between the evidence of each complainant. Whilst his Honour found that a joint trial would prejudice the accused, he considered that the probative value of the evidence sought to be led transcended that prejudice:

> In my opinion it has very considerable probative value in the improbability of witnesses giving such accounts unless the happenings had in fact occurred. It will be admissible to confirm the veracity of the other complainant and as circumstantial evidence in support of the counts involving the other complainant and goes far beyond propensity.[16]

Offences constituted by the same acts or omissions

Offences are constituted by the same acts or omissions where the evidence to support the commission of one offence is the same evidence which supports the commission of the other offence.[17]

For example, in *Healy v The Queen*[18] the appellant, pretending to be a police officer, indicated to a person facing trial for two criminal offences, that he was in a position to remove certain witnesses. The appellant was charged with two mutually exclusive counts in one indictment. The Court of Criminal Appeal held that the offences were properly joined because the offence of obtaining money by deception with intent to defraud was constituted by the same act or omission in the offence of attempting to pervert the course of justice.

Offences constituted by a series of acts done or omitted to be done in the prosecution of a single purpose

The Courts have construed the concept of the prosecution of a single purpose very widely.[19]

For example, in *H v The Queen*,[20] the appellant was charged on an indictment containing six counts alleging various offences against his daughter. The first five counts alleged sexual offences, namely indecent dealing and incest whilst the sixth count was an allegation of assault causing bodily harm. The Crown's contention was that the single purpose was the physical domination and abuse of the complainant by the appellant.[21] Pidgeon J accepted that it was within power to put in the one indictment a series of acts of abuse of the

one woman on the basis that the continual and purposeful abuse of that woman constitutes a single purpose, although it was arguable whether the case before him was such a case.

In *Lancaster v The Queen*,[22] the applicant was charged with two counts of armed robbery and two counts of assault with intent to resist arrest. The Court of Criminal Appeal accepted the Crown's contention that the counts were properly joined since they were a series of acts done in the prosecution of a single purpose, namely the commission of a robbery and the 'getting away'.[23]

Election or direction for separate trials

The determination of the question as to whether separate trials should be ordered for different offences generally takes place at a pre-empanelment hearing held pursuant to section 611A of the *Criminal Code*.[24]

The joinder of different offences in one indictment does not give rise to impermissible prejudice in itself such that joinder should never have been made.[25] The admissibility of evidence on each of the counts joined in the indictment is the key factor in determining whether there is impermissible prejudice to the accused such that the court should exercise its discretion to order separate trials.

Where the evidence relating to one count is admissible in proof in relation to the other counts then there is usually no risk of impermissible prejudice arising from a single trial of all the offences.[26]

However, where the evidence admissible on one count is not admissible on another count this gives rise to a 'risk of impermissible prejudice to the accused' such that 'the sound exercise of the discretion generally (if not universally) requires a direction for separate trials'.[27] It has been said that there is usually such a risk in sexual cases.[28] However, no real consideration has been given as to why cases involving sexual offences present a special risk. The answer may lie in a general public abhorrence of the commission of sexual offences.

In *De Jesus v The Queen*[29] the applicant had been charged on indictment with five offences, the two principal charges of which were both rape. These offences occurred at different times and in different places and were the subject of different defences. Although the counts were properly joined, Gibbs CJ held that in this case the joinder was highly prejudicial and the jury would be influenced by the fact that the offences were tried together, regardless of any direction to the contrary.

In *R v Correia*[30] the accused was charged with six offences against two different complainants. The offences took place within an hour of each other and in the same vicinity. The assaults were also of the same nature. Steytler J allowed the application for separate trials on two grounds. First, the prejudice to the

accused would be very high if separate trials were not ordered and there was a high risk of an unfair trial. Secondly, the evidence of each of the acts did not form part of the evidence of the other act in the sense that neither act would be rendered unintelligible and artificial by the isolation of the evidence of the other act.

Where two counts charged in the same indictment are mutually exclusive (i.e. if one were to be proven then the other could not be) this fact alone does not render the joinder improper.[31]

Rationale for the joinder of offences

Joinder of offences in one indictment reduces costs, saves time and preserves judicial resources. This factor is more significant in relation to the joinder of offences than the joinder of accused. For example, where two accused need separate trials there will be only two trials. Where someone is charged with 10 offences and separate trials are required, the possibility exists that there may be up to 10 separate trials. The cost of one trial will usually be significantly less than 10 separate trials.

Reduced cost and time saving can also work to the advantage of an accused person. There is also the potential benefit of concurrent sentences should an accused person be convicted following a joint trial of offences. As Pidgeon J pointed out in *H v The Queen*:

> [A]n accused person may not want separate trials or may wish to plead at the one time to the one Judge to admit all in wrongdoing in respect of the one person. He may wish to have only the one trial.[32]

Joinder also minimises inconvenience and trauma to witnesses in that it prevents witnesses from having to attend numerous trials to repeat the same evidence.

Another advantage of the joinder of offences is that the jury is given a complete picture of the alleged offending on which to base its decision. Where a jury is required to view an offence in isolation when in fact it formed part of a series of offences there is a risk that any decision to acquit may be based on a misconception such as the unlikelihood of the offender committing an isolated criminal act or of committing acts against one person in a group and not others. As the court observed in *R v Witham*[33] in cases involving offences of a sexual nature the joinder of the offences may render intelligible evidence which would otherwise provide a distorted picture of the relationship between the offender and the victim. Of course this risk must be balanced against the risk to an accused of having multiple offences heard before the same jury.

Rationale for separate trials for offences

The prohibition against joinder stems from the fundamental principle that evidence of the commission of offences other than the offence charged is inadmissible against an accused at a criminal trial.[34] The reason for the

inadmissibility of such evidence was eloquently stated by his Honour Justice Brennan in *Sutton v The Queen* as follows:

> [I]t is thought that the antipathy which evidence of another offence is apt to engender may unjustly erode the presumption of innocence which protects an accused person at his trial; i.e., the evidence of the other offence may be regarded by the jury as being more probative of guilt of the offence charged than it can fairly be thought to be.[35]

The primary argument against joinder is the unfairness and prejudice to the accused from having multiple offences heard before the same jury. There are said to be four areas of prejudice:[36]

(1) that the jury will become confused by the evidence and fail to consider the admissible evidence on each count;

(2) that the jury will accumulate the evidence in relation to each count so that evidence in relation to one count is taken into account when considering the evidence on one or more of the other counts;

(3) that the jury will infer that the accused has a criminal disposition by reason of the fact that he is facing trial for multiple offences; and

(4) the accused may have problems in presenting his defences on multiple counts.

Tucker has pointed out that:

> [O]utside of severance, virtually the only 'protective' device against prejudice available to trial judges is the summing up. The glaring problem here is that it is simply impossible to assess whether the summing up has effectively overcome the adverse effect of the jury's hearing otherwise admissible, prejudicial evidence against an accused.[37]

Where offenders are tried with more than one offence in the same indictment or jointly tried the judge must identify for the jury the admissible evidence in relation to each offence or against each accused person and identify the evidence the jury cannot use. However, the High Court has accepted that there are occasions when a direction to the jury will be insufficient to overcome the prejudice to an accused person arising from joinder.[38]

It is necessary then, in looking at the question of reform, to consider whether juries are in fact incapable of understanding and giving effect to directions aimed at overcoming prejudice. Consideration should also be given to whether, taking into account the interests of both the accused and the community, it remains appropriate to allow the mere possibility of a failure to abide by such directions to determine whether charges will be jointly tried.

In *Demirok v The Queen*[39] Barwick CJ said:

> In the administration of the criminal law, it must be accepted until the contrary is demonstrated that the jury accept and faithfully apply the

> judge's direction. The law cannot be administered upon any other basis.

As Pidgeon J pointed out in *Ahmet and Shelford v The Queen* [40] 'It would be a reflection on the integrity of the jury to suggest that they would not take notice of these instructions.'

Certainly, the verdicts which are commonly returned by juries in complex cases involving multiple counts or multiple offenders are testament to the fact that juries can and do obey directions from the trial judge on the admissibility of evidence.

JOINDER OF ACCUSED

The *Criminal Code* provisions

Section 586 of the *Criminal Code* relevantly provides:

> (5) Any number of persons charged with committing or with procuring the commission of the same offence, although at different times, or of being accessories after the fact, to the same offence, although at different times, and any number of persons charged with receiving, although at different times, any property which has been obtained by means of a crime or misdemeanour, or by means of an act which, if it had been done in Western Australia, would be a crime or misdemeanour, and which is an offence under the laws in force in the place where it was done, or any part of any property so obtained, may be charged with substantive offences in the same indictment, and may be tried together, notwithstanding that the principal offender or the person who so obtained the property is not included in the same indictment, or is not amenable to justice.
>
> (7) Any number of persons charged with committing different or separate offences may be charged in the same indictment and tried together if the offences arise substantially out of the same or closely related facts.

Section 587 of the *Criminal Code* provides:

> A person who counsels or procures another person to commit an offence, or who aids another person in committing an offence, or who becomes an accessory after the fact to an offence, may be charged in the same indictment with the principal offender, and may be tried with him or separately, or may be indicted and tried separately, whether the principal offender has or has not been convicted, or is not amenable to justice.

These provisions have been in the *Criminal Code* since it was first enacted. Whilst section 586 has undergone minor changes, section 587 has never been amended. It is interesting to note that, unlike section 585 of the *Criminal Code*, there is no prohibition of the joinder of offenders.

Construction

As Franklyn J pointed out in *Rintel v The Queen* [41] section 586(7) constitutes the sole authority under the *Criminal Code* for charging separate persons with

different or separate offences in the one indictment and for their joint trial in respect of those charges.

Effect of misjoinder

Unlike the misjoinder of offences, the misjoinder of offenders is an irregularity which goes 'to the root of the trial and cannot be cured by the proviso to section 689(1) of the *Criminal Code*'.[42] The Court of Criminal Appeal has held that the miscarriage of justice arises because an unlawful joinder deprives the accused person of his or her right to a separate trial.[43] However, no right to a separate trial is actually conferred upon an accused person by the *Criminal Code*. If any right is conferred by the *Criminal Code* then this would be a right not to face improperly joined charges.

Permissible joinder

In *R v Russell, Szann and Patterson (No 2)*[44] the Full Court of the Supreme Court of Queensland in considering section 568 (6) of the *Criminal Code* (Qld), similar in terms to section 586 (7) of the *Criminal Code*, stated that:

> The facts out of which an offence arises within the meaning of the subsection are the facts which the Crown must prove to obtain a conviction — ie, the facta probanda—and do not include all the evidence admissible to provide the offence.[45]

The Court held further that:

> The subsection in term permits the joinder of different charges arising out of different (although closely related) facts. Whether one set of facts is closely related to another is simply a question of degree.[46]

In that particular case, the facts were related in time and place, in the nature of the crime, the identity of the victim and the circumstances in which the offence was allegedly committed.

Where the only connection between two co-accused is out of court statements made by one accused which are not admissible in evidence against the co-accused then the co-accuseds should not be tried together. This is because the offences do not arise substantially out of the same or closely related facts.[47]

Separate trials of joint offenders

Section 624 of the *Criminal Code* provides:

> When two or more persons are charged in the same indictment, whether with the same offence or with different offences, the court may at any time during the trial, on the application of any of the accused persons, direct that the trial of the accused persons or any of them shall be had separately from the trial of the other or others of them, and for that purpose may, if a jury has been sworn, discharge the jury from giving a verdict as to any of the accused persons.

The provision has been in the *Criminal Code* since it was enacted and has never been amended. However, it is interesting to note that Griffiths did not recommend the insertion of this provision.

An application for separate trials will usually be made prior to trial pursuant to the provisions of section 611A of the *Criminal Code*.

In *Webb and Hay v The Queen*[48] the High Court of Australia set out the position at common law. Toohey J (with whom Mason CJ and McHugh J agreed on this point) said:

> [W]hen accused are charged with committing a crime jointly, prima facie there should be a joint trial. There are administrative factors pointing in that direction but, more importantly, consideration by the same jury at the same trial is likely to avoid inconsistent verdicts, particularly when each accused tries to cast the blame on the other or others.

Section 624 of the *Criminal Code* does not specify the factors to which a court is to have regard in relation to the question as to whether an accused person should be granted a separate trial. However, in *Leaman v The Queen* Neasey J stated that:

> A basic question faced by a trial judge considering whether to order a separate trial, or an appellate court considering whether a miscarriage of justice has occurred because he did not, always is whether the prejudicial effect of the inadmissible evidence is (or was) capable of being adequately neutralised by appropriate instructions to the jury. That question will usually involve two further issues, namely:
>
> (1) Will an average jury be reasonably capable, as an intellectual exercise, of performing the task thus given them? and
>
> (2) Is the prejudice likely to be so great in the circumstances that it would not be reasonable to expect the jury to leave the prejudicial evidence out of account against a particular accused even though it is inadmissible against him? [49]

Where the case against the accused is otherwise strong and where both the trial judge and the prosecutor have warned the jury the Court of Criminal Appeal has held that no substantial miscarriage of justice arises.[50]

In *R v Berghella and Italiano,*[51] accused Berghella and Italiano had been jointly indicted for wilful murder. Italiano applied for a separate trial. The case against both accused rested heavily on the evidence of Lewis, a crown witness. There was considerable evidence from Lewis concerning the location and condition of the body of the deceased, as well as taped admissions by Berghella which were solely admissible against Berghella but which would have had an enormously prejudicial effect on Italiano's case. Walsh J held that the evidence was so prejudicial that the effect of it could not be reasonably neutralised by a direction to the jury. There was thus a significant chance that the jury would take the information into account in determining the credibility of Lewis's evidence against Italiano and a separate trial was ordered.[52]

In *R v Hobby* [53] the factors taken into account by Scott J in support of a joint trial included the need to avoid repetition of the evidence (particularly that of a Crown witness who had already pleaded guilty to wilful murder), the length of the trial, and the particular security measures required in the case in relation to the accused.

Arguments in favour of joint trials of offenders

The public interest clearly favours the joint trial of offenders.[54] In *R v Demirok* the Full Court of Victoria held that:

> The matters of public interest which must be considered in this case, and in all such cases, may be summarised as follows. In the first place, there is the question of the administrative matters of court time spent and public expense incurred if more than one trial is to be conducted. These matters will in many cases not be of very great weight, in others they may assume real significance. Secondly, it is against the interests of justice that there should be inconsistent verdicts, and those interests require that where the accounts of accused persons differ or conflict their differences should be resolved by the same jury at the same trial. Thirdly, and allied with the first two considerations, it has always been the policy of the law to reach finality as expeditiously as possible; and no system could function if it permitted the repeated retrial of the same issues except in situations where the concept of justice so required. Fourthly, the convenience of witnesses must be considered. The lot of a witness in a criminal trial is not a happy one, and unless for good reason witnesses should not be required to give evidence of the same events at a succession of trials.[55]

A joint trial of offenders also provides the jury with a more complete and coherent picture of the criminal activity in question. Arguably, the jury will be in a far better position to ascertain the truth of the matter if they are presented with as complete a picture as possible rather than a fragmented account.

If each offender has a different version of events or there are questions of blame then it is counterproductive to the ascertainment of the truth that each offender gets to put his story to a different jury. If the same jury hears each account then they are in a position to assess the relative credibility of each offender and the truth of their version of events.

The joinder of offenders may also prevent abuses of the criminal justice system. For example, joinder prevents one accused giving self-incriminating evidence at a co-accused's trial and then having the favour returned by his own trial.[56] If co-accused are tried separately, the offender who is tried last will benefit in that he will have heard the prosecution case and will be in a position to tailor his defence when he is tried. Joint trials prevent one offender benefiting from being tried last.

Any special security or other measures which are peculiar to a trial (such as perhaps interstate video link up or the flying out of witnesses to give evidence) are more conveniently facilitated at a joint trial.

Rationale for separate trials of offenders

The primary reason for an accused person seeking a separate trial is based on a desire to avoid being prejudiced by evidence which arises during the course of the trial in circumstances where the evidence relates to the co-accused.[57] For example:

(a) an accused does not want to be tainted by evidence, which is inadmissible as against him, but admissible against his co-accused.

(b) the co-accused may have exclusive or antagonistic defences;[58]

(c) an accused may refuse to offer exculpatory evidence in relation to another co-accused if they are jointly tried; or

(d) the criminal record of one accused may be admitted into evidence and taint the co- accused.

There is often also the perception that an accused who faces a significantly weaker prosecution case than his co-accused will want to have a separate trial to avoid any 'fallout' from the stronger case against his co-accused. Alternatively, if there is a strong Crown case an offender who is not the first to be tried may plead guilty. Other reasons such as publicity, and the expense of a longer trial where more than one co-accused is involved may also be relevant considerations. In Western Australia the central question in each case revolves around whether the direction to the jury can overcome any prejudice to the accused arising from the joinder.

The factors which are said to favour the separate trials of offenders appear to place the offender's interests ahead of the public interest without real justification. In *Attorney-General's Reference No 1 of 1977,* Jones J considered the public interest in relation to the joinder of accused and commented that:

> Nothing could be more inimical to that interest than the exclusion of evidence that is relevant and admissible and perhaps of great weight against one accused, solely because of solicitude — as I think, an over-tender solicitude — or the interests of his co-accused. In my opinion when two or more accused are properly tried together — ie, in circumstances where there is no indication for separate trials — each of them can have no valid claim to any further protection than that the judge should direct the jury that it should have regard only to evidence admissible against him, and the judge can and should be relied upon to do that.[59]

Separate trials may promote economy and convenience by preventing long and complex criminal trials involving large numbers of offenders. Separate trials may also reduce the amount of evidence which has to be led against a particular accused, reduce cross-examination and addresses by multiple counsel and avoid tying up juries for long periods of time.[60] However, separate trials may also equal the length of one joint trial so that the net effect is the same in each case.

APPEALING DECISIONS ON SEPARATE TRIAL APPLICATIONS

Where application is made for separate trials for separate accused or separate trials for separate counts, that application is heard prior to trial under section 611A of the *Criminal Code*. The decision cannot be appealed from until the trial has concluded.

Background

In *Carter v The Queen* [61] the trial judge refused to make an order allowing the appellant a separate trial. The Full Court, following *Connell v The Queen*, refused to accept an appeal against that order on the grounds that it had no jurisdiction to do so and that the appeal was incompetent on that basis.[62] The Court held that the only rights of appeal from a decision made in the course of criminal proceedings are appeals to the Full Court sitting as the Court of Criminal Appeal, following a conviction, appeals by the prosecution under section 688(2), and appeals by persons who are charged but acquitted on the grounds of unsoundness of mind. The Court was firmly and unequivocally of the view that there is no right of appeal on interlocutory matters.

The question which arises is whether there should be a right of appeal from a decision of a court under section 585 or section 624 of the *Criminal Code* in relation to separate trials. There are two interests to be considered. These are: the desirability of not fragmenting the criminal process and the right of an accused to a fair trial.

Arguments in support of a right of appeal from a decision not to order a separate trials

The primary argument in support of allowing a right of appeal is that there would seem to be little justification in allowing a civil litigant the right of appeal on an interlocutory ruling but not allowing an accused person the same right.

At the present time, the accused person must wait until conviction before taking the matter on appeal and, if successful, faces the prospect of a retrial and further expense. A successful appeal at an interlocutory stage would also avoid a retrial of the matter in many cases.

Arguments in support of maintaining the status quo

The main argument against a right of appeal against interlocutory rulings in criminal matters is that such appeals result in an undesirable fragmenting of the criminal process leading to delays in the trials of accused persons.

In addition, the right of appeal at the interlocutory stage raises the undesirable prospect of two appeals leading to increased cost and imposition on judicial resources. The first appeal, against the decision on an application for a separate trial, takes place before the trial begins and the second appeal against conviction or sentence takes place after the trial.

SUGGESTED REFORMS

It is central to the administration of justice that criminal trials take place with due expedition at reasonable cost and with unnecessary inroads into judicial

resources. [63] However, these aims are not to be attained at the expense of a fair trial. It has already been observed that the requirement to have a fair trial comprehends not only fairness to the accused but also fairness to the state.[64] Ultimately, the way in which the interests of the accused and the state are to be balanced, and the determination of what constitutes a fair trial, is a matter for the courts and for the legislature.

The rules of joinder may be examined from two directions. The first involves looking at whether the rules of joinder themselves require amendment. The second involves looking at whether the procedures put in place to facilitate joinder require amendment.

Reforming the rules of joinder

The rules of evidence were designed to afford an accused person a fair trial by ensuring that inadmissible evidence is not placed before a jury. The rules of joinder were designed to promote cost efficiency and expedition by permitting offences and offences to be joined to reduce the number of trials which take place. This obviously leads to conflict.[65]

The question of reform of the rules of joinder in Queensland has recently been examined:

> The beneficial effects of joinder — primarily the expeditious administration of justice — will not be willingly given up in any reform process. Solutions may exist that do not necessarily require relinquishing the advantages of joinder. For example, in the United States the use of multiple juries to hear various counts has been successfully utilised. Additionally, consideration has been given to separating the summings up in relation to separate counts or counts against separate accused and then inviting the jury to retire to consider or at least form a preliminary view on its verdict in relation to a particular accused or count.
>
> It is submitted that any reform in this area should seek to eliminate the conflict between the rules of evidence and the law surrounding joinder.[66]

The first proposal is therefore that the rules of joinder be reconciled with the rules of evidence as follows.

Offences may only be joined if:

- the evidence relating to one count is admissible on the other counts as part of the *res gestae*;[67]
- the evidence relating to one count is admissible as similar fact evidence on the other counts (that is, the probative value of the evidence outweighs its prejudicial effect);[68] and
- the evidence relating to all offences is admissible to prove guilty passion in cases involving multiple offences of a sexual nature against one complainant.[69]

The chief problem with this proposal is that it relates only to the joinder of offences. If the joinder of offenders were to be reconciled with the rules of evidence then it is unlikely that joinder would ever be permitted.

A proposal for reform based on reconciling the rules of evidence with the laws relating to joinder would also place a heavy burden on the prosecution in that they would be required to justify joinder before a court based on the evidence then in existence.[70]

However, if there are strict rules relating to the joinder of offences based on the rules of evidence then the only question which would arise, and which could be determined prior to the trial, is whether the joinder was proper.

Reforming the procedures relating to joinder of offences

There are three options for reform. These are:

(a) Amendment section 585 of the *Criminal Code* to:
  (i) make cosmetic changes to the rules of joinder of offences;
  (ii) set out the criteria to which judges must have regard in exercising their discretion to order a separate trial; and
  (iii) insert a provision to deal with similar fact evidence and collusion;

(b) Remove the discretion of the court to direct election or separate trials under section 585 of the *Criminal Code* and include of a requirement for trial by judge alone in relation to offences of a sexual nature; and

(c) Remove the discretion of the Court to order election or separate trails under section 585 of the *Criminal Code* and insert a provision which requires the Court to order trial by Judge alone where:
  (i) the joinder of offences is found to create impermissible prejudice to the accused; or
  (ii) the joinder of offences is likely to lead to a long or complex trial.

Options (b) and (c) are alternative proposals to options (a) (ii) and (iii).

(a) Amendment of section 585 of the *Criminal Code*

(i) Cosmetic changes

In *The Criminal Code: A General Review*, Murray J recommended that several cosmetic changes be made to section 585 of the *Criminal Code*. These recommendations were that:

- the existing paragraphs of section 585 should be created subsections and the second paragraph should be converted from a proviso to a separate

subsection by simply deleting the words 'Provided that' and having the subsection start with the word 'When';

- the words 'statements of the offences may be made' in paragraph 3 should be amended to 'counts may be framed'; and
- the word 'But' in paragraph 4 should be deleted so that the newly created subsection begins with the word 'if '.[71]

These recommendations with respect to section 585 are still appropriate today.

(ii) Insert criteria governing the exercise of discretion to order a separate trial

Another option for reform is to amend section 585 of the *Criminal Code* to set out the criteria to which the Court is to have regard when exercising its discretion in relation to an application for a separate trial.

The following are suggested criteria:

- the cost of ordering separate trials having regard to the likely length of separate trials, security arrangements, and witness arrangements;
- the delay which would arise from ordering separate trials;
- inconvenience to witnesses; and
- whether there is a risk that prejudice to the accused which might arise cannot be overcome by a direction to the jury.

These factors are designed to strike a balance between the interests of the accused and the interests of the state.

(iii) Insert a provision to deal with concoction of similar fact evidence

The High Court (per Mason CJ, Wilson and Gaudron JJ) in *Hoch*[72] said:

> [S]imilar fact evidence serves two functions. Its first function is, as circumstantial evidence, to corroborate or confirm the veracity of the evidence given by other complainants. Its second function is to serve as circumstantial evidence of the happening of the events in issue. In cases where there is a possibility of joint concoction there is another rational view of the evidence. That rational view — viz joint concoction — is inconsistent both with the guilt of the accused person and with the improbability of the complainants having concocted similar lies. It thus destroys the probative value of the evidence which is a condition precedent to its admissibility.

There are two alternative proposals for reform. The first proposal is that section 585 of the *Criminal Code* be amended to abolish the effect of the decision in *Hoch* so that the Court, in exercising the discretion to order separate trials, must not take into account that similar fact evidence may have been concocted. In Queensland section 597A(1AA) was inserted into the *Criminal Code* (Qld) to abolish the effect of the decision in *Hoch*.[73] Section 597A (1AA) provides that:

> [W]hen considering potential prejudice, embarrassment or other reason for ordering separate trials under this provision in relation to alleged offences of a sexual nature, the court must not have regard to the possibility that similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, may be the result of collusion or suggestion.[74]

The other proposal for reform is the insertion of a provision in section 585 of the *Criminal Code* which provides a mechanism for dealing with contested allegations of concoction of similar fact evidence. This mechanism should be utilised at the time that an application for separate trials is made to prevent any disruption to the trial process.

For example, a *voir dire* could be held to determine the question where necessary. This was the recommended approach of Gaudron J in *BRS v The Queen* [75] where her Honour stated:

> It is axiomatic that, in cases such as the present, where evidence of conduct on other occasions is tendered in proof of the objective improbability of concoction, that evidence is not admissible unless the possibility of concoction has been excluded. That possibility must be explored before the evidence is admitted — by means of a voir dire if necessary.

If the Court holds that there is a possibility that similar fact evidence has been concocted then separate trials should be ordered.

(b) Remove the Court's discretion to direct election or separate trials under section 585 of the *Criminal Code* in relation to offences of a sexual nature and require trial by judge alone

The proposal is that where an accused person is charged with multiple offences in one indictment, and one or more of those offences are offences of a sexual nature, then those offences should be tried by a judge alone pursuant to the provisions of Chapter LXIVA of the *Criminal Code* where the risk of impermissible prejudice cannot be overcome by a direction to the jury. The High Court has repeatedly warned of the impermissible risk of prejudice arising in cases involving sexual offences. The rationale behind this proposal is that removal of the jury from the trial process will remove the potential for impermissible prejudice which results in an unfair trial. While the accused loses his existing right to trial by jury, it does not follow that the resulting trial is 'unfair'. The impact on an accused of the removal of this right must be balanced against the advantages to the community of the reduction in time, cost, use of resources, inconvenience and trauma to witnesses and the chance of inconsistent verdicts.

In addition, this proposal seeks to protect complainants in sexual offence

cases from having to repeatedly provide evidence against an accused person at separate trials.

At the present time, where an accused person is charged with two or more offences, an election for trial by judge alone does not have effect unless it is made in respect of both or all of the offences: section 651A(7) of the *Criminal Code*. Accordingly, section 651A(7) would need to be deleted and section 651A of the *Criminal Code* amended to provide that where an accused person is charged with two or more offences, and one or more of those offences is of a sexual nature, that person is to be tried by a judge alone where a risk of impermissible prejudice arises.

(c) Remove the Court's discretion to direct election or order separate trials and require trial by judge alone where there is a finding of prejudice to the accused or the likelihood of long or complex trial

The proposal is that where an accused person is charged with multiple offences in one indictment and the court finds that:

(i) the accused person is prejudiced by such joinder in circumstances where the prejudice to the accused cannot be overcome by a direction to the jury; or

(ii) the joinder of the offences is likely to lead to a long or complex trial;

then those offences should be tried by a judge alone pursuant to the provisions of Chapter LXIVA of the *Criminal Code*.

The rationale behind ordering separate trials for offences is that a direction to a jury by a court could not overcome the prejudice to the accused arising by reason of the joinder, mainly because evidence which would be led in relation to one count would not be admissible on the other counts.

In addition, the longer and more complex a criminal trial the greater the likelihood that the jury will become lost in, or be confused by, the evidence. If the jury is taken out of the equation and replaced by a judge alone, then there is no unfairness to the accused. This proposal accepts that in certain cases long and complex trials are beyond the endurance of juries.

It is envisaged that the court would determine the application in relation to prejudice or the likelihood of a long or complex trial pursuant to the provisions of section 611A of the *Criminal Code*.

As with proposal (b), section 651A(7) would need to be deleted and section 651A of the *Criminal Code* amended to provide that where an accused person is charged with two or more offences that person is to be tried by a judge alone if the court makes the relevant finding in relation to prejudice or longevity or complexity.

Reforming the procedures relating to joinder of offenders

There are two options for reform. These are:

(a) Amend section 624 of the *Criminal Code* to set out the criteria to which judges must have regard in exercising their discretion to order separate trials; or

(b) Remove the court's discretion to order separate trials under section 624 of the *Criminal Code* and insert a provision which requires the court to order trial by judge alone or trial by multiple juries where:
   (i) the joinder of offences is found to create prejudice to the accused; or
   (ii) the joinder of offenders is likely to lead to a long or complex trial.

Option (b) is an alternative proposal to option (a).

(a) Insert criteria for the exercise of discretion to order a separate trial

The first option for reform is to amend section 624 of the *Criminal Code* to set out the criteria to which the court is to have regard when exercising its discretion in relation to an application for a separate trial.

The following are suggested criteria:

- the cost of ordering separate trials having regard to the likely length of separate trials, security arrangements, witness arrangements;
- the delay which would arise from ordering separate trials;
- inconvenience to witnesses;
- where there is a risk that prejudice to the accused which might arise cannot be overcome by a direction to the jury; and
- the desirability of avoiding inconsistent verdicts.

These factors are designed to strike a balance between the interests of the co-accused and the interests of the State.

(b) Remove the Court's discretion to order separate trials and require trial by judge alone or multiple juries where there is a finding of prejudice to the accused or the likelihood of a long and complex trial

The first part of the proposal is that where an accused person is jointly charged with an offence or offences, and the court finds that the accused person is prejudiced by such joinder in circumstances where the prejudice to the accused cannot be overcome by a direction to the jury then those offenders should be jointly tried by a judge alone pursuant to the provisions of Chapter LXIVA of the *Criminal Code* or by multiple juries.

The second part of the proposal is that where an accused person is jointly charged with an offence or offences, and the court finds that the joinder of

the offenders is likely to lead to a long or complex trial, then those offenders should be jointly tried by a judge alone pursuant to the provisions of Chapter LXIVA of the *Criminal Code*

It is envisaged that the court would determine the application in relation to prejudice or the likelihood of a long or complex trial pursuant to the provisions of section 611A of the *Criminal Code*.

At the present time, where two or more accused persons are jointly charged, an election for trial by judge alone by one accused person does not have effect unless each other accused person also makes an election: section 651A (6) of the *Criminal Code*. Accordingly, section 651A (6) would need to be deleted and section 651A of the *Criminal Code* amended to provide that where an accused person is jointly charged with an offence or offences, that person is to be tried by a judge alone or by multiple juries where the risk of impermissible prejudice cannot be overcome by a direction to the jury.

Appeals against joinder

The proposal for multiple juries is that where co-offenders are jointly charged separate juries at one trial determine the fate of each of the co-accused.[76] This proposal would mean that each jury would only hear the evidence which is admissible against the relevant accused. This proposal has obvious limitations in terms of space in the courtroom and would only apply where there are two co-accused.

The rationale behind ordering separate trials for offenders is that a direction to a jury by a court could not overcome the prejudice to the accused arising by reason of the joinder, mainly because evidence which would be led in relation to one offender would not be admissible against his co-accused. In addition, the longer and more complex a criminal trial the greater the likelihood that the jury will be become lost in, or confused by, the evidence in relation to each offender. If the jury is taken out of the equation and replaced by a judge alone, or if there are multiple juries to decide the case against the accused only on the basis of evidence admissible against that accused and not his co-accused, then there is no unfairness to the accused.

The proposal is that section 611A of the *Criminal Code* should be amended to specifically allow for appeals in cases where a ruling on separate trials under section 585 or section 624 of the *Criminal Code* has been made. The proposal is that:

(i) the right to appeal would be open to the Crown as well as the accused;
(ii) the right to appeal should be to the Court of Criminal Appeal; and
(iii) strict time limits should apply so as to prevent any disruption to the trial process — for example, 21 days from the making of the order.

This proposal would only operate if the discretion to order separate trials is retained.

ENDNOTES

1 *Sutton v The Queen* (1984) 152 CLR 528, 542.
2 [1979] WAR 45, 51
3 See also section 43 of the *Justices Act 1902* which is almost identical in terms.
4 See minor amendments in No 20/54 and No 20/82.
5 Griffiths noted that 'Under the present law charges of any number of felonies (not including murder) or of any number of misdemeanours may be joined in the same indictment. But the practice is as set out in the text.' *Griffiths Criminal Code*, 267.
6 *H v The Queen*, (Unreported, CCA, Supreme Court of Western Australia, Library No. 930275 19 May 1993) 15; *Healy v The Queen* (1995) 15 WAR 104, 110.
7 *Lancaster v The Queen* [1989] WAR 83, 88; *Kangatheran v The Queen*, (Unreported, CCA, Supreme Court of Western Australia, Library No 920174, 3 March 1992; *H v The Queen*(Unreported, CCA, Supreme Court of Western Australia, Library No 930275, Pidgeon, Seaman, Murray JJ, 19 May 1993) 15.
8 *De Jesus v The Queen* (1987) 61 ALJR 1, 2 (Gibbs CJ)
9 *Packett v The King* (1937) 58 CLR 190, 207; *Sutton v The Queen* (1984) 152 CLR 540, 540-541.
10 *Lancaster v The Queen* [1989] WAR 83, 86.
11 Ibid 92.
12 (1984) 152 CLR 528.
13 (1988) 165 CLR 292.
14 In *Hamilton v The Queen*, (Unreported, CCA, Supreme Court of Western Australia, No 970082, Malcolm CJ, Wallwork and White JJ, 4 March 1997) the appellant had been charged with sexual offences against two complainants. The application to separate the counts was dismissed at trial and the Appellant was convicted on a number of counts. He was however also acquitted of a number of counts. The two complainants had complained of substantially the same offence in similar circumstances. The Court had to decide whether the offences were similar enough and of sufficient probative value to be admitted in as similar fact evidence. The Court held that as there was no evidence of concoction or opportunity for concoction between the two complainants the evidence could be heard in the same trial and could be admitted on the basis of similar fact evidence. If the evidence was explicable on the basis of concoction then the trials would have to have been split and the evidence only given in the counts against each complainant.
15 (Unreported, Supreme Court of Western Australia, Library No 940504, Seaman J 12 September 1994).
16 Ibid.
17 *Healy v The Queen* (1995) 15 WAR 104.
18 Ibid.
19 *Lancaster v The Queen* [1989] WAR 83, 87.
20 (Unreported, CCA, Supreme Court of Western Australia, Library No. 930275 A-C, Pidgeon, Franklyn and Wallwork JJ 19 May 1993).
21 Ibid 3 and 15-16.
22 [1989] WAR 83
23 Ibid 86-87.
24 *R v Correia* (1996) 15 WAR 95, 98.
25 *Lancaster v The Queen* [1989] WAR 83, 88-89.
26 *Sutton v The Queen* (1984) 152 CLR 542, 543.
27 Ibid 542.
28 *Hoch v The Queen* (1988) 165 CLR 292, 298; *De Jesus v The Queen* (1986) 61 ALJR 1, 3.
29 Above n 8.
30 (1995) 15 WAR 95.
31 *Healy v The Queen* above n 17: the appellant was indicted on two counts (attempting to obtain money by fraud and attempting to pervert the course of justice). The two charges were based on exactly the same evidence, although the acts done and the words said were claimed to have a different colour in determining each of the elements required in each of the two offences.
32 Above n 7.
33 [1962] Qd R 49, 82.
34 *Sutton v The Queen*, above n 26.
35 Ibid 545.
36 J Farrin, 'Rethinking Criminal Joinder: An Analysis of the Empirical Research and its Implications for Justice' (1989) 52 *Law and Contemporary Problems* 325, 327.
37 P Tucker, 'Joinder of Criminal Counts in Queensland — Principles, Policy and Conflict' (1998) 17 *Australian Bar Review* 239, 253.
38 *R v Darby* (1982) 148 CLR 668; *De Jesus v The Queen,* above n 8; *Sutton v The Queen* (1984) above n 34; *Hoch v The Queen* above n 28.
39 (1977) 137 CLR 20, 22
40 (Unreported, CCA, Supreme Court of Western Australia Library No 940220A-C, Pidgeon, Wallwork and Scott JJ, 29 April 1994) 6.
41 [1986] WAR 175, 180.
42 *Lancaster v The Queen* above n 25, 88.

43 *Rintel v The Queen*, above n 41.
44 [1965] 2 Qd R 334.
45 Ibid 337; This statement was approved by the Court of Criminal Appeal in *Rintel v The Queen* above n 43, 180-181.
46 *Russell, Szann and Patterson*, above n 44, 337. This statement was subsequently approved by the High Court in *Mackay v The Queen* (1977) 136 CLR 465, 469.
47 *Rintel* v *The Queen* above n 43, 176, 180-182. The appellant had been charged with possession of heroin with intent to sell or supply it to another. A co-accused was charged that on the same day and at the same place he attempted to obtain heroin with intent to sell or supply it to another. However, the appellant was arrested before there was any contact with his co-accused. The only connection between the appellant and his co-accused was out of court statements made by the co-accused which were inadmissible in evidence against the appellant. The Court of Criminal Appeal held that the two co-accused should not have been jointly tried.
48 (1994) 122 ALR 41, 76.
49 (1987) 28 A Crim R 104 108-109
50 *Seel v The Queen*, (Unreported, CCA, Supreme Court of Western Australia, Library No 960199, Pidgeon, Wallwork and Murray JJ, 12 April 1996). In this case the trial judge refused to order separate trials. The evidence which the accused claimed gave rise to the need for separate trials, was a number of out of court statements made by the co-accused which were highly damaging to Seel's case but which would not have been admissible at a separate trial. The accused was convicted of wilful murder at the joint trial. On appeal, the refusal to order separate trials was upheld. The principal point taken on appeal was that the statements by the co-accused were so prejudicial that even a strong warning from the trial judge was insufficient to overcome the prejudice. The Court of Criminal Appeal, however, relied on the adequacy of the warning given by the trial judge and the otherwise strong case against the accused and held no substantial miscarriage of justice had occurred. The Court held that the Crown Prosecutor had gone out of his way to fortify the judge's warning to the jury, and that as the case against the appellant was otherwise very strong there was no need for the jury to delve into inadmissible evidence to found a conviction.
51 (Unreported, Supreme Court of Western Australia, Library No. 940313, 3 June 1994).
52 Berghella was subsequently convicted of wilful murder, but Italiano was acquitted at the separate trial.
53 (Unreported, Supreme Court of Western Australia, Library No 980085, Scott J , 25 February 1998). This case is currently the subject of a reserved decision in the Court of Criminal Appeal. In this case an application to split the trial was brought on the basis of evidence provided to the police by the co-accused, which was highly prejudicial to Hobby. This evidence of the co-accused was in both video and written form, and heavily implicated Hobby in the arranging of a contract murder. The evidence would not have been admissible at a separate trial. Scott J held that the jury would be able to separate the evidence in their minds and would not take it into account when assessing the guilt of the accused once they had been properly directed.
54 D Just, 'Joinder of trial of accused persons and its resistance' (1988) *Law Institute Journal* 948, 950.
55 [1976] VR 244, 254.
56 Tucker, above n 37; 245.
57 Above n 48.
58 M Weinberg, 'Joint Trials-The Problem of Reciprocal Blame' (1984) 8 *Criminal Law Journal* 197-216.
59 Above n 2, 52.
60 M D Finlay, 'Some Problems in Joint Criminal Trials' (1991) 15 *Criminal Law Journal* 239; B Judge, 'No Easy Solution to the Problem of Criminal Mega-trials' (1990) 66 *Notre Dame Law Review* 211.
61 (1994) 74 A Crim R 300.
62 (Unreported, Supreme Court of Western Australia, Library No 930514 A-C; Malcolm J, Rowland and Franklyn JJ, 21 September 1993).
63 C Yates, 'How Many Counts to an Indictment?' [1976] *Criminal Law Review* 428,432.
64 *Attorney-General's Reference No. 1 of 1977,* above n 2.
65 Tucker, above n 37; 254.
66 Ibid 259.
67 Ibid 259.
68 Ibid 259-260.
69 F McGuire, 'Child Sexual Offences—Joinder of Charges and Similar Facts' (1995) 15 *The Queensland Lawyer* 181, 185-186.
70 Tucker, above n 37, 261
71 M Murray, *The Criminal Code A General Review Volume II*, 371-372.
72 *Hoch v The Queen*, above n 28.
73 See also *Crimes Act* (Vic) s 398A discussed in HNG Austin, 'Propensity For Change: the *Crimes (Amendment) Act 1997* (Vic), Similar Facts and Separate Trials (1999) 23 *Criminal Law Journal* 26.
74 Tucker suggests that s 597A (1AA) does not obviate the essential test of *Hoch* because the probative value of the evidence must still outweigh its prejudicial effect: above n 37, 246
75 (1997) 71 ALJR 1512, 1525.
76 JD Peelen, 'Joinder and Severance' [1997] 85 *Georgetown Law Journal* 1054.

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BRS v The Queen (1997) 71 ALJR 1512.
Carter (1994) 74 A Crim R 300.
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Demirok v The Queen (1977) 137 CLR 20.
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Jumeaux v The Queen (Unreported, Supreme Court of Western Australia, Library No 940504, Seaman J, 12 September 1994).
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R v Darby (1982) 148 CLR 668.
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R v Hobby (Unreported,Supreme Court of Western Australia, Library No 980085, Scott J, 25 February 1998).
R v Russell, Szann and Patterson (No 2) [1965] 2 Qd R 334.
R v Witham [1962] Qd R 49, 82.
Rintel v The Queen [1986] WAR 175.
Seel v The Queen (Unreported, CCA Supreme Court of Western Australia, Library No 960199, Pidgeon, Wallwork and Murray JJ, 12 April 1996).
Sutton v The Queen (1984) 152 CLR 528.
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4.5

Pre-trial and Trial Practice in the Courts of Petty Sessions

INTRODUCTION

The Courts of Petty Sessions are in no different a position than the other courts in Western Australia. They are thought to cost too much and take too long to get results.

The vast majority of criminal cases are determined in the Courts of Petty Sessions. In 1995-96 there were 80 169 charges heard resulting in 76 818 convictions against 31 286 individuals.[1] As at November 1996, it was noted that waiting times (for trial) in the Perth Court of Petty Sessions had increased from five weeks to 17 weeks since 1994.[2] It is reasonable to assume that these figures have continued to grow since 1995-96, although there is a dearth of publicly available information about the activities of the Courts of Petty Sessions in Western Australia.[3]

Whatever the empirical studies show, it is clear that the public perception of the court system in Australia generally is poor. The recent Australian Institute of Judicial Administration Incorporated report *Courts and the Public* quoted from a Queensland survey as follows:

> Across gender, age, household income group and type of dispute, an overwhelming proportion of respondents expressed dissatisfaction with the legal system. Three quarters agreed it was 'out of date', 'easy to twist', 'slow' and 'too complicated'. Only a quarter agreed it was 'fair to people like me' and 'something to be proud of'. Two-thirds disagreed with the proposition that the present legal system is 'easy to understand'.[4]

The need for reform

In its 1984 discussion paper on the Courts of Petty Sessions, the Law Reform Commission of Western Australia concluded that:-

> 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.[5]

The reasons for the need for a review are not hard to find. The existing *Justices Act* is the result of the consolidation in 1902 of a number of earlier Acts, enacted in Western Australia in 1850. These in turn were based on three English statutes of 1848, collectively known as *Jervis's Acts*. *Jervis's Acts*, and the reforms which they constituted, were seen as necessary 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'.[6]

The need for a review now is based on the same reasons as in 1848: the increase in the number of cases being dealt with, and the time it takes to deal with them.

Scope of this sub-section

Pre-trial practice includes the way in which criminal proceedings are instituted. It also includes the process of pleading guilty and being sentenced.

Trial practice goes beyond the trial itself in most cases. It includes the sentencing process, where there has been a finding of guilty. Sentencing itself is not within the scope of this sub-section, only the procedure involved in the sentencing process.

This sub-section attempts to identify the main reasons for expense, delay and inconvenience. Options for reform are suggested. Information technology should be used wherever possible as the means of carrying out the reforms. As noted in *Courts and the Public*:

> The potential of computers as judicial support systems is only being realised. Judgements from most superior courts in Australia are now available on-line (although, inexplicably, there are still no national standards for the storage and citation of electronic judgements) but other information can also be held on databases which might improve the consistency of certain kinds of decisions (such as sentencing patterns or assessment of damages in personal injuries cases) or the speed with which the decisions can be made.[7]

It is beyond the scope of this sub-section to recommend drafting changes. Many of the provisions of the *Justices Act* are in exactly the same terms as they were in 1848. The need for redrafting is self-evident.

THE MEANS OF INSTITUTING CRIMINAL PROCEEDINGS

The present position

Proceedings before a Court of Petty Sessions must be commenced by complaint.[8] The form of the complaint is prescribed.[9] No other type of form has been prescribed since the inception of the *Justices Act* although there is power to do so. The complaint form is lodged or filed at the court, and administrative arrangements are made to place it before a magistrate. In cases where the complaint form has been merged with a summons to appear, the magistrate has the complaint placed before him on the date to which the defendant has been summonsed. In cases in which the defendant has been arrested (and either released on bail or kept in custody), the defendant's bail or custody arrangements are pre-arranged to coincide with the date on which the complaint will be placed before the magistrate.

In either case, when the defendant appears the complaint form is read to him. It is the process of reading the complaint form which constitutes 'charging' the defendant.[10] In later provisions, the *Justices Act* goes on to refer to a 'charge'[11] and the term appears to become synonymous with the term 'complaint'.

The Court of Petty Sessions procedure begins with the defendant being charged. It comes to end, in a summary case, with either a conviction and sentence or a dismissal.[12] In an indictable case the defendant is either committed to the superior court,[13] or discharged.[14]

Deficiencies in the present system

The form used to initiate proceedings, namely the complaint form, is outmoded. This is equally true of the complaint form standing alone, and the complaint form merged with the summons form.[15] The format of the complaint form is difficult to understand, particularly for the unrepresented defendant, and is not readily adaptable to electronic dissemination.

Details of each appearance are recorded on the complaint form by the magistrate. These handwritten notations, which are often illegible or at least difficult to decipher, are the court's primary record of any proceeding.

Difficulties also result from the present practice whereby the first notification a defendant has of the exact terms of the charge for which he has been arrested is when it is read by the magistrate at the first appearance. Moreover the defendant is not able to obtain a copy of the complaint at that time as the only available copy is with the magistrate. In these circumstances any request for an adjournment must inevitably be granted. Even where a defendant wishes to plead guilty it is unlikely he will be advised to do so until such time as his legal representative is aware of the precise nature of the charge.

Options for reform

The initiating form could be redrafted, so as to be in a more modern form. The *Young Offenders Act* provides an example of a form which is drafted in

relatively simple terms, and satisfies the requirement of informing the defendant of what he or she is charged with.[16]

The largest number of charges before the courts are laid by police for criminal and traffic offences. The present procedure requires police, having arrested a defendant, to take him or cause him to be taken before the court as soon as practicable or release him on bail.[17] That requirement operates against the police having time to investigate all possible charges, decide what to charge a defendant with, and to carry out any formal procedure of charging him. There is no requirement placed on police to charge the defendant or tell him what he is to be charged with. There is no requirement to provide him with copies of any complaint forms. The complaint forms may not even be made out at the time the defendant is released on bail. Until change is implemented, the Courts of Petty Sessions will retain the responsibility of telling the defendant what he is charged with ('charging' him) and arranging for him to be provided with copies of the complaint forms.

What may be needed is that police be obliged to carry out a formal charging procedure before putting the person into court. Provision could be made for the defendant to be given a copy of the complaint form before he appears in court. The Law Reform Commission of Western Australia recommended in 1984 that:

> 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. 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 ..., 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 he knows what he is alleged to have done and when he is alleged to have done it.[18]

The option of imposing the obligation on police to charge a person and provide him with copies of the charges in written form would require that extra resources be provided to the Police Service. Presumably that cost could be offset by the savings involved in taking that responsibility away from the Courts. There should also be a cost recovery in fewer adjournments being necessary.

At this early stage of the procedure, maximum benefit can be obtained from the use of information technology. By way of example, the Department of Justice, Victoria, proposes the establishment of a Justice Information Exchange in that state:

> Agencies will be required to implement information systems that support the new criminal justice processes and collect the information

> required. They will need to pass this information to the Justice Information Exchange as soon as possible. The Justice Information Exchange will then notify all relevant parties of the availability of this new information. This new way of operating represents a marked departure from current practices. Instead of having to ask someone to send a document, people will be automatically notified that a document is available and be able to access it immediately.
>
> The Justice Information Exchange will provide a secure managing capability between parties. This will reduce reliance upon other more manual means of communication such as the post, telephone and fax.[19]

It is suggested that a similar Information Exchange system be provided for the in Courts of Petty Sessions in Western Australia. The first document lodged would be the complaint form or other initiating document. The immediate benefit would be that the defendant and his counsel would have access to that information on or before the first appearance in court. The plea could be made earlier in the process than at present, resulting in fewer applications to adjourn.

The establishment of a Justice Information Exchange might be an alternative to a requirement for Police to carry out the charging procedure and provide copies of the charges. If both options were implemented together however, it is submitted that the ideal result would be achieved of informing the accused at the earliest stage of what is alleged against him, as well speeding up the process at the first appearance in court.

Proposal 1

(a) The Court of Petty Sessions' initiating document should be redrafted.

(b) There should be an obligation imposed upon police, in cases of arrest, requiring a formal reading of a charge and providing copies of the initiating form.

(c) There should be a Justice Information Exchange providing the facilities for electronic exchange of information.

LATE PLEAS OF GUILTY

The present position

Where a defendant who pleads guilty does not do so early in the process, two problems arise. Firstly, each adjournment prior to the plea of guilty necessarily creates delay and expense, if only administratively. Secondly, a plea of guilty as late as the date set for hearing creates wasted judicial time, expense and inconvenience to witnesses.

It has been noted that a plea of guilty for a less serious matter can require only five minutes of court time.[20] However, far greater time is taken getting

to that stage if the plea is not entered early. In the absence of Western Australian statistics, other states serve as a useful guide. In Victoria, it has been found that approximately 40 per cent of all cases in the Magistrates' Courts are adjourned at least once, of which 12 per cent are adjourned three times or more. On average, each adjournment adds 40 days to the length of a case.[21]

In Western Australia, statistics show that of matters listed for trial only 45 per cent proceeded on the day set down. Nearly 20 per cent of defendants listed for trial changed their plea to one of guilty on the day. Nearly 25 per cent of the trials were adjourned.[22]

The defendant who ultimately pleads guilty, although late in the process, is subject to the same interlocutory procedures as the defendant who maintains a plea of not guilty throughout. He goes to a pre-trial hearing date (proposed) and to a hearing date. He slows down the process for all those defendants who maintain their pleas of not guilty.

Reasons for the problem

There are at least four identifiable obstacles to a defendant entering an early guilty plea.

At present, the defendant who has been arrested (not summonsed) makes his first appearance in court without sufficient information to enable him to decide whether to plead guilty or not guilty. Prior to appearing in court, he is not entitled, or able, to be provided with copies of the complaints, the particulars (material facts) or his record. All of that basic information can be obtained, but only after one or more adjournments of the case.

After he has obtained the necessary information to make an informed decision, the defendant may wish to obtain legal advice. This is difficult to do using the Legal Aid duty lawyer system because of the limited time available. The duty lawyer system does not have enough resources to provide advice to every defendant who seeks it. Those lawyers acting as duty lawyer on the day may be reluctant to advise a defendant to plead guilty because of the danger of being criticised later. In *Norden v Miller*, Smith J said, in allowing an appeal against conviction on a drink driving charge:

> Duty counsel was in error when he advised the appellant that the chance of successfully defending the case would not be great. We all make errors of judgment, however, in the course of our careers. The consultation between the appellant and duty counsel was hurried and it is clear that there was not adequate opportunity to investigate the legal questions debated at some length before me. [23]

Similar observations were made in the South Australian case of *Halliwell v Kraft* in which Legoe J said:

> What does concern me is the fact that the appellant was represented by a solicitor whose instructions would appear, from what I have been told, to have been rather hastily obtained with the consequence that the court was not provided with sufficient details to adequately deal with the serious charges under consideration.[24]

A defendant who becomes aggrieved at his ultimate penalty has an easy target for complaint in the duty lawyer.

The defendant may be reluctant to plead guilty early because he may wish to have time to gather up materials (eg character references) to present to the court in mitigation of penalty. He may also wish to have time to put his affairs into order, if facing imprisonment. This is difficult to do when the present law with respect to bail operates against bail being granted after a plea of guilty and before sentence.[25]

Many defendants are charged with more than one offence. These defendants may be required to appear in different courts at different times. The only way to achieve the one sentencing date is to plead not guilty and constantly adjourn one or another of the cases in order that they may ultimately come together.

Options for reform

There could be changes made which would make it easier for a defendant to plead guilty early.

Information

Basic information should be made available to the defendant on or before the first appearance in court, including copies of the complaint forms, the statement of material facts and the record of convictions.

These three documents or set of documents are relied upon by the Court in sentencing the defendant. The Court has the complaint forms, the material facts are read out, and the record is handed up. The defendant ought to have access to those documents before he appears in order to obtain legal advice.

It would be important to limit the amount of information required to be given to the defendant in order to minimise the administration burden. Accordingly, it is not suggested that statements of prosecution witnesses or video records of interviews be provided at this early stage.

There are three possibilities as to where the obligation should be placed to provide basic information to the defendant. Firstly, the Court could provide the information to the defendant but the court itself must first receive the information form the prosecuting authority (usually the police). Secondly, the prosecuting authority could assume the responsibility. In fact, the prosecuting authority already has the responsibility, but can only comply after

one or more adjournments of the case. To speed up the process would certainly place extra administrative burdens on the police.

The third option is that the police provide the basic information but to the proposed Justice Information Exchange instead of directly to the defendant or his counsel. There could be physical access to the exchange provided at the court building. This would enable a defendant in person, or the duty lawyer, to receive the information at the Court on the day of appearance if necessary. The case would need to be 'stood down' for the information to be obtained rather than adjourned to a later date. There would be a number of advantages to all parties. The police would have time after the arrest and bail process to prepare a statement of material facts, and obtain the record. They would be working towards providing these to the information exchange at a later time, rather than to the defendant at the time of his being bailed. More importantly, it would avoid the necessity for personal service of the documents once the defendant has been released on bail.

Legal advice

There is no doubt that a defendant is entitled to have legal advice before he pleads guilty. The aim should be to avoid the necessity to adjourn the case for this purpose. The legal advice would ideally be obtained *before* the first appearance in court, or on the day.

There are a number of things which could be done to enable that to occur.

Consideration could be given to introducing a system of 'Duty Lawyer of Choice'. Any private lawyer accredited by Legal Aid would be able to attend court as duty lawyer at the request of his own client and be paid a set fee when his client pleads guilty on the first appearance. Many clients would then be encouraged (by way of not paying a higher fee) to plead guilty on the first appearance. A client could engage his own lawyer under such a scheme, and there is likely to be a level of trust between the two which should expedite the decision to plead guilty.

The Legal Aid Duty Lawyer scheme itself presently operates a small scale system of seeing its clients a day or more before the first appearance. Lack of resources means that this cannot be utilised to its fullest extent. The time used to provide legal advice should be the time *before*, not *after*, the first appearance in court. An expansion of the existing system of earlier consultation would reduce delays but would obviously require the allocation of additional financial resources.

It is not only the defendant who has an interest in what happens on the first appearance in court. The lawyer who advises and represents the defendant also has an interest in ensuring that he or she is not subject to later criticism should the defendant plead guilty at the first appearance. Most judicial criticism

of a duty lawyers focuses on two perceived wrongs; namely that the charges were too serious for duty lawyer and that insufficient time was spent advising the defendant. In response to those criticisms it can be said that all charges are serious in that they carry a potential term of imprisonment and that for a summary court to function efficiently the number of adjournments for legal advice must be reduced.

In order to enable duty lawyers (both Legal Aid and private) to operate more effectively, it is suggested that legislative protection from complaint be provided for those lawyers who advise a defendant to plead guilty at a first appearance.

Adjournment for sentencing

Once a defendant has pleaded guilty, it is not necessary that sentencing take place immediately. In order to encourage early pleas of guilty, it is suggested that there be an adjournment *after* plea if necessary.

In order to achieve that, there should be a system in Courts of Petty Sessions which duplicates the present fast track system of committal to the superior court. This fast track system is demonstrably successful in encouraging defendants to enter early pleas of guilty. Altogether, 35.7 per cent of all committals to the District Court are now by way of the fast track system.[26]

Where a defendant pleads guilty to an indictable offence at an early date, he is committed to the superior court for sentence only.[27] He is not convicted by the Petty Sessions Court.[28] There is inevitably a delay in getting to the superior court. These is no presumption against bail being granted during that delay pending appearance in the superior court.[29] The Court of Petty Sessions can order a pre-sentence report for the use of the superior court.[30] On sentencing by the superior court, full account is given by the sentencing judge to the early plea of guilty.[31] That fact is stated in open court.

The ways in which duplication of the fast track system could be achieved might include:

- The criteria for adjourning the sentencing process[32] might be widened, so as to specifically allow for the defendant to prepare if he is facing imprisonment. This would include time to obtain legal representation for a plea in mitigation.
- The presumption against bail being granted after conviction could be removed with the other *Bail Act* provisions remaining unchanged.

The advantages to the Court of Petty Sessions would be:

- Pleas of not guilty simply to obtain a delay before sentencing would not be required. A defendant could plead guilty and still obtain a delay where it is necessary.

- The court would be better able to manage the sentencing process where the defendant is facing imprisonment. This could include such things as diversion schemes, where sentencing needs to be adjourned for long periods of time. What needs to be adjourned is the sentencing process, not the decision as to whether or not to plead guilty.
- The court would be better able to manage those cases which do ultimately go to trial. The management of those cases would not be slowed down by cases where the not guilty plea has been entered simply to obtain a delay before sentencing.

Proposal 2

(a) Basic information should be made available to the defendant on or before his first appearance in court. The information should be provided through the proposed Justice Information Exchange.

(b) The existing Legal Aid Duty Lawyer system of earlier consultation with clients be expanded. Private lawyers ought to be able to act as duty lawyers for their own clients. Duty lawyers ought to be protected from complaint from aggrieved defendants.

(c) Adjournment for sentencing should be made more attractive to defendants by removing the presumption against granting bail after conviction.

TRIALS NOT PROCEEDING

The present position

As noted above,[33] only 45 per cent of matters listed for trial in the Perth Court of Petty Sessions proceeded on the day set. Matters that were adjourned amounted to 25 per cent, and nearly 20 per cent of defendants changed their plea to guilty. The situation leads to a number of undesirable results:

- The court rooms are not fully utilised [34]
- Overlisting to compensate for anticipated late cancellations can itself result in trials being adjourned. This inconveniences all parties and results in additional costs to the community.[35]
- Witnesses, particularly victims, are inconvenienced. For many victims, being in court is an alienating experience. The number of adjournments can be very frustrating.[36]
- There is a financial cost both to the community (police witnesses) and to the individual (civilian witnesses) when the witness travels to court unnecessarily, particularly from a country area.

The delay in waiting for trial has been steadily increasing over recent years. Between 1994 and 1996 the waiting times in the Perth Court of Petty Sessions

increased from five weeks to 17 weeks.[37] Without change, it is reasonable to assume that the waiting times will continue to increase.

Reasons for the problem

There is no provision for any type of case management. That there should be case management in Courts of Petty Sessions appears to be well accepted.[38]

No case management

Both the Supreme Court and the District Court in Western Australia have status conferences designed to provide those courts with information relevant to the listing requirements. Further, both superior courts have a procedure available for pre-trial hearings, at which the judge can make binding rulings on matters such as admissibility of evidence.[39]

Some Courts of Petty Sessions in Perth and in the metropolitan area have introduced pre-trial systems known as status conferences or callovers. It is difficult to determine the effectiveness of these. For example, analysis of the first year of operation of the status conference system in the Perth Court of Petty Sessions found that:-

> Analysis was inconclusive on the success of status conferences in reducing trial cancellations. The examination found that 75 per cent of trials did not proceed on the scheduled day despite a status conference. This result was no better than for shorter trials that had no status conference.[40]

Whilst it appears desirable that there be some type of pre-trial management, it appears equally desirable that there be some force in what occurs at the pre-trial management phase. Effective pre-trial management should cut down the number of cases going to trial, as well as provide a planning phase for the trial itself so it is not likely to be adjourned.

Witnesses not present

The present law[41] contemplates that each appearance in court, with both complainant and defendant present, is a hearing of the case. In practice, without a plea of guilty, the case is adjourned to a date specifically set to hear the evidence.[42] Earlier pleas of guilty, and case management should reduce the number of cases proceeding to a hearing date. With those cases which do proceed, the problem remains of what to do when the case is said to be not able to be heard on the day set for hearing. If either party does not appear, the court may proceed to hear and determine the complaint in the party's absence[43] .The complainant, normally a public officer with authority to prosecute (eg, police), is invariably present. Where the defendant does not appear, the present provision would appear to be adequate, subject perhaps to the provision being mandatory rather than discretionary.

However, an analysis of the relevant case law indicates that the main reason for seeking adjournments, either by the prosecution or the defence, is that witnesses, said to be essential to the party's case, are unavailable.[44] The

search for responsibility for the witness being unavailable occupies much of the fact-finding time of the magistrate. There are no legislative criteria on which to base a decision whether or not to adjourn a hearing. Where the refusal of an adjournment would result in serious injustice to one party, an adjournment should be granted unless in turn this would mean serious injustice to the other party.[45]

Options for reform

The need for disclosure

Case management — pre-trial disclosure

In order to manage a case it seems clear that the person managing it would have to know something of what it was about. In order to have a say in that part of the process, it seems that each party would have to know something of the other party's proposed case. At present, there is an inability to manage a case because disclosure of information is a process which does not fit well within the adversarial system. Pre-trial disclosure needs to be considered as part of case management.

Prior to trial, the prosecution is obliged, by a combination of legislation and case law, to disclose much of its evidence to the defence. The defence is not obliged to disclose anything to the prosecution or to the Court. The magistrate, because he is the finder of fact, traditionally receives no information prior to the hearing which might influence him in that role.

Changes aimed at instituting effective case management must affect the traditional rights and responsibilities of the parties. The more difficult question is the degree of change required.

In recent times it has been suggested that the time has come to *require* disclosure of some material, and disclosure of what witnesses are required, for the purposes of identification and limitation of the issues in criminal proceedings. In a recent case, the Chief Justice of the Supreme Court of South Australia said:

> It is submitted that the time has come for some limits to be placed upon the right of silence and for some obligation to be imposed upon the defence to join in the identification of limiting of issues in criminal proceedings to an extent inconsistent with the maintenance of the right of silence. It is well known that criminal courts in Australia and in other countries are struggling to cope with the volume of work coming before them. It is equally well known that the length of trials is tending to increase. These matters are a cause for real concern. It is equally well known that the effectiveness of current methods of case flow management is limited because, among other things under rules such as those that exist in South Australia, the court has no power to require the defence to disclose the nature and extent of the defence case.[46]

The issue of pre-trial disclosure generally, by both prosecution and defence, is covered in sub-section 4.2.[47]

Application of disclosure rules

Whatever option is chosen for reform, it would seem that the regime for disclosure should be different as between matters dealt with in the Courts of Petty Sessions and matters dealt with on indictment. This would be consistent with the idea that charges heard summarily are less serious than those dealt with an indictment, and should be dealt with quickly and inexpensively.

Limits on pre-trial disclosure might take into account the following:

- Certain types of offences should be outside the disclosure scheme. For example, charges of speeding, parking, disorderly and drink driving offences might fairly be excluded.
- Defence disclosure should not include civilian (non-expert) witness statements. Lawyers acting for defendants may not take or prepare witness statements, being limited by the fact that defendants do not always have the financial resources to pay for that level of preparation.

Timing of disclosure

Prosecution disclosure should be done in stages, for example:

- Initial disclosure, to include complaint forms, material facts and record of convictions. This type of information ought to be disclosed prior to the first court appearance, as part of the process to encourage and enable an early plea of guilty. Specifically, prosecution disclosure at this stage should not include witness statements and written or video records of interview (if any). To require disclosure of that type of information early in the process would require extra resources and expense. Further, in most cases it would not be necessary.
- Full prosecution disclosure, prior to a pre-trial hearing, which should include witness statements, documents, records of interview and experts' reports. This type of disclosure is consistent with the pilot scheme of disclosure which has been operating in the Perth Court of Petty Sessions for about two years. The only difference suggested is that the video record of interview (if any) would be disclosed at this later stage and not earlier.

Once full prosecution disclosure has been made, defence disclosure should be required. Defence disclosure should include:

- A requirement to give notice of an alibi, similar to the requirement already in place for trials on indictment;[48]
- A requirement to disclose the general nature of the defence;
- A requirement to provide copies of statements of any expert witness whom the defence intends to call;

- A requirement to notify which prosecution witnesses will be required to be present, what facts or documents will be admitted and any other matter of evidence which will result in less inconvenience to witnesses; and
- A method to provide to the court copies of any statements of witnesses whom it proposes to call, if it wishes to do so.

It is suggested that any regime of defence disclosure more than that indicated above would be counter-productive. Anything additional would require more financial resources from the defence side out of proportion to the level of seriousness of offences tried in Courts of Petty Sessions. As well, it would in all probability slow down the court process by requiring a longer adjournment before trial.

It is suggested that disclosure should be made to the proposed Justice Information Exchange. The benefit of such a system again would be that each party would not have to go to the expense of service of the documents. Furthermore, the documents could then be accessed by the Court itself for use at the pre-trial conference.

In order to encourage defence disclosure it is suggested that the degree of co-operation given by the defendant in the pre-trial process be specifically recognised as a mitigating factor in sentencing. Over and above the minimum requirements, a defendant may choose, for example, to provide non-expert witness statements or an outline of the proposed defence. A plea of guilty is specifically recognised as a mitigating factor,[49] principally because it saves the time, expense and inconvenience of a trial. Co-operation by the defendant in the pre-trial process is equally important in achieving those objectives.

Proposal 3

(a) There should be a requirement of pre-trial disclosure, by each party to the other. Charges of minor offences should be outside the scheme.

(b) Prosecution disclosure should be required in stages, with full disclosure required only at the pre-trial conference stage.

(c) Defence disclosure should be required after prosecution disclosure, and should not include a requirement to disclose statements of non-expert witnesses.

(d) The degree of co-operation given by the defendant in the pre-trial process should be specifically recognised in the sentencing process should the defendant be found guilty.

Case management — pre-trial conference

Whilst it appears accepted[50] that there should be case management in Courts of Petty Sessions, minor offences should be outside that scheme. Many minor offences do not need a pre-trial conference where the issues and proposed evidence are well defined from the material facts.

Before the pre-trial conference, if there is to be one, it is important that (i) pre-trial disclosure has already taken place, and (ii) the magistrate has available to him the information which has been compulsorily or voluntarily exchanged in the pre-trial disclosure process

The magistrate's powers at the pre-trial conference should be at least the same as those available to a judge in the superior court.[51] There could be wider powers including:

- The power to admit as evidence the concessions and admissions which the defence indicates it is prepared to make, as part of the pre-trial disclosure process. Section 32 of the *Evidence Act* would need to be widened over and above the ability to make bare admissions of fact. For example, where the defence concedes, the magistrate ought to be able to order that a prosecution witness's statement be read into evidence, a document be admitted without the maker being present, or a document, which is not the original, be admitted. In many cases it is important that the evidence be heard publicly and in open court, even where that evidence goes to prove a fact (or element) which the defendant is prepared to admit under section 32 of the *Evidence Act*.
- The power to order that a police officer be permitted to give evidence by way of reading notes.
- The power to admit as evidence the concessions and admissions which the prosecution indicates it is prepared to make, where the defendant has chosen to provide witness's statements as part of pre-trial disclosure.
- In addition to any concessions and admissions made by prosecution or defence, the power to order that the evidence of expert witnesses be given by the tendering of their reports or their statements being read into evidence. This is particularly in regard to medical witnesses.
- In addition to any concessions and admissions made by the prosecution or defence, the power to order that the evidence of witnesses of a technical nature (e.g. owners of property) have their evidence given by the reading of their statements into evidence.

These powers would need to be exercised according to strict criteria. The witness may be required for cross-examination by either party for reasons outside of the technical nature of their evidence.

There could also be a general power in the Court to depart from orders made where the interests of justice require it. Further prosecution witnesses may come forward prior to the hearing. Concessions may have been made in error. The fundamental principle is that each party should have the right to cross-examine witnesses and it is only when the proposed evidence is of a technical nature that the principle should be departed from.

Specific issues may arise as a trial date approaches which require that there be a pre-trial conference as a means of planning for the trial administratively. The new provisions enabling evidence to be given by audio and video link would need to be dealt with.[52] For example, a witness may wish to give evidence from a remote location. The pre-trial conference would also be available for the production of documents on a summons to produce. The witness who is not required to give evidence would not be inconvenienced by attending at the trial. Objections to produce documents could be dealt with before the trial.

Proposal 4

(a) There should be a pre-trial conference in all matters in which a plea of not guilty has been entered. The pre-trial conference requirement should exclude charges of offences which can be categorised as minor offences.

(b) The powers of the Court in the pre-trial conference should include power to:
- make rulings on the admissibility of evidence;
- receive admissions of fact on wider grounds than those presently permissible under section 32 of the *Evidence Act*; and
- direct the manner in which evidence can be given by certain witnesses, or the manner in which their evidence should be presented, such manner of giving evidence to be not limited to oral evidence.

ONE DEFENDANT AND MULTIPLE CHARGES IN COURTS OF PETTY SESSIONS

The present position

The factual assumption underlying the procedural rules under which Courts of Petty Sessions (and superior courts) operate is that there is one defendant charged with one offence. Some procedural rules are written to take into account that this may not always be the case. The *Justices Act* permits joinder of more than one charge in a complaint form where the matters of complaint are substantially of the same act or omission on the part of the defendant.[53]

It is however, abundantly clear that the factual basis on which the procedural rules are written is now incorrect. As noted above, in 1995-1996 in the

Courts of Petty Sessions there were 76,828 convictions against 31,286 individuals.[54] On average, each defendant is charged with more than two offences. The true figure would be higher, when taking into account that all indictable matters also commence in the Court of Petty Sessions. Each of the different factual circumstances that go to make up these figures lead to different problems in sentencing, case management, trials and adjournments.

The different factual circumstances appear to be as follows:

- One defendant, more than one offence, committed at the same time; or
- One defendant, more than one offence, committed at different times; or
- Both of the above, but charged at different times and proceeding through the courts at different times; or
- All of the above, with some charges indictable only, some charges summary only and some requiring election; or
- All of the above, with charges commencing in different Courts of Petty Sessions (geographically).

The end result of any individual charge in the Court of Petty Sessions is reasonably predictable. As noted above, in 1995-1996 there were 80,169 charges heard resulting in 76,818 convictions.[55] The conviction rate is in excess of 95 per cent. Thus, in 95 per cent of cases, the end of the Petty Sessions procedure for summary offences will be that sentence has to be imposed.

The difficulty in terms of case management, in the multiple charges scenario is, that each magistrate, dealing with an offence at any stage of the Petty Sessions procedure, may know nothing of the status of other charges or their existence. Further, in 95 per cent of cases each charge will result in a sentence being imposed, and the sentencing process can become fragmented when sentences are imposed at different times.

The situation needs to be rectified so that unnecessary adjournments and multiple appearances may be reduced. As noted above, each adjournment adds 40 days to the length of a case.[56]

Sentencing should be done once and once only. It is desirable that there be only one sentencing process wherever an accused is in the criminal justice system on multiple charges. That there should be only one sentencing process is recognised, for example, in the *Sentencing Act* which provides for a superior court to sentence on summary matters in certain circumstances.[57] A fragmented sentencing process already creates problems in relation to sentence calculation. Further problems are created within the prison system in relation to sentence planning. Pre-release programmes and parole can be held up.

Proposed diversionary systems, such as specialist drug courts, may not be able to function efficiently where diversion depends upon on early plea of guilty or a final disposition of all outstanding cases.

No attention is paid to provisions enabling or requiring charges to be brought together (in time) where a single accused has more than one charge in the system at one time. In short, the existing procedure is written in terms of managing the charge, not the person.

Options for reform

It is considered that provisions ought to be made for managing the accused person, rather than the charge. This would enable the court to better manage each individual charge, by relating each charge back to the constant, namely the one accused. Consideration could be given to creating files (paper or electronic) on each individual accused. The same file ought to be used to receive and deal with new charges if they arise during the currency of any pending charges. Several advantages would arise.

- More informed and accurate decisions could be made about bail. On receiving the new charge, the court would know whether the new offences were allegedly committed whilst on bail for others.
- The defendant, if he wished to plead guilty, could do so at an earlier rather than a later stage. There would be no need to adjourn newer charges off to catch up with older ones. The older ones, even awaiting trial, would be before the court and able to be dealt with sooner if the defendant wished to plead guilty.
- When the defendant re-offends, all previous information relating to that defendant is immediately available for the sentencing process on the new offence.

Provisions could be made for the mandatory joinder of all charges set for pre-trial conference or hearing. Any new charge coming in to the court could, subject to availability of witnesses, be set for pre-trial conference or trial at the same time as present cases set for pre-trial conference or trial. It is accepted that such provision would be in conflict with rules which require separation of trials in order to avoid prejudice to the accused. However the magistrate, as well as being the fact-finder, is also aware of the rules of admissibility of evidence in his or her role as judge and thus able to ignore inadmissible evidence.

Advantages of joinder of hearings, over and above that presently allowed,[58] would include:

- On being found guilty, which will occur in 95 per cent of cases, there need be only one sentencing process.
- The accused person need attend court on only the one occasion.
- Witnesses who might be common to each charge against the accused need attend the court only on the one occasion.

Proposal 5

(a) The Court should create and use files relating to each individual defendant who has a charge or charges pending, rather than files relating to each individual charge pending against a defendant.

(b) When a defendant is charged with an offence whilst other charges are pending, there should be provision for the mandatory joinder of all charges at the same pre-trial conference or trial.

ONE DEFENDANT AND MULTIPLE CHARGES IN COURTS OF PETTY SESSIONS AND SUPERIOR COURTS

As noted above, each defendant in the Court of Petty Sessions is charged with more than two offences on average. Some defendants are charged with indictable offences which are initially dealt with in a Court of Petty Sessions before being transferred to the District or Supreme Courts. In 1997/98, 2,596 defendants were sent to the superior courts from the Courts of Petty Sessions .[59]

The present position

Particular problems arise when this occurs. A defendant may have charges pending against him which can only be dealt with in the superior court, and other charges which can only dealt with in the Court of Petty Sessions. When a defendant pleads guilty or intends to plead guilty to all charges, potential problems have largely been solved. By a combination of the 'fast track' procedure[60] and the *Sentencing Act* provisions,[61] the summary matters can be taken to the superior court for sentencing on the same day as sentencing for superior court matters.

It is where there are pleas or intended pleas of not guilty to some charges that the problem arises. Anecdotal evidence suggests that defendants 'play the system' to try to achieve the best result. The desire is to deal with the more serious (superior court) matters first. If a conviction results, then the aim is to achieve the best possible penalty. Where a lenient sentence is imposed the aim is to return to the Court of Petty Sessions and try to persuade the magistrate (in 95 per cent of cases) to follow the sentencing of the superior court judge.

The problem is that this 'system playing' necessarily involves constantly adjourning or applying to adjourn the Court of Petty Sessions matters for reasons unrelated to case management or intended plea. Witnesses, including police, victims and experts, are kept waiting for months or even years for reasons relating only to the accused's desire to achieve the best possible result for himself by way of sentence.

The practice of adjourning Courts of Petty Sessions matters from time to time leads to obviously undesirable results. Each adjournment means unnecessary delay. Where the Court of Petty Sessions brings the matter to

an end by setting it down for trial, the defendant will often plead guilty at the last moment, resulting in inconvenience to the courts and witnesses.

Reasons for the problem

The basic reason for the problem is that the defendant is being dealt with by two different courts at the same time. Courts of Petty Sessions were introduced to deal with minor offences. Superior courts remained to deal with more serious offences. No procedural rules were ever written to contemplate that an individual accused might be tried in both courts. Constant re-arranging of jurisdiction in reaction to perceived seriousness of offences has only exacerbated the problem over the years.

Options for reform

It is suggested that, whenever an accused is sent to the superior court, the file, which would contain all outstanding Courts of Petty Sessions matters, should also be sent the superior court. The superior court would have the responsibility of managing the accused person including such things as:

- receiving any new charges which may be laid, including summary charges;
- accepting pleas to the summary charges and either setting a date for a hearing in the Court of Petty Sessions or imposing a sentence; and
- adjourning the summary charges for advice so that the defendant would decide whether to plead guilty or not guilty.

Advantages of this system would include:

- More informed decisions being made about bail. The judge would know whether new offences had allegedly been committed while on bail for others;
- Applications to adjourn the summary matters would be dealt with on a more informed basis. The judge would know whether the matters have any relationship to the indictable matters;
- Where sentencing needs to be carried out on the summary matters, it could be done at the same time as sentencing on the indictable matters. This would be particularly effective where the accused intends to plead guilty to all charges; and
- The Courts of Petty Session would be relieved of the unnecessary administrative burden of adjourning the summary matters from time to time, simply to wait the outcome of the superior court. If appropriate, the superior court could adjourn the summary matters to keep pace with the indictable matters.

In the United Kingdom relatively new provisions have been introduced which require the superior court to deal with summary matters in certain circumstances. When an accused is charged with an indictable only crime, the magistrate's court (subject to the power to adjourn) is required forthwith to send the accused to the Crown court for trial. The transfer to the Crown court applies also to any related offences triable either way and any connected summary-only offences carrying imprisonment or disqualification.[62] The

superior court holds summary-type hearings where there is a not guilty plea to an indictable offence, and the accused does not elect jury trial. The superior court returns cases to the magistrates' court for a trial when there is a plea of not guilty to a summary-only offence.

It is considered that a model based on the new UK provisions does not go far enough. Once a defendant is charged with an indictable-only offence, or elects trial on indictment, the superior court should deal with all outstanding or new charges. The superior courts should deal with everything except the pre trial conference or the trial of the summary charge.

The overriding aim should be to deal with the accused person within the criminal justice system as a whole, not the individual charges. The one exception should be for summary offences which are factually connected to the indictable offence. The defendant may be charged with stealing a motor vehicle, robbery and resisting arrest, the vehicle being used to carry out the robbery, and the defendant resisting arrest when apprehended at the scene. All such connected offences ought to be tried in the superior court notwithstanding the jurisdictional differences. The expense to the community and the inconvenience to witnesses of running two 'sets' of trials is too great. The hearing of summary offences as part of the indictable trial would take up a minimal amount of extra time. Furthermore, the Judge would be in the best position to sentence for the totality of the conduct, should convictions result.

Proposal 6

(a) When a defendant is charged with a new summary offence, and he has a matter pending in the superior court, the Petty Sessions charge (file) should be sent to the superior court. The superior court should deal with the summary charge in all respects except for pre-trial conference and trial.

(b) When a defendant is charged with an indictable only offence, or elects to be dealt with on indictment, and is charged at the same time with a summary offence, all charges should be sent to the superior court to be dealt with in the same way as in (a) above.

(c) When a defendant is charged with an indictable only offence, or elects to be dealt with on indictment and has a summary charge pending, the summary charge (file) should be sent to the superior court to be dealt with in the same way as in (a) above.

(4) When a defendant is charged with an indictable only offence, and is charged with connected summary offences, the superior court should conduct the hearing of the summary offences as well.

TRIAL PROCEDURE

The present position

The *Justices Act* provides that:

> The practice before Justices upon the hearing of a complaint of a simple offence or other matter shall, in respect of the examination and cross-examination of witnesses be in accordance as nearly as may be with the practice for the time being of the Supreme Court upon the trial of an issue of fact in an action at law.[63]

There are advantages in applying the same trial procedure in all levels of courts. One body of evidence law applies. There is consistency in the application of case law. Greater certainty results.

There may also be disadvantages. The superior courts deal with more serious matters, which because of seriousness are decided by juries. Jury members are not trained in law. They must be directed in each and every case on how to deal with evidence (according to law), and how to apply the law. With the exception of any admissions which the accused person may make, all the evidence must be seen and heard.[64] That takes time and requires the presence of the witnesses.

In Courts of Petty Sessions the same process of seeing and hearing all of the evidence in each case also takes time. It may not be necessary in all cases, particularly where

- the evidence given is of a technical nature, such as expert evidence, and its weight does not depend on the way in which the evidence is presented; or
- the evidence is uncontested, in the sense that the opposing party asks no questions or makes no submissions on the 'value' of that particular witness.

Instances are numerous of witnesses attending trials in person unnecessarily. Conversely, the prosecution may fail because an uncontentious witness does not appear. A trial may be adjourned because a witness, who later turns out to be non-contentious, has not appeared. In all those cases, justice is not done.

Trials may be adjourned once they have commenced, as well as before they have commenced. The trial may be adjourned from one day to the next, in the course of a normal working day. However, a practice has developed in the Courts of Petty Sessions of a trial being adjourned for a period of time greater than one day to the next. Most often this occurs because the particular case takes longer than has been estimated. The particular magistrate who starts the trial is then committed (by way of administrative arrangements) to hear other trials the next day. The practice of adjourning trials for long periods of time this way is called, in the jargon of Courts of Petty Sessions, adjourning 'part heard'.

Adjourning a case 'part heard' is obviously undesirable. Witnesses may have to attend again at the later time and, where the lapse of time is lengthy, there may be an adverse effect on their recollection of events. The magistrate, the prosecutor and the defence have to recall facts a long time after the event and a transcript may be required when otherwise it would not be. The delay may also impair the magistrate's ability to recollect the demeanour of the witness which may affect his ability to properly decide on issues of credibility.

Options for reform

The Courts of Petty Sessions should operate as closely as possible to the procedure of the superior courts. However, specific procedures could be different. Options for reform include:

- The Courts of Petty Sessions should not require that all evidence be given orally. There should be an ability for each party to make concessions and admissions in the way in which evidence is presented, over and above the present ability of the accused to make admissions of fact.[65] This would include that a witness's statement be read out and tendered as evidence and a document be admitted without the maker being present.
- In addition to concessions made by the parties, the court should have power to order that certain types of notoriously non-contentious evidence be presented without the witness being present. This would include such things as experts' reports where it is not proposed to question the witness. It would also include such things as statements of the owners of property whose only purpose is to prove the fact of ownership.
- There could be a general rule that even where evidence is given orally, it may be given in chief by a statement being read out. This would do away with the unnecessary practice of witnesses memorising their statements outside the courtroom and repeating the contents in the witness box.

In all cases, the aim should be to reduce inconvenience to witnesses and reduce the length of trials.

- The practice of adjourning trials 'part heard' ought to be restricted. This should include preventing a trial being 'part heard' during the course of evidence. It is during that stage that witnesses, including the accused, are inconvenienced most. It may still be permissible to adjourn the other parts of the case, including submissions, decision and sentencing. However, that time too should be limited so that the Court's impressions of the evidence of witnesses does not fade with time.

Legislative reform to prevent trials being part heard would necessarily force a change in the way in which courts, mainly the busy metropolitan courts, arrange their lists. It may be necessary to create some type of 'rolling list' to accommodate the changes which would occur from day to day, or through the working day. The priority should be to reduce inconvenience to witnesses

and parties at the trial stage, even where that may be at the expense of inconvenience to the court.

Proposal 7

(a) The Court should have power at the trial to receive admissions of fact and direct the manner in which evidence can be given in the same way as is suggested in proposal 4(b).

(b) There should be a limit to the time for which a hearing can be adjourned. The presumption should be that a hearing be adjourned, if necessary, from one working day to the next.

JURISDICTION

While the greater volume of work in Courts of Petty Sessions involves hearing charges for offences, a significant amount of the court's time is taken up with other matters such as extraordinary driver's licence and restraining order applications. Without minimising the importance of these applications, the allocation of judicial resources to this area reduces the resources available for the resolution of criminal charges, thereby increasing delays. One solution is for these types of applications to be dealt with administratively.

Courts of Petty Sessions also review decisions on licensing matters such as firearms and security agents licences. Again, significant resources are directed at this component of the court's jurisdiction. As long ago as 1982 it was proposed that the appellate jurisdiction of Courts of Petty Sessions in Western Australia be conferred on a proposed Administrative Law Division of the Local Court.[66]

Whatever approach is taken, consideration needs to be given to whether it is in the community's interests for these applications to be dealt with judicially in a Court of Petty Sessions which is primarily a court of trial for simple offences. However, it is considered that the issue would be best dealt with by way of a further and separate reference for review.

SUMMARY OF PROPOSALS

1. (a) The Court of Petty Sessions' initiating document should be redrafted.

(b) There should be an obligation imposed upon police, in cases of arrest, requiring a formal reading of a charge and providing copies of the initiating form.

(c) There should be a Justice Information Exchange providing the facilities for electronic exchange of information.

2. (a) Basic information should be made available to the defendant on or before his first appearance in court. The information should be provided through the proposed Justice Information Exchange.

(b) The existing Legal Aid duty lawyer system of earlier consultation with clients be expanded. Private lawyers ought to be able to act as Duty Lawyers for their own clients. Duty lawyers ought to be protected from complaint from aggrieved defendants.

(c) Adjournment for sentencing should be made more attractive to defendants by removing the presumption against granting bail after conviction.

3. (a) There should be a requirement of pre-trial disclosure, by each party to the other. Charges of minor offences should be outside the scheme.

(b) Prosecution disclosure should be required in stages, with full disclosure required only at the pre-trial conference stage.

(c) Defence disclosure should be required after prosecution disclosure, and should not include a requirement to disclose statements of non-expert witnesses.

(d) The degree of co-operation given by the defendant in the pre-trial process should be specifically recognised in the sentencing process should the defendant be found guilty.

4. (a) There should be a pre-trial conference in all matters in which a plea of not guilty had been entered. The pre-trial conference requirement should exclude charges of offences which can be categorised as minor offences.

(b) The powers of the Court in the pre-trial conference should include power to:

- make rulings on the admissibility of evidence.
- receive admissions of fact on wider grounds than those presently permissible under Section 32 of the *Evidence Act*.
- direct the manner in which evidence can be given by certain witnesses, or the manner in which their evidence should be presented, such manner of giving evidence to be not limited to oral evidence.

5. (a) The Court should create and use files relating to each individual defendant who has a charge or charges pending, rather than files relating to each individual charge pending against a defendant.

(b) When a defendant is charged with an offence whilst other charges are pending, there should be provision for the mandatory joinder of all charges at the same pre-trial conference or trial.

6. (a) When a defendant is charged with a new summary offence, and he has a matter pending in the superior court, the Petty Sessions charge (file) should be sent to the superior court. The superior court should deal with the summary charge in all respects except for pre-trial conference and trial.

(b) When a defendant is charged with a indictable only offence, or elects to be dealt with on indictment, and is charged at the same time with a summary offence, all charges should be sent to the superior court to be dealt with in the same way as in proposal 6(a).

(c) When a defendant is charged with an indictable only offence, or elects to be dealt with on indictment and has a summary charge pending, the summary charge (file) should be sent to the superior court to be dealt with in the same way as in proposal 6(a).

(d) When a defendant is charged with an indictable only offence, and is charged with connected summary offences, the superior court should conduct the hearing of the summary offences as well.

7. (a) The Court should have power at the trial to receive admissions of fact and direct the manner in which evidence can be given in the same way as is suggested in proposal 4(b).

(b) There should be a limit to the time for which a hearing can be adjourned. The presumption should be that a hearing be adjourned, if necessary, from one working day to the next.

ENDNOTES

* The Law Reform Commission of Western Australia engaged the Hon Edward Morrissey Franklyn QC, former justice of the Supreme Court of Western Australia, to prepare this sub-section. The views expressed are those of the Commission.

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30 *Sentencing Act* s 20(2).
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R v Ling (1996) 90 A Crim R 376.

R v Udechuku (1982) WAR 21.

4.6

Preliminary Hearings

BACKGROUND

The nature and evolution of the preliminary hearing

The term 'preliminary hearing' is frequently used interchangeably with the terms 'preliminary examination' and 'committal hearing', although in Western Australia preliminary hearing is strictly correct, being the terminology of the *Justices Act 1902*. The preliminary hearing is one, albeit now optional, stage in the process by which a person charged with an indictable offence is committed for trial in a court of competent jurisdiction.

The historical and primary purpose of the preliminary hearing is to 'screen charges' to ensure that persons are not put upon their trial without there being sufficient cause. Its function is to determine whether or not there is sufficient evidence, admissible in a court of law, 'to put the defendant upon his trial for an indictable offence' before a court of competent jurisdiction[1].

The right to some preliminary consideration of a charge to ensure that there is no trial on indictment without sufficient cause has existed in England in one form or another for many centuries. From its introduction as a function of justices of the peace in the 16th century until its reform in the 19th century, this scrutiny was inquisitorial in nature and a reflection of the justices' police function.[2] With the emergence of professional police forces, justices were relieved of their investigative and police functions and were able to assume a more judicial and supervisory role in the criminal process, a role formalised by reforms in the law.

The preliminary examination in its present form dates from the combined operation of the *Prisoners' Counsel Act 1836* (UK) and *Indictable Offences Act 1848* (UK).[3] With some modifications, the procedures established under those Acts form the basis of the preliminary hearing procedure in the *Justices Acts* of all Australian jurisdictions to the present day.

So far as Western Australia is concerned, the preliminary hearing dates from 1850 when justices were granted the power to discharge a defendant following a committal hearing.[4] That hearing involved recording in depositions the evidence given orally before the examining magistrate or justices in the presence of the defendant. The magistrate or justices could commit the defendant for trial if he or they were of the opinion that the evidence given was sufficient to put the defendant on trial for an indictable offence. If not, the defendant was discharged.[5] A hearing was required in every case charging an indictable offence.

That process of committal found its way into the *Justices Act 1902* and remained largely unaltered until the introduction of the so-called 'hand-up brief' procedure in 1976.[6] This procedure gives the defendant the right to elect whether or not to have a preliminary hearing and requires the prosecution to give the defendant certain information to make that decision. It was introduced following the recommendations in 1970 of the Western Australian Law Reform Committee, although the impetus for reform had its origins many years before and reflected trends in other jurisdictions also concerned about:

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

(ii) the inconvenience, waste of time, and unnecessary expense involved in committal proceedings, particularly when the defendant had pleaded guilty; and

(iii) the delay that could result in bringing cases to trial.[7]

The issues of efficient and effective use of resources, and reducing the time between the charging of an accused and his or her being brought to trial in a court of competent jurisdiction, have prompted the present reappraisal of the preliminary hearing procedure.

The procedure in Western Australia

Currently, a person is committed for trial if

(i) after electing a hand-up brief and being called upon by justices or a magistrate[8] to plead, the defendant pleads 'not guilty'; or

(ii) after a preliminary hearing, the justices or magistrate consider that there is evidence sufficient to put the defendant upon his or her trial for some indictable offence.[9]

However, committal by justices or a magistrate is not the only means by which a person can be brought to trial. A person can be the subject of an *ex officio* indictment presented by the Attorney General or, as is now invariably the case, the Director of Public Prosecutions (DPP).[10] Likewise, no trial will be held unless either the Attorney-General or the DPP presents an indictment.

Accordingly, the decision of a magistrate or justices to commit, or not commit, is not conclusive of whether a defendant will in fact be tried.

The prospect of a preliminary hearing arises only in cases where a defendant is charged with an offence which is to be tried on indictment, either because the offence is not one which can be dealt with summarily, or because the defendant elects for trial on indictment. When a person is charged with an indictable offence and first brought before the magistrate, the defendant has the charge read and, if necessary, explained to him or her.[11] The defendant is then told that he or she is not required to plead to the charge and is given a notice in the prescribed form explaining the procedures in Part V of the *Justices Act.*[12] If the charge may be dealt with summarily, and the magistrate is of the view that the charge can be adequately dealt with summarily, the defendant is informed of the defendant's right to elect summary disposition of the charge and the defendant is invited to elect.[13] The proceedings are then adjourned.[14]

Unless an order to the contrary is made, the prosecution must as soon as reasonably practicable file with the clerk of petty sessions and serve on the defendant a statement of material facts relevant to the charge and copies of any confessional material.[15] Following service by the prosecution of that material, the magistrate advises the defendant that he or she is not required to plead to the charge, but gives the defendant the opportunity to do so.[16] If the defendant pleads 'guilty' the magistrate, without convicting, commits the defendant to the District or Supreme Court for sentence.[17] The material filed by the prosecution is transmitted to the indicting authorities (technically the Attorney-General, but in practice the DPP).[18] This is the *expedited committal for sentence* or *'fast-track' committal.*

If the defendant does not plead 'guilty', the magistrate addresses the defendant in accordance with the Ninth Schedule to the *Justices Act*, summarising the defendant's rights and the procedure to follow, and causes a copy to be given to the defendant. The magistrate then adjourns proceedings after directing the prosecution to serve and lodge with the clerk of petty sessions, at least four days before the hearing is to resume, a copy of 'the written statement of each person which the prosecution proposes to tender in evidence or to be used in evidence' under section 69(2) of the Act.[19]

This is what is commonly referred to as the 'hand-up brief', or the 'committal' brief or papers, although at this stage it is more accurately an 'election brief'. The statements must comply with the formalities set out in section 69(3) of the Act. Often these statements are erroneously referred to as 'the depositions', which are more properly the oral evidence of witnesses.[20]

It is important to understand that the election brief only contains those statements of witnesses which the prosecution proposes to tender in evidence

under section 69(2),[21] namely, evidence for the purposes of committal. The election brief is supplied to the defendant in order that he or she can make his or her election. It is not intended to, and frequently does not, comprise a comprehensive disclosure of the case the Crown will present at trial.[22] Indeed, the prosecution is under no obligation to prepare or serve an election brief, and may prefer to establish a case justifying committal upon the oral testimony of witnesses to be called at a preliminary hearing.[23]

Occasionally a witness will not co-operate with the police in supplying a statement in a form suitable for inclusion in the election brief. The *Justices Act* provides for such a witness to be summoned prior to the defendant's election to be examined and 'testify what he knows concerning the matter of the complaint'.[24] This opportunity to take 'pre-election depositions' was unnecessary before the introduction of the hand-up brief alternative to a preliminary hearing, as witnesses could be called at the latter and examined to discover what they knew. However this power to take depositions to supplement the brief is essential to a hand-up brief system, although in practice the prosecution seldom considers it necessary to resort to it.[25]

Upon the resumption of the hearing (commonly referred to as the 'election date') and once the defendant has been served with a copy of the election brief, and pre-election depositions (if any) have been taken, the defendant is called upon to elect whether or not he or she wishes to have a preliminary hearing.[26]

Aside from a committal for sentence, there are two courses the proceedings may then take.

If the defendant *elects not to have* a preliminary hearing, and pleads 'not guilty', the papers comprising the election brief are tendered to the court and the defendant is committed directly for trial without the magistrate considering whether there is a *prima facie* case against him or her; indeed the *Justices Act* specifically prohibits a defendant from submitting that there is insufficient evidence in the papers to put him or her on trial.[27] The 'election brief' becomes the 'committal brief', with the brief supplied to the defendant and upon which the defendant has made his or her election being transmitted in due course to the court in which the offence will be tried.

If a defendant *elects to have* a preliminary hearing (often referred to as the 'committal hearing'), section 102 of the *Justices Act* applies,[28] and the prosecution calls for examination of the witnesses it considers necessary to establish a case for committal. Provided that there is no objection, a written witness statement which formed part of the election brief and otherwise complies with the necessary formalities[29] may be tendered in evidence at the preliminary hearing,[30] and the statement is signed by the magistrate.[31] If a

party so requests, the admissible parts of the statement are read out.[32] The maker of the statement may, in the interests of justice, be required to attend to give evidence and be cross-examined.[33]

There is no defence entitlement to particulars of the charge. A preliminary hearing is not a judicial proceeding, but an examination of the sufficiency of the evidence. Particulars are thus provided by the prosecutor's opening and the evidence led, although the magistrate has a discretion to require particulars to assist him or her to determine the relevance of evidence and cross-examination.[34]

The course and extent of the preliminary hearing depends upon decisions made by both the prosecution and defence.

The prosecution decides what evidence it will present.[35] Although some recent authorities are to the effect that the prosecution should call all material witnesses,[36] the preliminary hearing does not demand full disclosure of relevant evidence in the possession of the prosecution. Subject to considerations of fairness, the prosecution need only present such evidence as is necessary to establish a *prima facie* case,[37] and only rarely will the prosecution seek to do more. Not all those witnesses whose statements appear in the election brief may necessarily be called at the preliminary hearing. The prosecution is not limited in the evidence it may lead to only that material contained in the statements supplied in the election brief. It decides what evidence, if any, it will try to present in the form of statements.

The defendant may choose not to object to the tender of some or all of the statements proffered by the prosecution.[38] The defendant is not entitled to secure the attendance for cross-examination of a person who has made a statement pursuant to section 69 if that statement is not sought to be tendered in evidence; the prosecution may decide that it has sufficient evidence to show cause for committal without either the oral evidence or the statement of particular witnesses. Indeed, the *Justices Act* itself now prohibits the calling of certain children against whom offences have been committed unless there are 'special circumstances that justify' the child being called.[39]

Neither the election brief nor the preliminary hearing necessarily require the prosecution to disclose the evidence available to the Crown, or even the evidence that the Crown proposes to present in due course at trial.

Once the prosecution has completed its evidence, the defendant is invited to speak in answer to the charge, and whatever is said is recorded.[40] The defendant is entitled to give evidence or call evidence on his or her own behalf, but in practice this is unknown.[41]

If the evidence presented at the preliminary hearing is 'sufficient to put the defendant upon his trial for an indictable offence' — that is, establishes a

prima facie case of the defendant's having committed an indictable offence — the defendant must be committed for trial to the appropriate superior court.[42] If the prosecution fails to establish a *prima facie* case the defendant is discharged[43] but, unlike the dismissal of a complaint following a summary hearing of a charge by a Court of Petty Sessions, a discharge following a preliminary hearing does not operate to acquit the defendant and bar further proceedings against him or her. The DPP may chose to present an indictment notwithstanding a discharge, and may decline to indict where there has been a committal.

However this once-routine scrutiny by a magistrate of prosecution evidence, to ensure that defendants were not committed for trial on indictment without sufficient cause, has now become an optional procedure with only the occasional case being evaluated at a preliminary hearing. The hand-up brief in Western Australia, and equivalent 'paper committal' procedures in other Australian jurisdictions, has largely supplanted the preliminary hearing as a means of committal for trial. Statistics reveal that in Western Australia in 1988 just under 90 per cent of committals from the Perth Court of Petty Sessions were by way of hand-up brief;[44] the figure in 1997 reached 90 per cent.[45] In the vast majority of cases the process of committal for trial has become an exercise in receiving statements and copies of documentary evidence from police investigators and transmitting them to the court of trial via authorities responsible for indicting.[46]

While the preliminary hearing can still perform a 'charge-screening' function and leaves in the hands of the magistrate the power to commit for trial, the critical power is the power to indict, and that is vested, for all practical purposes, in the DPP.

Functions and objectives

Preliminary hearings are used for several purposes incidental to, but of greater value than, their primary role as a mechanism for assessing whether evidence is sufficient to justify committal.[47] In theory at least, these objectives can directly or indirectly contribute to the full and efficient presentation of a case in the court of trial, and benefit the administration of justice. Many are directed to the defence's 'discovering', and obtaining 'disclosure', of the prosecution case. Some can confer forensic advantages to the prosecution or defence should the charge ultimately come to trial.

The preliminary hearing can serve an important role in the defence's 'discovery' of the prosecution case. Properly conducted hearings, in an appropriate case, may assist the defence to gain a better understanding of the nature and substance of the prosecution's evidence, especially if the evidence is particularly technical and involved, and can reveal strengths and weaknesses not apparent on the face of the disclosed material. Notwithstanding that the prosecution is not obliged to call all its witnesses at the preliminary hearing, or disclose all its

evidence, careful cross-examination may elicit information as to other evidence in the possession of the police.

The preliminary hearing also provides an opportunity to test the prosecution's case and experiment with lines of cross-examination and defences which the defence may not be able to explore at a trial. If the examination is fruitless or elicits unfavourable answers no harm is done, as would be the case if before a jury. It allows the defence to observe and assess how witnesses perform in giving their evidence and under cross-examination, and to cross-examine them with a view to freezing their testimony on critical points which, if departed from at trial, will provide the grounds for adverse comment as to the witness's reliability.

If the prosecution's evidence is seen to be weak, the defence may be provided with the basis for a reasoned submission for a *nolle prosequi*. On the other hand, the evidence may demonstrate that certain parts of the prosecution case are incontrovertible, in turn leading to the admission by the defence of those facts or issues at trial and saving time and the expense of proof.

It has been suggested[48] that even in cases where the defendant proposes to ultimately plead 'guilty' a preliminary hearing may be useful to bring out and establish mitigating factors which may bear upon the sentence (although having regard to the substantial credit for an early plea under the fast-track system and the opportunity for trials of contested issues, this option would be of limited appeal, and is arguably a misuse of the process).

Plainly the prosecution as well as the defence can derive benefit from a preliminary hearing in certain cases. While a prosecutor may regard it as merely another draw on his or her limited time and resources, the attention which can be applied to a brief only in the process of 'getting up' for a hearing obliges the prosecution to marshal its evidence in an orderly and comprehensible fashion.

The hearing may demonstrate to the prosecution that some parts of its case are difficult to prove, that evidence necessary to establish some parts of the case is tenuous, or that its case is in some respect deficient, providing the opportunity to supplement that proof by other evidence to be called at trial. The preliminary hearing may result in the committal or (following review by the DPP) indictment upon a lesser or greater charge, or more or fewer charges than those the subject of the hearing. It may result in the abandonment by the defence of hopeless or speculative defences, and even encourage a plea of guilty in due course.

The prosecution, too, may benefit from seeing how some of its witnesses perform in giving their evidence and under cross-examination, and may commit reluctant witnesses to a story on oath in advance of trial. It is of no advantage

to the prosecution to proceed to trial on the testimony of an unchallenged witness who, in the end, may prove to be unreliable, confused or mendacious.

However, as the election for a preliminary hearing is the prerogative of the defence, the potential benefits to the prosecution may be unrealisable. The prosecution can theoretically force a defendant into a preliminary hearing (say, by preparing a slight, or no, election brief), but such an approach is rarely practicable or justifiable. The major benefits from preliminary hearings are generally seen to accrue to the defence, and it is from the defence that come the most spirited arguments in favour of retaining preliminary hearings in their present form.

However, preliminary hearings are frequently not used to their advantage, or may be perverted. They are wasted when the defence elects a preliminary hearing without any real purpose in mind. They are perverted when they are embarked upon to frustrate the ends of justice, such as to delay committal for trial, or to intimidate or deter witnesses by long, aggressive and vexatious cross-examination.[49]

Notwithstanding that preliminary hearings may confer benefits to one or other party from time to time and in some cases, they may still be procedurally antiquated and their value in our modern criminal justice system is open to question. Given that the preliminary hearing was originally designed to serve a charge-screening function, does it do so satisfactorily? Can resort to a preliminary hearing be justified because of some of the advantages collateral to charge-screening it may bestow? For example, if there is clearly a sufficient case, is it justifiable to have a hearing for the purpose of a fishing expedition for evidence, or to merely have a look at the witnesses with a view to attacking them at trial? Should a defendant be entitled to a dress-rehearsal for his or her trial?[50] Is it a satisfactory mechanism for discovery of the prosecution case? Are more effective and resource-efficient alternatives possible?

Shortcomings of preliminary hearings

Against the benefits which the preliminary hearing may confer must be balanced its shortcomings. Apart from whether the preliminary hearing satisfactorily performs its functions of charge-screening and obtaining discovery and disclosure of the prosecution case, concern has focussed upon

(i) the expense to the public and defendants, and cost in court and other public resources, occasioned by resort to a preliminary hearing;

(ii) the delay in the disposition of criminal cases occasioned by resort to a preliminary hearing; and

(iii) the burden upon witnesses and victims of crime who may be required to give evidence and be cross-examined at a preliminary hearing and again at a trial.

Unsatisfactory charge screening

If the primary function of the preliminary hearing is to ensure that no-one is put to trial without there being sufficient evidence to establish a case against him or her, that function is now more effectively performed by the DPP. This is particularly so when one remembers that the DPP will consider the case as a matter of course whether or not a magistrate commits for trial, and will do so with reference to considerations apart from the evidence before the magistrate,[51] and which may be inaccessible to a magistrate.

Notwithstanding that there may be a 'sufficient' case in law, the DPP, in deciding whether to indict, will consider whether there exists a reasonable prospect of conviction[52] and a raft of other 'public interest' considerations,[53] most of which would be incompatible with a magistrate's responsibilities.[54] When a magistrate discharges a defendant, the DPP may remedy deficiencies in the case with further evidence, or may simply take a different view of the case.

Nor are those involved in the criminal justice system under any illusions as to this. In arguing for the retention of the preliminary hearing as a fundamental feature of the criminal justice system it should not be forgotten that relatively few defendants elect preliminary hearings, and of those elections few hearings actually take place.

Each year some 2 500 matters are committed to the District or Supreme Courts. Approximately 60 per cent of cases are processed through the Perth Court of Petty Sessions. In 1997 there were approximately 1 550 committals from the Perth court, of which 1,405 committals (90 per cent) were by way of hand-up brief. Of those hand-up brief committals, close to 40 per cent were expedited, or 'fast-track', committals for sentence.

Of 144 preliminary hearings in Perth, the DPP's Court of Petty Sessions team assumed responsibility for 124, but only 66 (53.2 per cent) proceeded to evidence on the listed day. Of the balance, 54 (43.5 per cent) were resolved by the hearing date, by withdrawal of charges or a decision by the defendant to accept a committal by way of hand-up brief. In the end, less than half of the matters set down for preliminary hearings actually went ahead.[55] It appears that the number resulting in the defendant's discharge was negligible.

In those cases where the defence elected a preliminary hearing, the objective was unlikely to be merely to secure a discharge. More probably the purpose was to expose weaknesses in the prosecution case which might deter the DPP from presenting an indictment in due course, or to commit witnesses to testimony which might be used for the purposes of cross-examination at the (foreseen to be inevitable) trial.

In short, preliminary hearings do not guarantee that weak cases will not proceed to indictment, although what emerges in the course of one may influence the DPP's decision whether to indict.

Inadequate tool for discovery and mechanism for disclosure

The hand-up brief procedure only requires the prosecution to disclose those statements it proposes to tender in a preliminary hearing. That might be all the evidence supporting the prosecution case, or part of it, or none at all. The statements prepared by the police may overstate the prosecution case or fail to reveal, or may conceal, serious shortcomings in the evidence. The check is the *prospect* of there being a preliminary hearing. Depositions can be comprehensive, whereas statements may not be. The preliminary hearing ensures that the prosecution has, and discloses, *some* case against a defendant. Accordingly, modern recourse to a preliminary hearing is, most importantly, a check against inadequate disclosure and a means by which the defence can discover more about the police case.

However, the Crown's prosecutorial duties demand that there be full and proper discovery of relevant material.[56] A preliminary hearing will rarely meet this standard. It will, at best, oblige the investigating authorities to reveal to the court no more than the material in existence at the time of the hearing, not what may be obtained thereafter, and even this is not guaranteed. The preliminary hearing was never designed as a mechanism for discovery of the prosecution case or to guarantee disclosure of relevant material in the prosecution's possession. To the extent that it does perform these functions it duplicates the obligations routinely discharged by the DPP.

Notwithstanding its shortcomings, the preliminary hearing does perform an important role in the absence of satisfactory alternatives in that it provides

> a date, well in advance of the trial itself, by which a substantial part of the prosecution's evidence must be made available to the defence . . . [T]he same result can probably be achieved without a committal if prosecution authorities set and adhere to their own disclosure dates … but arguably, externally enforced deadlines will be complied with more consistently.[57]

However, other mechanisms can be devised to compel adequate disclosure of the prosecution case in advance of the trial.

Cost in time and resources

Of the 124 preliminary hearings in the Perth Court of Petty Sessions and taken over by the DPP in 1997, the total court time listed was 175.5 days, with an average allowed of just over seven hours for each listed hearing. The average court time used was 2.6 hours, or 36.6 per cent of the time assigned. Of the 66 preliminary hearings which proceeded, only 54 per cent of the time allocated was consumed. To minimise wasted days, the Perth Court over-lists in the knowledge that many preliminary hearings do not proceed.[58] Preliminary hearings, and the listing of preliminary hearings which do not eventuate, consume time and resources of prosecutors, the courts, the police, witnesses and defendants (and legal aid bodies who fund them). This cost in time and resources is a major criticism of preliminary hearings and the manner in which they are used.

By far the greatest criticism of the present committal system is attracted by long and unwieldy preliminary hearings, aimed at frustrating and delaying the progress of a case. It is true that these are uncommon. It is also true that some problems may be solved by giving magistrates greater, legislatively sanctioned, control over which witnesses need to be called by the prosecution and the extent to which they may be cross-examined. It may also be argued that the resources consumed in a preliminary hearing, if it results in a prosecution decision not to indict, are well spent if the wastage of the greater resources of a trial is avoided.

Nevertheless the potential for misuse remains and even the present wastage of court and prosecution resources is unacceptable in a modern criminal justice system unless a clear public interest can be demonstrated. It demands a consideration of whether those resources can be better applied to, and the objectives of preliminary hearings better attained by, alternatives.

Contribution to delay

Preliminary hearings cause delay in bringing defendants to trial. If there was no need to hold a preliminary hearing, a matter would enter the higher court lists earlier and the overall time between charge and trial would be reduced proportionately. This is so even when a hearing is not being misused to delay or frustrate the trial.

Several months are added to any time between arrest and committal if a defendant elects to have a preliminary hearing, although the time may be greater for longer hearings which require larger blocks of court time to be found and reserved. Adjournments of hearings before they commence, and hearings adjourned part-heard, will further delay committal and any consequent trial.

It is true that a substantial part of the time between charge and committal is used to carry out tasks which would have to be performed regardless of whether or not a preliminary hearing was held. Indeed, forcing these tasks to be carried out at an early stage pre-committal may be preferable to allowing them await the period between committal and trial. Even if it were possible to list matters for trial more quickly, there would still be no guarantee that the total time which elapses between charge and trial would be significantly reduced. If anything, the backlog in the superior courts would increase due to matters entering the courts faster than they were being cleared. Furthermore, the purpose of the preliminary hearing is not to reduce the total time taken to dispose of a criminal prosecution, and so its utility generally should not be judged and condemned by reference to its contribution to any delay.

Nevertheless, the election for a preliminary hearing does result in a delay of the committal for trial and hence a delay in the presentation of an indictment and, inevitably, loss of priority in the listing of a case for trial. This delay may

be lessened by changing the manner in which hearings are listed. But any delay caused by preliminary hearings is acceptable only if they, or the delay, serve some public interest which outweighs the postponement of justice.

Burden on witnesses and victims of crime

There is a recognised public interest in protecting citizens who become involved in the criminal justice system only by reason of their misfortune in being victims or witnesses. It is undesirable that they be required to give evidence on more than one occasion and, if this happens, it is defensible only if unavoidable in the interests of justice.

The public interest is paramount, and most notably outweighs the interests of defendants, in cases involving child victims of sex offences, where there is a prohibition in any but 'special circumstances' against the victims being called to give evidence at a preliminary hearing. This is precisely the category of witnesses with which one would expect cross-examination to realise the greatest advantages for a defendant.

Presently, a defendant can trigger a preliminary hearing by objecting to the tender of any witness statement that the prosecution proffers under section 69 of the Act. Unless the tender of a witness's statement attracts the consent of the defendant, the witness who has made a statement upon which the prosecution proposes to rely must attend to give evidence at the hearing and be available for cross-examination. The opportunity to cross-examine witnesses is one of the prime objectives of a defendant who elects to have a preliminary hearing. It is plain from the 'special reasons' test that if the cross-examination of particular witnesses is considered essential, the interests of justice are not defeated by a requirement that a defendant articulate and justify being given that opportunity.

The prosecution is obliged to establish only a *prima facie* case. The defendant has never had the right to hear, observe, and cross-examine all, or any particular, prosecution witnesses.[59] If the opportunity to cross-examine witnesses is a benefit to a defendant which alone would justify the retention of preliminary hearings, the 'special reasons' test has already made considerable inroads into that opportunity.[60]

SCOPE FOR REFORM

Objectives for reform

Plainly some benefits may flow from properly conducted preliminary hearings in appropriate cases. However, can the beneficial features of preliminary hearings be preserved or improved upon, and the unsatisfactory aspects eliminated or ameliorated? Are preliminary hearings the best or only way of securing those benefits?

The National Legal Aid and the Conference of Australian Directors of Public Prosecutions *Best Practice Model for the Determination of Indictable Charges*, concludes that criminal procedure is, and should remain, fundamentally

accusatorial; that is 'the State accuses the citizen of a criminal offence and must prove guilt without the enforced assistance of the accused'. It goes on to observe that:

(i) the public interest in improving the efficiency of criminal proceedings by reducing delay and costs must proceed in the context of the accusatorial framework;

(ii) the committal, long regarded as a cornerstone of the criminal justice system, has evolved to be more concerned with discovery of the full extent of the Crown case than in determining whether there is sufficient evidence to put the accused on trial;

(iii) alternative mechanisms for disclosure will justify 'a fresh approach' to committals; and

(iv) notwithstanding that some jurisdictions have limited the right to cross-examine witnesses at committal, the opportunity to cross-examine key prosecution witnesses prior to trial is valuable and should be retained.

The *Model* proposes that:

(v) the operation of the criminal justice system can be improved by treating the committal as part of the overall trial process rather than the first step in a two-stage process;

(vi) the reduction of the time between committal and the first mention in the court of trial, perhaps assisted by the use of technology, could achieve a more efficient determination of matters; and

(vii) one aspect of the accusatorial process is that of disclosure of the evidence upon which the prosecution is based,[61] and improving the process of disclosure of material relevant to the guilt or innocence of the accused would facilitate this.

Other jurisdictions

It is not proposed to recount in detail the committal procedures of other jurisdictions. The procedures of other jurisdictions, and their experience of their operation, may significantly differ from that of Western Australia. However, significant features will be identified in order to prompt evaluation and comment.

New South Wales

In New South Wales committal proceedings are governed by Div 1 of Pt 4 of the *Justices Act 1902*, which prescribes that prosecution evidence is to be presented by way of written statements which must satisfy certain formal requirements.

Disclosure

The written statements are not admissible at the committal proceeding unless they are served within allowed time limits, along with copies of exhibits or

notification of an opportunity to inspect them.[62] In this way New South Wales attempts to achieve disclosure before the hearing of at least a case justifying committal.

Presentation of Evidence

The prosecution can only call witnesses if it can satisfy the court that certain procedural requirements relating to the admissibility of the written statements could not reasonably be complied with, or that the evidence is additional evidence of a person whose statement has already been admitted and a further written statement would not be appropriate.[63] If not satisfied the court can adjourn the proceedings to enable the appropriate written statement to be prepared and served on the defendant, or the proceedings can proceed without the evidence being taken.[64] The court must reject part or all of a written statement to the extent that it is inadmissible.[65]

The court may direct that the maker of a statement which has not already been admitted into evidence attend to testify,[66] either on the application of a party or by its own motion.[67] A defendant must give the prosecution notice at least 14 days before the proceeding if he or she wishes the maker to attend to give evidence.[68] The court must be of the opinion that there are 'substantial', or in the case of proceedings relating to an offence involving violence,[69] 'special' reasons why, in the interests of justice, the witness should attend to give oral evidence.[70] The witness can only be cross-examined in relation to matters which were the basis upon which the direction was made.[71] The court may terminate any examination or cross-examination on any particular matter if satisfied that any further examination or cross-examination will not assist it in deciding whether to commit the defendant for trial.[72] The power to exclude evidence on discretionary grounds is limited.[73]

Test for Committal

When the evidence for the prosecution has been taken, the justices must discharge the defendant unless they are of the opinion that 'having regard to all the evidence . . . the evidence is capable of satisfying a [reasonable jury properly instructed] beyond reasonable doubt that the defendant has committed an indictable offence'.[74] If not discharged, the defendant is invited to answer the charge, and any statement the defendant makes is recorded. The defendant may give, or call, evidence on his or her behalf, which is taken in the same manner as that for the prosecution.[75] When all evidence has been taken, the defendant is committed if the justices are of the opinion that 'there is a reasonable prospect that a [reasonable jury properly instructed] would convict the defendant of an indictable offence'; otherwise the defendant is discharged.[76]

General

In New South Wales the preliminary hearing is not optional, as in Western Australia, but mandatory. Whenever a defendant indicates that he or she will be pleading 'not guilty', the matter is adjourned to a defended committal hearing. However, the process presumes that any examination of the prosecution case will involve an assessment of the content of its written statements. Accordingly, in New South Wales a magistrate considers the adequacy of the evidence and whether it warrants committal in all cases. Statistics for New South Wales must therefore be interpreted in this context.

Queensland

Committal proceedings in Queensland are governed by Pt 5 of the *Justices Act 1886* and closely follow the procedure established in England and Wales by 'Sir John Jervis's Act' as amended by the *Criminal Law Amendment Act 1867*.

Disclosure

There is no specific requirement for the service of a brief, save that the admission of statements in evidence at the preliminary hearing depends, *inter alia*, upon a copy having been provided to the other party and it complying with certain requirements as to form.

Presentation of Evidence

A written statement can be tendered as evidence in lieu of oral testimony by either the prosecution or the defence,[77] provided that the defendant is represented, that no party objects to its admission, that a copy has been made available to the other party, and that certain requirements as to form are satisfied.[78] Upon its admission as evidence, the written statement must be signed by the justices[79] and has effect as if it was a deposition of its maker.[80]

If, other than exhibits, all of the evidence tendered is in the form of written statements and the defendant's legal representative consents to his client being committed for trial or sentence without consideration of the contents of the written statements, the court commits the defendant without considering the sufficiency of the evidence.[81] However if that consent is not forthcoming, or if the evidence is comprised of both written statements and oral evidence, the court considers the sufficiency of the evidence in the same manner as it would if all evidence were given orally.[82]

Test for Committal

If, at the close of the prosecution case, the justices are of the opinion that the evidence is 'sufficient to put the defendant upon trial for an indictable offence' the defendant is invited to plead or speak in answer to the charge, and is allowed the opportunity to give evidence and call witnesses.[83] If the defendant

pleads 'guilty', he or she is committed for sentence. If upon a consideration of all the evidence the justices are of the opinion that it is 'sufficient to put the defendant upon trial for an indictable offence' the defendant is committed; otherwise the defendant is discharged.[84]

South Australia

In South Australia, preliminary examinations are governed by Pt V of the *Summary Procedure Act 1921*.

Disclosure

At least 14 days prior to any preliminary examination taking place, the prosecution is required to file in the court and serve on the defendant:

(i) statements of witnesses and copies of documents on which the prosecution relies as tending to establish the guilt of the defendant;

(ii) a document describing any other evidentiary material on which the prosecutor relies as tending to establish the guilt of the defendant together with a statement of the significance that the material is alleged to have; and

(iii) any other admissible material relevant to the charge and available to the prosecution on which the prosecution does not rely as tending to establish the guilt of the defendant, other than material affecting the credit of a witness or material the truthfulness or reliability of which the prosecution distrusts.[85] Any like material which subsequently comes into the prosecution's possession must also be filed and served as soon as practicable after it is acquired.[86]

Accordingly, South Australia endeavours to ensure comprehensive disclosure of the prosecution case prior to the hearing.

After the disclosure requirements have been satisfied, and unless the defendant admits the charge, the examination proceeds.

Presentation of Evidence

The preliminary examination itself involves the tender by the prosecution of the statements and other materials filed in the court and the court must admit them as evidence subject to any objections as to admissibility.[87] The defendant may give notice that the defence requires certain witnesses to attend to give evidence and be cross-examined. The court's leave must be obtained. Likewise the prosecution requires leave of the court to call that witness for oral examination.[88] Leave will be granted only if 'special reasons' are made out, having regard to the need to ensure adequate disclosure of the prosecution case, the need to ensure adequate definition of the issues for trial, the need to ensure that the evidence is sufficient to put the defendant on trial, and the interests of justice.[89] Leave will not be granted to call the

victim of an alleged sexual offence or a child under the age of 12 years unless the court is satisfied that the interests of justice cannot be adequately served except by doing so.[90]

The defence may give or call evidence, and the prosecution may call evidence in rebuttal.[91]

Test for Committal

Once evidence has been completed, the court must consider whether the evidence is sufficient to put the defendant on trial for an offence; namely, if 'in the opinion of the Court, the evidence, if accepted, would prove every element of the offence'.[92] Otherwise, the charge will be rejected and the defendant discharged.[93] If the evidence is sufficient to put the defendant on trial for an offence, the court will review the charges laid to ensure that they properly correspond to the offences for which there is sufficient evidence, and amend them as necessary.[94]

Tasmania

Committal proceedings in Tasmania are governed by Pt VII of the *Justices Act 1959*.

Election for Hearing

Once a defendant charged with an indictable offence and brought before the justices is informed of the charge and his or her rights, he or she is required to plead.[95] If the defendant pleads 'not guilty' or 'that he has cause to show why he should not be convicted of the charge', the defendant is required to choose one of three courses:[96]

(1) the defendant may require the depositions of witnesses be taken before a justice and propose to dispute that an order for committal should be made;

(2) the defendant may not dispute that an order for committal be made, but may require the depositions of one or more witnesses to be taken before a justice before committal; or

(3) the defendant may not require any depositions of witnesses to be taken before a justice.

A defendant standing mute or not making a definite choice is deemed to have taken the first option.[97]

Disclosure

There is no explicit requirement for the service of material upon the defendant. The wish to encourage a defendant not to dispute an order for committal provides an incentive for timely disclosure of material in the paper form.

Presentation of Evidence

Except in the case of an 'affected child', the taking of a deposition means the examination of the witness before a justice[98] and (unless the court permits otherwise) the defendant,[99] and its recording in writing or mechanically with the statement signed by the witness or the transcript appropriately certified. A statutory declaration or affidavit may be received as the witness's evidence and signed deposition, and signed by the court, but the court may summon the witness to attend for further examination or cross-examination if it thinks 'just cause exists for doing so', and must do so if the opposing party requests it.[100]

The deposition of an 'affected child' — essentially, a person under the age of 17 years the victim of a specified sexual offence[101] — is not taken by examination unless the justice is satisfied that there exist 'special circumstances' which justify the child being required to attend for examination, further examination, or cross-examination.[102] Instead, the deposition is the presentation of a copy of a written, electronic or other recording of a statement made by the child, appropriately certified.[103]

Witnesses may also be summoned for the purpose of taking their depositions for a number of specified reasons, such as the poor health or imminent permanent departure from Tasmania of a Crown witness.[104]

It is not clear whether the defendant can give evidence himself or herself, or whether the defendant can call witnesses.[105] No doubt, as in other jurisdictions, this problem is largely academic.

Test for Committal

In committal proceedings which involve the taking of depositions, the court must consider at the conclusion of the prosecution's evidence whether the evidence is 'sufficient to put the defendant on trial for any indictable offence'. If the court is not satisfied, the defendant must be discharged.[106] In deciding whether the evidence is sufficient to put the defendant on trial, the court must assume that a jury will accept the prosecution case, despite any evidence favourable to the defendant, and determine whether, upon this basis, a jury could lawfully convict.[107]

Where a defendant has pleaded 'not guilty' or 'cause to show' and elects courses (2) or (3) above, the court must commit the defendant for trial.[108]

Victoria

Committal proceedings in Victoria are governed by section 56 of, and Schedule 5 to, the *Magistrates' Court Act 1989*.

Disclosure

An accused person may elect to stand trial without a committal proceeding at any time after the service of the hand-up brief.[109] The brief includes the statements which the prosecution intends to tender at the committal proceeding, and reveals the exhibits proposed to be tendered in evidence.[110]

Presentation of Evidence

Service of the hand-up brief relieves the prosecution of the need to make available at the committal proceeding a person who made a statement unless the defendant serves a notice requiring the maker's attendance.[111] The court may set the notice aside if it is satisfied that it would be frivolous, vexatious or oppressive in all the circumstances to require that witness to attend.[112]

There are three possible courses the proceedings may take.

If a hand-up brief has been served and the defendant has not given notice that witnesses are required, the statements (subject to any evidence being ruled inadmissible by the court) constitute the sole basis for the court's determination as to whether the defendant should be committed.[113] This is the most common way committal proceedings are conducted.

If a hand-up brief has been served but witnesses are called and give evidence, their evidence also forms part of the material to be considered. Unless the court gives leave to the contrary, the witness's evidence-in-chief is confined to the witness identifying himself or herself and attesting to the truthfulness of his or her statement.[114]

If no hand-up brief has been served, unless the court orders otherwise the evidence-in-chief of each prosecution witness must be given in the form of a statement prepared and signed before the committal proceeding is held. Again, the witness's evidence-in-chief is confined to the witness identifying himself or herself and attesting to the truthfulness of his or her statement. Subject to the court ruling part or all of it inadmissible, any statement prepared before the committal proceeding and any exhibit or document referred to in it is admissible into evidence if it is proved that the statement was served personally on the defendant beforehand and its truthfulness has been attested to.[115]

Witnesses who give evidence may be cross-examined and re-examined.[116] The defendant may give and call evidence.

In certain circumstances where the committal proceedings relate to a charge of a sexual offence or certain offences of personal violence, the evidence-in-chief of witnesses under the age of 18 years or with impaired mental functioning

may be given by way of an audio or video recording of the witness answering questions.[117] Unless the court is satisfied by the prosecution that it is in the interests of justice to do so, the prosecution must use the hand-up brief procedure if the committal proceeding relates to a charge of a sexual offence.[118]

Test for Committal

At the conclusion of the prosecution evidence, the defendant is discharged if the court is of the opinion 'the evidence is not of sufficient weight to support a conviction for any indictable offence'.[119] The same test is applied again at the conclusion of all the evidence of the prosecution and defence.[120]

Australian Capital Territory

Preliminary examinations in the Australian Capital Territory are governed by Pt VI of the *Magistrates Court Act 1930*, which provides for the preliminary examination to be conducted:

(a) partly or wholly on the basis of written statements; or
(b) entirely without written statements.

Disclosure

In the case of (a), the prosecution notifies the defendant of its intention to rely upon statements without requiring the attendance of the witnesses who made them. Copies of the statements and other materials to be relied upon are filed and served on the defence, and are filed before the magistrate who is to conduct the examination.[121]

Presentation of Evidence

If the written statements are in the form of statutory declarations and satisfy certain requirements as to form[122] they are admissible as evidence of the matters stated in them and are regarded as the witness's deposition,[123] subject to the court ruling part or all of any written statement inadmissible.[124] A defendant may render the statement inadmissible by requiring the attendance of the maker.[125] A defendant who does not give notice may nevertheless object at the hearing to a written statement being tendered, and if that objection is upheld the maker will be required to attend and give evidence.[126] The prosecution may also call the maker to give oral evidence and be cross-examined.[127]

Where written statements are not to be tendered (option (b) above), the court examines witnesses on their oath, and the defence may cross-examine them.[128]

Test for Committal

Except in the case of offences punishable by life imprisonment, a defendant may plead 'guilty' at any time and if the plea is accepted and is to be dealt

with on indictment, the defendant is committed for sentence.[129] Upon considering the prosecution case the court must discharge the defendant unless it is of the opinion that 'the evidence is capable of satisfying a jury beyond reasonable doubt that the [defendant] has committed an indictable offence'.[130] If the defendant is not discharged, he or she is invited to answer the charge and give and call evidence.[131] Once all the evidence has been taken, the court must discharge the defendant if it 'is of the opinion, having regard to all the evidence before it, that a jury would not convict the defendant of an indictable offence'. Otherwise, the defendant is committed for trial.[132]

Northern Territory

Preliminary examinations in the Northern Territory are governed by Part V of the *Justices Act*,[133] the procedure being almost identical to that of the Australian Capital Territory.[134]

Test for Committal

Following the completion of the prosecution evidence, the justice considers 'whether it is sufficient to put the defendant upon his trial for any indictable offence' and discharges the defendant if it is not.[135] If the evidence is sufficient and the hearing proceeds, the defendant is invited to answer the charge and is allowed the opportunity to give and call evidence.[136] Once all evidence has been taken the justice must consider 'whether the evidence is sufficient to put the defendant upon his trial for any indictable offence.'[137]

Commonwealth of Australia

Preliminary hearings dealing with indictable offences under Commonwealth law are conducted according to the laws of the State or Territory in which the criminal proceedings are taking place, subject to certain limited exceptions.[138]

England and Wales

Committal proceedings have been retained (except for charges of sexual offences or offences of violence or cruelty where a child is the alleged victim,[139] or in cases of serious or complex fraud[140]),[141] albeit in a modified form. They are governed by sections 4 to 8 of the *Magistrates' Courts Act 1980*.

Originally these sections, which have been the subject of one successful and one unsuccessful attempt at amendment, provided for two forms of committal proceedings. The first was known as '6(2)' or 'paper' committal. If all of the evidence before the court consisted of written statements duly tendered, and a represented defendant had not requested the court to find that the statements disclosed insufficient evidence to put him or her on trial for the offence, the court could commit for trial without consideration of the written statements.[142]

The second, known as a 'full' committal, permitted witnesses to be called and the defence was at liberty to cross-examine those witnesses.[143] In the case of written statements, the court could require the makers of the statements to

attend and give evidence, either of its own motion or on the application of a party.[144] The court would consider the evidence and any statement of the defendant, and commit the defendant for trial if it was of the opinion there was sufficient evidence to put the defendant on trial by jury for an indictable offence.[145]

The now repealed[146] section 44 of, and Schedule 4 to, the *Criminal Justice and Public Order Act 1994* sought to abolish committal proceedings in favour of a transfer for trial procedure to be applied to all defendants to be tried on indictment.[147] The prosecution was to be required to serve a notice of its case on the magistrates court and the defendant within a prescribed period.[148] The notice would specify the charge to be transferred for trial, include a set of documents containing the evidence on which the charge were based, and such other information as may be prescribed.[149]

Upon service of the notice, the defendant had a set time within which to make an application to the magistrates court to dismiss the charge,[150] which the prosecution could oppose.[151] The court was required to consider the application on the basis of the written evidence before it and in the absence of the parties, unless the defendant was unrepresented[152] or obtained leave to make oral representations on the ground of the complexity or difficulty of the case.[153] The prosecution could make oral representations in response.[154]

If it appeared to the court upon considering the written evidence and any submissions that there was insufficient evidence to put the defendant on trial by jury, the court was required to dismiss the charge and discharge the defendant. This barred any further proceedings for the offence except by way of a bill of indictment preferred with the consent of a High Court judge.[155] If, however, no application for dismissal was made or the court considered that there was sufficient evidence, the court was required to transfer the proceedings to the Crown Court for trial.[156]

Time limits were prescribed which could be extended with leave, the grant of which could be opposed.[157] However practical difficulties associated with implementing the transfer for trial procedure, including those associated with time limits, provoked considerable opposition to the procedure and eventually led to its abandonment.[158]

The *Criminal Procedure and Investigations Act 1996* repealed the provisions of the *Criminal Justice and Public Order Act 1994*, which would have abolished committal proceedings, in favour of a modified form of committal proceedings which came into effect on 1 April 1997. With respect to any alleged offence into which no criminal investigation had begun before that date,[159] the role of the magistrates court and the procedure associated with committal proceedings are substantially retained but evidence can only be tendered by

the prosecution in writing and oral evidence can no longer be admitted.[160] In furtherance of the prosecution's power to obtain and lead evidence, a justice of the peace can require a person to attend and give evidence in the form of a deposition or to produce a document or other exhibit prior to the commencement of committal proceedings if the court is satisfied that the person is likely to be able to do so on behalf of the prosecution, but will not voluntarily do so[161] — a process reflecting our pre-election deposition.

The reforms to committal proceedings have been characterised as 'a significant, indeed, an historic change in criminal procedure in England and Wales'.[162] However, other reforms of the *Criminal Procedure and Investigations Act 1996* are also notable, and include the extensive regulation of prosecution and defence disclosure and criminal investigations by the police, provision for pre-trial rulings, and for preparatory hearings in cases to be tried in the Crown Court which appear to a Crown Court judge to be of such complexity or length that substantial benefits are likely to accrue from a hearing.

The reforms to preliminary hearings in England and Wales are particularly noteworthy because there is no provision for an *ex officio* indictment of the kind found in many Australian jurisdictions. A bill of indictment can only be preferred in England and Wales if the defendant has been committed for trial, or is the subject of a notice of transfer in respect of a case of serious and complex fraud or violent or sexual offences against children, or if the bill is preferred by the direction of the Court of Criminal Appeal or by the direction or with the consent of a High Court judge.[163]

Overview of other jurisdictions

An examination of other Australian jurisdictions and England and Wales reveals resort to varied attempts to overcome the identified shortcomings of the traditional committal process.

Improving charge screening

Raising the threshold that must be surmounted by the prosecution case in order to achieve committal is the commonest method of attempting to improve the preliminary hearing's effectiveness in screening and sifting out weak cases.

In place of the traditional criterion — whether the evidence is 'sufficient to put the defendant to trial' — Australian jurisdictions have adopted a variety of assessments:

- whether there is 'a reasonable prospect that a reasonable jury properly instructed would convict' (New South Wales);
- whether 'the evidence, if accepted, would prove every element of the offence' (South Australia);
- whether the evidence is of 'sufficient weight to support a conviction for any indictable offence' (Victoria); and

- whether the evidence is 'capable of satisfying a jury beyond reasonable doubt that the defendant has committed an indictable offence' (ACT).

More effective discovery and disclosure

Several states have attempted to ensure that the prosecution case is comprehensively disclosed as soon as possible after charge. However, all but one still link disclosure to the evidence that the prosecution proposes to present to justify committal, although the higher the test for committal the greater is likely to be the disclosure required.

South Australia has gone the furthest with its legislative requirement that the prosecution disclose all material in its possession relevant to the charge, but by doing so has demonstrated that the obligation to disclose material need not have anything to do with committal or preliminary hearings. Indeed, if the requirement is complied with, there is even smaller scope for a preliminary hearing to perform any useful discovery or disclosure function.

Saving time and resources

In every jurisdiction there is a move towards some form of 'paper committal'. Western Australia has made the holding of a preliminary hearing optional at the defendant's election. In New South Wales, prosecution evidence is to be by way of written statements unless there are at least 'substantial', and in some cases 'special', reasons for evidence to be by way of oral testimony. In Victoria the case is to be assessed by reference to statements unless the defendant requires the attendance of witnesses. In South Australia, witnesses can only be required to attend with the court's leave. Other jurisdictions have attempted to bypass the preliminary hearing in certain categories of cases (as in England and Wales). In Tasmania, a defendant can choose not to dispute that an order of committal should be made.

Denying, except in certain circumstances, a preliminary hearing or limiting the scope of a hearing are increasingly common strategies aimed at reducing the time and expense of committals and minimising the opportunity for their abuse.

Reducing delay

Changing the character of the committal may reduce delay, and as noted the most common strategy is limiting the scope of the inquiry. England and Wales have gone the furthest by denying a preliminary hearing in certain cases. But delay will occur in a matter being committed and listed for trial whenever evidence is called pre-committal, if only because the tribunal required to hear the evidence will need to find the necessary time to do so.

Relieving burden on witnesses and victims of crime

Limiting the scope of the committal hearing protects witnesses from the necessity and the burden of giving evidence. All jurisdictions permit the use of written statements in lieu of oral testimony, subject to certain conditions, but some go further than others.

In New South Wales not even the prosecution can require a witness to give testimony without there being 'substantial reasons'. However, as in other states, New South Wales has recognised the need to provide special protection to witnesses and victims in circumstances which render them more than usually vulnerable. The degree of protection varies from jurisdiction to jurisdiction. In Western Australia it is intended that the evidence of complainants under the age of 16 in sexual offence and certain other cases may be given by way of written statement notwithstanding any objection by the defence. In Victoria committals for sex offences must be by way of hand-up brief unless the prosecution satisfies the court that the interests of justice require otherwise, and the evidence of witnesses under 18 years or with impaired mental functioning may be pre-recorded. In Tasmania 'affected children' are not required to give evidence in other than 'special circumstances'.

REVIEW OF OPTIONS

Below we present several options, with arguments for or against each.

Option A

Retain preliminary hearings without significant change.

This option retains the status quo, leaving open the prospect of introducing improvements or eliminating specific inefficiencies and anomalies. Retaining preliminary hearings in their present form does not exclude the possibility of effecting improvements.

Any major change to the tried and familiar procedures may generate uncertainty and confusion until its operation and ramifications are known, and alternatives may not, in the end, operate as effectively as the processes we know. However, there are compelling arguments in favour of reassessment of the preliminary hearing's utility, and there exists considerable scope for reform.

Option B

Limit the offences for which a preliminary hearing is available.

This course has been taken in several jurisdictions. England has decided that preliminary hearings should not be available in cases of serious or complex fraud which may result in lengthy trials and are proved largely by the production of voluminous amounts of documentary evidence or information, or sex offences or offences of violence or cruelty committed against children. In each case the restriction is based upon specific public policy considerations.

In the one case, the objective is to reduce the cost and delay produced by lengthy preliminary hearings calculated to frustrate the course of justice; in the other, the paramount consideration is to protect children from having to give evidence and be cross-examined on more than one occasion. In Western Australia child victims of sex offences are protected from giving evidence at preliminary hearings in any but 'special circumstances'.

Plainly certain public policy considerations outweigh any possible benefits to a defendant from a hearing. Other categories of witnesses might likewise be protected, or preliminary hearings made unavailable for certain types of offences, with a consequent saving of resources.

However, the usefulness of a preliminary hearing depends not on the particular offence charged but the issues to be raised at trial, and these blanket limitations may deny the benefits of a hearing to those cases which would benefit the most. Preliminary hearings could still be open to abuse, or be resorted to unnecessarily, and the identified deficiencies of preliminary hearings would not be eliminated, merely confined to fewer cases.

Option C

Retain preliminary hearings, but alter them to improve their effectiveness as a 'charge-screening' mechanism.

A magistrate may decide whether or not to commit, but the Director of Public Prosecutions decides whether or not to indict, and the Director may make that decision with reference to evidence and other information unavailable to the magistrate. The real value of a preliminary hearing as a charge-screening mechanism lies in what the prosecution may glean from assessing the evidence of the witnesses it chooses to call, but it is hard to know how useful they are in fact.

Some jurisdictions have raised the threshold test for committal, from that of a '*prima facie* case' to one requiring assessment of whether there exists a 'reasonable prospect of conviction', in order to make the preliminary hearing a more effective charge-screening mechanism. Fewer matters relying on testimony of questionable weight would be committed for trial. Also, the prosecution would be obliged to present more than a bare case for committal, thus providing greater disclosure to the defence of the case against it.

On the other hand, raising the threshold for committal has created its own problems of interpretation and application in the jurisdictions which have adopted that course. If the inquiry focuses upon the likelihood of conviction after trial, the magistrate may be required to sit as a 'hypothetical jury', and so usurp the function of the jury. The 'preliminary hearing' may become a

'preliminary trial' resulting, effectively, in there being two trials of the same cause with the first having all the benefits of a rehearsal.

The deficiencies of preliminary hearings would not be eliminated, but the hearings would require a more elaborate inquiry and so would be longer and more expensive. The burden on witnesses would be greater. The prosecution may be obliged to call more witnesses (including vulnerable witnesses), and they would need to attend, give full testimony, and have their credibility assessed at what would amount to two trials.

However, the elevated test would not add to the protection already afforded by the evaluation routinely performed by the Director of Public Prosecutions when deciding whether to indict.

Option D

Retain preliminary hearings, but allow use of evidence of witnesses at the trial.

A major objection to the abolition of preliminary hearings is their utility to the defence for observing and cross-examining witnesses and tying them down to testimony which may later be used as a basis for cross-examination at trial. A major criticism of preliminary hearings is that witnesses are burdened by having to give evidence in an adversarial hearing on two occasions — once in order to establish a case for trial, and again at the trial itself.

One option may be to retain the preliminary hearing and the defendant's right to cross-examine witnesses, but to record that testimony — say, by way of video-tape — to be re-played to the jury in the trial at the option of the party calling the witness and become evidence at the trial in place of the witness's repeated testimony. The preliminary hearing's role in preserving the evidence of witnesses who might become unavailable by the time of trial would also be rendered more effective. The pre-recording of evidence for later use at trial is already available and widely used in the case of child complainants and 'special witnesses' (usually vulnerable victims of sex crimes).

Related issues, such as the excision of inadmissible portions of the pre-recorded evidence, and the circumstances in which the prosecution or the defence could require the further attendance of the witness at the trial for additional testimony or cross-examination, would still need to be resolved. But most witnesses would be subject to only one court appearance and one session of cross-examination, either at the preliminary hearing or the trial, reducing the burden upon witnesses and saving court time and expense.

Preparation time before trial may be saved if a witness's testimony was known and need not be repeated. Counsel would be forced to consider most carefully the decision to require witnesses to attend for cross-examination at the preliminary hearing.

However, some issues of relevance and admissibility of evidence are more appropriately raised before and resolved by a trial judge, rather than a magistrate in the context of a preliminary hearing. The nature of a case after indictment may be different to what it was before committal, rendering some evidence irrelevant and making other parts, which had not been anticipated and fully explored at the hearing, important. The focus of the parties may shift from the trial to the preliminary hearing and change the character of the hearing. Preparation time may remain the same, but may shift from a stage pre-trial to pre-committal. Much of the effort pre-committal may have to be repeated pre-trial.

Pre-recorded evidence is widely used in the trial of some sex offences, but courts and juries may not be so accepting of the pre-recorded testimony of important witnesses lacking any obvious need for special protection. If the pre-recorded evidence of a witness is thought to have less impact upon tribunals of fact than if the witness were giving his or her evidence in person, defendants may seek preliminary hearings to attempt to achieve pre-recording.

Option E

Retain preliminary hearings solely for the function of charge-screening, and find alternatives for the disclosure and discovery functions.

Charge-screening, of course, was the historical purpose of the preliminary hearing. Perhaps it may be retained for that purpose, and its important incidental functions excised and replaced by more effective and efficient alternatives. Much of the disclosure of the Crown case is now effected by reference to the prosecution's traditional disclosure obligations, which are being progressively formalised by guidelines, and so the preliminary hearing can be regarded as unnecessary for that purpose.

Several options may be considered.

(1) The present practice, with the prosecution calling witnesses and presenting evidence.

The prosecution would only need to present such evidence as would be necessary to obtain a committal, and it may be that the magistrate could

indicate when he or she is satisfied that there is sufficient evidence for that purpose.

If this was the preliminary hearing's only function, there would be less scope for cross-examination of prosecution witnesses. One option might be that the 'right' be legitimately curtailed as irrelevant in deciding whether the evidence revealed a *prima facie* case. The preliminary hearing would then effectively become a deposition-taking exercise, where the oral testimony of the witness would take the place of his or her written statement as part of the material upon which the magistrate's decision to commit for trial would be based. Any written statement served by the prosecution with the election brief would still be known to the defendant. If oral evidence departs from the written statement, that departure could continue to be the subject of cross-examination at the trial.

Depending on whether the threshold for committal remains that of a *prima facie* case, or is raised to a more stringent threshold, the defendant's right to call witnesses and give evidence at the preliminary hearing can be removed. In reality, it is rarely if ever used.

As fewer prosecution witnesses will testify at a hearing directed at the need to reveal a case, this alternative would be more considerate of the interests of witnesses. Fewer would be called at two hearings, and fewer still subject to two sessions of cross-examination. The limitations on the process would result in the hearing taking less time and consuming less court time and resources. The prosecution could use the process to preserve the evidence of witnesses who might be unavailable by the time of trial. It would focus on the effective performance of one primary designated function, namely, the determination whether there is sufficient evidence to warrant committal for trial.

However, in most cases it may be a disproportionately cumbersome and costly mechanism for determining this single narrow issue. It would not prevent the use of the hearing to achieve other objectives, and may not effectively achieve even that of charge-screening. Even if the defence were to be permitted to retain the ability to cross-examine and obtain additional information from prosecution witnesses, this opportunity would still depend upon the prosecution's choice of witnesses.

(2) Base the decision to commit for trial solely on written or other material disclosed by the prosecution and submissions.

This option is, in effect, a 'paper committal' of the type available in several other jurisdictions, where the magistrate considers the case disclosed and supporting submissions to decide whether the test for committal has been satisfied. The material need not be considered in open court or in the presence

of counsel or the defendant. The decision, and reasons, whether or not to commit might have to be reduced to writing.

There would be no need for witnesses to attend to give evidence at a preliminary hearing and later at trial. As there would be no formal hearings at which evidence would be presented, court resources would be saved. The decision whether or not to commit for trial could be made soon after the disclosure of the prosecution case.

However, the interpretation of the written evidence without the benefit of questioning by the prosecution or cross-examination by the defence may result in committal decisions being made based upon unsatisfactory material. The preliminary hearing would essentially be a scrutiny by a magistrate of the same hand-up brief which had already been analysed by the prosecution, leading to duplicated effort and no great advantage to the criminal justice system or any party to it. For example, without having probed more deeply into the written material, the defence may not be able to make early decisions about a plea or trial strategies.

Furthermore, defendants may be encouraged to elect this type of preliminary hearing who might otherwise have elected a hand-up brief, as it would at least involve some scrutiny of the papers by a judicial officer and a possibility of no committal, thus using up court and prosecution resources to no real advantage. Rather than a proper consideration of the evidence, argument may be based upon the wording of what might later be found to be poorly drafted statements.

(3) Base the decision to commit for trial on written material disclosed by the prosecution, with an option to require a hearing, or to hear the evidence of specific witnesses, if there is a question as to the sufficiency of the evidence.

This hybrid proposal involves a consideration of the prosecution election brief with the defence being able to require the attendance of specific witnesses to give evidence and be available for cross-examination in the manner of the traditional hearing.

The process could follow the present procedure after a defendant is charged. Once an election brief is served and the proceedings resume after any pre-election depositions are taken, the defendant can be asked whether he or she takes issue with being committed for trial upon the material which has been served. If not, the defendant would be required to plead, the plea would be recorded, and without any consideration of the material the defendant would be committed for trial or sentence as the case may be.

If the defendant takes issue with being committed on the materials disclosed, the defendant may

(i) submit to the magistrate that there is not sufficient evidence to commit and that the defendant should be discharged; and/or

(ii) apply for an order that one or more specific witnesses attend for cross-examination on any matter or matters that may be specified by the magistrate; and/or

(iii) give notice that the defendant proposes to give oral evidence, or tender written statements pursuant to section 69 of the *Justices Act*.

No witnesses would be required to attend for cross-examination unless 'good cause' be shown; for example, unless the magistrate is persuaded that 'the evidence contains ambiguity, uncertainty or omission of a matter material to an element of the offence and not going solely to credit' or 'on the question of credit, that in a specified respect or for specified reasons the witness might not be believed on a matter material to an element of the offence or generally if the relevant facts cannot be established otherwise than by the testimony of that witness'.[164]

Likewise the prosecution, if it wishes to assess a witness upon whom its case at trial will depend, may call that witness to give evidence under oath, without the need to call all witnesses to establish a case.

If the parties consent to a committal for trial based on the written material, there would be similar advantages to those referred to in Option E(2) above. The parties would retain the ability to require the attendance of witnesses if there was a serious question as to the sufficiency of the evidence, but resources would be saved and efficiencies achieved as the case that the prosecution would need to present by way of oral testimony would be limited and focussed. Investigators would have an incentive to provide more comprehensive disclosure of the prosecution case, and exercise more care in the written statements they take from witnesses, to avoid the need for witnesses to be called to give evidence at a hearing.

But in cases where the witnesses are ordered to attend, the deficiencies of the traditional preliminary hearing would continue, and the success of the process would rely upon the fortitude of magistrates to ensure that the criteria for requiring attendance are applied in a way that would properly serve the ends of justice.

(4) Discovery alternatives if the discovery function of the preliminary hearing is eliminated.

The preliminary hearing's discovery and disclosure functions evolved because the criminal justice system's historical failure to institutionalise disclosure

procedures resulted in inadequate or inconsistent disclosure to the defence prior to trial.

Many of these functions are now the subject of prosecution disclosure responsibilities and are being formalised across Australia into guidelines.[165]

Option F

Abolish the preliminary hearing and replace it with a procedure enabling scrutiny of the sufficiency of evidence and/or further discovery.

A preliminary hearing can take place notwithstanding that it will achieve no useful charge-screening, discovery or disclosure objectives. It displays significant shortcomings in its performance of any of those functions, and it may be that these individual functions can more effectively and efficiently be performed by alternative and specific applications.

Arguably, it was justifiable to allow or require an inquiry by way of preliminary hearing in all cases where one was elected in an age when disclosure was not provided for by other means. The defence may justifiably defer serious trial preparation until more complete information concerning the prosecution case can be obtained at the preliminary hearing. But if there is effective disclosure at an early stage, the defence can assess whether there is a real need for either a further judicial exploration of the sufficiency of the evidence to justify committal, or further discovery.

If the preliminary hearing is unnecessary as a mechanism for securing disclosure, or for the perpetuation of the evidence of witnesses who may later be unavailable, or for trial preparation, it is questionable if it is needed as a mechanism for charge-screening and securing further discovery. Not all of these are required in all cases, and separate procedures might be more effective and efficient means of satisfying such requirements, as they arise, on a case by case basis.

The criminal justice system already makes some provision for production or disclosure of necessary material. For example, it is expected that at some stage in the course of trial preparation counsel will determine whether or not particulars of the charge are required. It is an assessment that the prosecution will usually make as a matter of course, and particulars will be provided in the indictment or in response to a request from the defence. If the defence considers that the particulars are inadequate, there has always been provision for an application for particulars to be made. This, and a variety of other applications upon which a ruling may be obtained and directions given, can now be made with the authority of section 611A of the

Criminal Code. Arguments as to the admissibility of evidence, the editing of records of interview, the exchange of expert evidence, the return of *subpoenae duces tecum*, and the pre-recording of evidence in cases where that is allowed, now routinely occur before trial. Why could not the individual purposes presently served by preliminary hearings be dealt with in a similar manner?

Armed with the appropriate powers, the court of trial can satisfy the demands for charge-screening, discovery and disclosure. It is in the interests of society as well as an accused that fatally defective cases do not proceed to trial. After full disclosure is made by the Crown, or even as a lever to ensuring that such disclosure is made, the defence will have sufficient information to assess whether an application questioning the sufficiency of the evidence has a realistic chance of success. Counsel can then bring an appropriate application before the court. The court would allow or refuse such an application simply on the basis of the written, and other, material disclosed by the Crown.[166]

Applications for the pre-trial recording of evidence by the Crown are presently brought post-committal, usually well after indictment and after the case has been through at least one pleas day and a status conference at which a date has been fixed for trial. An early transferral to the court of trial would enable applications to be brought at an earlier stage in the proceedings, once disclosure was complete and an indictment prepared. The preservation of the evidence of a witness who is unlikely to be available for trial, presently an incidental and fortuitous benefit of the preliminary hearing, could be the subject of an application by the Crown.

If the defence determines that further discovery of the prosecution case is required, or has reason to question whether all evidence has been disclosed, that too could be the subject of an appropriate application. The Crown's obligations to ensure that relevant material is fully disclosed would assume an element of immediacy, as failure to disclose in a timely manner would have consequences for the early trial and disposition of the indictment. Presently, there is no element of urgency prior to committal.

Likewise, there would be pressure on the defence, perhaps supplemented by strict time limits, to ensure an early preparation for trial.

Abolition of the preliminary hearing and its replacement as outlined would have profound implications for the criminal justice system and its rationalisation. It would focus critical attention upon the desirability for specialist criminal courts, the closer integration of the pre- and post-indictment processes of the criminal justice system, and the advantages of unifying the various criminal court jurisdictions. It would point to the prospect of eliminating altogether, in the case of matters to be tried on indictment, the need for any preliminary

proceedings in the Courts of Petty Sessions. Once an election was made to have a charge tried on indictment (in those cases where there was a choice) or once it was determined that the charge can only be tried on indictment, the matter could be remitted to a court of appropriate jurisdiction from which time that court could take control of the case and direct its progress. Only in the criminal process are proceedings commenced in one jurisdiction which are ultimately determined in another; civil claims within the jurisdiction of the Supreme Court are not commenced in the Local Court.

The resources of Courts of Petty Sessions presently consumed by proceedings preliminary to the committal for trial of indictable matters would be released and could be applied to matters within the Court's jurisdiction, while superior courts responsible for the disposition of indictable matters would assume control of proceedings at an early stage and co-ordinate their disposition. The delay and waste of resources involved in a charge progressing through Courts of Petty Sessions which do not have jurisdiction to make binding decisions concerning it would be eliminated. The court of trial could control the progress of proceedings, including the early programming and listing of cases for trial, and there would be less need to schedule unnecessary intermediate proceedings between the laying of the charge and trial.

The defence's interest in obtaining further discovery in appropriate cases would be preserved, and would have the sanction of the court of trial. The interests of both the defence and public to ensure, so far as is possible, that cases do not proceed to trial where there is insufficient or unsatisfactory evidence would be preserved. However, applications for discovery and for testing the sufficiency of evidence would be brought only if the defence first determined that they were necessary and that there was a reasonable chance of success. The courts would be required to deal with few applications of little merit.

Prosecutors and defence counsel would be prompted to consider and make decisions about the course the proceedings were to take at a much earlier stage, rather than deferring decision-making until the preliminary hearing and when the indictment was finally listed for trial. Early consideration of the merits of the case, the witnesses and evidence, and the setting of trial dates would enable defence counsel to define and narrow the issues at an earlier stage.

As matters such as the sufficiency of evidence would be determined by and large after discovery and by the court of trial, police would have the incentive to disclose more of the relevant material in their possession earlier in the proceedings, and to provide more comprehensive and detailed statements from witnesses.

Option G

Abolish the preliminary hearing and leave the functions it serves to the Crown.

This is the position in the case of serious frauds in England.[167]

Under these schemes the prosecutor screens the charges brought by the police or investigators by applying clear and published criteria which are intended to be more effective at removing undeserving cases from the process than the test of 'sufficiency of evidence' presently applied at a preliminary hearing. After certifying that there is a sufficient case to warrant a trial, the case is transmitted directly to the court of trial.

As the DPP possesses the power to indict, and that power is exercised with reference to not only the existence of a *prima facie* case but an assessment of whether there exists a reasonable prospect of conviction and other identifiable public interest criteria, this proposal would simply result in that assessment being made at the committal, rather than the indictment, stage.

This reform could include a requirement that the prosecutor, on request, give reasons for a decision to proceed, or provide for some sort of review of the decision, or both. In England, for example, the decision in serious fraud cases may be reviewed during a compulsory 'preparatory hearing', similar to a pre-trial conference, which must be conducted by the trial court.

The English reform replaces the discovery function of the preliminary hearing with the 'preparatory hearing', at which both sides disclose their entire case and evidence. At the conference held for this purpose an application may be made for the further questioning of a witness and an order is granted in exceptional cases. An alternative would be to implement the separate application procedures described in the discussion of the options above.

The other advantages touched upon in Option F above would apply.

Delay would be reduced, as less time would elapse between the laying of charges and trial, and witnesses would generally not be required to testify until the trial.

Although it is impossible to know whether prosecutors are more or less fallible than magistrates in deciding whether a defendant has a case to answer (and noting that the latter apply a less stringent test for committal), prosecuting authorities would be able to gauge the effectiveness of their charge-screening decisions either by a review procedure or by reference to how many unmeritorious cases proceeded to trial.

However, charge-screening by those officials who would be responsible for conducting the prosecution might not be regarded by the defence or the public as disinterested as scrutiny by a court, notwithstanding that magistrates rarely discharge a defendant following a preliminary hearing and only infrequently give reasons for their decisions whether to commit.

CONCLUSIONS

The purpose of this sub-section is to encourage debate for reform.

The preliminary hearing in its traditional form, while fulfilling many useful functions, is neither designed nor equipped to achieve the fundamental goals of a fair, efficient and accountable criminal justice system — that of effecting discovery by the defence of the case against it, and that of ensuring full disclosure of the prosecution case. The ability to tie a prosecution witness down to a story, the chance to establish inconsistencies which might tactically enable cross-examination at trial, and the opportunity to enjoy a rehearsal of the trial, are understandable objectives from the perspective of a defendant. However, they are incompatible with a modern criminal justice system dedicated to bringing to justice those who violate the laws of the community it is meant to serve.

The preliminary hearing must instead be evaluated with reference to its role as a component in a larger system dedicated to facilitating the proper determination of the issue of guilt or innocence of those the community charges with crimes against it.

The criminal justice system we know today is a product of many centuries of development, often hesitant, piecemeal and haphazard. The processes and institutions we now take for granted and describe as 'fundamental rights' were once themselves radical innovations, introduced to remedy specific problems of a system which, with the wisdom of hindsight, appear bizarrely inefficient, ineffective, or unjust. It is only proper that the criminal justice system and its component processes be periodically reassessed against the purposes they are meant to serve — reformed and improved if there is scope to do so, or discarded and replaced if unsatisfactory.

The National Legal Aid and the Conference of Australian Directors of Public Prosecutions *Best Practice Model for the Determination of Indictable Charges* has already been referred to. Its philosophy appears to reflect the essence of submissions received by the Law Reform Commission of Western Australia and, in the context of the criminal justice system with which we are operating and familiar, desirable objectives.

In particular, the *Best Practice Model* recommends that if preliminary hearings are to be abolished —

(i) some formula needs to be found, beyond that presently provided for in the *Justices Act*, to require at least the service upon the defendant of the statements of witnesses upon whom the prosecution will rely in due course to prove its case;

(ii) some avenue must be made available to ensure that disclosure is sufficiently comprehensive so as to reveal all relevant evidence; and

(iii) some mechanism for 'discovery' must be provided by which the defence can obtain relevant evidence or satisfy itself that there has been disclosure.

It is suggested that these recommendations are useful not only as yardsticks against which to measure the preliminary hearing in its current form, but as worthy goals for reform.

ENDNOTES

* The Law Reform Commission of Western Australia engaged Mr Michael Mischin, senior Crown Prosecutor with the Director of Public Prosecutions for Western Australia, to prepare this sub-section. The views expressed are those of the Commission.

1 *Justices Act 1902* (WA) s 107; *inter alia* Gibbs ACJ & Mason J in *Barton v The Queen* (1980) 147 CLR 75, 99. Defenders of preliminary hearings place great reliance upon their observations concerning the importance of the protections afforded by a preliminary hearing, and the seriousness of denying an accused the benefit of the protection it affords. It must be remembered that the Justices were commenting on the consequences of depriving an accused, by way of executive action by the Attorney General, of a stage in the criminal process 'uniformly available to other accused persons, which is of great advantage to him . . .' (at 100-101). And, they forget that there was a strong dissent on this point by Stephen, Murphy and Wilson JJ.

2 The evolution of the preliminary hearing and the changing role of justices is helpfully summarised in Bishop, *Criminal Procedure* (1998), 328-331.

3 6 & 7 Will IV c 114 and 11 & 12 Vict c 42 ('Sir John Jervis's Act') respectively.

4 14 Vict No 4, s 16.

5 LRCWA, *Report on Courts of Petty Sessions*, Project No 55, (November 1986) paras 8.2-8.3, 119-120.

6 *Justices Act Amendment Act 1976* (WA), No 33 of 1976.

7 Western Australian Law Reform Committee, *Report on Committal Proceedings*, Working Paper, Project No 4 (1970).

8 Although the *Justices Act* refers to 'justices', in fact responsibility for the committal process invariably devolves upon Court of Petty Sessions magistrates, and 'magistrate' is the term which shall be used. However, in conformity with the *Justices Act*, a person charged with an offence will be referred to as 'the defendant', rather than 'the accused', which is more properly applied to his or her status post-committal.

9 *Justices Act 1902* (WA), s 107.

10 *Criminal Code* s 579, *Director of Public Prosecutions Act 1991* (WA), s 20(2).

11 *Justices Act 1902* (WA), s 98(1).

12 *Justices Act 1902* (WA), s 98(3).

13 *Justices Act 1902* (WA), s 99.

14 *Justices Act 1902* (WA), s 100(1).

15 *Justices Act 1902* (WA), s 100(1)(d)-(f).

16 *Justices Act 1902* (WA), s 101(1).

17 *Justices Act 1902* (WA), s 101(2).

18 *Justices Act 1902* (WA), s 101(3).

19 *Justices Act 1902* (WA), s 101A.

20 *Justices Act 1902* (WA), s 73(1).

21 See *Re Harlock; ex parte Robinson* [1980] WAR 260; *Carter and Connell v Evans (No 2)* (1990) 3 WAR 94.

22 For several reasons; see *Moss v Brown* [1979] 1 NSWLR 114, 129-130.

23 Although one incentive to the disclosure of the prosecution case by way of the election brief is the preservation of the evidence in a form which makes it available for use at the trial in the event of the witness being dead or ill or out of the jurisdiction, or if being 'kept out of the way by the person accused'; *Evidence Act* 1906 (WA), s 107.

24 *Justices Act 1902* (WA), ss 74(1) & 101B(1).

25 The nature of the procedure and its purpose was considered in *R v Craig; R v Rodgers* (1991) 5 WAR 107, 122, 125.

26 *Justices Act 1902* (WA), s 101B(1). A defendant is deemed to have elected to have a preliminary hearing if the defendant remains mute or does not directly answer the question putting him to his election, or if the defendant objects to the tender of any statement under s 69.

27 *Justices Act 1902* (WA), s 101C(a) & (c).

28 See also *Justices Act 1902* (WA), s 73.

29 As set out in *Justices Act 1902* (WA), s *69(3).*

30 *Justices Act 1902* (WA), s 69(2)(a).

31 *Justices Act 1902* (WA), s 73(2)(b).

32 *Justices Act 1902* (WA), ss 73(2)(a) & 102(1)(b). Although the Act suggests that the reading of statements is mandatory, in practice this occurs only if the parties insist.

33 *Justices Act 1902* (WA), ss 73(2)(c) & 102(1)(a).

34 *Christianos v Young* (1990) 3 WAR 303, following (*inter alia*) *Moss v Brown* [1977] 1 NSWLR 114.

35 *Inter alia, Moss v Brown* [1979] 1 NSWLR 114, 124.

36 *Houston v Crannage* [1990] WAR 11, at 20-24 and cases cited therein; *R v Sloan* (1988) 32 A Crim R 366; but cf *Re Healy and Houston; Ex parte Attorney-General* (1990) 2 WAR 297.

37 *Re Harlock; ex parte Robinson (supra)*.

38 *Justices Act 1902* (WA), s 69(3)(d).

39 *Justices Act 1902* (WA), s 69(2a) and *Evidence Act*, s 106A & Sch 7.

40 *Justices Act 1902* (WA), s 102.

41 *Justices Act 1902* (WA), s 105.

42 *Justices Act 1902* (WA), s 107.

43 *Justices Act 1902* (WA), s 106.

44 D Brereton & J Willis, 'Evaluating the Committal' in *The Future of Committals*, (Conference Proceedings Australian Institute of Criminology, 1-2 May 1990) 5.

45 GM Overman, *A Review of the Role of the Director of Public Prosecutions in the Perth Court of Petty Sessions* (1997), 8.

46 '. . . not so much a judicial and forensic exercise as a bureaucratic, procedural and administrative one.'; *per* P A Sallmann, 'Committals Again Under the Microscope' in *The Future of Committals*, (Conference Proceedings, Australian Institute of Criminology, 1-2 May 1990) 1.

47 '. . . [T]he nature and purpose of a magisterial inquiry . . . is to receive, examine and permit the testing of evidence introduced by the prosecution for the inquiring magistrate, in order to determine whether there is sufficient evidence to warrant the person charged being put upon trial and, if not, to discharge that person. . . . It is true that in practice the occasion, or the evidence given, is often used for other purposes. . . . However, it is no part of the function of the inquiry, or the duty of the committing magistrate to ensure that these uses are served . . .' Widgery LCJ in *R v Epping and Harlow Justices; Ex parte Massaro* [1973] QB 433, 434-435 cited with approval, along with *Moss v Brown* [1979] 1 NSWLR 114 in *Re Healy and Houston; Ex parte Attorney-General,* above n 36.

48 EM Heenan, 'Preliminary Hearing - Use and Abuse', in *Criminal Law - A System Under Trial* (Law Society of Western Australia, Continuing Legal Education Seminar 1986) Paper No 1.

49 Notwithstanding that magistrates may have authority to limit the cross-examination of witnesses (see *Connell v Reynolds* (1993) 9 WAR 27) drawing the line may be difficult in practice in any but extreme cases.

50 J Seymour, *Committal for Trial*, Australian Institute of Criminology (1978) 111.

51 Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines,* cl 17: 'Even if a *prima facie* case exists, the prosecution of an offence must also be in the public interest. This requires, in part, the balancing of the proper administration of criminal justice against available resources.'

52 Ibid cl 24: 'If the prosecutor considers that, on the material available, there is no reasonable prospect of conviction by an ordinary jury properly instructed then unless further prompt investigation will remedy any deficiency in the prosecution case, the prosecution should be discontinued.'

53 Ibid cl 30: 'Despite the existence of a *prima facie* case and reasonable prospects of conviction, it may not be in the public interest to proceed if other factors, singly or in combination, render a prosecution inappropriate . . .'

54 Such as all those listed in cl 30.

55 GM Overman, *A Review of the Role of the Director of Public Prosecutions in the Perth Court of Petty Sessions* (1997). Unfortunately, a comprehensive range of statistics is unavailable. Magistrates' Courts statewide statistical collections only involve collection of the total number of committals per year and the total number of preliminary hearings. Apparently no records are kept of the number that result in committal or discharge (M Johnson, Director Magistrates' Courts, letter to LRCWA, 13 November 1998). Information from the DPP was not forthcoming by the date this sub-section was completed.

56 Now articulated to a large extent by cl 57-65, *Statement of Prosecution Policy and Guidelines*, and *Guidelines for Disclosure of Material Additional to the Crown Case*. Australian DPPs continue to develop and work towards articulating comprehensive disclosure principles.

57 Brereton & Willis, above n 44, 18.

58 Overman, above n 45.

59 Even the high-water mark reached by *Houston v Crannage* [1990] WAR 11, 23-24, admitted of exceptions (quoting King CJ in *R v Harry; Ex parte Eastway* (1985) 39 SASR 203).

60 The present provision in the *Justices Act* is flawed and steps are being taken to have it amended. The philosophy underlying it is plain.

61 In *The Model* footnote 'v', in the context of proposals for defence disclosure of the essence of a defence and the facts in dispute with a view to confining the issues to be determined at trial, the document recognises that '. . . the first and essential step [in achieving the goals of 'best practice'] is to strive to obtain credible prosecution disclosure. Unless defence Counsel has confidence that there has been full prosecution disclosure, it is unlikely that there will be any specific defence disclosure. . .'

62 *Justices Act 1902* (NSW), ss 48B & 48C.

63 *Justices Act 1902* (NSW), s 48AA(1).

64 *Justices Act 1902* (NSW), s 48AA(2).

65 *Justices Act 1902* (NSW), s 48F.

66 *Justices Act 1902* (NSW), s 48E(3).

67 *Justices Act 1902* (NSW), s 48E(1).

68 *Justices Act 1902* (NSW) ss 48E(4) & 48GA; the period of notice can be reduced with the consent of the prosecution or if the circumstances of the case so require.

69 Which include prescribed sexual offences, attempts to murder, doing grievous bodily harm, robbery and other offences of actual or threatened violence; *Justices Act*, s 48E(2) & (9).

70 *Justices Act 1902* (NSW), s 48E(2). Once the direction is given, the witness's written statement is inadmissible unless the direction is withdrawn, which withdrawal must be on the application or with the consent of the applicant; *Justices Act* 1902, s 48E(5) & (6).

71 *Justices Act 1902* (NSW), s 41(10). The court may, however, permit cross-examination to extend beyond those matters if it is satisfied that there are substantial reasons, in the interests of justice, for doing so.

72 *Justices Act 1902* (NSW), s 41(9).

73 *Justices Act 1902* (NSW), s 41(8A).

74 *Justices Act 1902* (NSW), s 41(2), (8)

75 *Justices Act 1902* (NSW), s 41(4) & (5).

76 *Justices Act 1902* (NSW), s 41(6), (8).

77 *Justices Act 1886* (Qld), s 110A(2).

78 *Justices Act 1886* (Qld), s 110A(4) & (5).

79 *Justices Act 1886* (Qld), s 110A(11).

80 *Justices Act 1886* (Qld), s 110A(12).

81 *Justices Act 1886* (Qld), s 110A(6).

82 *Justices Act 1886* (Qld), s 110A(7) & (10).

83 *Justices Act 1886* (Qld), s 104.

84 *Justices Act 1886* (Qld), s 108.

85 *Summary Procedure Act 1921* (SA), s 104(1); *Goldsmith v Newman* (1992) 59 SASR 404, 408.

86 *Summary Procedure Act 1921* (SA), s 104(2).

87 *Summary Procedure Act 1921* (SA), s 106(1)(a).

88 *Summary Procedure Act 1921* (SA), s 106(1)(b) & (c). For a discussion of what may constitute special reasons, see *Goldsmith v Newman* (1992) 59 SASR 404 at 409-412.

89 *Summary Procedure Act 1921* (SA), s 106(2) & (3).

90 *Summary Procedure Act 1921* (SA), s 106(3).

91 *Summary Procedure Act 1921* (SA), s 106(1)(d) & (e).
92 *Summary Procedure Act 1921* (SA), s 107(1).
93 *Summary Procedure Act 1921* (SA), s 107(2).
94 *Summary Procedure Act 1921* (SA), s 107(3).
95 *Justices Act 1959 (Tas)*, s 56A(3).
96 *Justices Act*, s 56A(6).
97 *Justices Act*, s 56A(8).
98 *Justices Act*, s 56A(6A).
99 *Justices Act*, s 56A(6c).
100 *Justices Act*, s 57(4).
101 *Justices Act*, s 3(1).
102 *Justices Act*, s 57A(2).
103 *Justices Act*, s 57A(1), (4).
104 *Justices Act*, s 69A.
105 *R v Butwell* (1994) 3 Tas R 469, 478.
106 *Justices Act*, s 61.
107 *In the matter of an Application for a Writ of Certiorari and Other Relief by Alan Farrell*, (Unreported, Supreme Court of Tasmania, BC 9503806, 2 August 1995.)
108 *Justices Act*, s 62.
109 *Magistrates' Court Act 1989* (Vic), s 56(1) & (3).
110 *Magistrates' Court Act 1989* (Vic), Sch 5, cl1(1). The brief must contain a notice specifying the 'committal mention date', fixed by the court's Registrar, which must be within a prescribed period (*Magistrates' Court Act 1989* (Vic), Sch 5, cl 1(1)(a)), 1(1A) & 1(1B)) and the brief served 28 days beforehand unless otherwise allowed (cl 2). The statements must be in the form of affidavits and comply with various requirements as to form.
111 *Magistrates' Court Act 1989* (Vic), Sch 5, cl 3(1) & (2).
112 *Magistrates' Court Act 1989* (Vic), Sch 5, cl 3(4)-(8).
113 *Magistrates' Court Act 1989* (Vic), Sch 5, cl 5(5).
114 *Magistrates' Court Act 1989* (Vic), Sch 5, cl 6(1).
115 *Magistrates' Court Act 1989* (Vic), Sch 5, cl 6(2), (3).
116 *Magistrates' Court Act 1989* (Vic), Sch, cl 5(7) & (8).
117 *Magistrates' Court Act 1989* (Vic), Sch 5, cl 1(1AA); *Evidence Act 1958* (Vic), s 37B.
118 *Magistrates' Court Act 1989* (Vic), Sch 5, cl 15(5) & (6).
119 *Magistrates' Court Act 1989* (Vic), Sch 5, cl 11(1).
120 *Magistrates' Court Act 1989* (Vic), Sch 5, cl 11(2).
121 *Magistrates Court Act 1930* (ACT), s 90.
122 *Magistrates Court Act 1930* (ACT), 90AA(2).
123 *Magistrates Court Act 1930* (ACT), 90AA(1).
124 *Magistrates Court Act 1930* (ACT), 90AA(8).
125 *Magistrates Court Act 1930* (ACT), 90AA(3).
126 *Magistrates Court Act 1930* (ACT), 90AA(6).
127 *Magistrates Court Act 1930* (ACT), 90AA(9).
128 *Magistrates Court Act 1930* (ACT), 90AB.
129 *Magistrates Court Act 1930* (ACT), 90A.
130 *Magistrates Court Act 1930* (ACT), 91.
131 *Magistrates Court Act 1930* (ACT), 92 & 96.
132 *Magistrates Court Act 1930* (ACT), 94.
133 The short title of the Act omits mention of any year; however it was originally enacted as the *Justices Ordinance* 1928.
134 *Justices Act* (NT), ss 105A, 105B.
135 *Justices Act* (NT) s 109.
136 *Justices Act* (NT) ss 110 & 111.
137 *Justices Act* (NT) s 112.
138 *Judiciary Act 1903* (Cth), s 68.
139 *Criminal Justice Act 1991* (UK) c 53, s 53, Sch 6.
140 *Criminal Justice Act 1987* (UK) c 38, ss 4 and 5.
141 In both cases, committal proceedings may, but need not, be dispensed with. The procedure is similar

if the committal proceedings are dispensed with; an unappealable notice of transfer is given before the magistrates court prior to committal proceedings which has the effect of transferring the matter to the Crown Court for hearing. Application can subsequently be made to the Crown Court for the charges transferred to be dismissed.

142 *Magistrates' Courts Act 1980* (UK) cl 43, former s 6(2).

143 *Magistrates' Court Act 1980* (UK), former s 4(3).

144 *Magistrates' Court Act 1980* (UK), former s 102(4).

145 *Magistrates' Court Act 1980* (UK), former s 6(1).

146 *Criminal Procedure and Investigations Act 1996* (UK) cl 25, s 44.

147 *Criminal Justice and Public Order Act 1994* (UK) cl 33, Sch 1, Pt I, s 4(1).

148 *Criminal Justice and Public Order Act 1994* (UK), s 5(1).

149 *Criminal Justice and Public Order Act 1994* (UK), Sch 1, Pt I, s 5(2).

150 *Criminal Justice and Public Order Act 1994* (UK), Sch 1, Pt I, s 6(1).

151 *Criminal Justice and Public Order Act 1994* (UK), Sch 1, Pt I, s 6(2) & (3).

152 *Criminal Justice and Public Order Act 1994* (UK), Sch 1, Pt I, s 6(5).

153 *Criminal Justice and Public Order Act 1994* (UK), Sch 1, Pt 1, s 6(6). The prosecution was entitled to oppose the application: s 6(7).

154 *Criminal Justice and Public Order Act 1994* (UK), Sch 1, Pt I, s 6(8).

155 P Richardson (ed), *Archbold Criminal Pleading, Evidence and Practice* (1997), 89.

156 *Criminal Justice and Public Order Act 1994* (UK), cl 33, Sch 1, Pt I, s 7(1).

157 *Criminal Justice and Public Order Act 1994* (UK), Sch 1, Pt I, ss 5(1), (3) & 6(1), (4).

158 See I Brownlee & C Furniss, *Committed to Committals?* [1997] Crim LR 3, 4-8.

159 *Criminal Procedure and Investigations Act 1996* (Appointed Day No.3) Order 1997, SI 1997 No 682 (c 25); *Criminal Procedure and Investigations Act 1996* (Commencement) (Section 65 and Schedules 1 & 2) Order 1997, SI 1997 No 683 (c.26).

160 *Magistrates' Court Act 1980* (UK), ss 5A-5F.

161 *Magistrates' Court Act 1980* (UK), s 97A.

162 I Brownlee & C Furniss, *Committed to Committals?* [1997] Crim LR 3, 15.

163 *Administration of Justice (Miscellaneous Provisions) Act 1933* (UK) c 36, s 2(2); P Richardson (ed) *Archbold: Criminal Pleading, Evidence and Practice* (1997) 84-90.

164 DJ Reynolds SM, *Criminal Practice and Procedure Review Committee Report*, Committal Proceedings, (undated).

165 Nevertheless, presently the capacity of prosecution authorities such as the DPP to meet those obligations is dependant upon investigators – police or other enforcement agencies – providing to prosecutors all relevant material in their possession. JR McKechnie QC, written submission to LRCWA, 20 July 1998.

166 The present power to have pre-election depositions taken can be preserved in magistrates, thus preserving their old inquisitorial function. It may be that while the charge is progressing through the court of trial, the brief could be (as is now the case) supplemented by the depositions of a witness called to 'testify what he knows concerning the matter of complaint'.

167 *Criminal Justice Act 1987* (UK) cl 38.

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4.7

Pre-trial Case Management and Trial Procedure for Trials on Indictment

This sub-section is concerned with pre-trial case management and trial procedures of indictable matters following committal of the accused to the District or Supreme Court for trial. It is directed at identifying ways of eliminating or reducing delays and inefficiencies in the system.

PRE-INDICTMENT PROCEDURES

A committal to the Supreme or District Court results from a charge of an indictable offence laid by the police or other authorised person or authority in the Court of Petty Sessions. On being charged, the accused may choose to have a preliminary hearing of the prosecution case in the Court of Petty Sessions (the committal hearing), with statements of the evidence to be led having previously been made available to him. If the accused so chooses he has the right at that hearing to cross-examine any witness whose evidence is relied on by the prosecution. He may also give or call evidence but generally does not do so.[2] If the magistrate conducting the preliminary hearing is satisfied on the evidence before him that a prima facie case is made out either in respect of the offence charged or some other offence, he commits the accused to the appropriate superior court for trial.[3] If the magistrate is not satisfied the accused is discharged.[4]

An accused can however choose to go to trial without having a preliminary hearing, pleading not guilty to the charge.[5] In such a case he is committed for trial without a hearing (referred to as a hand-up brief). It is desirable that such an accused should be informed of his right to a preliminary hearing in open court so that no question can arise as to him having, without proper appreciation, surrendered his right to test the evidence for its sufficiency to put him on trial and move for a no case to answer order in the committing court. This is the present practice.

Following the order of committal and whether or not there was a preliminary hearing, the relevant superior court is advised by the Court of Petty Sessions of the committal order. The evidence relied on by the prosecution in the lower court, whether by way of sworn testimony or statements contained in the hand-up brief, is forwarded to the Director of Public Prosecutions (the DPP). The charge on which the accused is committed is that which the investigating authority, generally the police, has considered appropriate having regard to the evidence it has collected or some other offence disclosed by the evidence.

An alternative procedure would be for the accused to be remanded forthwith to the appropriate court of trial. Whether or not he should be then entitled to a preliminary hearing or go straight to trial following the pre-trial procedures in place in that court is another question. If there is to be a committal hearing there seems no necessity for it to be held in the Court of Petty Sessions with the consequent delay before indictment.[6]

THE INDICTMENT

Section 578 of the *Criminal Code* relevantly provides that:

> When a person charged with an indictable offence has been committed for trial, and it is intended to put him on trial for the offence, the charge is to be reduced to writing in a document which is called an indictment.[7]

An indictment may be presented even where the accused has been discharged following the committal hearing (referred to as an *ex officio* indictment).[8]

It is important to recognise that the Director of Public Prosecutions is not bound by the committal charge. Section 579 of the *Criminal Code* provides, inter alia, that when a person has been committed for trial for an indictable offence allegedly committed by him, an indictment may be presented against him for any indictable offences considered to be prima facie disclosed by the evidence and whether or not mentioned in the commitment for trial.

It does not follow that because there has been a commitment for trial an indictment must issue. It is the duty of the DPP to consider all the evidence and to exercise his discretion whether and upon what charge the he will present the accused for trial on indictment. That this is so is implicit in the wording of sections 578 and 579 of the *Criminal Code*. Nor is the DPP obliged to proceed to trial. Section 581 provides that the Crown may elect not to proceed with an indictment pending in a court in which case the DPP must inform the court in writing by entering a *nolle prosequi*.

The purpose of a trial is to establish whether the allegations contained in the indictment are substantiated according to law. Assuming that the concept of a trial fair to both the accused and the public involves a consideration of whether the trial will result in unnecessary expense, inconvenience or

unfairness, it would seem incumbent upon the Crown to assess and evaluate, prior to issue of the indictment:

(1) whether the evidence which gave rise to the committal is sufficient to justify the case going to a jury, either in respect of the charge as laid or any other charge prima facie disclosed by the evidence;

(2) whether, there being a prima facie case, the evidence is such that a conviction is unlikely;

(3) whether, having regard to the evidence, the charge on which the accused was committed is the appropriate charge or whether some other charge should be alleged in the indictment; and

(4) whether, where there is a multiplicity of charges against the same accused open on the evidence, the indictment should allege each and every one of them or a lesser number.

It is appropriate that the criteria on which the Crown determines whether to proceed with the prosecution of an indictable offence on indictment should be the strength of the case and, depending on the degree of that strength, such issues as the likelihood of conviction, the unfairness, inconvenience and cost to the accused and to the public of a trial unlikely to result in a conviction. All of this however is subject to the question 'Is prosecution in the public interest?' It is clear from the Guidelines issued by the DPP, that such criteria are in fact those adopted by the Crown.[9]

PRE-TRIAL CASE MANAGEMENT

Current pre-trial procedure

Supreme Court

Currently, when an accused is committed to the Supreme Court for trial, the matter is listed for the next 'pleas' day when, if an indictment has been presented, the accused is required to enter a plea.[10]

If no indictment has been presented by the pleas day, the accused may either be remanded to the next pleas day or may indicate his intention to plead not guilty to the charge on which he has been committed, in which case, as a matter of practice, he is remanded to the next status hearing of the court. Pleas days are held at the commencement of each criminal sitting, generally monthly. Status hearings are held monthly.[11]

Generally an indictment has been presented by the date of the status hearing. Despite the current procedure, by reason of the provisions of section 612 of the *Criminal Code*, an accused is not obliged to plead until the date fixed for trial and then only after being informed in open court of the offence as charged in the indictment.

The document annexed as Appendix A to this sub-section (the pro forma) sets out the questions to be put to an accused at a status hearing. In the normal course the trial date or dates are fixed at the status hearing, regard

being had to the availability of counsel and witnesses. If necessary or desirable, a date or dates is or are also then fixed for a Directions Hearing and, if it is seen as likely to be necessary, for the determination of matters which, pursuant to section 611A of the *Criminal Code*, may be dealt with prior to trial. Those matters are:

(a) the determination of any question of law or procedure which the court considers may be then conveniently made to facilitate the preparation for or conduct of the trial or to be otherwise desirable;

(b) the determination of any question of fact which, in a trial, may be lawfully determined by a judge alone without a jury; and

(c) permitting the accused to make admissions under section 32 of the *Evidence Act 1906*.

The need for a section 611A hearing is often not identified until the directions hearing. It is sometimes then not possible to fix a suitable pre-trial date for a such a hearing and the matters in issue then fall to be determined on the trial date in the absence of the jury.

The judge dealing with a section 611A hearing need not be the judge who will conduct the trial before the jury. Nevertheless, section 611A matters dealt with before commencement of the trial are taken as being part of the trial.[12]

In the Supreme Court the period between committal and trial is said to be generally five to six months. The backlog of cases in the Supreme Court as at 31 December 1998 was 27 which, it is anticipated, would be dealt with by the end of April or May 1999.

District Court

The procedure in the District Court is similar to that in the Supreme Court. The accused's first appearance before that court is generally something less than ten weeks after committal. The indictment is generally presented then. The District Court usually holds two status hearings in respect of each accused, partly because of the number of cases it must deal with and partly to ensure that the accused or his counsel is in a position to properly answer the questions to be put at the status hearing. It is said that neither the accused nor his counsel are generally sufficiently prepared at the first status hearing to appropriately answer those questions.

The trial dates and, if necessary, any directions and or section 611A hearings, are fixed at the second status hearing. Directions and section 611A hearings are generally held only if requested by either prosecution or defence. Consequently the risk of a lengthened trial because matters appropriate to a section 611A hearing are identified only at trial, is heightened.

The backlog of cases in the District Court (other than in circuit districts) as at 31 December 1998 is said to have been 700, the resolution of which is said

to be 13 months in each case from the first appearance of the accused before the District Court.

The objectives of current pre-trial procedures and matters of concern in practice

The purpose of the status, directions and section 611A hearings is to identify and resolve prior to trial, if possible, issues which would or might otherwise require to be dealt with at trial in the absence of the jury. The object is to reduce the length and cost of trials. Common issues dealt with are the admissibility of evidence, issues relating to proposed expert testimony, and the voluntariness of alleged confessions.

Indictment — delay in presentation and late amendment

Neither the *Criminal Code* nor the *Criminal Practice Rules*[13] provide any period of time within which an indictment must or should issue nor for service of the indictment on the accused. So far as the Code and Rules provide, the accused will learn of the contents of the indictment when it is presented in Court the accused is entitled to a copy only at that time.[14] In practice, however, a copy of the indictment is sent to the legal adviser of an accused when it is filed. Presumably an unrepresented accused receives a copy at that time also.

A matter of concern is that the presentation of an indictment by the Crown is frequently delayed, sometimes until shortly before trial and, when presented, the indictment is not necessarily in respect of the identical offence for which the accused was committed. It is also not unusual for the indictment presented to be later amended, sometimes as late as the commencement of the trial, thereby giving rise to new issues requiring the adjournment of the trial. An adjournment is more likely in such cases when the accused is unrepresented. There are no statistics as to how often these delays occur, but information from the Criminal Registries of both courts indicates them to be not infrequent.

The delay in such cases is not necessarily the fault of the Crown. It seems that there is often a delay in receipt by the DPP of the committal papers from the Court of Petty Sessions and that on occasions the DPP finds the evidence to be incomplete or unsatisfactory in some areas, requiring further evidence to be obtained before determining whether the charge on which the accused was committed or some other charge is to be alleged in the indictment, if indeed an indictment is to issue.

It is recognised that while late amendments to the indictment might cause delays in the trial process in some cases, justice might well require such an amendment having regard to the evidence found to be in fact available at the trial or for other proper reason.

The Annual Report (1997/98) of the Office of the DPP[15] reports on certain performance indicators developed in respect of prosecutions,[16] one of which is 'at least five days prior to the first appearance of the accused person the DPP will file an indictment or a *nolle prosequi* in the Court registry in 90 per

cent of criminal matters'.[17] The 'first appearance' referred to would seem to be the date for the first appearance in the trial court fixed on committal from the Court of Petty Sessions. The Report comments that the time frame so fixed 'represents a measure of effectiveness in that within that time frame each committal brief has been accurately and professionally assessed and indicates that a proper fair and accountable decision has been made to proceed with charges or discontinue'.[18] The success of that indicator would, it seems, require an early presentment of the indictment.

Lack of adequate preparation for pre-trial hearings

An obvious weakness of the system is that all too frequently counsel, whether appearing for the prosecution or defence, are insufficiently instructed or prepared to provide accurate answers to the questions put at the status hearing and, on occasions, to deal with the subject matter of section 611A hearings on the fixed day. This results, on occasions, in adjournments to a further status or section 611A hearing to enable the purpose of those respective hearings to be fulfilled or, if time does not permit an adjournment, the matter is then necessarily dealt with at trial.

So far as the Crown is concerned, it seems that counsel appearing at status hearings and, on some occasions, directions and section 611A hearings, are neither the DPP officer responsible for the matter nor counsel allocated to appear at trial. Often the result is that those appearing for the Crown have not appropriate familiarity with the evidence and issues to be dealt with.

That problem is not limited to the Crown. Instructing solicitors representing the accused are frequently similarly deficient in arranging informed representation at such hearings with similar consequences.

The failure of counsel, whether representing the Crown or the accused, to be properly prepared for the well known issues to be canvassed at status hearings and or for the identified issues to be dealt with at the directions or section 611A hearings, can give rise to unnecessary delay, cost and inefficiency in the criminal trial process.

Late guilty pleas

Late guilty pleas, even at the outset of a listed trial, are a feature of our criminal trial system. They are clearly productive of considerable and unnecessary expense in the conduct of matters leading to trial, the calling of a panel of jurors for the anticipated trial and the loss of the day or days set aside for the trial. Their adverse effect on the speedy resolution of criminal charges is self evident. Statistically they represent 12.9 per cent of trials listed for the year.[19]

The reasons for late pleas can be identified as:

(1) a strategic decision by the accused to delay sentencing for whatever reason;

(2) failure by counsel for the accused to turn his mind to the matter earlier;

(3) delay in presentment of an indictment and hence of identification of the offence to which the plea is to be made;

(4) late amendment by the prosecution to the indictment;

(5) defence negotiations for an amended or less serious charge; and

(6) the failure of either or both prosecution and defence to properly evaluate the prosecution evidence at an early stage which, if done, would allow either an informed plea to be made at the appropriate time or sensible negotiations to be undertaken between prosecution and defence for acceptance of a plea to an appropriate lesser charge founded on the evidence.

Nolle prosequi

Statistics issued by the DPP for 1997/98 put discontinued trials at 4.5 per cent of all trials for that year.[20] Experience and information from the Courts' Criminal Registries reveal that it is not unusual for the Crown to withdraw charges the subject of an indictment and enter a *nolle prosequi* late in the processes leading up to the trial and even on the day of trial. The waste of time and costs involved in the preceding pre-trial process and the effect on the efficient conduct of the criminal trial system are evident.

We have, however, referred earlier to the DPP's adoption of a performance indicator which proposes that in most cases a *nolle prosequi* will be filed at least five days prior to the accused's first appearance in the court.[21] If that indicator is met delays and costs will be substantially alleviated.

The reasons for late withdrawal of charges are not always clear. One can, however, fairly assume that in some cases withdrawal is inevitable due to the loss of essential evidence for whatever reason. There may be other reasons.

There is anecdotal evidence, unsupported by statistical evidence, suggesting that in some cases withdrawal occurs following the evaluation of the evidence shortly before trial by counsel briefed or assigned to appear at the trial. Previously unnoticed deficiencies in the prosecution case are sometimes identified resulting in the late filing of a *nolle prosequi*.

The current practice in the Office of the DPP following committal is for each charge or group of charges against an accused to be assigned to a file manager who remains responsible for the matter until such time as it has been listed for trial and assigned or briefed to counsel. Early identification of deficiencies in the prosecution case will depend on a number of factors including the ability, experience and workload of the individual file manager.

If the anecdotal evidence is given some credence then it would seem that trial counsel bring to bear a level of scrutiny more likely to identify deficiencies,

although it must be acknowledged that trial counsel will have had the advantage of interviewing the witnesses in the course of preparation.

Long and complex trials

That a trial may, in any event, be long or complex is a matter of fact rather than one of concern. The pre-trial procedures mentioned herein should assist in containing the length or complexity of a trial. They should be directed to early identification of the issues for trial by appropriate disclosure by both parties, including disclosure of documentary evidence, identification of simpler ways of presenting evidence and to reduction of the volume of evidence to be considered by the jury.

Indigent defendants

It is now accepted law that an accused charged with a serious offence is entitled to and should not have to face a trial without legal representation.[22] The complexities of the law and the procedures of trial are generally beyond the understanding or at least knowledge of most accused. It should also be recognised that the trial of an unrepresented accused is not only unfair for that reason but is generally longer and more wasteful of court time. Matters which could be agreed between counsel to shorten the trial cannot generally be adopted and the various pre-trial procedures are relatively ineffective when the accused is unrepresented.

The courts however cannot compel counsel to represent an indigent accused. Nor can they compel the State to provide finance for any such representation. Consequently it would seem desirable and in the public interest as well the interests of a fair trial of those charged with serious offences, that there be established by legislation a Public Defenders Office to represent indigent accused.

Possible solutions

Indictment — delay in presentation and late amendment

This problem would be largely obviated if the investigation of indictable offences or at least the collection of evidence by the police were put under the supervision of the DPP, and that the DPP, with proper appreciation of the evidence and its strength, then determined what charge should be laid in the Court of Petty Sessions. Even if the DPP did not have such a supervisory role, it is desirable that the DPP have early access to the evidence and identify the charge to be laid at Petty Sessions.

While early participation by the DPP is desirable, the reality is that a complaint alleging the offences for which the accused is arrested must be laid by the arresting officer before or immediately following arrest. The accused is then required to plead to that offence. It follows that, in many cases, the opportunity to engage the DPP in the investigation or identification of the appropriate offence will not exist. The circumstances of the offence may require an on the spot investigation and or arrest of the accused and the laying of the charge with no reasonable opportunity to consult with or even refer the matter to the DPP. Offences occur and arrests take place at all hours of the

day and night. There are obvious difficulties in having an officer of the DPP available 24 hours a day to check the evidence collected by the arresting authority and determine the appropriate charge to be laid. Nevertheless, there is room in many cases for the early involvement of the DPP prior to an accused having to plead in Petty Sessions, particularly when the arrest is preceded by a period of investigation.

There seems no reason, however, if the DPP were to have the supervision of the collection of evidence by the police or at least the task of identifying the appropriate charge for committal, why, if there is a committal, at the first status hearing in the Supreme Court and at least the second status hearing in the District Court, the Crown could not present its indictment charging the offence in respect of which it intends to go to trial.

Section 611A of the *Criminal Code,* to which we have earlier referred, enables a pre-trial hearing to be held following committal and before the presentation of the indictment, the relevant determinations and admissions being then made. In practice section 611A hearings are not held until ordered at a status hearing or a directions hearing. It would clearly be desirable that an indictment be issued prior to the order of a section 611A hearing as it does not follow under the present procedures that the charge on which the accused was committed will be that alleged in the indictment. If it is not, the matters and issues to be dealt with at such a hearing might well differ from those relevant to the indicted offence at trial.

The key to efficient and cost effective pre-trial management procedure is the early issue and presentation of the indictment, the evidence having first been evaluated or assessed.

It would seem desirable to fix a time from committal (to be fixed by law with power to extend) within which an indictment must issue, be served and presented. This is because, until issue and presentation, there is no certainty that a matter will proceed to trial. Nevertheless, in the interim, there will be or may be appearances involving remands and even status and section 611A hearings which may eventually be fruitless. It would also be helpful if the requirement of early service of the indictment were compulsory.

Lack of adequate preparation by prosecution and defence

Generally, identification of questions of law or fact which may properly be dealt with at a section 611A hearing is a matter for counsel. While it would be preferable for counsel who is to appear at trial to attend all pre-trial hearings, in practical terms it is almost impossible to achieve. The need to consider the availability of both prosecution and defence counsel can cause considerable problems with listing matters for pre-trial hearings or trials.

It is apparent, however, that counsel appearing at status hearings are often not properly instructed or have not properly assessed the evidence and fail

to then make any such identification. This may be because the pro forma questions to be put at a status hearing are not specifically addressed to section 611A hearings. In these cases some judges endeavour to identify the relevant matters and suggest that, where the issues arising are capable of resolution by agreement, counsel should endeavour to agree to them. A date is then fixed for a section 611A hearing of the matters identified. On this date, if the issue or issues have not been earlier resolved, the necessary determinations are made after hearing both prosecution and defence.

It would seem desirable, if the present practice is to be maintained, that counsel be required and prepared at the status hearing to answer not only the questions set out in the pro forma as it now stands but to also indicate what are the matters (if any) likely to require a section 611A hearing. Directions could then be given at the status hearing in respect of those matters and any other matters which the judge considers appropriate; a date or dates could then be fixed sufficient to enable all matters to be dealt with prior to trial at a hearing combining, if necessary, the features of a further directions hearing and section 611A hearing.

A failure to obtain or provide the necessary instructions or adequately prepare for a pre-trial hearing can arguably constitute professional misconduct on the part of those instructing counsel, if not counsel themselves. If it were put beyond doubt that such a failure is in fact professional misconduct in that it is a breach of obligation to the court and of the professional obligation to the accused, the likelihood of failure would be substantially reduced without unfairness to the accused and without involving the court in other forms of sanction. It is recognised of course that the fault may not be that of counsel but may lie in the instructions given by the accused or the accused's failure to properly instruct counsel.

Pre-trial procedure obliging both prosecution and defence to make early appropriate disclosures as to their respective cases so as to identify the real issues for trial, would compel counsel to properly evaluate the evidence at an early stage and avoid the delays and inefficiencies which presently occur.

Late pleas of guilty

On a late change of plea from not guilty to guilty, the defence should be required to explain the delay and justify its reasonableness. If the Court is satisfied that it was not reasonable and that it caused unnecessary delay and/or costs to the Crown, then costs could be awarded by way of compensation against the accused, or, if the circumstances require, his instructing solicitor or counsel. It would be necessary of course that any person at risk of a costs order be heard before any order is made.

Such delay on the part of solicitor or counsel could, in some circumstances, arguably constitute professional misconduct — eg, for neglect in attending to

the brief — and justify appropriate disciplinary action. If the accused was responsible for the delay, depending on the circumstances, the delay could be taken to indicate a lack of remorse to be taken into account in sentencing.

Nolle prosequi

So far as charges which should never have been laid are concerned, the solution would seem to be in proper case management. As mentioned earlier, the DPP is taking measures to that end. It seems that a most effective measure would be for the DPP, in the appropriate case, to undertake the determination of the appropriate charge in Petty Sessions following an evaluation of the evidence, or alternatively an early evaluation of the evidence following committal and prior to issue of the indictment (if any). There would, of course, need to be a time requirement from committal for presentation of the indictment, with provision for leave to extend time, if this measure were adopted.

Appropriate pre-trial procedures such as pre-trial disclosures by prosecution and defence, section 611A hearings and compulsory conferences would necessarily assist in determining, relatively early, the appropriateness of the charge laid and whether there should be a change in the charges or the plea.

Giving some weight to the anecdotal evidence that withdrawal of charges follows evaluation of the evidence by counsel shortly before trial, it would seem that were counsel assigned or briefed at a much earlier stage, the number of late withdrawals would be substantially reduced. However, the listing difficulties which would result may well outweigh the benefits of such an approach.

It seems to the Commission, however, that if a time was prescribed for the issue, service and presentation of an indictment (assuming the evidence was properly evaluated prior to issue), the success of the existing case management procedure would be substantially increased. Pre-committal assessment of the evidence and identification of the appropriate charge by the DPP would be even more successful.

Costs could be awarded against the Crown by way of compensation in the case of a late *nolle prosequi* in circumstances where the accused has been put to expense (personally or by Legal Aid) in preparing for trial.

The hearing of an application for an accused's costs could be held in camera if public policy considerations arise. If the Crown could not justify the delay in filing the *nolle prosequi* or otherwise notifying the accused that it proposed to withdraw the charge, the accused would seem entitled to compensation for the costs unnecessarily incurred.

Compulsory pre-trial conferences

Following presentation of the indictment and in the event of a plea of not guilty being notified, an early pre-trial conference between prosecution and defence could help avoid delay. The purpose of the conference would be to

discuss the reality of a plea of not guilty, either to the offence charged in the indictment or some lesser offence supported by the evidence, or amendment of the indictment to allege an offence supported by the evidence to which the accused would plead guilty. It would necessarily involve an assessment of the strength of the Crown case and an appreciation by the defence of its case, if any.

If compulsory disclosure by the Crown and defence is brought into effect, a compulsory conference could well assist in facilitating compliance with such disclosure requirements and the strength of the Crown case will be then more evident. Such a conference might also be appropriate following pre-trial disclosure by the DPP and prior to and even after disclosure by the accused, thereby possibly saving further pre-trial procedures.

The conference should be presided over by a judge or registrar as determined by a judge. The content of discussion at the conference should be privileged and not admissible in evidence. Such a conference between parties acting in good faith and in the interests of the public on the one hand and the accused on the other could well result in an early plea of guilty or, if appropriate, an early *nolle prosequi*. It could well further refine the issues for trial, and identify further matters for admission and time saving evidentiary procedures. Whether and when the conference is held should be in the judge's discretion. To be effective the conference should be compulsory.

In practice, pre-trial conferences are often held on an ad hoc basis between prosecutor and defence. There is no obligation to disclose and no compulsion to confer. Formalisation of such conferences so that they are compulsory and held in the context of an obligation to disclose should result in an early definition of issues and shorter and less costly trials.

Federal Court procedure — does it reduce cost and delay without unfairness to the accused?

The Federal Court operates what is referred to as a 'docket' system. On a matter being initiated in the Court, whether criminal or civil, it is allocated to a specific judge who controls, manages and is responsible for its conduct until its completion at trial or its earlier resolution. In this the judge is assisted by a registrar of the court. The matter is expected to be completed within 18 months. Steps taken towards its completion, including directions and other hearings, are recorded on computer.

Anecdotal evidence suggests that, if necessary to enable the timetable to be met, the judge is relieved from other duties for any period or periods as is necessary. It is significant that the Federal Court criminal jurisdiction does not involve jury trials and that its volume of criminal matters is relatively small compared with the Supreme and the District Courts of this State. There would be practical difficulties in applying the docket system to the criminal jurisdiction of the Supreme or District Courts without a substantial increase

in the number of judges and support staff which itself would seem to require additional staff accommodation, library and other facilities. Nevertheless there seem to be clear advantages in having all pre-trial procedures conducted by or under the supervision of the trial judge.

Failure to raise issues at pre-trial hearings

Not infrequently, issues which could or should have been raised at the status hearing and dealt with at a directions or section 611A hearing are raised at trial by counsel. Often this is a result of different counsel appearing at trial from the counsel who appeared at the status hearing, although that is not always the case.

The issues raised at trial may or may not have merit. Nevertheless, fairness to the accused requires that the issue is dealt with and disposed of, in the absence of the jury if appropriate. Sometimes issues raised for the first time at trial are of such a nature as to require the trial to be adjourned or aborted. Should the accused and/or his counsel be penalised for failure to raise an issue at the pre-trial hearings? There would be an obvious injustice to the accused if sanctions were applied to him for the deficiency of his counsel, and an obvious injustice to his counsel at trial if a sanction were imposed on him or her for what different counsel at pre-trial hearings failed to raise, or because counsel was acting on instructions given by the accused.

PRE-TRIAL DISCLOSURE

Right to remain silent

The trial is conducted on the basis that the Crown must establish beyond reasonable doubt the guilt of the accused without any assistance from the accused save to the extent that he or she, with full appreciation of his or her right to remain silent, may voluntarily make admissions. Further the Crown must anticipate any defence and meet it in the preparation and presentation of its case. Should the accused give or lead evidence which gives rise to a defence or an arguable defence which could not reasonably have been foreseen, the Crown cannot, save in exceptional circumstances, re-open its case to rebut that evidence. As a result the Crown often must lead evidence to deal with possible issues which are in fact not in issue and with possible defences upon which the accused does not intend to rely.

Prosecution disclosure

It is essential to a fair trial that the accused knows the case he or she has to meet. This highlights the need for him or her to be informed, as soon as is reasonably practicable, of that case. The DPP's Policy and Guidelines document recognises the need for and encourages full disclosure prior to trial.[23] The Guidelines do not, however, fix time limits and, of course, have been drawn up on the basis that the accused has no obligation to disclose any part of his or her defence.

In order to encourage and facilitate full and timely disclosure it would seem desirable that, the relevant papers having been received by the DPP following committal, the indictment issue should occur within some prescribed period.

Within a further prescribed period, the Crown should serve on the accused, in addition to the papers comprised of the hand-up brief and any other statements intended to be relied on by the Crown. It follows that the Crown should also be obliged to disclose to the accused any evidence which has come or subsequently comes into its possession or knowledge which can reasonably be seen as of assistance to the accused, whether or not it intends to rely upon the same, and the names and statements of any additional witnesses on whose evidence it intends to rely. Sensibly, disclosure should be made as soon as is reasonably possible after such evidence comes into the Crown's possession and at the latest, within a prescribed period prior to trial.

Prosecution disclosure could also extend to providing a notice of the substance of the allegations against the accused with particulars revealing, without ambiguity, the precise nature of the accusation and any proposition of law intended to be relied upon. However, it is apparent that this degree of disclosure could incur additional cost and delay particularly if there is some conflict as to the adequacy of the information provided.

The question arises whether the Crown should not be permitted to rely on any evidence not so disclosed without the leave of the Court. It seems that fairness would require a leave application, which would enable the trial judge to have regard to the nature of the evidence, the reasons for non-disclosure and the interests of justice.

Defence disclosure

Given that disclosures can reduce delay and the length and cost of trials by removing the need for evidence as to matters not in issue, and isolating or assisting to isolate the real issues for trial, why should an accused not come under an obligation to disclose? That would not seem to work any unfairness on the accused or to prejudice his or her fair trial in any way.

The length and cost of a trial can, in most if not all cases, be substantially reduced by pre-trial disclosure by the accused (within some specified time frame) of the nature of his defence with sufficient particularity to identify the issues and facts in dispute at the trial. It is difficult to see how a requirement to make such disclosure can reasonably be said to be unfair to the accused or to result in an unfair trial. The trial will be conducted on the real issues relevant to guilt or innocence. There is no apparent unfairness to the accused and there is a clear perception of fairness to the public in that the trial will be limited to relevant issues.

Although the nature of our criminal justice system is adversarial, the obligation of the Crown to prove facts not in issue or to meet a possible defence on which an accused might not intend to rely incurs additional costs, results in a trial lengthier than it need be and is of no benefit to the prosecution or the

accused. The Crown in any event must prove guilt beyond any reasonable doubt.

Section 32 of the *Evidence Act 1906* provides that an accused may admit at his trial any fact alleged or sought to be proven against him and that such an admission is sufficient proof of the fact admitted without other evidence. Whether any pre-trial admission should be declared to be sufficiently proven by the fact of its admission is another question. Further evidence might emerge subsequent to the admission which renders its veracity doubtful. For example the admission may have been made under a misapprehension of the law or the facts, or it may have been knowingly, falsely made to protect another or for whatever reason. Consequently it would appear appropriate that the accused should have the right to seek leave to withdraw an admission made prior to the trial. This could be done at a section 611A hearing at which the accused must satisfy the court that, on the evidence as it then is, the admission cannot be accepted beyond reasonable doubt as being a true and correct admission of the relevant facts.

If leave was not given, it seems not unfair that the fact that the admission was made should be evidence open to be led by the prosecution to prove its making, the accused having the right however to challenge its validity by cross-examination and evidence. It would be for the jury to determine what credibility and weight should be given to such a pre-trial admission.

Nature and content of prosecution and defence disclosure

Draft Criminal Practice Rules have been prepared for this State and can be found in a Report issued May 1998 entitled 'Review of the Criminal Practice Rules'.[24] For the purpose of this sub-section, the Law Reform Commission of Western Australia expresses no opinion as to whether those draft rules should or should not be adopted. It queries, however, whether an encroachment on the substantive right to silence can validly be effected by rules of court.[25]

However, Order 6 Rule 6 of the draft rules is useful in that it itemises what their author considers the appropriate matters for disclosure by both prosecution and defence and, for that reason, the provisions of draft Order 6 Rule 6 have been annexed as Appendix B. The respective obligations of prosecution and defence to disclose, there set out, are not dissimilar to those in force under the *Crimes (Criminal Trials) Act 1993* (Vic). Apparent differences are that, under the Victorian Act (but not under the Draft Rule), the accused is required to file a notice stating which elements of the offence charged are admitted and which are not admitted. Furthermore, the notice must reply to any proposition of law specified in the prosecution disclosure as one relied on by the prosecution, and must also provide a statement of any proposition of law (other than a general proposition relevant to all cases) on which he or

she intends to rely. The accused is not, however, required to give notice of alibi as he or she is under the Draft Rule.

An obligation on the parties to disclose could incorporate disclosure of the matters provided for in draft Order 6 Rule 6 and also include those matters of difference referred to above provided for in the Victorian act but not clearly provided for in the Draft Rule. Arguably, such disclosures by prosecution and defence would enable the real issues at the trial to be identified prior to trial without unfairness to the accused and with a consequential substantial saving of trial time and cost.

It would also seem desirable that provision be made for the prosecution, by leave, to re-open its case at trial to call evidence in reply to evidence led by the accused which could not reasonably have been foreseen by the prosecutor having regard to the disclosures made by the accused. This would represent a departure from the accepted Rule against splitting the prosecution case but would enable the jury to determine the issues on the basis of all the relevant evidence. Again this does not seem to work any unfairness to the accused.

Should the *Criminal Code* provide for pleas limiting the trial issues?

The question has been raised as to whether the delays in and consequent costs of a trial could be met to some degree by introducing into the *Criminal Code* provision for additional pleas serving to identify the matters in issue. The varying facts and circumstances which apply to each trial make specific identification of such possible pleas difficult.

The issue in a trial is whether the accused is guilty or not guilty at law. Provision is made by section 32 of the *Evidence Act 1906* (WA) for an accused to make admissions. The fact admitted does not require further proof. Section 611A provides a procedure for that to be done at pre-trial. The question arises, if an accused is not prepared to make an admission, will he be prepared to make one or more specific pleas to identify issues additional to a plea of not guilty? The pre-trial disclosures which would appear appropriate and which have been referred to in this sub-section are or should be directed to obtaining admissions which will identify the issues for trial. It would seem that if an accused is prepared to plead by way of admission to some facts at trial, he would be equally prepared to make admissions at trial under section 32 of the *Evidence Act* with the same effect as a plea. Consequently provision in the *Code* for pleas specifically directed to limiting the issues may have limited impact.

There would also appear to be difficulties in calling on the accused to plead to specific issues. He can only plead guilty to an offence. It would seem not only confusing but improper to require him to plead guilty or not guilty to, say, an element of the offence when the offence itself is denied and there is no 'guilt' attached to admission of the element. In practical terms, pleas,

however phrased, to anything less then the offence charged or an alternative offence open on the evidence, can be no more than admissions. It would certainly be helpful if, when first arraigned, an accused admitted, by way of a "plea" or otherwise, all or some matters not in issue. But it is difficult to identify any way of compelling an accused to do so. If the pre-trial procedures suggested above are adopted, the question of admissions would seem to be there appropriately dealt with prior to trial.

Sanctions for failure to disclose or departure from disclosure

This issue has been addressed at some length in sub-section 4.2 on the Right to Silence.[26]

It is difficult to identify a sanction, both effective and fair, to compel an accused to make any admission whether at pre-trial or at trial. That the law might provide for such admissions to be made and yet cannot compel an accused to make them is problematic. It would be difficult to determine whether any particular admission should or could have been made pre-trial until the conclusion of the trial. There would seem to be less difficulty in the case of sanctions for failure to disclose. However, any sanction which can fairly be seen to prejudice the fair trial of the accused would be unacceptable.

Under the *Crimes (Criminal Trials) Act 1993* (Vic) the trial judge and, with leave, a party to the trial may comment if the accused or prosecutor introduces evidence at the trial not disclosed prior to trial and which represents a departure from the case disclosed prior to the trial; for failure unreasonably to comply with the requirements of that Act or of any order made under it a party or his legal representative personally may be penalised in costs. That Act also provides that if an accused has refused to concede or agree facts or elements of an offence but at trial does not seriously contest the unconceded matter and is found guilty, such failure may be taken into account in sentencing as indicating a lack of remorse. Those provisions do not appear unfair and are calculated to lead to compliance with disclosure requirements.

As Appendix B reveals, the draft Order 6 Rule 6(5) contemplates a sanction which appears to go further. It would permit the trial judge to comment on and invite the jury to draw inferences consistent with the onus of proof as appears to it proper in respect of any unauthorised failure to comply with an obligation to disclose or any departure in a matter of substance from the disclosures. Depending on its form and content, it could be argued that the exercise of that right of comment is unfair to an accused and provides a fertile ground for appeal.

On the other hand the Victorian model which permits comment by the judge and, by leave, a party to the trial, opens the door to possibly unjustified comment by counsel to the effect that such failure by the defence is evidence of guilt.

An appropriate sanction for failure to comply with a disclosure obligation or departure in substance from the case as disclosed might be a comment by the trial judge in terms of the draft Order 6 Rule 6(5) (see Appendix B), which would additionally draw to the jury's attention that the onus of proof remains on the Crown despite the non-disclosure or departure.

The respective obligations of the prosecution and defence to make disclosure under the Victorian Act are not dissimilar to those proposed by Order 6 Rule 6 of the Draft Rules.

Sanctions by way of imposition of costs on either the accused or his legal representative for failure to comply with the requirements of pre-trial procedures would seem to be not without difficulties. A costs order against the accused would, in many cases, be ineffective were he without the financial ability to pay it. Having regard to the high cost of litigation that would not be uncommon. If found guilty, he might, in any event, be serving a substantial term of imprisonment. Who would enforce the payment? It seems inappropriate for the Court to be involved. Such a costs order would, presumably, be enforceable by the prosecution and, in the case of an order against the Crown, by the accused.

Questions would also arise as to how the costs are to be assessed; whether the trial judge is to be involved in the assessment; what scale of costs, if any, is to be applied; whether there should be a taxing procedure and as to enforcement procedures. Should there be a hearing to determine whether the failure could be reasonably justified and whether a cost order would be unjust in the circumstances? Would questions of solicitor client privilege arise as to the accused's instructions to his legal representative? Should there be a right to appeal against the making or the amount of the order? Costs against the legal representative of an accused involve similar questions. In some cases the failure might result from instructions from the accused. Is the solicitor or counsel obliged to withdraw from the case if so instructed? If so what delays and costs will this involve? It might be that different legal representatives have been involved over the pre-trial process and a relatively complex inquiry is required to identify where the fault lies. Also of relevance is an apparent unfairness in that, unlike an order made against the accused's legal representative, it is unlikely that a costs order made against counsel or instructing solicitor for the Crown for failure to comply would be met by him personally.

The questions and issues which could arise from a sanction by way of order to pay costs would seem to have the potential to not assist in reducing the costs and delay, if any, resulting from the failure and to give rise to continuing court involvement with costs arising directly out of the sanction itself.

Sanctions have been suggested in the form of a refusal to permit the defence to lead evidence or advance specific arguments at trial because of a failure at pre-trial to disclose the same. This kind of sanction would carry the risk of, at least, an arguable claim that the trial was unfair if the rejected evidence could have resulted in an acquittal or a lesser verdict. It would seem a fruitful avenue for appeal, and could work against the saving of time and costs. Consideration would also need to be given to the question whether such a sanction is appropriate in all cases, bearing in mind factors such as lack of representation and the mental or financial stability of the individual.

In a particular case, of course, the refusal or failure of an accused or the Crown to comply with a disclosure requirement and/or order of the court might constitute contempt of court or professional misconduct. Possibly all relevant breaches of disclosure obligations should be declared by legislation to be a contempt of court and, in so far as a legal representative of the Crown or the accused is concerned, to be professional misconduct. The conduct could be dealt with as such and judges could make it clear at pre-trial hearings that contempt and or misconduct proceedings would be initiated in the appropriate case.

The threat of such a sanction, let alone the sanction itself, would have an impact on counsel for both the accused and the Crown as well as on the accused personally, the latter being aware that even if acquitted, he might nevertheless be penalised by imprisonment or otherwise for his contempt.

The positiion of the legal representative could be made clearer by imposing a requirement that any legal practitioner representing an accused, whether as solicitor or counsel:

- be obliged to notify the court that he or she is so acting; and
- certify to the court that he or she has advised the accused of —
  - (i) the obligation to disclose as required by law;
  - (ii) the possible consequences of the failure to so comply; and
  - (iii) that in respect thereof the legal practitioner has acted in accordance with his client's instructions.

THE TRIAL

Ideally the trial will commence and carry on to completion without interruption. All issues otherwise required to be dealt with in the course of the trial in the absence of the jury will have been disposed of at the pre-trial hearings.

In practice that does not always occur. Some issues will only arise at trial and cannot be foreseen, for example, matters arising out of inappropriate or irrelevant examination or cross-examination.

This sub-section does not attempt to identify all areas in which the trial process could be reformed but merely raises some aspects of the trial process which can be assisted or are affected by the pre-trial case management issues

referred to above. Some ways in which the length of criminal trials can be reduced are also considered. A number of significant issues have already been dealt with in this Volume.[27]

Addresses

Opening addresses

Section 637 of the *Criminal Code* allows counsel for the Crown to address the jury for the purpose of opening the prosecution case but makes no provision for an opening address on behalf of the accused.

It seems desirable that, whether or not an obligation to make pre-trial disclosure is imposed on an accused, statutory provision be made for the accused or his counsel at the close of the prosecution opening address and before evidence is led, to outline to the jury the nature and essence of the defence case. If the pre-trial procedures mentioned above are introduced, then, the prosecution opening having been completed, there would seem to be no question but that the defence would be in a position to properly outline its case. As a consequence the jury would be aware of the issues prior to commencement of the evidence and in a position to more readily evaluate the evidence as it emerges.

If the defence opening departs from the case revealed by the disclosure, the court and prosecution would be made aware of the variation and would be in a better position to deal with it by way of evidence, thereby reducing the possible need for the Crown to apply at the close of the defence case for leave to respond.

If the suggested pre-trial procedures are not adopted there would seem to be no unfairness to the accused in requiring him or her to outline the nature and essence of the defence following the prosecution's opening address and before evidence, nor is there any valid reason why it should not be done. Indeed such an opening would enable the Crown and jury to more readily identify the issues and would assist in limiting the length of the trial and the jury's ability to properly evaluate the evidence. An opening statement would be conducive to a quicker resolution of the issues by the jury after retirement and a quicker verdict.

Closing addresses

Consideration needs also to be given to the order of closing addresses, there being a strong view that an accused should always have the right of last address. As the law presently stands, when an accused gives or leads evidence, the Crown is entitled to reply to defence counsel's address to the jury.[28] Other than to support a perception that the right of final address carries a tactical advantage, there seems little justification for changing the present order of address.

The public interest in achieving a trial fair to both the accused and the community is not served by procedures devoted to giving one party a tactical advantage over the other. The function of the prosecutor is different from

that of defence counsel: his or her duty is not to secure a conviction, but to present the Crown case to the jury, both by way of evidence and in address, in an objective and fair way so that the jury can determine guilt or otherwise. Defence counsel, on the other hand, necessarily is wholly partisan. His or her obligation is to present the accused's case as best he or she can, consistent with professional ethics, to achieve a verdict of not guilty. Although there is a legal presumption of innocence, a finding of not guilty is a verdict that the jury is not satisfied of guilt beyond reasonable doubt. That is the result defence counsel seeks to achieve. In doing so defence counsel frequently does not address the jury on the evidence in an unbiased and even handed way, but in a way calculated to produce at least a reasonable doubt. This is often done with a biased approach to the evidence aimed at the emotions of the jurors.

It would seem that the interests of a fair trial require that the prosecutor, acting fairly, objectively and without bias, should continue to have the right to final address as presently provided, so as to restore a balance, should it be necessary, to the evidence as presented in the defence address and to remove or reduce any emotional impact which might cause individual jurors to disregard a proper consideration of the evidence.

Presentation of evidence, prosecution witness statements, expert evidence and records

Witness statements

The evidence of witnesses proposed to be called by the Crown is reduced into writing and made available to the defence prior to trial. In the main it is the evidence upon which the accused was committed, supplemented by additional evidence. This evidence is generally proven at trial *viva voce*. It is not unusual at trial for evidence that is undisputed to be read out by consent, the presence and swearing of the witness being dispensed with. However, on many occasions, witnesses are called to lead evidence which is undisputed, a procedure which causes costs and delay. A function of the pre-trial hearings should be the identification of evidence to be led by the other party which is undisputed in any relevant sense with the objective of having that evidence read over to the jury at trial and the witnesses' presence being dispensed with. There seems no reason why that should not be done if the parties all consent.

Whether or not an order should be made that a witness's undisputed statement be read to the court where the parties do not consent requires further consideration. The reading out of all witness statements as evidence in chief would certainly save time and some costs. On one view such a procedure would allow the jury to be provided with a more accurate account in that the evidence would not be affected by memory loss caused either by the effluxion of time or the trauma of giving evidence. Further, as counsel cross-examining would remain entitled to take the witness through the events *viva voce*, the ability to identify inconsistencies would remain.

However, experience has shown that the true impression of what has occurred is best described by a witness in his or her own words and is rarely, if ever, conveyed fully in a written statement. Statements tend not to go into detail and their content may be influenced by the input of the investigating officers or the form of questions put in the taking of the statement. The credibility of a witness is best assessed by seeing and hearing him or her give evidence and that applies equally to evidence in chief as to cross-examination or re-examination. It is important that the jury have the witness's complete evidence as to the events testified to in his or her written statement. That would not necessarily occur if the witness was deprived by order of the court from explaining in his or her own words the full circumstances of the matters to which he or she is testifying.

When the written statement of evidence is the subject of dispute the importance of *viva voce* evidence is magnified. It is generally accepted that the manner in which a witness gives evidence is important in assessing his or her credibility. This is so in relation to evidence in chief as well as subsequent evidence. The same caveats as to the detail of the statement and whether or not it has been influenced by the input of investigating officers or the form of questions asked apply. Experience shows that often doubtful evidence reveals itself in evidence in chief as the witness, in reliance on his or her own recollection, even though refreshed by reference to a statement prior to trial, fails to faithfully follow the statement. This exposes areas of cross-examination which may not be revealed if the written statement is merely read out. A comparison of the oral testimony in chief, in cross-examination, and in re-examination with the content of the written statement is a valuable aid in assessing the credibility of the witness. The reading out of disputed statements of evidence would deprive the accused of an opportunity to identify areas for cross-examination and the jury of areas for consideration on the issue of credibility.

Business records, technical and scientific evidence

The proof of business records, technical and scientific evidence could well be facilitated by pre-trial conferences designed not only to identify undisputed material but also to achieve agreement as to a written form of producing such evidence before the jury with clarity and brevity.

The involvement of expert witnesses in relation to evidence of this nature is frequently necessary at trial. If it were made clear by law that expert witnesses called by the prosecution or defence are called to assist the court and not to serve in a partisan way the interests of either party, the issues arising out of competing expert testimony may well be reduced by their attendance before a judge at a preliminary hearing or conference at which the areas of agreement and disagreement could be isolated. The matters of agreement and disagreement identified there could then be identified to the jury in counsels' opening addresses and/or by the trial judge when the respective experts give

evidence so that the jury is clear as to the issues involved. If all issues are resolved at the pre-trial hearing or conference, a statement as to the agreed evidence signed by both prosecution and defence could be admitted into evidence without formal proof and without any need for the experts to be called.

A statutory power conferred on the court to permit, in the appropriate case, evidence to be given or admitted at trial in a form approved by the trial judge other than strictly in accordance with the laws of evidence, including power to permit documentary and other evidence to be given in the form of a record, would facilitate the understanding and effect of relevant evidence by the jury and lead to a saving of time and cost.

Trial judges charge to the jury

The length and complexity of the trial judge's charge to the jury has become a frequent matter of concern, if not complaint. To some extent the apparent excessive length and complexity of the charge can be seen as the result of Appeal Court decisions setting aside juries' verdicts as unsafe and unsatisfactory because of a found failure by the trial judge to direct, adequately or at all, on specific matters found to be relevant to the circumstances of the offence or to adequately or even-handedly summarise the respective cases of the Crown or the accused. Consequently trial judges quite properly introduce into their charges to the jury all matters which they perceive as giving rise to a possible risk of appeal. In many cases, judges add further to the length of the charge by giving hypothetical illustrations of the meaning and effect of the matters upon which they have directed. This again can be seen, in many cases, to be a product of Appeal Court decisions to the effect that directions must be in such terms as to be understandable by the jury. It is generally accepted also that the language used by some judges incorporates judicial jargon which is not readily understandable by the jury. The result is said to be and, in many cases it probably is the case, that the jury becomes confused by the number and nature of the directions given. There is at least anecdotal evidence to that effect and in a paper recently published reference is made to empirical evidence to the same effect.[29]

It may be that the length and complexity of a judge's charge can be reduced by an awareness and determination by the trial judge to address and direct only on matters directly relevant to the evidence. The view of the judiciary is that that is how, in general, they presently act. It may be that some judges could use plainer English than they presently use. Many judges regret the obligation to give directions on the many matters on which they must presently address being conscious of the burden that lengthy charges place on the jury. They recognise, however, that the criminal justice system is not helped if their failure, deliberate or otherwise, to address and or direct on a particular matter or aspect of the evidence leads to an appeal and possible re-trial.

It is strongly arguable, having regard to the jury's function as the finder of facts, that a trial judge should not have to comment on the evidence; possibly even that he should be prohibited from commenting except to the extent that it is essential to a direction which he or she must give. Such a direction would seem quite likely in some cases of identification evidence, alibi evidence and in relation to competing expert testimony. Having regard to the different 'power' positions of the Crown on one hand and a particular accused on the other, it would seem desirable that a trial judge retains a general over-riding discretion to so comment.

It is also strongly arguable that in view of the jury having heard the cases advanced by prosecution and defence, the trial judge should not be obliged to summarise the respective cases to the jury. An exception could be made in the case of an unrepresented accused where the interests of a fair trial might require that a summary be provided.

It may be that directions as to the need for or desirability of corroborative evidence could be dispensed with, they being presently required on the assumption that the jury cannot itself perceive the strength or weakness of the relevant evidence and require the Trial Judge's assistance to that end. The same can be said of the warnings currently given in respect of evidence given after substantial delay of time, the evidence of young children and that of mentally disabled persons.

The removal of these matters, at least as a matter of obligation, from a trial judge's charge to the jury could well result in the charge being substantially shorter and more easily understood. However, it would seem prudent for the trial judge to make clear to the jury that it should advise him if it required any further direction or clarification.

CATEGORISATION OF CRIMINAL OFFENCES

Another way in which costs and delays in the criminal justice system could be reduced is to further curtail the right to trial by jury, either by broadening the circumstances in which indictable trials are heard by judge alone[30] or by limiting the types of cases which are to be heard on indictment.

In New South Wales, pursuant to the *Criminal Procedure Amendment (Indictable Offences) Act 1995* (NSW) criminal offences are divided into four procedure categories being:[31]

1. Summary offences which must be dealt with summarily in the Lower Court.
2. Indictable offences which must be dealt with on indictment.
3. Scheduled indictable offences which will be dealt with summarily in the Lower Court unless the prosecution elects to have the matter dealt with on indictment. These are referred to as 'table 2 offences'.

4. Scheduled indictable offences which will be dealt with summarily unless the prosecution or accused elect to have the matter dealt with on indictment. These are referred to as 'table 1 offences'.

Table 2 offences are those considered by the New South Wales legislature to be the less serious of the indictable offences to which an 'election' applies. They include some offences against the person as well as larceny, stealing and like offences to a value not in excess of $5 000. Table 1 offences include malicious wounding and infliction of grievous bodily harm (each of which in New South Wales carries a maximum penalty of seven years' imprisonment) and administering poison so as to endanger life (which carries a maximum penalty of 10 years' imprisonment). Save as otherwise expressly provided by the Act or by the Act which creates the scheduled indictable offence, the maximum penalty for offences dealt with summarily is two years' imprisonment.

It can be seen that an appropriate, similar categorisation of offences in this state would enable the prosecution to deal with specific scheduled offences which presently must be tried on indictment, by way of summary trial unless, in the case of Table 1 type offences, the accused requires trial on indictment. It may be that for particular indictable offences dealt with summarily on election, the maximum penalty should be increased beyond that presently available for offences dealt with summarily, the increase, however, being not so great as to remove the incentive by an accused to elect. Presumably there would be an evaluation by the Crown of the particular circumstances of the case and an assessment made as to whether the public interest requires trial on indictment. In these cases the appropriate election would be made. The categorisation, if made, could well result in many cases presently tried on indictment being dealt with summarily in the lower court. The attraction to an accused of a categorisation is a substantially reduced maximum penalty on summary trial.

Any categorisation must be a matter for the legislature acting as the public will. Having regard to the prevalence of offences against the person and the public perception that penalties for offences are inadequate, the adoption of a categorisation would require considerable care in deciding what offences are to be made the subject of an election, and what the maximum penalty upon summary conviction should be.

PROPOSALS

The following have been identified in the course of this paper as potential reforms of the pre-trial and trial process:

1. That accused who plead not guilty at Petty Sessions to a charge to be tried on indictment be remanded forthwith to the appropriate court of trial.

2. That the DPP supervise the collection of evidence by the police in respect of indictable offences and determine the appropriate charge to be laid in Petty Sessions. Alternatively that the DPP have early access to the evidence and determine the charge to be there laid.

3. That to achieve efficient and cost effective pre-trial case management, to reduce *nolle prosequis* and belated amendments to charges, indictments should not be presented until after proper evaluation and assessment of the evidence by the DPP, the charge alleged being that determined by the DPP.

4. That to obviate delay in evaluation and assessment, a time should be prescribed from committal, within which the indictment must issue and be presented, with power in the court to extend such time.

5. That the indictment and the evidence on which it is based be served on the accused within a prescribed time prior to presentation, with power in the court to extend time.

6. That on presentation of the indictment the accused should be remanded to a status hearing at which orders for appropriate pre-trial procedures will be made and the trial dates fixed.

7. That appropriate pre-trial procedures include compulsory conferences between prosecution and defence in respect of such matters as the court considers appropriate or as the parties agree, presided over by a judge or other court officer as directed by a judge.

8. That within a prescribed time or as ordered by a judge, the Crown file and serve on the accused:

- a statement of the facts it proposes to prove;
- any particular proposition of law on which it proposes to rely;
- a copy of each deposition, statement or report of witnesses it intends to call;
- notification of the names of witnesses intended to be called who have not then provided a deposition, statement or report and the general nature of their proposed evidence; and
- copies of all documents intended to be relied upon.

The obligation to provide such information should be a continuing obligation in respect of any such material or information.

9. That within a prescribed time of service of such material on him or her the accused file and serve on the DPP:

- a statement specifying factual admissions to be made;
- the facts in issue as not admitted;

- the elements of the offence which are admitted, identifying also those which are not admitted;
- any prosecution evidence the admissibility of which is challenged;
- propositions of law or other grounds relied upon to show that the prosecution's evidence is insufficient to establish guilt including propositions of law said to counter propositions of law specified by the prosecution; and
- notice of any alibi on which he or she intends to rely (*Criminal Code* s 636A).

10. That there be provision for the Court to excuse compliance by the respective parties with all or any of such pre-trial disclosures for good reason shown.

11. That the Crown be entitled, by leave, to re-open its case to call evidence in reply to evidence led by the accused which could not reasonably have been foreseen by the prosecution having regard to the defence disclosures or failure to disclose in accordance with the above requirements.

12. Sanctions:

(a) That in the case of a late *nolle prosequi* or a late change of plea from not guilty to guilty the reasons for delay be required by the Court subsequent to the *nolle* or late plea being made.

(b) The Court should have power to award costs by way of compensation against the Crown, when due to its delay in presenting a *nolle*, the accused has been put to unnecessary expense, whether personally or via Legal Aid, in preparing for trial.

(c) That the Court also have power to award costs against an accused or, in appropriate circumstances his legal representative personally, for an unreasonably late change of plea where the delay has caused unnecessary cost to the Crown.

(d) That if any such delay is the result of unjustifiable dilatoriness on the part of the legal representative of a party the same should constitute professional misconduct and be subject to the appropriate processes.

(e) That save where the delay can fairly be seen to result from no fault on the part of the accused it be taken into account in sentencing as indicating a lack of remorse.

(f) That failure by an accused to concede or agree facts or elements of an offence which are then not seriously contested at trial should, in the appropriate case, be taken into account in sentencing as indicating lack of remorse.

(g) That the introduction of evidence at trial which represents a material departure from the case disclosed prior to trial, in the appropriate case, renders the party introducing the evidence or his legal representative personally liable in costs by way of compensation for its effects on the other party's preparation for trial.

(h) The trial judge and, with leave, a party to the trial be entitled in such case to comment to the jury on such failure and on any failure to comply with the requirements of the disclosure rule and invite the jury to draw such inferences, consistent with the onus of proof, as appears proper in respect thereof.

(i) That refusal or failure by an accused or the Crown, without leave, to comply with a disclosure requirement be declared by legislation to be in contempt of court.

13. That a represented accused by his or her counsel, and (unless excused by the trial judge) an unrepresented accused, be required, at the close of a prosecution opening address to the jury and before any evidence is led, to outline to the jury the nature and essence of the defence case. This will enable the jury to better appreciate the relevance of the evidence as it is given and consequently less time will be required by the jury for considering the evidence and reaching a verdict.

14. That all pre-trial procedures in respect of an offence to be tried on indictment should be the responsibility of the proposed trial judge and be conducted by him personally only to the extent that he or she considers appropriate.

15. That the pre-trial procedure continue to include such status, directions and section 611A hearings as the judge considers appropriate to identify issue and facilitate the conduct of the trial.

16. That undisputed depositions and witness statements be admitted into evidence without formal proof if both prosecution and defence agree.

17. That the deposition or statement of a witness be read to the jury at trial and stand as the evidence-in-chief of that witness.

18. That in the case of proposed competing expert evidence, a pre-trial conference be held between the parties with the expert witnesses to isolate the issues and the areas of agreement, and that in the case of resolution of all issues, an agreed statement of the agreed evidence be admitted into evidence without formal proof.

19. That the trial judge have power to admit into evidence without formal proof an agreed statement or record of evidence of business records, and technical and scientific matters relevant to the trial if in his or her opinion

it is appropriate to do so and a general power, in the absence of objection, to permit documentary and other evidence to be given in the form of a record if he or she is of the opinion that it will assist the jury's understanding of the issues.

20. That trial judges be relieved by law from any obligation to give warnings to the jury as to the dangers of acting on the evidence of any witness.

21. That trial judges be relieved by law from any obligation to summarise the respective cases of the prosecution and defence, except where the accused is unrepresented.

22. That the legislature consider categorising cases so that some offences presently requiring trial on indictment, may be tried summarily if an election to that effect is made, the consent of the Crown being required to any such election in the case of more serious offences identified by the legislature.

ENDNOTES

* The Law Reform Commission of Western Australia engaged the Hon Edward Morrissey Franklyn QC, former Justice of the Supreme Court of Western Australia, to prepare this sub-section. The views expressed are those of the Commission.

1 *Justices Act 1902* (WA), s101A and s 101B.
2 *Justices Act* ss 102 and 105.
3 *Justices Act* s 107.
4 *Justices Act* s 106.
5 *Justices Act* s 101C.
6 LRCWA, *Preliminary Hearings*, sub-section 4.7.
7 The *Criminal Code* was established by the *Criminal Code Act 1913* (WA).
8 *Criminal Code,* s 579.
9 Office of the Director of Public Prosecutions, *Annual Report Director of Public Prosecutions Act 1991: Statement of Prosecution Policy and Guidelines* (1992-93) 41.
10 *Criminal Code* ss 612 and 616.
11 Supreme Court of Western Australia, *Listing of Criminal Cases Practice Direction 3 of 1993* (11 May 1993) in *Western Australian Law Almanac* (1999).
12 *Criminal Code* s 611A(2) and (3).
13 Published in Gazette No 93 (18 September 1969) and operative from that date.
14 See *Criminal Code* s 613.
15 Office of the Director of Public Prosecutions of Western Australia, *Annual Report 1997/98.*
16 Ibid 40-45. Five key performance indicators that have been developed in an attempt to reflect the performance of the DPP. The five key indicators concern early advice to court on charges, establishing a case to answer, readiness to proceed, convictions after trial and costs per prosecution.
17 Indicator 1 – Early Advice To Court on Charges, above n 15, 40.
18 Ibid.
19 Ibid 6-7. For the year 1997/98, 907 trials were listed and 117 of those did not proceed to trial because of late guilty pleas.
20 Ibid 6-7. For the year 1997/98, 907 trials were listed and 41 of those did not proceed because of discontinuances.
21 Ibid 40.
22 *Dietrich v The Queen* (1992) 109 ALR 385.
23 Office of the Director of Public Prosecutions, above n 9, 21-23.
24 Michael Murray, *Criminal Practice Rules Review,* Report on Discussion Draft (May 1998).
25 *R v Ling* (1996) 90 A Crim R 376.
26 See pp 723-762.
27 See sub-sections 3.1-3.3 and 4.2.
28 *Criminal Code* s 637
29 Geoffrey Flatman QC and Mirko Bagaric, 'Juries Peers or Puppets: The Need to Curtail Jury Instructions' (1998) 22 *Criminal Law Journal* 207.
30 See sub-section 4.8.
31 See Schedule 1 of the Act.

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NEW SOUTH WALES

Criminal Procedure Amendments (Indictable Offences) Act 1995 (NSW)

VICTORIA

Victorian Crimes (Criminal Trials) Act 1993 (Vic)

WESTERN AUSTRALIA

Criminal Code Act 1913 (WA) and *The Criminal Code*
Evidence Act 1906 (WA)
Justices Act 1902 (WA)

Cases

Dietrich v The Queen (1992) 109 ALR 385.
R. v Ling (1996) 90 A Crim R 376.

Appendix A

Supreme Court Criminal Practice Direction No 1 of 1989 — Schedule

PRE-ARRAIGNMENT HEARINGS

Questions to be put to accused persons

(1) Has the accused person received a copy of:
- (a) depositions; and
- (b) indictment?

(2) Does the accused person intend:
- (a) to plead guilty at any future time to any one or more of the counts in the indictment;
- (b) to make application in relation to the formal substance of the indictment;
- (c) to make any motion at or before trial?

(3) Has the accused person been given notice of and proper opportunity to inspect anything which the prosecution may tender at trial?

(4) Which facts or items in aid of proof shall be —
- (a) agreed;
- (b) admitted into evidence without objection;
- (c) omitted from evidence?

(5) Does the accused person intend to rely on an alibi; if so have the requirements of section 636A of the Criminal Code been complied with?

(6) Is evidence of expert witnesses to be presented at the trial? Has there been a video recording of the police interview.

(7) Are there any evidentiary matters that can be determined before the jury is empanelled?

(8) Are there any known difficulties in or bearing upon the conduct of the trial?

(9) Is there any other matter to be mentioned?

Appendix B

Order 6, Draft Criminal Practice Rules*

PRE-TRIAL DISCLOSURE

6. (1) If, upon arraignment, the accused person enters a plea which raises an issue requiring trial by a jury under the Code s 622, or if the accused person elects to be tried by a Judge alone under the Code s 651A, the DPP shall be under a continuing obligation to file and serve as is practicable upon the accused person -

(a) without prejudice to the capacity of the accused person to seek an order for particulars to be delivered under the Code s 592, a statement of the facts proposed to be proved by the Crown in support of each offence charged in the indictment and any alternative offence of which the accused person might be convicted upon the indictment, which statement shall also specify any particular proposition of law upon which the Crown proposes to rely;

(b) a copy of a deposition given, a signed statement made, or report prepared by or on behalf of each person who may be called by the Crown at the trial of the accused person;

(c) a notice naming and describing the relevance of each person who may be called as a witness by the Crown at the trial of the accused person, but from whom no statement or report has been obtained;

(d) a copy of a record which may be tendered in evidence by the Crown at the trial of the accused person, or, if it is not reasonably practicable to copy such a record, a notice specifying where and when it may be reasonably inspected;

(e) a copy of the criminal history, if any, of the accused person.

* *Criminal Practice Rules Review*, Report on Discussion Draft (May 1998).

(2) Within 28 days after the filing and service of the statement referred to in sub-rule (1)(a) the accused person shall file and serve upon the DPP a statement specifying —

(a) the admissions of fact which the accused person is prepared to make at the trial;

(b) those facts proposed to be proved by the Crown which will be in issue at the trial or will not be admitted by the accused person without further qualification (setting that out);

(c) those records to the admissibility of which the accused person objects and the grounds of such objection; and

(d) any particular ground upon which the accused person may contend at the trial that his guilt of each offence charged in the indictment, or any alternative offence of which he might be convicted upon the indictment, may not be proved.

(3) The accused person shall thereupon be under a continuing obligation to file and serve as soon as is practicable upon the DPP-

(a) a notice giving the prescribed details of an alibi as required by the Code s 636A;

(b) a copy of a deposition given, a signed statement made, or report prepared by or on behalf of each person who may be called by the accused at his trial to give evidence as an expert; and

(c) a copy of a record which may be tendered in evidence by any such expert or, if it is impracticable to copy such a record, a notice specifying where and when it may reasonably be inspected.

(4) A party may apply to a Judge for directions as to compliance with this Rule, or for a direction that he or she be relieved, wholly or in part, of the obligation to comply with any of the requirements of this Rule upon the ground that compliance would -

(a) be impracticable, or serve no useful purpose in the context of the particular case;

(b) involve unacceptable risk to the health, safety or welfare of any person;

(c) interfere with the administration of justice in connection with the trial of an offence with which the accused person is charged; or

(d) otherwise be prejudicial to the public interest.

(5) The failure, except upon the direction of a Judge, of a party to comply with any requirement of this Rule and the fact that the case of a party

departs in respect of any matter of substance from that disclosed under this Rule may be made the subject of comment at the trial by the Judge, who may invite the jury to draw such inference consistent with the onus of proof as appears proper in respect of such failure or material departure.

4.8

Trial by Judge Alone

BACKGROUND

> The object of a trial is the administration of justice in a course that is free from doubt or chance of miscarriage as merely human administration of it can be — not in the interest of either party.[1]

This observation made in 1867 remains true today. The New South Wales Law Reform Commission in its 1986 report,[2] asked whether the system of trial by a jury of citizens drawn from the community should remain a feature of the criminal justice system and answered as follows:

> The Commission is firmly of the opinion that trial by jury should be retained in serious criminal cases. The jury is an effective institution for the determination of guilt. It has the added benefit of possessing ability to do justice in the particular case. The jury system is, moreover, an important link between the community and the criminal justice system. It ensures that the criminal justice system meets minimum standards of fairness and openness in its operation and decision making, and that it continues to be broadly acceptable to the community and to accused people. The participation of lay people in the system itself validates the administration of justice and, more generally, incorporates democratic features into that system.[3]

The 'serious criminal cases' there referred to were explained by the Commission as those in which the accused is at risk of a severe penalty or where the facts and circumstances involved in the case render it a matter of significance within the calendar of criminal offences.[4]

Section 80 of the Commonwealth Constitution provides that trial on indictment for an offence against any law of the Commonwealth shall be by jury. In *Kingswell v The Queen*[5] in which the High Court considered the application of section 80 Deane J said:

> [I]t appears to me that the correct criterion of what constitutes a serious offence is that it not be one which can appropriately be dealt with summarily by justices or magistrates. Within the limits of those offences which are capable of being appropriately so dealt with, the question whether a particular offence should, as a matter of legislative policy, actually be dealt with summarily by justices or magistrates is a matter for the parliament.[6]

The primary conclusion of the New South Wales Law Reform Commission[7] was that the trial of serious criminal cases, as a general rule, should be before a judge and a jury of 12 citizens selected at random from the general community. That conclusion effectively echoes the provisions of section 80 of the Commonwealth Constitution. In *Brown v The Queen*[8] it was held by a majority of the High Court that section 80 precluded an accused person from electing to be tried by judge alone for an offence against a law of the Commonwealth. Brown was charged in South Australia with an indictable offence against the Commonwealth *Customs Act* to which he pleaded not guilty and elected under section 7(1) of the South Australian *Juries Act* to be tried by judge alone. The trial judge ruled that section 80 did not permit such an election. That decision was upheld by the High Court. Consequently, absent amendment to the Commonwealth Constitution or legislative prohibition by a state of trials of offences against the laws of the Commonwealth, there will remain a requirement in all states of Australia for trial by jury in respect of Commonwealth offences prosecuted on indictment.

STATUTORY PROVISIONS FOR TRIAL BY JUDGE ALONE

In 1994 the *Criminal Code* (WA) was amended by insertion of Chapter LXIVA, comprising sections 651A to 651C, entitled 'Trial by Judge Alone'. It is necessary only to set out section 651A.

> (1) In this section 'election' means an election under subsection (2).
>
> (2) Subject to this section, where an accused person committed for trial before any court for an indictable offence elects to be tried by a judge alone, the trial is to proceed without a jury.
>
> (3) An election is to be made in open court in accordance with rules of court.
>
> (4) An election can be made —
>
> (a) before an indictment has been presented to a court against the accused person; or
>
> (b) at any stage after an indictment (including an *ex officio* indictment) has been presented to a court against the accused person but before the identity of the trial judge is known to the accused person.
>
> (5) An election does not have effect unless the Crown consents to the trial proceeding without a jury.

(6) Where 2 or more accused persons are jointly charged, an election made by one accused person does not have effect unless each other accused person also makes an election.

(7) Where an accused person is charged with 2 or more offences, an election does not have effect unless it is made in respect of both or all of the offences.

(8) An accused person who elects to be tried by a judge alone cannot subsequently elect to be tried by a jury.

Speaking to the amendment in her second reading speech in the Legislative Assembly, the Honourable Attorney-General pointed out that criminal trials by judge alone have been provided for in Canada for many years and had been introduced into South Australia in 1984, New South Wales in 1990 and the Australian Capital Territory in 1993. She informed that Assembly that, apart from having bearing on the difficulties faced by juries in highly technical and complex trials and concern about publicity affecting trials, the time and cost of trials might be reduced by the amendments. However, unlike the South Australian, New South Wales and Australian Capital Territory provisions, there is no requirement in the Western Australian provisions that an accused must have received legal advice with respect to the election before making an election. One must assume the omission to incorporate such a provision into the Western Australian Act was deliberate. The omission however gives rise to the question whether it can be assumed, in all cases, that an election made for trial by judge alone, consented to by the Crown, is in truth an informed and/or voluntary election and whether there exists the possibility of challenge to a guilty verdict on appeal on the ground that the election was not one truly made with full understanding of its consequences. It is of interest that Wilson J said in his dissenting judgment in *Brown*:

> Provided that the accused has a fair trial according to law by a tribunal of his choice, the public interest is likely to be satisfied. There is no reason why the verdict of a jury should attract and hold the confidence of the community any more than the decision of a judge *when the method of trial by judge alone has been freely chosen by the accused person and the choice expressed in the manner prescribed by law*.[9]

It should be mentioned that not only Canada but also New Zealand and North America incorporate the option of trial by judge alone within the criminal trial framework under which they respectively operate. In 1971 New Zealand made trial by judge and jury compulsory in respect of offences carrying the death penalty, life imprisonment or a maximum penalty of 14 years or more. Otherwise in New Zealand there is no absolute right to trial by judge alone, it being a matter for the discretion of the judge in that, on an application for trial without a jury, he shall so order unless in the interests of justice he considers the accused should be tried by a judge and jury.[10]

NEW ZEALAND LAW REFORM DISCUSSION PAPER

In a discussion paper issued in July 1998, by the New Zealand Law Commission, the view was expressed that the mandatory requirement for trial by jury be removed. The penalty of 14 years' imprisonment was not seen as a reliable guide to the need for a jury trial in some cases but not others, because issues of community values or verdicts needing the application of the community conscience can arise in cases of offences punishable by less than 14 years' imprisonment.[11] It was said by the Commission that jury trials are desirable when the decisions to be made throughout the trial are finely balanced and can lead to vastly different consequences in terms of whether the accused is convicted and, if so, in respect of the length of sentence to be imposed. With that we agree. Of course whether the trial be by judge alone or judge and jury it is essential that it be a fair trial according to law. That has been described as a fundamental of our criminal justice system[12] and is accepted as basic to the Commission's present task. But it is not axiomatic that a 'fair trial' requires trial by jury, and it must be recognised that the trial must be fair, not only to the accused but also to the community represented by the Crown.

The New Zealand Commission discussion paper leaves open the question: 'Should some offences always be tried by jury?' The Commission gave consideration to the question of costs and backlog in jury trials, pointing out that the right to trial by jury was susceptible to calls to raise 'the maximum penalty threshold', this being consistent with the New Zealand legislation providing that offences punishable by three months' imprisonment (the present maximum penalty threshold) or less are to be tried by a judge alone. Its view was that:

> Although the jury trial system could be streamlined to operate more cheaply and effectively, the right to trial by jury itself is too important to be subordinate to cost-efficiency considerations … and it would not be appropriate to reduce the right to trial by jury on those grounds.[13]

In essence its views were that the right to trial by jury should be maintained save for what might be legislated as minor offences (ie those the maximum penalty for which was below the legislated threshold for a jury trial) but that otherwise, in the case of indictable offences there should be a right to elect trial by judge alone. The paper reveals that, in forming that view, the Commission was influenced by what it found to be the position in the United Kingdom, Canada, Australia and the United States. In common with those countries it recognised the value of community input, particularly in relation to issues of 'reasonableness, provocation, self-defence, dishonesty and indecency' each of which raises a community issue requiring the application of the community's conscience and community acceptance. However, the Commission was of the view that that application was not a compelling reason to require trial by jury in some cases but not others.

The New Zealand Commission's view of the function of the jury in criminal trials is not dissimilar to that of the 1986 New South Wales Law Reform Commission.[14] It summarised the jury's main functions as, a fact finder, the conscience of the community, a safeguard against arbitrary or oppressive government, an institution which legitimises the criminal justice system and an educative institution. It approved as relevant the following passage from the judgement in the American case, *Taylor v Louisiana:*

> The purpose of the jury is to guard against the exercise of arbitrary power — to make available the common sense judgement of the community as a hedge against the over zealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of the judge. … Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical for public confidence in the fairness of the criminal justice system.[15]

The New Zealand Commission considered whether mandatory trial without a jury was 'justified or desirable in fraud trials or where the facts, legal issues, mode of presentation or type of offence involved might make the case complex', as in the case of trials attracting publicity or trials involving sexual offending.

It was of the view that there should be no special provision for trial by judge alone in such cases but concluded that persons prosecuted indictably should be able to elect trial by judge alone, and that the election should not be subject to the prosecution's consent or any right to oppose the election as that would undermine the accused's right to trial by jury.

The New Zealand Commission was further of the view that calls for trial by judge alone or a specialist tribunal to hear fraud cases are not based on evidence suggesting juror incompetence. It was not in favour of mandatory trial by judge alone in the case of offences which attract media publicity, whether because of the circumstances of the offence or the identity of the accused, again leaving the mode of trial to the defendant's election. As to the trauma faced by complainants in trials involving sexual offences, it was of the view that complainants could apply to the court to give evidence in an alternative way such as by closed circuit television based on the individual need. This facility is already available in this State.[16]

The New Zealand Discussion Paper is of particular interest in that it is the most recent relevant Law Reform paper, it is current and it was prepared after examination of the legislation, history and criminal practice framework of countries (including the Australian states) with a similar criminal justice system and in the context of the delays and costs involved in criminal trials and the search for expedition.

CRIMINAL TRIALS IN SIMILAR JURISDICTIONS

In the United Kingdom trials of indictable offences are held before a judge and jury. In 1983 a committee called the Frauds Trial Committee, under the chairmanship of Lord Roskill, was formed to consider the reform of criminal proceedings, and specifically to secure the just, expeditious and economical disposal of fraud criminal proceedings. Its recommendation as to the form of trial was that complex fraud cases should be tried by a tribunal comprised of a High Court judge and two lay members, the verdict should be by simple majority and a dissenting opinion should not be disclosed. That recommendation was not implemented and complex fraud trials remain the subject of trial by judge and jury. A similar proposal was unsuccessfully proposed in Hong Kong in 1985 by the Trial Of Commercial Crimes Bill, trial by judge and jury being retained.

In Canada the right to trial by jury for offences punishable on indictment by a minimum of five years' imprisonment is guaranteed by the Charter of Rights and Freedoms. There is no right to trial by jury for offences tried summarily. Under the Canadian *Criminal Code 1988,* an accused may elect trial by jury for an indictable offence which is not within the absolute jurisdiction of the provincial court.[17] Under section 427 of the *Criminal Code* a jury trial is mandatory for offences of treason, mutiny, piracy and murder, except with the consent of the accused and the provincial Attorney-General. For other indictable offences the accused may elect trial by judge alone.

There are mandatory provisions for trial by judge alone in Northern Ireland to deal with politically motivated and other scheduled offences including murder, manslaughter, kidnapping, false imprisonment and firearm offences.[18] The *raison d'etre* for those provisions can be clearly found in the political problems which beset that country.

Jury trials were abolished in both Singapore and South Africa in 1969. It seems clear that, like the legislation applicable in Northern Ireland, this resulted from the different cultural, political and legal climate of those countries. The same reasoning is not applicable in Australia.

CURRENT WA PROVISIONS AND COMMENTS

One can assume that an accused person might properly elect trial by judge alone where his fair trial is seen by him to be prejudiced by previous media publicity or evidence likely to induce revulsion in a jury or if the accused considers that because of racial, religious or cultural differences, the risk of a prejudiced jury exists. However the election may be made for other tactical reasons, such as judge-shopping.

As the law in this State presently stands, the right to elect trial by judge alone applies in respect of all indictable offences of whatever degree of seriousness. There is no requirement for reasons for the election to be given. The election might well be made for reasons which have no relevance to a fair trial. The

election however is ineffective unless consented to by the Crown. There is no requirement that reasons be given by the Crown for the grant or refusal of consent and there are no guidelines as to the principles on which it should act in coming to its decision in that regard. It seems fair to assume that the power vested in the Crown to consent or not is to ensure that the public interest is met, or seen to be met, and that consent will be withheld where the public interest will not be met, or seen not to be met, by trial by judge alone. Assuming the correctness of that assumption, it would seem desirable that the reasons for consenting or withholding consent be open for public scrutiny. As the law presently stands, there is no room even for the trial judge to test the reason for the election or the basis of consent or refusal of consent which may, in fact, be flawed. Nor is there room for him to test whether the accused in fact understands the full effect of his election. That the law requires the Crown to consent to an election underlines the basic assumption common to all states in Australia, as well as to the United Kingdom, Canada, New Zealand and the United States of America that, because of the nature of the offending or the particular circumstances of the case, some trials should be by a judge and jury. That assumption carries with it the requirement that the public has the right to be assured that its role, even if limited to only serious criminal offences, is not unfairly or improperly eroded by the election/consent procedures in respect of cases where a jury trial is in the public interest.

In our view, there is a strong element of unfairness in the present legislation enabling refusal to consent without giving reasons, even though the Crown may have good reason to refuse consent. It is the perception of unfairness that is damaging to the criminal justice system. There seems to be no good reason why, in general, the Crown should not be obliged to justify to the court the decision not to consent and justice and fairness would dictate that it should not be withheld without good reason. We have already referred to the United States case of *Taylor v Louisiana* in which it was said:

> The purpose of the jury is to guard against the exercise of arbitrary power — to make available the common sense judgement of the community as a hedge against the over zealous or mistaken prosecutor.[19]

Refusal to consent might well be the result of a mistake or over zealousness. It follows in our view that legislation providing for an election for trial by judge alone requires to be self-evidently fair to both the Crown (and so the community) and the accused and so avoid perceptions of an unfair criminal justice system and an unfair trial. In the case of a trial which can fairly be seen to require trial by jury and media publicity possibly affecting the fair trial of an accused, the prejudice of the publicity can generally be met by delaying the trial until its impact is lessened, if not lost. Generally it is accepted that in most cases the prejudice can be met after a delay by an appropriate direction to a

jury. Delay to avoid the effect of media publicity may itself result in witnesses' memories being unreliable at the delayed trial, or even to the loss of witnesses, such matters being inimical to a fair trial. These may be reasons for refusal to consent, but there is no reason why the law should not require the reasons to be known. The failure to supply reasons gives rise to a sense of grievance in an accused who believes he has good reason to elect trial by judge alone and is frustrated by a Crown refusal. An unexplained refusal by the Crown can also create uneasiness in the public as to the fairness of the resulting trial. There are a number of readily recognisable reasons for an accused to elect trial by judge alone and a refusal to consent, where the election appears fair and reasonable, requires reasons to be given. It is an accepted fact that the rules of criminal procedure have traditionally been formulated to minimise the risk of the innocent being wrongly convicted. An essential feature of a criminal justice system is that it must be fair and be seen to be fair judged by prevailing community standards. In our view the absolute right of the Crown to veto an accused's election for trial by judge alone induces a strong perception of unfairness and more so when the accused has made a fully informed election and the court can see nothing inimical to justice in permitting such a trial.

ARGUMENTS FOR AND AGAINST TRIAL BY JURY AND BY JUDGE ALONE

There is not a great deal of difference in the identification by the authors of the various papers to which we have access of the principal arguments for and against trial by jury and for and against trial by judge alone. Those which query the effectiveness of trial by jury can be summarised as follows:

1. The lack of ability of unqualified or inexperienced jurors to comprehend fully or at all the scientific and technical evidence in complex trials, this being exacerbated in the case of lengthy trials.
2. The cost of a jury and the effect thereon of the increased time involved in jury trials.
3. Congestion in the criminal courts brought about by the length of trials and delay in their disposal.
4. The possibility of prejudiced jurors.
5. That juries do not question witnesses or counsel and may not have full access to exhibits tends to lead to verdicts which are not rationally based.
6. The disruption, socially and economically, of the lives of jurors due to the interruption of their personal and working lives, this being exacerbated by lengthy trials.
7. That jurors sometimes acquit when the evidence of fault is overwhelming.

The arguments in favour of retention of the jury system may be summarised as follows:

1. Community participation in the criminal justice system brings a diverse range of perspectives, personal experience and knowledge to bear in individual criminal cases. There is an accumulated experience of human affairs which assists in the collective ability to make judgements.
2. Jurors determine the relevant facts of the case and apply the law to reach a verdict. Their number enables them to represent the general community in the standards and values they apply. Particular prejudices are likely to be negated by different or alternative views within their number.
3. A group deliberation of the jury applying the matters referred to in points 1 and 2 above is likely to be an effective way of determining contested facts and issues by reason of group exploration and scrutiny.
4. Unlike a judge, the jury is not bound to apply the law in a strict and technical way but can base its verdict on the broad equities of the case and bring the conscience of the community to bear on its merits. It is consequently a safeguard against arbitrary or oppressive conduct by the State and/or authority in the making of laws, their application and their enforcement. It acts as the community conscience in deciding criminal cases and assumes a degree of responsibility for the integrity and fairness of the criminal justice system.
5. The community participates in the administration of justice by way of the jury system. This participation legitimises and maintains public confidence in that system and ensures that it does not become alien to the community but is in step with standards of ordinary people.
6. The jury system protects the citizen from judges who might be too responsive to higher authority and, as was pointed out by Clisby in his paper 'Concern Over Jury Trial Changes',[20] has direct bearing on the independence and quality of the judiciary in that it prevents the conscious or unconscious exercise of public or private influence over individual judges or the perception of any such influence.

None of the Law Reform papers to which we have had access or any other available papers recommend abolition of the right to trial by jury, nor has that solution been proposed by any of the trial judges with whom we have had discussion. Indeed there is general support for retention of trial by jury. That is the unanimous view of those judges of the Supreme and District Courts of this State to whom we have spoken for the purposes of this sub-section. Generally, trial by a judge alone in the case of serious offences or those involving public figures receives little support from the judiciary. There is also a strong consensus of opinion among serving judges that in the present climate of attacks on judicial officers, trial by jury is a bulwark supporting the integrity of the judicial system in that it prevents the perception of undue influence on or bias of the trial judge.

Trial of criminal offences other than by judge and jury is not new. Such trials have long existed in the Courts of Petty Sessions and where so provided by statute. This paper is concerned with the trial of indictable offences not dealt with summarily and so with the trial of offences which are determined by the legislature to be 'serious offences'. What are serious offences appropriate for the trial by jury must always be determined by the legislature on the basis of current community values. If it is satisfied that some offence, presently the subject of trial by jury, should, having regard to community values, be no longer so subject, that is a matter for the legislature. The process usually adopted is to legislate for such offences to be dealt with summarily. However, in coming to that decision it is incumbent that recognition by the legislature of community values carries with it a recognition that a trial must be and must seem to be a fair trial within the parameters of such values. As was said by Badgery-Parker in a paper delivered by him, where —

> trial without jury is forced upon an accused person against his or her will, rather than being the result of his or her exercise of free choice, the risk is that the trial will be perceived by him or her and by others in the community, as being less fair.[21]

In *Brown v The Queen*[22] Deane J stressed the

> 'deep seated conviction of free men and women about the way in which justice should be administered in criminal cases', namely that, regardless of the position or standing of the particular alleged offender, guilt or innocence of a serious offence should be determined by a panel of ordinary and anonymous citizens, assembled as representative of the general community at whose hands neither the powerful nor the weak should expect or fear special or discriminatory treatment.[23]

It is axiomatic in our opinion, that changes to the criminal justice system should only be made if they are necessary, effective to improve the system and fair to both the community and the accused. Changes to the trial system must have as the ultimate goal a fair and just trial and one that can be seen to be such. Although cost savings and delay are the present focus of the consideration of change, any change which does not result in a fair trial is, in our view, unacceptable in our community. The abolition of the right to trial by jury in serious offences in favour of trial by judge alone has met with strong opposition in all states of Australia where it has been proposed. Where change has been made, its has been to provide trial by judge alone as a conditional alternative. That is also the position in New Zealand. Abolition of trial by jury in favour of trial by a tribunal in the case of fraud offences was rejected in the United Kingdom. Retention of the jury in criminal trials of serious offences is generally accepted by the authors of all the papers to which we have referred. The value of the system of trial by jury was recently recognised in the United Kingdom in the Narey report.[24] It is however generally acknowledged that in some cases trial of serious offences by a judge alone

may be appropriate. We have earlier referred to the legislation of the various states which deal with this. It is undisputed that judge alone trials are generally faster and less expensive than jury trials. That has been the experience of trial judges in this State, and anecdotally is the experience of other jurisdictions where the criminal justice system provides for such trials. These reasons alone, however, have not been accepted in any relevant jurisdiction as sufficient reason to abolish the right to trial by jury.

Trial by judge alone is seen to be appropriate in cases where the only real issue is a question of law, or where the issues are simple fact issues which do not require community input, or where the issues are so complex that there is a risk the jury will not properly turn its collective mind to the same, or where the trial can be fairly seen in advance to be of such length as to be an imposition on and oppressive to the members of the public sitting as a jury. Whether or not any particular case falls within any of these classifications is not necessarily self-evident. The question will generally need to be determined by an examination of the evidence relied upon by the Crown together with the benefit of submissions of both the Crown and defence as to what the issues will be, their complexity and as to the probable length of the trial. It is not practical to decide by the mere nature of the offence that the trial should be by judge alone. Such a decision would ignore the issues which might arise out of the defence and be seen to unfairly deprive the accused of his right to trial by jury. Even what might appear on the evidence to be led by the Crown on a simple case of armed robbery can be complicated by defence issues such as identification, alibi, intent and, if there are joint alleged offenders, by issues relevant to complicity. To legislate that certain offences must be the subject of mandatory judge alone trials would exclude the offender from trial by jury where the defence might well require community input.

TRIAL BY JUDGE ALONE — AREAS OF CONCERN

Trial by a judge alone is, however, not without its own areas of concern. The trial lacks community input. Whilst in some cases that may be of no effect, in cases where community values are called upon, (eg issues of reasonableness, provocation, self defence, fraud and indecency) its absence is a serious deficiency. Moreover, it should not be assumed that a trial judge is naturally free of bias or prejudice and that he is able to exclude such matters from his deliberations, or that he is not sensitive to public opinion or pressure and may consciously or unconsciously accordingly react in arriving at his decision. He is, however, trained to put aside such matters. The extent that he does so largely depends on the individual judge. These matters can be particularly significant where the circumstances of the offence charged arouse public fear, anger or debate or where a public figure carrying public support is involved, either as an accused or a material witness. Judges with whom we have spoken express concern at having to conduct, as a judge alone trial, a case (for example) such as that against the late Justice Murphy and the possible effect of public reaction on the particular judge.

Most appeals against verdicts in criminal trials are in respect of the rulings or directions of the trial judge. That a number of such appeals succeed reveals the fallibility of the judge and the reality of possible judicial error in a criminal trial by judge alone. Section 651B of the *Criminal Code* provides that the judgment in any trial by judge alone is to include the principles of law applied by the judge and the findings of fact on which he relied. The practical result of that subsection is that a judge must not only set out his findings of fact but also his reasons for the findings and all the law relevant to the charge or charges faced by the accused. He must do this whether the verdict is one of guilty or not guilty and he must do so, in the case of multiple charges, in respect of each charge. In this he will be conscientious in order to reduce the possibilities of appeal. The time taken to prepare and write the judgment will not necessarily be short. In a complex or protracted trial or one involving a number of charges it will probably take a number of days if not weeks or months. It would clearly be inappropriate for him to deliver the verdict or verdicts at the conclusion of the trial and deliver his written reasons later.

There is the additional unfortunate circumstance that, while awaiting the verdict or verdicts the accused must either be held in custody or released on bail. In general and practical terms he or she would be expected to be kept in custody until judgment is given and then to be sentenced or released as the verdict requires. Should the verdict be 'not guilty' there is a perceived injustice if he or she has been kept in custody to await the trial judge's reasoned but delayed decision, thereby giving rise to criticism of the trial judge for keeping him or her in custody after close of the evidence and addresses. Yet in most cases it would clearly be inappropriate to release the accused on bail and, in practical terms, where the offence charged would warrant imprisonment, only if a 'not guilty' verdict were the only appropriate verdict on the evidence.

The judge's reasons, expressed as required by law are open to public scrutiny. This has at least two serious side effects. One is that his findings may reflect adversely on witnesses or parties named in evidence relating to the circumstances of the charge against the accused. His findings of fact on acquittal might necessarily at least suggest that a witness in the trial or even a person named in evidence is the possible perpetrator of the offence charged. Those findings might in fact be wrong. In the context of a serious criminal offence, the potential for damage to the reputation of innocent persons arising out of published findings of fact is great and, in our view, probably far greater than an adverse finding against a witness or party in a civil trial. The other and more significant side effect is that the written judgment provides scope for a detailed search by defence counsel for grounds of appeal either by way of claimed misdirection or non-direction on the law or of findings allegedly not supported by the evidence or of an unsafe and unsatisfactory verdict having regard to the evidence and findings of fact. Such a search is not available in

the case of a trial by jury where its findings of fact are not disclosed. Consequently it can be seen that, following trial by a judge alone, the scope for appeal, with attendant costs and delay, is enormously increased over that which follows from a jury trial. A successful appeal against conviction will generally result in a re-trial with its attendant costs and delays. There can be no complaint about that but, to the extent that the appeal can be seen to be based on the written reasons for judgment, the cost savings and apparent time saving obtained by judge alone trial could be illusory to a significant extent. The probability of such appeals, delays and costs would of course increase with an increase in the number of mandatory judge alone trials. The obligation to deliver written reasons creates potential problems in the scheduling of criminal trials in each criminal session. It is important that the judge gives and delivers his verdict, with reasons, in respect of one trial before commencing the next. Consequently he needs to be relieved of any other duties whilst he writes his reasons and, in the absence of an alternative trial judge, the commencement of any new trial for which he is listed needs to be postponed until delivery of his verdict with reasons in respect of the earlier trial. Judge alone trials carry a serious potential for delay in the completion of trials listed for the particular session unless sufficient number of judges is scheduled to conduct not only jury trials, but each judge alone trial listed for the session. The problem is compounded if there are a number of judge alone trials listed in that session.

There are no statistics available of the number of judge alone trials conducted in the Supreme and District Courts of this State or of the number of appeals from the decisions of the trials. The Commission's enquiries reveal two only judge alone trials in the Supreme Court, *Cutter v The Queen*[25] and *R v Holcroft.*[26] each of which was appealed. In each case the grounds of appeal were found in the reasons for judgment of the learned trial judge.

Cutter was convicted of attempting unlawfully to kill, the trial judge having satisfied himself on the evidence that Cutter had the intent to kill at the relevant time. Cutter led no evidence at the trial. That verdict was upheld by a majority decision of the Court of Criminal Appeal but overturned by a 3:2 majority decision of the High Court as being unsafe and unsatisfactory. The successful ground of appeal was that the judge had wrongly applied an objective test rather than a subjective test as to the intent of the accused at the time of inflicting the injury. The majority of the High Court held that, although it was a question of fact, the trial judge should not have rejected as a rational inference the possibility that the applicant stabbed his policeman victim without an intent to kill.

Holcroft was convicted of unlawful assault on the night of 9 November 1995 and of a further four offences said to have been committed at the same premises later the same night between the hours of midnight and 5am the

following morning. The accused's defence was that of an alibi for the hours between midnight and 5 am. The learned trial judge rejected the alibi. On appeal his Honour's rejection of the alibi was overturned on the basis of new evidence which did not show the alibi to be true but which required reconsideration of his Honour's reasons for rejecting the alibi. The four counts were referred back for retrial and we are informed that the retrial has not yet been held.

In *R v MPW*[27] it was held that while the trial judge probably took it into account, his failure, even though sitting alone, to comment on the evidence of good character led by the accused was a failure to comply with his obligation under section 33(2) of the *Criminal Practice Act 1986* (NSW) to expound, in the case of a judge alone trial, the principles of law applied. That decision carries the warning to trial judges sitting without a jury not to assume that they will be assumed to have applied all the relevant legal principles appropriate to the evidence.

These cases exemplify the scope for appeal which arises out of judge alone trials in respect of the necessary requirement that reasons for the findings of fact as well as of the relevant principles of law must be given and the consequent scope for additional costs and delay. It is, of course, appropriate that that be the case and we make the point only that the apparent saving of costs and time achieved by a judge alone trial may, in the end, not save much, if any, costs or time.

In discussions with judges of the District Court we are informed that most of the judge alone trials held in that Court have been the subject of appeal. We are also told that the percentage of cases in which the accused has elected such a trial in that Court is low. This is consistent with the statistics of the other states as provided in the papers to which we have had access.

The protection from personal criticism, animosity and/or threat of revenge which flows from the relative anonymity of jurors and their findings of fact and from the corporate nature of those findings does not exist in judge alone criminal trials. All responsibility for the verdict, whatever it might be, rests with the trial judge. He is consequently at some significant risk of action of whatever nature by individuals, interest groups and the media who may be disappointed or outraged by his findings and/or decision. It must be recognised that in a particular case vulnerability might well have a conscious or unconscious influence on the judge's conclusions depending upon his personality and strength. It is relatively significant that the 1986 New South Wales Royal Commission recommended that the anonymity of jurors should be protected. Anonymity is impossible in the case of a judge conducting a judge alone criminal trial and, unlike a jury, his findings of fact and reasoning are exposed. The possibility for media-driven pursuit of a judge in respect of his specific

findings and or verdict is very real and has the potential to bring the criminal justice system into disrepute. Anecdotal evidence is that the strain on a judge in a judge alone criminal trial, particularly where value judgments must be made, is quite substantial and in some cases oppressive. In *R v Marshall,*[28] the first judge alone murder trial in South Australia, White J pointed out that [at least] in murder and treason trials:

> [T]he values of the community are so deeply involved in the many value-judgments which have to be made in the course of the trial and the sophisticated evidentiary rules and procedures have been so deeply developed in order to enshrine those values in their interstices, that trial without a jury on a charge of murder will be in danger … of becoming quite a different legal process than it has been traditionally. The values are too important; and the burden on the trial judges is oppressive.[29]

The message in that passage is that the evidentiary principles which exclude evidence the probative value of which is outweighed by its prejudicial value, might well be inappropriate in a judge alone trial on the footing that a judge will recognise and ignore the prejudice and give the evidence only such probative value as it deserves. Justice White had reservations about a judge's ability to be completely free of prejudice in every case. Section 651C(2) of the *Criminal Code* (WA) requires the judge in a judge alone trial 'to apply, so far as is practicable, the same principles of law, practice and procedure as would be applied in a trial before a jury'. One can anticipate argument and probable appeals to determine whether this applies to the discretionary rejection of probative but unduly prejudicial evidence. In *Amoe v DPP (Nauru)*[30] the discretion to exclude such evidence was considered by the High Court. Their Honours observed that only in the most exceptional case would a judge have to disqualify himself or herself because unfairly prejudicial material had been admitted into evidence. Nevertheless the trial judge must make the decision whether to allow it into evidence, in the course of which he accepts it to be prejudicial thereby giving rise to the allegation that he was possibly in fact prejudiced by it.

It is generally accepted that a jury has a right to bring in a less serious verdict, or what has been described as a merciful verdict, when, on the application of community values it considers it appropriate, even though the evidence strictly calls for a different verdict. It may be impossible for a judge to exercise that discretion, despite the provision of 651B(1) which compels him to 'make any findings or give any verdict that could have been made or given by the jury if the trial had been held before a jury'. The need to include in his reasons the relevant principles of law and findings of fact and the public scrutiny that attaches to his judgment would render such a course impossible.

How can these matters of concern affecting judge alone trials be overcome? Most, of course, can be obviated by either legislatively relieving the trial judge

of the obligation to set out his findings of fact or alternatively suppressing publication of the same. Such remedies would, at first sight, make him or her much less vulnerable to criticism and would put him or her in the same position as a jury, the findings of fact of which are not disclosed. That view of the position is however fallacious. The trial judge would not be in the same position as the jury. His reasonings and findings are those of a single person trained in the law but nevertheless untested and unchallenged by a contrary or different view of the evidence or a preference for a competing inference. The findings of fact of a jury, on the other hand, are the result of joint consideration and discussion by its members, the views of each being subject to scrutiny, examination, testing, acceptance or rejection by fellow jurors. That in itself is a safeguard against unreasoned or corrupt findings. The jury's ultimate findings are the result of joint discussion and consideration and, at least in some cases, may well reflect the different conclusion or chain of reasoning to that originally adopted by a particular juror. When that does not follow there is a majority verdict or a hung jury. If there is a hung jury, justice generally requires a re-trial.

To relieve the judge of the necessity to set out his findings of fact or to suppress his findings from publication would be to create a trial system redolent of injustice and ripe for corruption. It would be contrary to every accepted principle of justice and, in particular, to the accepted principle that judges must be accountable. It would be impossible to determine whether or not there had been a fair trial and would give rise to the suspicion of judicial misconduct in the case of an unpopular verdict. It is essential that the trial judge's reasons be available as the accused is entitled to know whether they reveal error and, if so, to seek rectification by way of appeal.

If a judge is to set out his findings of fact with reasons then it could be said that publication of his name is unnecessary and that prohibiting or otherwise withholding publication can protect his or her anonymity. It is said that in some European countries where the inquisitorial system of trial for criminal offences operates, the trial judge's decision and verdict are delivered as the decision or verdict 'of the court' without identification of the trial judge's name. That, however, is contrary to our tradition. In practice the media decides what trials it will report on and generally that includes publication of the trial judge's name. To take away that accepted right of the media would require legislation prohibiting publication of the trial judge's name. The result would be a verdict with reasons by an unnamed judge. But our tradition is and the common law requires that judges be accountable for their decisions. Accountability requires identification. To prohibit or suppress publication of the name of the judge bringing down a decision which may or may not be controversial would, in our view, arouse public outrage and give rise to strong and unnecessary suspicion of the judiciary. It would also attract a well-founded claim of interference with freedom of the press. Further the practicality of

suppressing or withholding the name of the judge does not stand up to examination. Any trial must be listed and a judge allocated prior to its commencement with the result that a number of persons, mainly court staff, are aware of the trial judge's identity at a relatively early stage. Counsel and witnesses subsequently become aware of his identity. The trial is generally open to the public. To exclude the public to preserve the trial judge's anonymity is unacceptable and is, moreover, difficult to justify. His or her reasons for decision must be available for scrutiny and accountability requires that they be attributed to a specific judge. If the judgment is appealed, is the judge's name then to be suppressed? The grounds and nature of the appeal may be such that it is in the public interest that the name is revealed. In the end, in the absence of common legislation throughout Australia, his identity could be made public by media outlets in other states.

TECHNICAL EVIDENCE

A further question that needs to be addressed is whether, in a judge alone trial involving technical evidence, the judge should sit with an expert or experts in the particular technology who will advise him or her on, or make decisions in accordance with, the evidence relevant to the particular technology. We hereafter refer to such experts as 'the tribunal expert'.

The Law Reform Commission has great difficulty with the concept of a tribunal expert making findings of fact within the area of his or her technology. Issues of credibility may be involved in the technical evidence. The tribunal expert's opinion or conclusion may be contrary to that of either or both experts in the same field called by the prosecution and/or the defence. As a member of the tribunal his or her opinions and conclusions would not be subject to testing or challenge by cross-examination or otherwise at trial. The trial judge would, it seems, be bound by the tribunal expert's opinion and conclusions even though, on his or her own assessment of the evidence, he or she might prefer the tested evidence of an expert witness called by the prosecution or defence. In the end the verdict achieved in the trial might not be that of the trial judge because of the weight necessarily given to the technical conclusions or opinions of the tribunal expert. A serious question would arise if the decision was taken on appeal, and a challenge was made to the technical conclusion of the tribunal expert. There is a distinct lack of fairness in a trial in which binding conclusions of fact could be made in accordance with the untested opinion or conclusions of a tribunal expert and contrary to the evidence given and tested on oath at trial.

There are problems also with the concept of a tribunal expert sitting with the trial judge in a judge alone trial to give advice only on technical matters arising out of the evidence. His or her advice would not be subject to challenge or testing by cross-examination by the prosecution or defence. It is not given on oath. Unless it is statutorily made necessary that the content of any advice given by an expert must be made known to the prosecution and defence,

each would be ignorant of the nature of the advice given. There would be a risk that the decision would be made on the basis of that advice. If, as a safeguard, it is made necessary that any advice given must be made known to prosecution and defence, the question arises, how is it then to be dealt with? Is the trial to be adjourned while further evidence is called to contest it? Are the expert witnesses whose testimonies have already been given to be recalled to give further evidence in respect of the advice? It may be that the tribunal expert persists in not agreeing with those experts or any additional experts called. One can see the trial becoming more complex. Again there is a high risk of appeal in respect of decisions apparently made on advice given which was not supported by the evidence.

There seems little advantage in the trial judge sitting with an expert or experts in a technical trial. The evidence on which he or she acts should be that which has been given under oath in the trial subject to testing by cross-examination. A preferable alternative in the event of disagreement between the technical witnesses called would be for the trial judge to have the right to call an expert witness or witnesses whose evidence would be subject to testing by cross-examination by both the Crown and defence. This would, in all probability, necessitate an adjournment of the trial to enable the expert or experts to familiarise himself or themselves with the evidence already given. That however would seem to be a less complex and fairer way of dealing with the matter.

CONCLUSIONS

There is, in our opinion, a clear case for preserving judge alone trials but not to the necessary exclusion of jury trials except for offences which, having regard to community values in the context of a fair trial, are offences which the legislature, representing the community and applying its values, legislates as being appropriate for mandatory trial by judge alone. Identification of such an offence is a matter for the legislature. It is important, however, in this context that the test should be recognised as community values in the context of a fair trial and the decision should not be driven by issues of cost and or time saving. The primary object is to ensure, in all cases, a fair trial. It is generally conceded in the papers to which we have had access that the jury trial is the best available method of dealing with serious crime and, in our view, it has not been otherwise shown. It is also generally accepted that on only rare occasions is a jury verdict seriously in error. Its decisions are generally correctly based on or are otherwise understandable on the evidence, in the latter case generally reflecting community values.

Trial by judge alone should remain an option in respect of all serious offences but utilised only if it is shown to be appropriate in the circumstances and fair to both the accused and the Crown. The right to trial by jury is so entrenched in our community that its removal would appear unfair to the accused and to the community and, generally, would not be seen to result in a fair trial.

It is apparent that in some cases, trial by judge alone is not only appropriate and without prejudice to a fair trial but is also more expeditious than trial by jury. It should remain an option. However the option should be for the accused to apply, rather than elect, to have trial by judge alone. Whether in fact such a trial will be fair to both the accused and the Crown will depend largely on the nature of the offence charged, the issues raised by it, the evidence supporting it and the validity of the reasons for seeking such a trial. The issue of complexity in the sense of a complex trial is a matter of degree and, depending on the nature of the evidence, may be well within the competence of the jury. It should not be assumed that in all cases jurors are incapable of understanding and properly assessing the evidence, even in cases said to be complex. If delay is an issue, the reasons for delay should be analysed. Much delay in criminal trials arises from the legal aid system and the processing by legal aid bodies of applications for aid. If an application is refused it is common for it to be followed by an application for a review of that decision and, if again refused, by a 'Dietrich' application with consequent further delay and cost. Delay also frequently results from the practice of the Crown in not allocating a particular trial to or briefing counsel until shortly before trial or because Crown or defence witnesses are not available. This is the case whether the trial is by jury or judge alone.

A change in Crown practices would alleviate the situation, but delays caused by legal submissions, lack of advocacy skills and defences of little or no merit will not be avoided. Of course judge alone trials permit greater intervention by the trial judge to ensure that court time is not wasted. The degree of intervention however is, as a matter of practice, severely limited. What might be seen as excessive intervention can give the impression of bias. In our view many of the delays presently affecting criminal trials can be improved by case management and by the trial judge asking questions of witnesses to ensure that the evidence is clear to and understandable by the jury. There is no reason why he should not question the jury to ensure that they have a fair understanding of the evidence. In a judge alone trial there is a saving of time in not having to empanel a jury and the absence of addresses to the jury by counsel and the bench. There is however no saving of time in so far as arguments on issues which would be heard in the absence of a jury are concerned. In any event these arguments are generally heard by direction of the court at a preliminary hearing, thereby saving what would otherwise be jury time and costs. That time saved however, may well be consumed by the need for written reasons for verdict. Any costs as well as time saved may well be lost in appeals not otherwise available arising out of the written reasons. Unsuccessful appeals involve time and costs without aiding justice in any way.

For those reasons, as well as the perceived unsatisfactoriness of the present statutory provisions relating to judge alone trials the Commission is of the

opinion that the accused should be entitled to apply to a judge for a judge alone trial. The application should be supported by reasons and grounds and the Crown should be entitled to be heard on the application. The decision whether or not to grant an application should be that of the judge to whom the application is made. So far as possible the application should be made *before* the trial judge is known and *after* presentment of the indictment. If the indictment is not presented early enough for that to be done then the trial should be adjourned to be heard by a judge other than the then trial judge thereby alleviating judge shopping. The judge hearing the application should come to his decision whether or not to grant the application after hearing both applicant and the Crown and after consideration of the evidence and submissions available to him. The Crown should be obliged to make available on the application all the evidence on which it relies. It would be a matter for the applicant to inform the judge of the evidence relied on by him or her to support his or her application. There should be power for the application to be heard *in camera*.

The present provision which allows an election by the accused to be aborted by the Crown's refusal to consent does not enhance the image of fairness essential to the criminal justice system. In New South Wales, to avoid the perception of judge-shopping, the Crown initially adopted the practice of never refusing consent to an accused's election.[31] There is anecdotal evidence that in this State the Crown rarely consents , apparently as a matter of policy, in trials involving public figures. The policy effectively negates the purpose of the Act in requiring the Crown to either consent or refuse consent to an election, its role clearly being to represent the community to ensure that the trial is by judge alone only if, in all the circumstances, it is appropriate. This was apparently recognised when guidelines were subsequently issued by the New South Wales Director of Public Prosecution for the exercise of the discretion to consent.

We have given consideration to whether the interests of the community require also a right on the part of the Crown to apply for a trial by judge alone. We have limited this consideration as appropriate only to cases in which the evidence led by the Crown is such that the only substantial issue would appear to be a matter of law or where the Crown can show that the factual issues are simple and of such a nature as to not require community input. Community input would not be required if a trial did not involve issues as to the reasonableness of the impugned conduct or whether the ordinary man in the circumstances revealed by the evidence would have acted as the accused did, or whether the acts giving rise to the offence were in lawful self-defence or the result of provocation or whether there was dishonesty by ordinary standards or where the issue was which of conflicting stories was to be believed.

The difficulty however, is that, in the absence of agreement between the Crown and the accused, the question whether a question of law only is involved or the application of community values is required will generally not emerge until the accused either gives or leads evidence or elects not to. As the law presently stands he is not obliged to disclose his defence and may call on the Crown to prove its case. In our opinion the difficulty cannot be satisfactorily overcome by requiring the accused to plead his defence in advance. Any such pleading will necessarily assume that the Crown case will be as revealed by the depositions and that the Crown witnesses will testify in accordance with their depositions and will remain unshaken in cross-examination. However, experience shows that witnesses frequently do not testify in accordance with the depositions and that cross-examination frequently throws up fresh issues. It would be entirely inappropriate to enable the Crown to obtain an order for a trial by judge alone against the wishes of the accused in such circumstances.

However, if the Crown had the right to apply for such an order, it should only be made if the judge is satisfied on the evidence before him and on the supporting submissions that the interests of justice require the trial to be by judge alone. While the judge might be satisfied on a Crown application that the issues then identified can be dealt with more expeditiously and with possible cost saving by a judge alone rather than a jury trial, that is a far step from satisfaction that the interests of justice require a judge alone trial. Indeed it is difficult to conceive the circumstances and issues that would lead a judge to conclude that the interests of justice require the trial to be by judge alone. Consequently the Commission has concluded that there should be no right conferred on the Crown to apply for a judge alone trial.

OPTIONS

The Law Reform Commission of Western Australia is of the view that the options open for trial by judge alone are:

1. That the law remains as it is, that is, the accused having a right subject to the consent of the Crown to elect trial by judge alone.
2. Abolition of trial by jury, all trials to be by judge alone.
3. Specific offences to be declared by law to be the subject of mandatory trial by judge alone; all other serious offences to be tried by jury.
4. That an accused have the right to apply to a judge of the court in which he is to be tried for trial by judge alone for reasons shown, the Crown and accused having the right to be heard on the application, the decision being that of the judge hearing the application.
5. That both the accused and the Crown have the right to apply to a judge of the court in which the accused is to be tried for trial by judge alone for reasons shown, the accused and the Crown having the right to be heard on the application, the decision being that of the judge hearing the application.

PROPOSALS

1. Trial by judge alone should not be the preferred method of trial. Trial by judge alone should be mandatory only in respect of 'not serious offences' fairly characterised by the legislature having regard to community values, and thus dealt with summarily.

2. Trial by judge alone should however be available as an alternative to trial by jury in appropriate cases but not as a right of either the accused or the Crown.

3. It should be open to an accused charged on indictment with a serious offence not triable summarily to make application, supported by grounds and reasons, to a judge of the court in which he is to be tried, for an order to be tried by judge alone. Notice of application should be served on the Crown to appear and be heard in opposition to the application. Before deciding the application the judge should be satisfied that the accused understands the effect and consequences of the order if made.

4. The application must be made either *before* or *after* an indictment has been presented to the court against the accused person in respect of the offence or offences the subject of the application and *before* the trial judge is known. It should be dealt with at a preliminary hearing.

5. Where the accused is charged with two or more offences in the one indictment, in the absence of an order for a separate trial of a single charge the subject of the application, no order for trial by judge alone shall be made on any such application unless the judge is satisfied in respect of each offence charged in the indictment that the interests of justice do not require trial by a judge and jury. An order may be made in respect of any charge the subject of an order for separate trial.

6. Where the accused is charged jointly with another or others then, in the absence of an order for separate trial of the accused, no order for trial by judge alone should be made unless each of the jointly charged persons joins in the application and unless the judge is satisfied in respect of each accused person that the interests of justice do not require trial by a judge and jury.

7. Applications for trial by judge alone may be heard *in camera* if the judge considers that to be appropriate in the interests of justice and a fair trial.

8. Unless the interests of justice require the trial to be by a judge and jury the application for trial by judge alone should be granted.

SUMMARY OF CONCLUSIONS

1. Trial by jury is the preferred and entrenched method of trial for serious offences in all states of Australia, New Zealand, Canada, the United States of America and the United Kingdom.
2. The right to trial by jury is accepted by the community as a fundamental right.
3. Trial by judge alone is, however, appropriate in some cases.
4. Mandatory judge alone trials should only be provided for in the case of offences which, having regard to community values, are appropriate. Whether or not any offence is appropriate is a matter for the legislation to determine having regard to such values. Generally it is only offences which, in the context of community values, are not seen as serious offences which are appropriate.
5. Trial by judge alone should be a conditional option available, if found appropriate, to an accused who fully understands the effects and consequences of this type of trial in lieu of trial by jury.
6. The critical issue in determining whether the accused should have the benefit of that option is whether the trial will be a fair trial having regard to the respective interests of the accused and the community. The Crown represents the interests of the community.
7. The requirements of a fair trial require that the reasons for seeking trial by judge alone and any objections thereto are available for scrutiny. Whether or not trial by judge alone is ordered must be the result of proper consideration of the reasons.
8. The law presently applying to judge alone trials in this State predicates trial by jury unless the accused elects trial by judge alone and the Crown consents. The right to elect applies to all indictable offences other than those against a law of the Commonwealth prosecuted on indictment.
9. No reason is required for the election nor for consent or refusal of consent.
10. The discretion conferred on the Crown to consent or refuse consent must be seen as one vested in it on behalf of the community to ensure that the election is only given effect if trial by judge alone is seen to be fair to both the accused and the community. The existence of the discretion underlines community acceptance of trial by jury as the preferred mode of trial.
11. It follows that the reasons for consent or refusal to consent should be open to public scrutiny. The present law permitting consent or refusal without given reasons is open to abuse by neglect, or over zealousness or for tactical reasons. It gives rise to a strong perception of unfairness

and the opportunity for unaccountable unfairness. The community should be able to be satisfied that its interest and that of the accused in a fair trial are not eroded by the election/consent procedure.

12. The present law is inadequate to satisfy the requirements of a fair trial and accountability by the Crown in consenting or refusing consent to a judge alone trial.

13. The preferable mode of determining whether a judge alone trial is appropriate in any case is by application by the accused supported by written reasons for an order for a judge alone trial. The application should be made to a judge of the court in which the accused is to be tried and heard as a matter preliminary to trial and before the trial judge is known. The Crown should be entitled to oppose the application for cause supported by written reasons. The application should be granted unless the judge is satisfied that the interests of justice require trial by jury and only if satisfied that the accused fully understands the effects and consequences of the order.

14. The judge should have power to suppress from publication the accused's reasons if the interests of justice require it and any part of the Crown's reasons relating thereto. He should also have power to order that the application be heard *in camera*.

15. Provisions similar to that in section 651A of the *Criminal Code* relating to multiple charges and joint offenders should be enacted.

ENDNOTES

* The Law Reform Commission of Western Australia engaged the Hon Edward Morrissey Franklyn QC, former justice of the Supreme Court of Western Australia, to prepare this sub-section. The views expressed are those of the Commission.

1 *R v Bertram* [1867] LR1 PC 520, 534, quoted in Caroline Harrison, *Redefining Justice?: Trial by Judge Alone* (1993) 1.

2 NSW Law Reform Commission, *Criminal Procedure Report: The Jury in a Criminal Trial,* LRC 48 (1986).

3 Ibid 13.

4 Ibid 19.

5 (1986) 60 ALJR 17.

6 Ibid 35.

7 NSW Law Reform Commission, above n 2, 102.

8 (1986) 160 CLR 171.

9 *Brown,* above n 8, 193 (emphasis added).

10 *Crimes Act 1961* (NZ), ss 361B and 361C.

11 Law Commission of New Zealand, *Juries in Criminal Trials,* Preliminary Paper 32 (1998).

12 *Dietrich v The Queen* (1992) 177 CLR 292.

13 Harrison, above n 1, 31-32.

14 NSW Law Reform Commission, above n 2.

15 419 US 522, 530 (1975).

16 *Evidence Act 1906* (WA), s 106I and 106R.

17 *Canadian Criminal Code 1988*, RSC 1993 c-46/d-4.6, s 536.

18 See the *Emergency Provisions (Northern Ireland) Act 1973*, the *Firearms (Northern Ireland) Order 1981* and the *Offences Against the State Act 1939*.

19 *Taylor*, above n 15, 530.

20 *Law Society Bulletin* (December 1991) 22-24.

21 Justice Jeremy Badgery-Parker 'The Criminal Process in Transition: Balancing Principle and Pragmatism – Part I' (1995) 4 *Journal of Judicial Administration* 171.

22 *Brown*, above n 8.

23 Ibid 269.

24 Narey 'Review of Delays in the Criminal Justice System' (Home Office, February 1997).

25 (1997) 71 ALJR 638.

26 (Unreported, Supreme Court of Western Australia, Library No 970602, Kennedy, Ipp and Staytler JJ, 13 November 1997).

27 (Unreported, New South Wales Court of Criminal Appeal, File No 60110194, McInerney, Dunford and Simpson JJ, 14 December 1995).

28 (1986) 43 SASR 448, 499.

29 Ibid 499.

30 (1992) 66 ALJR 29.

31 J Willis 'Trial by Judge Alone' (1998) 7 *Journal of Judicial Administration* 144.

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4.9

Costs in Criminal Proceedings

INTRODUCTION

The issue of costs in criminal proceedings is not one that has attracted much attention from legal commentators on the criminal justice system. There is a relative paucity of published material on the subject, as well as an apparent absence of cost analyses of the various possible costs systems or measures that might be proposed. The issue of costs is, however, one which can impact on the parties in criminal proceedings. It may impact on the accused who is innocent and who may have to incur serious financial hardship to vindicate his innocence. It is evident that an absence of appropriate mechanisms for awarding costs can place the cost of adequate legal representation beyond the reach of the ever-increasing category of persons who do not qualify for legal aid, and can result in charges being defended inadequately or people pleading guilty because they know they will be unable to recover any of the costs of a successful defence. On the other side of the coin, concern has been expressed that the administration of criminal justice may be adversely affected if prosecutorial decisions are unduly influenced by the possibility of adverse costs orders.

THE PRESENT POSITION RELATING TO AWARDING COSTS IN CRIMINAL PROCEEDINGS

Legislative provision is made for awarding costs in summary proceedings in the *Justices Act 1902* (WA) (the '*Justices Act*') and the *Official Prosecutions (Defendants' Costs) Act 1973* (WA) ('the *Costs Act*').

Summary proceedings

Section 151 of the *Justices Act* provides:

> In all cases of summary convictions and orders, the justices making the same may, in their discretion, order by the conviction or order that the defendant shall pay to the complainant such costs as to them seem just and reasonable.

Section 152 of the *Justices Act* provides:

> When justices, instead of convicting or making an order, dismiss the complaint, they may, by their order of dismissal, order that the complainant shall pay to the defendant such costs as to them seem just and reasonable.

Section 153 of the *Justices Act* requires the sum allowed for costs to be specified in the conviction or order of dismissal.

The *Costs Act* governs the matter of costs on dismissal of a complaint in an 'official prosecution', defined in s 4 of the Act. Section 152 of the *Justices Act* applies to prosecutions other than official prosecutions. It appears from the decision in *Robson v Carter*[1] that the purpose of the *Costs Act* was to counter the long-established rule of practice of not awarding costs against unsuccessful police complainants in the absence of unreasonable conduct or want of good faith.[2] As explained in *McEwen v Siely*[3] this practice appears to have been based upon the public policy consideration that it would be bad for the administration of justice if members of the police force failed to lay or prosecute informations for fear of having costs awarded against them which they would have to pay out of their own pockets. As the Court pointed out,[4] the rationale for this practice fell away once the position came to be that a police officer was entitled to be indemnified out of public funds for any costs he was ordered to pay.

Section 5(1) of the *Costs Act* provides that, subject to the Act, a successful defendant is entitled to his costs. Section 4 of the Act states that a defendant is successful if the charge is dismissed, withdrawn, or struck out, or a conviction thereon is quashed.

Section 5(3) of the Act provides that where a defendant is successful by reason of a decision of the Appeal Court, the Appeal Court shall make an order as to the amount of his costs in the Appeal Court. Section 5(4) provides that where a defendant is successful by reason of the Appeal Court reversing a decision of the summary court, the Appeal Court shall make an order as to the amount of the costs in the Appeal Court and in the summary court.

Section 5(5) of the Act provides that the amount of the costs ordered, other than court fees, shall be in accordance with the scale fixed from time to time by a determination under section 58W of the *Legal Practitioners Act* 1893 (WA), but that the court may make an order for payment of costs including an amount in excess of the amount for any item in that scale if it is satisfied that having regard to the special difficulty, complexity, or importance of the case, the payment of greater costs for that item is desirable.

It appears that there is currently no scale validly determined under section 58W of the *Legal Practitioners Act*, the scale purportedly made and gazetted on 27 March 1991 having been held to be invalid.[5] The decision in *Williams v Beverley*[6] nevertheless confirmed that a successful defendant may be awarded costs under section 5(5). The Court in *Klahn v Talbot*[7] accepted that the scale, while invalid, may be regarded as indicating the limits within which the discretion to order costs should be exercised, while recognising that it cannot bind the Court in the exercise of its discretion.

Section 6 of the *Costs Act* limits the circumstances in which the court may order that a successful defendant is not entitled to his costs or part thereof to the following:

(a) where the court, having found the defendant guilty, disposes of the charge without recording a conviction;

(b) where the defendant has done or caused to be done or has omitted or caused to be omitted something (other than an act or omission the subject of the charge) which was unreasonable in the circumstances and which contributed to the institution or continuation of the proceedings; or

(c) where the defendant has done or caused to be done or has omitted or caused to be omitted something during the course of proceedings or in the conduct of the defence or appeal calculated to prolong the proceedings unnecessarily or cause unnecessary expense.

Section 7 of the *Costs Act* gives the court a discretion to order that a partly successful defendant is entitled to the additional costs he incurred by reason of being charged with an offence or offences in respect of which he was successful. Section 4(2) provides that a defendant is partly successful if (a) he is convicted of a lesser offence than that with which he was charged, or (b) he is charged with several offences on the same complaint and is successful in respect of one or some of them.

Case law dealing with costs in summary proceedings and appeals from summary proceedings establishes, *inter alia*, the following.

Time for fixing costs

Upon a proper construction of sections 151 to 153 of the *Justices Act*, where the court allows costs to a complainant or defendant, the court must fix the amount of costs at the time of the conviction or dismissal and specify the sum allowed in the conviction or order for dismissal. The court cannot make an order of conviction or dismissal and adjourn the determination of the amount of costs for agreement or later determination. Where the costs cannot be specified at the time of conviction or dismissal, the actual conviction

or dismissal of the complaint should be deferred until the costs can be specified and stated in the order.[8] In *Garstone*[9] Justice Heenan referred to Justice Jackson's acknowledgment in *Bateman* that the reason underlying the original need for justices to decide and fix costs forthwith upon conviction or dismissal may have less weight nowadays when a stipendiary magistrate usually presides regularly and continuously in a court of Petty Sessions. Justice Heenan observed[10] that during the 23 years which have passed since *Bateman* was decided it has become much more common for Courts of Petty Sessions to deal with cases in which costs cannot be specified at once. His Honour stated that it might be desirable now for the relevant provisions to be amended.

Discretion

In *Dilatte v Edgar*[11] the Court summarised the principles applicable to the discretion to order costs as follows:

- the Court has a very wide discretion in relation to the question of costs;
- discretion must be exercised taking into account all relevant matters which include the assessment of the relevant conduct of the parties which has given rise both to the institution of the proceedings and to the continuation of the proceedings;
- the court has regard to the conduct of both sides; and
- a successful party, in the absence of special circumstances, generally has the right to expect that an order for costs will be made in his favour but that the discretion is not fettered by any right but must be exercised having regard to the conduct of the parties which has given rise to the proceedings.

Fixing costs against a defendant — just and reasonable

The court needs to inquire into the defendant's means and ability to pay where an order for costs is contemplated.[12] Where the combined total of an appropriate fine and an order to make payment towards the costs of the prosecution constitutes a penalty which is totally out of proportion to the offence it is appropriate to scale down either the fine or the amount of the order to pay prosecution costs, in order to avoid the overall burden on the defendant being out of proportion to the offence.[13]

Costs Act — section 6

Where the court finds the defendant guilty but disposes of the charge without recording a conviction, it is only in unusual circumstances that the defendant should be held entitled to costs: *Jones v Holt.*[14]

In *Harwood v Nell*[15] it was held, applying *Latoudis*, that the unreasonable failure of a successful defendant in a prosecution under the *Road Traffic Act 1974* (WA) to disclose to the police information that showed that someone other than he was the rider of the motor cycle at the relevant time, may have caused the proceedings to be unnecessarily continued, and justified the magistrate's decision to deny the defendant his costs.

In *Green v Espinoza,*[16] the failure of a defendant to inform the police of an exculpatory fact was conduct which was regarded as having contributed to the institution or continuation of proceedings within the meaning of section 6(1)(b) of the *Costs Act*, and justified the successful defendant being denied his costs. As the Court held, section 5 of the *Costs Act* confers a *prima facie* entitlement to an award of costs on a successful defendant in summary proceedings, but that *prima facie* entitlement can be displaced by proof of the matters set out in section 6(1) of the Act. It was argued on behalf of the defendant that he had no obligation to disclose his defence to the police. In *Green v Espinoza,* Justice Anderson held in relation to this argument, applying *Latoudis v Casey:*

> But where the defence is such that the prosecution might not be instituted or might be abandoned if the defence is disclosed, an exercise of the undoubted right to silence may have to come at a price in this jurisdiction.[17]

It is noted that in the South Australian case of *Ling*[18] it was also held that the exercise of a discretion to reduce costs awarded to a successful defendant based on the failure to make a sensible and appropriate disclosure of the defence case does not abrogate the right of silence. The Court held that authority required the conclusion that in the exercise of its discretion in relation to costs a court can take into account conduct of the defence which has unreasonably prolonged the proceedings (referring to Justice Toohey in *Latoudis*[19] in this regard) or which has occasioned unnecessary expense in the conduct of the proceedings (referring to Justice McHugh in *Latoudis*[20] in this regard). The Court held that in a particular case the manner in which the defence is conducted may justify a refusal to award a successful defendant his or her costs or full costs, even though the conduct was an exercise of the right of silence.

Preliminary hearings

Costs cannot be awarded at preliminary hearings held pursuant to the provisions of the *Justices Act.*[21]

Costs on appeal

Where a defendant who is acquitted appeals against the refusal of the magistrate to award him costs, and the Appeal Court upholds the appeal, the defendant is not entitled to the costs of the appeal, as section 5(3) of the *Costs Act* restricts costs being awarded in the Appeal Court to a defendant who is successful, and a defendant is stated in section 4 to be successful if the charge is dismissed, withdrawn, or struck out, or a conviction thereon is quashed.[22]

It is unclear whether section 5(3) requires the Appeal Court to stipulate the actual amount of costs or whether it is sufficient that the Court order the amount to be determined on taxation. Appeal Courts do sometimes refer the matter of costs to the Registrar for inquiry and report to the Court, and then fix costs on receipt of the report.[23]

Proceedings on indictment

Awarding costs in proceedings on indictment is limited to the circumstances referred to in sections 674, 675 and 728 of the *Criminal Code (WA)*.

Section 674 provides that when a person is convicted on indictment of any indictable offence relating to the person of any person, the Court may require the offender to pay to the aggrieved person his costs of prosecution.

Section 675(1) provides that in the case of a private prosecution on a charge of the unlawful publication of defamatory matter, if the accused is acquitted he is entitled to recover from the prosecutor his costs of defence unless the court otherwise orders. Section 675(2) provides for the recovery by a private prosecutor of his costs on a complaint of the unlawful publication of defamatory matter in certain circumstances.

Section 728 empowers a court to award costs to a successful accused in the case of a private prosecution.

Apart from these very limited situations, there is no power to award costs in proceedings on indictment.[24] The authorities explain that the absence of awards of costs in indictable proceedings derives from the absence of a statutory power to award such costs. Whereas the common law rule that the Crown neither receives nor pays costs has essentially been displaced by legislation in Western Australia in summary proceedings,[25] it has not been displaced in proceedings on indictment.

In *R v Goia*[26] Gallop J considered the general rule that in criminal proceedings brought by the Crown costs will not be awarded in favour of or against the Crown to be

> [O]ne of importance which considerably affects, for good or ill, the nature of criminal process in this country. An accused person, at least if legally aided or unrepresented, may put the Crown to proof without risking his or her assets.... The rule has always been regarded as reciprocal…[27]

In *R v Scott*[28] Justice Hill explained that the position at common law that the Crown neither paid nor received costs had, at least initially, the historical justification that the courts of common law did not award costs. It was only gradually and by statute that the power to order costs found its way into the common law.[29]

Other than the suggestion in some cases that the Crown prerogative may provide some justification or explanation for the absence of costs in criminal proceedings, the cases do not appear to provide any further rationale for this, whether in respect of proceedings on indictment or summary proceedings.

ADEQUACY OF CURRENT POSITION

In general terms it is considered that the present position achieves a just and proper balance. This is subject, however, to the following qualifications and observations.

Summary proceedings

Complainant's costs

The *Costs Act* establishes as a general principle that a successful defendant should be awarded costs. The position of the official complainant is governed by the *Justices Act*, which does not expressly provide as a general principle that a successful complainant should be awarded costs, but leaves to the Court a wide discretion.

It is noted that the Australian Law Reform Commission ('ALRC') in its 1995 Report,[30] recommended[31] that the prosecution should not be able to recover costs unless the court is satisfied that the accused unreasonably failed to comply with the court's directions, or the legislation creating the offence provides for a right to recover costs. The ALRC expressed the view[32] that it is generally inappropriate for a defendant who is found guilty of an offence to be liable for the costs of the prosecution given that:

- he or she is already subjected to some form of penalty;
- a prosecutor is performing a public duty and is backed by resources of the state;
- in many jurisdictions the sentence imposed on a defendant who is found guilty after trial does not attract the discount which would be given for a timely plea of guilty;
- the prosecution can use its power to seize and forfeit assets of criminals on conviction.

The ALRC stated, however,[33] that the prosecution should be able to recover costs where a defendant has failed to comply with orders of the Court, unreasonably prolonged the proceedings or unreasonably withheld significant evidence until a late stage of the proceedings. The imposition of costs in these situations, it stated, reinforces the court's ability to reduce the complexity, duration and costs of trials.

Notwithstanding the ALRC's view, it is considered that the court's general discretion to award costs to the prosecution should be retained.

Justice Parker observed in *Thomas v Schwager*[34] that while the High Court in *Latoudis v Casey*[35] was concerned with awards of costs to a successful defendant, the reasoning of the majority would not appear to make a distinction between a successful defendant and a successful respondent. It was said by Chief Justice Mason,[36] and Justices Toohey[37] and McHugh,[38] that costs indemnify a successful party in litigious proceedings in respect of liability for professional fees and out of pocket expenses reasonably incurred in connection with the litigation. Costs are not ordered to punish the unsuccessful party. They are compensatory in the sense that they are to indemnify the successful party.

Justice Parker pointed out that the majority members of the Court in *Latoudis* appear to have accepted the correctness of the general approach to the payment of costs in summary proceedings which was indicated in *Hamdorf v Riddle*[39] where it was said:

> We think then, without attempting to fetter the discretion of courts of summary jurisdiction, that they should, in a general way, exercise their discretion as to costs in the way in which it is exercised in the trial of a civil action, but without discriminating between the costs of successful complainants and successful defendants at least to any greater extent that the civil courts distinguish between the costs of successful plaintiffs and successful defendants.[40]

It is also considered that the existence of the power to order a defendant to pay the costs of the prosecution may operate as a discouragement to those defendants who know the prospects of conviction are high from proceeding in a way that is wasteful of time and costs and from 'running cases' because they consider they have little to lose.

It is therefore proposed that the Court's general discretion under section 151 of the *Justices Act* to award costs to the prosecution should be retained.

It is further considered that the way in which the discretion to award costs to successful complainants is exercised does not presently require statutory intervention. The exercise of the discretion in practice appears to be appropriately and adequately controlled by the various superior court decisions which deal with section 151 of the *Justices Act*, some of which are referred to above.

Quantum of costs

Defendant's costs

The maximum amounts provided for under the scale of costs purportedly determined under section 5(5) of the *Costs Act* may be viewed by some as inadequate given what may be considered to be the reasonable costs of legal representation today. This scale, although it does not have legal force, continues to serve as guide as to the maximum amounts considered to be appropriate in the ordinary case and may be considered by magistrates to provide a starting point as to what costs should be allowed. While recognising that it is the intention of the legislature that costs awarded under the Act are to be lower, generally, than the costs awarded in a Supreme Court action,[41] the amounts provided for by the scale may be thought to be somewhat low. Justice Mason pointed out in *Latoudis*[42] that costs in criminal proceedings are 'compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings'. While accepting that costs awards are not intended to restore to successful litigants all the costs they have incurred, it is considered that realistic compensation would require the maximum amounts provided for in the ordinary case to be increased. It is noted that the maximum costs

recoverable in respect of civil trials in the Local Court are well in excess of the amounts provided for in respect of summary trials in a Court of Petty Sessions, even though the consequences for a defendant in a criminal matter are potentially much more serious than those which face a defendant in a civil matter. Accordingly, it is proposed, first, that a valid scale be fixed by determination pursuant to section 5(5) of the *Costs Act*, and, second, that the scale make allowance for maximum amounts which are in excess of those contained in the present scale and which have regard to — although do not necessarily equate to — the reasonable costs of legal representation today.

Proposal 1

A valid Scale of Costs be fixed by determination pursuant to section 5(5) of the *Costs Act* and that allowance be made in the Scale for maximum amounts which are in excess of those contained in the present Scale and which have regard to — although do not necessarily equate to — the reasonable costs of legal representation.

Complainant's costs

The costs awarded to the prosecution are generally much lower than those awarded to defendants. This is largely due to the fact that at present State summary prosecutions are generally carried out by police officers and the professional costs of solicitors or counsel are not awarded. The position is different in Commonwealth matters where legal practitioners employed by the Office of the Commonwealth Director of Public Prosecutions generally prosecute in summary matters.

The Attorney-General for Western Australia has announced a proposal that legal practitioners — employed by or on brief from the DPP — rather than police officers prosecute in summary matters. This would lead to applications for costs which include professional fees.[43] It is considered that this would not of itself call for any legislative changes with regard to costs, and that the relevant provisions of the *Justices Act* and the effect of the various decisions dealing with those provisions would provide appropriate and sufficient direction. In particular, it is not considered that the introduction of a professional prosecutor can justify statutory removal or curtailment of the discretion to award costs to the prosecution in appropriate cases.

Time for fixing costs

As set out above, Justice Heenan in *Garstone,* having observed that, during the 23 years which have passed since *Bateman* was decided, it has become much more common for Courts of Petty Sessions to deal with cases in which costs cannot be specified at once, stated that it might be desirable now for the provision requiring costs to be fixed at the time of conviction or acquittal to be amended. This view is respectfully endorsed. It appears undesirable in

cases where costs cannot be immediately specified for the order of conviction or dismissal to be held over.

It is noted that the Western Australia Law Reform Committee ('WALRC') in 1972[44] expressed the view[45] that a magistrate should be empowered, if he thinks it necessary, to adjourn the application for costs to chambers and grant leave to adduce further evidence, whether by affidavit or orally.

It is proposed that the relevant provisions of the *Justices Act* be amended to allow the Court to record a conviction or order a dismissal and to award costs but to leave the question of the amount of costs for agreement or later determination. By way of comparison it is noted that section 8 of the *Costs Act* provides that the Court 'may adjourn to Chambers the question of costs, or the amount thereof, under this Act to enable the making of submissions and the tendering of evidence, including affidavit evidence, on that question.'

Proposal 2

The relevant provisions of the *Justices Act* be amended to allow the Court to record a conviction or order a dismissal and to award costs but to leave the question of the amount of costs for agreement or later determination. This might be achieved by including in the *Justices Act* a provision similar to section 8 of the *Costs Act*.

Costs Act — section 6

A question arises whether the circumstances under which a court, pursuant to section 6 of the *Costs Act*, may decline to award costs to a successful defendant should be amended or enlarged upon.

It may be considered that the three situations referred to in section 6 provide appropriate instances where a successful defendant might be denied some or all of his costs. The situations in section 6(b) and (c) are justified on the basis that the purpose of a costs award is to indemnify a party in respect only of expenses which have been reasonably and properly incurred. Section 6 would seem to provide ample scope for a court to express its disapproval of conduct of a defendant which is wasteful of costs and in this way contribute to proper case management.

A related question is whether a Court should have power to deny a defendant his costs or part of them as a disciplinary measure or sanction to mark its disapproval of inappropriate conduct which is not wasteful of costs. This requires consideration of whether disciplinary costs measures or orders, while appropriate in other types of proceeding, are appropriate for criminal proceedings. It is proposed, however, that consideration be given to whether it might be appropriate to introduce provisions to allow a court to deny a

defendant all or part of his costs as a disciplinary measure to mark its disapproval of inappropriate conduct. As this issue is related to the issue, considered below, whether a Court should have power to order punitive or disciplinary costs against an unsuccessful defendant, this proposal is included under Proposal 8 below.

Acquittal on technical grounds

The ALRC recommends in its Report[46] that in considering whether a successful defendant should be denied some or all of his costs, regard should be had, *inter alia*, to whether the dismissal or withdrawal of the charges was based on technical grounds.[47]

In its 1972 report[48] the WALRC considered whether the dismissal of a charge on a technical point should constitute a ground for denying costs. It stated as follows:

> In the Committee's opinion there would be danger in such a course, due to the wide meaning of 'technical point'. On the one hand it would cover the situation in which the prosecution fails because of the neglect to establish some matter requiring only formal proof (eg, the proof of relevant regulations). In such a case it may seem improper to allow an accused his costs. On the other hand the term could include a situation where an acquittal is obtained because it has been sought to establish some element of the offence by evidence which is inadmissible. There seems no reason why the accused should be denied his costs in this sort of case.[49]

It concluded that it would be very difficult if not impossible to define precisely those circumstances in which an accused should be denied costs because of the failure of the prosecution on a technicality. It recommended that this should not be a ground for denial of costs.

MacKinnon[50] points out that it is often a matter of difficulty to distinguish between the 'legal' or 'technical' points by which persons who may be guilty are acquitted, and the (presumably) more substantive matters which satisfy us of 'true' innocence. He also points out that legal or technical argument may be as fatal to the prosecution of one who is really innocent as to one who may be guilty. He concludes that the failure of a prosecution on a technicality should not be a consideration in awarding costs.

Requiring regard to be had to whether an acquittal occurred on technical grounds in determining whether a successful defendant should be awarded costs, or all of his costs, could introduce undesirable complications.[51] It is proposed, however, that consideration be given to whether it may be appropriate to introduce provisions allowing a court to refuse a successful defendant some or all of his costs on the basis that he was acquitted on technical grounds.

Proposal 3

Consideration be given to whether it may be appropriate to introduce provisions allowing a court to refuse a successful defendant some or all of his costs on the basis that he was acquitted on technical grounds.

The 'truly innocent' defendant

Similar considerations apply to whether costs should only be awarded to a defendant who is shown to be innocent as opposed to one whose guilt merely has not been proved beyond reasonable doubt.[52] There is in Scots law the third verdict of 'not proven'. This verdict indicates that the State has not established full legal proof that the accused committed the crime, whereas the Scottish verdict of 'not guilty' represents a finding that the accused is in fact innocent of the alleged crime. The question arises whether a defendant should be denied his costs in situations where 'not proven' would be the appropriate verdict.

The WALRC in its working paper[53] which preceded its 1972 report stated:

> Under the present system, on a criminal charge, the issue precisely before the court is not whether the accused is innocent but whether the prosecution has proved his guilt beyond a reasonable doubt. The system does not draw any distinction between an innocent accused and an accused whose guilt has not been proven. In the Committee's view a system of awarding costs to accused persons which tended to create such a distinction and in effect introduced degrees of 'not guilty', should, if possible, be avoided.[54]

The Law Reform Commission of Canada has stated:

> What that means in ordinary language is that if an accused is charged with a criminal offence and is acquitted without receiving costs there is at least the risk that in the public eye he will still be regarded as less than innocent. If he should not apply for costs a suspicion of guilt would be raised, and if he should apply and be refused perhaps an even greater suspicion would be raised.... Persons ... would run the risk that even if acquitted or otherwise freed, if costs were not obtained they would be forever prejudiced in obtaining or holding employment. Persons in public service occupations and many others where trust, integrity, responsibility, and other personal attributes are job-important would be especially vulnerable. As well such a system of costs compensation could well put unbearable pressure on these people in the defence of a prosecution. To them it would never be sufficient to just be acquitted or to be content should the prosecution abandon a prosecution by a withdrawal or a stay of proceedings.[55]

The Law Reform Commission of Canada also suggests[56] that a system which singled out the 'innocent' by costs awards would compromise the presumption

of innocence. They suggest that acquitted persons for whom costs were denied would be in a worse position than at the commencement of criminal proceedings. Though acquitted, they would no longer be presumed innocent but would be subject to the suspicion of guilt with all of the consequent disadvantages that could attach to that condition. The Commission quotes the following extract from a working paper of the British Columbia Law Reform Commission:

> [C]ases are few that lead to a clear-cut conclusion of innocence. Most evidence is circumstantial and the Judge or jury must draw inferences about whether an accused did or did not commit a certain act and whether he did it knowingly or with a wrongful intention. These are matters for human judgment rather than scientific proof, and an accused who wins an acquittal on such judgment is entitled to have his acquittal taken at face value.[57]

MacKinnon[58] also takes the view that in awarding costs attempts should not be made to determine grades of innocence and that 'innocent' should be taken to mean that the presumption of innocence has prevailed. He, too, argues that an acquittal without costs might be a tainted acquittal, and that tainted acquittals would compromise the presumption of innocence. He also adverts to the fact that reserving costs to the 'truly innocent' could lead to protracted proceedings to determine who should get costs and who should not.

In *Latoudis* Dawson J held:

> In many cases defendants quite properly escape conviction without having positively established their innocence. However, to differentiate cases of that kind from those in which a defendant has established his innocence, and not merely raised a doubt, by making an order for costs against the informant in the one case but not the other, would be invidious and inconsistent with the presumption of innocence.[59]

There appears to be an absence of published material on the Scottish system to indicate to what extent, if any, the concerns expressed by the Law Reform Commission of Canada are justified.

Counter-arguments against those who reject the view that the question of 'true innocence' should enter into the determination of whether a successful defendant should be awarded costs, might include the following:

(a) Most of us in any event make a rough and ready distinction between true innocence and an acquittal or discharge.[60]

(b) If it is the case that a criminal trial is 'a search for proof, not truth', there may be no harm in recognising that as a consequence some acquittals mean not proven rather than not guilty.[61]

(c) A system of costs that took into account whether a person was shown to be innocent might not in fact create 'two classes of innocence', because it would be recognised that those who were denied costs might well have been innocent but were simply unable to prove it.[62]

(d) The introduction of two classes of innocence by a system of costs that took into account whether an accused was shown to be innocent would in any event be a benefit which would inject a measure of realism into the criminal law system.[63]

It might also be argued that the risk of creating two classes of innocence would be reduced if the determination of costs eligibility was dependent on the exercise of a discretion which took into account, in addition to the question of innocence, other factors such as the conduct of the accused in relation to the investigation and the proceedings.[64]

It might be considered that the arguments against allowing a system of costs which takes into account whether an accused has been shown to be innocent as opposed to merely not having been proved guilty outweigh arguments to the contrary. It is proposed, however, that consideration be given to the desirability or otherwise of introducing legislative provision which would allow a court, in determining whether a successful defendant should be awarded costs, to take into account whether the defendant has been shown to be innocent as opposed to merely not having been proved guilty.

Proposal 4

Consideration be given to the desirability or otherwise of introducing legislative provision which would allow a Court, in determining whether a successful defendant should be awarded costs, to take into account whether the defendant has been shown to be innocent as opposed to merely not having been proved guilty.

Preliminary hearings

As noted above, costs cannot be awarded at preliminary hearings held pursuant to the provisions of the *Justices Act*.[65] Where a defendant avoids committal at a preliminary hearing it is considered that he should ordinarily be entitled to an award of costs. It is noted that in New South Wales on the discharge of a defendant at committal proceedings the Court may make an order for costs as seems just and reasonable.[66]

Further, it is apparent that in the majority of cases where a defendant elects to have a preliminary hearing it is found pursuant to s 107 of the *Justices Act* (WA) that the evidence is sufficient to put the defendant on trial for the indictable offence and the defendant is committed. It is equally clear that in

many instances a defendant elects to have a preliminary hearing not in a genuine attempt to test whether a prima facie case exists, but for strategic or forensic reasons, or to have a 'practice run'. Preliminary hearings, where the defendant is committed, also have the effect of delaying the final disposition of matters. It is considered that a defendant should in some instances be required to contribute to the costs of these proceedings, and that the prospect of a defendant having to pay costs might well provide an effective sanction against elections to have preliminary hearings for reasons of delay or strategic reasons. The fact that magistrates perform a ministerial rather than judicial function in committal proceedings should not be a bar to awards of costs in appropriate situations. It is accordingly proposed that legislative provision be made for awards of costs both for or against a defendant in preliminary hearings. The exercise of the discretion to award costs would be subject to the principles referred to in relevant decisions and might also be the subject of statutory exceptions or qualifications where, for instance, a defendant is partly successful, for example where he is committed on fewer or lesser charges than those with which he has been charged.[67]

Proposal 5

Legislative provision be made for awards of costs in preliminary hearings.

Costs on appeal

Where a defendant who is acquitted appeals against the refusal of the magistrate to award him costs and the appeal court upholds the appeal, the defendant is not entitled to the costs of the appeal. The Appeal Court should have the discretion to award costs to a defendant who successfully appeals in relation to the matter of costs and it is proposed that consideration be given to amending the *Costs Act* to provide for this.

Proposal 6

Consideration be given to amending the *Costs Act* to provide that the Appeal Court may award costs in the appeal to a defendant who has been acquitted in summary proceedings and who successfully appeals in relation to the matter of costs.

It is unclear whether section 5(3) of the *Costs Act* requires the Appeal Court to stipulate the actual amount of costs or whether it is sufficient that the Court should order the amount to be determined on taxation. It is considered that, as in civil matters, the Appeal Court should have the power to order that the amount of costs be determined on taxation by the taxing officer of the Supreme Court. It is also considered that the Appeal Court should also

have the power, when making an order as to costs in the summary court under section 5(4) of the *Costs Act*, to order that the amount be determined on taxation. It is accordingly proposed that legislative provision be made for this.

Proposal 7

The *Costs Act* be amended to permit the Appeal Court to order that the amount of costs in the Appeal Court and in the summary court be determined on taxation.

Punitive costs

The ALRC has recommended[68] that as a general rule the prosecution should not be able to recover costs from a convicted defendant. As an exception to this, however, the ALRC proposed that the prosecution should be able to recover costs pursuant to a disciplinary and case management costs order.[69] The ALRC considered that such orders may be appropriate where:

(a) the defendant has failed to comply with orders of the court;
(b) the defendant has unreasonably prolonged the proceedings; or
(c) the defendant has withheld significant evidence until an unreasonably late stage of the proceedings.

The imposition of costs in these situations would, in the ALRC's view, reinforce the court's ability to reduce the complexity, duration and costs of trials.

It is considered that the existing discretion to award costs to the prosecution on summary conviction should be retained. In that situation, it may be unnecessary to make further provision for punitive or disciplinary costs. Where the conduct of an unsuccessful defendant has been wasteful of costs, the prosecution can be compensated for those costs under existing law. It is likely that the discretion as to costs vested in courts under the relevant provisions of the *Justices Act* and the *Costs Act* provides an appropriate mechanism to deter behaviour which is wasteful of costs, and that courts have adequate powers under the laws relating to contempt to control reprehensible behaviour by a defendant which cannot itself be said to have increased costs. It is questionable whether disciplinary costs orders, while suited to other types of proceedings, are appropriate in criminal proceedings.

It is proposed, however, that consideration be given to whether it may be appropriate to introduce provisions which specifically empower a court to make a punitive or disciplinary costs order against a convicted defendant to mark its disapproval of inappropriate conduct. It is also proposed that consideration be given to whether it may be appropriate to allow a court to deny a successful defendant all or part of his costs as a punitive or disciplinary measure.

Proposal 8

Consideration be given to whether it is appropriate to introduce provisions which specifically empower a court to make a punitive or disciplinary costs order against a convicted defendant to mark its disapproval of inappropriate conduct. Consideration also be given to whether it is appropriate to allow a court to deny a successful defendant all or part of his costs as a punitive or disciplinary measure.

Proceedings on indictment

Costs in favour of the accused

During the second reading debates in Parliament[70] preceding the enactment of the *Costs Act* in 1973 the view was variously expressed that the measures to be introduced in respect of summary proceedings should be seen as a starting point. The argument was advanced that it was inconsistent to allow costs in favour of successful defendants in summary proceedings but not in proceedings on indictment, and the hope was expressed that the measures would extend in due course to higher courts. It was lamented by some members that the measures were not extended to higher courts at the time. In his second reading speech in the Legislative Assembly the then Attorney-General, the Hon Mr TD Evans, expressed a desire that the principle of awarding costs to successful defendants be extended in due course to all courts. He stated:

> First of all, the member for Floreat said he hoped a similar measure in relation to the higher courts would soon be introduced. An undertaking was given that when we have the benefit of the experience of the operation of this legislation at the level set out in the Bill, earnest consideration will be given to an extension of the principle. ... I gave the assurance that there is no lack of desire on our part to see the principle of costs awarded to successful defendants applying right across the board, and not only in the higher courts but also in legal and other administrative tribunals.[71]

The Bill[72] which gave rise to the *Costs Act* was drafted following a report of WALRC[73] to the Attorney-General. In its working paper[74] which preceded the report the WALRC suggested[75] that legislative provisions relating to the payment of costs to acquitted persons could be made to apply:

(a) on every indictable charge tried on indictment; or
(b) on every indictable charge, whether tried on indictment or summarily; or
(c) on every indictable charge, and every summary charge where the offence is punishable by imprisonment; or
(d) on every charge.

In the working paper at paragraph 39 the WALRC expressed the tentative view:

> [T]hat ideally an accused should be awarded his costs on every charge on which there is no conviction but that this right of the accused should be subject to the discretion of the court limited along the lines laid down for the awarding of costs in civil cases (see paragraph 34(d) above).

The manner of exercise of the discretion referred to in paragraph 34(d) of the working paper is expressed in the following terms:

> [T]he court will order that the accused against whom a charge has been dismissed, recover his costs unless of opinion that his conduct before or after the commencement of the case has resulted in costs being unnecessarily or unreasonably incurred, in which event it may deprive him of part of his costs.

In relation to the financial burden on the State in implementing such a system, the WALRC stated in the working paper:

> If the financial burden to implement such a scheme is too much for the State to bear, the scheme could be varied either by limiting the offences to which the scheme was to apply or by allowing only for a lower scale of costs or a prescribed percentage of the costs in all cases or by both limiting the offences and allowing a lower scale or percentage of costs in such cases. In the Committee's view, at this stage, it would be preferable, if insufficient finances are available, to limit the scheme in the first instance to indictable offences.[76]

In its report[77] the WALRC explained that the reason for the suggestion in the above quotation that it would be preferable, if insufficient finances were available, to limit the scheme in the first instance to indictable offences, was that the number of indictable offences is much less than that of summary offences, but that the cost of a successful defence against a charge of an indictable offence is likely to be much greater, and so bear more harshly upon the individual concerned.

The WALRC stated in its report that the proposal in paragraph 39 of its working paper had received support from the Hon Mr Justice Wallace, The Hon Mr Justice Zelling (Chairman of the South Australian Law Reform Committee), and the Law Society of Western Australia. On the other hand, the Solicitor-General and the State Crown Solicitor had argued for greater limitations to be placed in the awarding of costs than those proposed in paragraph 39 of the working paper. The Solicitor-General's views concerning cost orders in favour of acquitted persons were essentially that:

(a) The Court should be given an unfettered discretion to award costs to those acquitted, rather than costs simply following the event;

(b) When it comes to the question of costs, the issue is one of compensation, and this requires a consideration of the merits of the

case. In this regard it is relevant to consider that many verdicts of acquittal in trials are sympathy verdicts, or verdicts which depend on a reasonable doubt albeit attended with grave suspicion, or verdicts which are plainly perverse. He also stated that having regard to the committal procedure, no one is required to stand trial on indictment unless there is evidence on oath which if believed would justify a conclusion of guilt beyond reasonable doubt. Further, very few accused persons have anyone but themselves to blame for the charges made against them.

The State Crown Solicitor's views were as follows:

(a) He was concerned that the costs payable to acquitted persons both in summary proceedings and proceedings on indictment would be a substantial burden which would compete with other demands on public money, and was concerned that this extra burden would by and large be caused by the wrongful or improper, whether or not criminal, conduct of the accused which attracted police attention in the first place. He considered that generally speaking accused persons are the authors of their own misfortune.

(b) He could not agree with the suggestion that costs in criminal proceedings should be awarded as in the trial of a civil action, and stated that acquittal is not a matter of the accused establishing his innocence but is a result of the prosecution failing to satisfy the court of the accused's guilt beyond reasonable doubt.

(c) He considered, however, that 'where an entirely innocent man has been the victim of unfortunate circumstances resulting in his being wrongly charged with an offence, or where the police have acted negligently or injudicially in the initiation of charges against an innocent person ... the community owes it to the acquitted person to bear the burden of his legal costs.' To accomplish this the courts should be empowered to award payment of costs to an acquitted person out of funds appropriated for that purpose.

It is noted that the opposition of the Solicitor-General and Crown Solicitor to the proposal in paragraph 39 of the Law Reform Commission of Western Australia's working paper did not distinguish between summary proceedings and trials on indictment.

It is also noted that all responses to the Commission's proposals agreed that in at least some circumstances an acquitted accused in a trial on indictment should be paid costs.

The WALRC concluded in its report that it was still of the view that there should be provision for costs to be awarded to persons who are acquitted on indictment. It continued:

> It is true as the Solicitor General points out that apart from the rare case of an *ex officio* information a person is not indicted unless there has been a preliminary hearing at which the prosecution established a *prima facie* case. However, the Committee thinks that this point cannot be pressed too far since it is usual for the accused to reserve his defence until the trial, when the prosecution's case may wear a different aspect. On the other hand the Committee would agree that some jury verdicts are sympathy verdicts which would make an award of costs seem unjustified.[78]

The WALRC listed in paragraph 29 of its report a number of possible ways in which the question of costs following an acquittal on indictment could be dealt with, including the following:

(a) The court could be given an unfettered discretion to award costs;

(b) The court could be given a discretion to award costs but with guidelines laid down to which the court would have regard (as in New Zealand); or

(c) The court could be required to award costs except in limited circumstances (as is the position in relation to summary proceedings under the *Costs Act*).

The WALRC stated[79] that it had no combined view as to which of these alternatives should be adopted.

The ALRC[80] has expressed the view[81] that there is no compelling reason for maintaining different costs rules for summary and indictable matters. In its earlier draft recommendations[82] the ALRC proposed[83] different costs rules for summary proceedings and trials on indictment. In this regard it stated in the draft recommendations:

(a) In almost all cases the decision as to whether a matter should go to trial is determined by the relevant State DPP. When making a determination the DPP must balance the interests of justice, the public and the rights of the defendant. The risk of an adverse costs order could have an 'anomalous impact' on the balancing of these interests.

(b) Mechanisms are already in place to ensure that unmeritorious matters do not go to trial. These include committal procedures and the review of matters by the DPP. There is therefore less need for a costs order to deter unmeritorious prosecutions.

(c) Most defendants in trials are entitled to legal assistance. This reduces the proportion of defendants who may suffer hardship or disadvantage as a result of being unable to recover the costs of legal representation.

In the light of these matters, the ALRC proposed[84] to limit the ability of an accused on indictment to recover costs to cases where charges are withdrawn or the court finds there is no case to answer.

In its later report[85] the ALRC explained,[86] however, that most responses to its draft recommendations supported the introduction of a single set of costs rules for both types of proceeding, on the basis that:

(a) committal proceedings are an inadequate filter as the magistrate usually has insufficient evidence to determine the real merits of the case;

(b) screening of cases by the DPP may not be a reliable filtering process because some cases are prosecuted as a matter of policy even though there may not be enough evidence to convict;

(c) a significant number of defendants in indictable matters do not qualify for legal aid and may suffer substantial hardship in presenting their case; and

(d) the risk of an adverse costs order will not affect the administration of justice by deterring the prosecution from bringing appropriate cases to court.

There appears to be merit in many of the arguments and counter-arguments that have been advanced in relation to the issue of extending costs awards to persons who have been acquitted in proceedings on indictment.

The following additional comments and observations are made:

(a) There appears to be a general consensus that at least in some situations it is unjust not to compensate an acquitted accused person for at least part of the expenses incurred in defending the proceedings.

(b) There is a significant likelihood that some accused persons, who do not qualify for legal aid, may decide to plead guilty for monetary reasons, notwithstanding that they may have a good defence, because they know they will be unable to recover any of the costs of a successful defence. This may be thought to be unjust. It may be argued, however, that this is less likely to occur in proceedings on indictment where the potential penalties are generally greater. It needs to be borne in mind, however, that penalties imposed by courts of summary jurisdiction, which often deal with indictable matters, can often be more severe than those imposed in proceedings on indictment.

(c) It may also be considered unjust that persons who do decide to defend charges and are required to spend considerable sums of money to establish their innocence can be financially very seriously affected. There is a trend towards reduction in legal aid funding, and the costs of defending proceedings on indictment are likely to have considerable impact on an ever-increasing section of the community. This is not to say that burdening the State with the obligation to pay costs to successful accused persons is necessarily the appropriate way to overcome the limitations in legal aid funding, but rather that the power to award

such costs would be a measure 'alongside other facilities such as legal aid to ensure that justice will not be — like the Ritz Hotel — available to all who can afford it'.[87] It is also noted that the WALRC in its 1972 working paper suggested that a system of awarding costs to successful accused persons in proceedings on indictment would have the effect of increasing the funds available for legal aid:

> A large number of accused persons receive legal aid. Consequently a substantial amount of the money paid to successful defendants for costs in criminal cases will find its way into the legal aid. The more extensive the scheme adopted [for paying costs to acquitted persons] the greater this amount will be. As a result the legal aid scheme will be able to provide more extensive aid and thus will come closer to achieving the ideal that every accused person has a right to legal representation when prosecuted by the State.[88]

(d) Although it is sometimes said that the Crown enjoys no victories and suffers no defeats, it remains the position that criminal proceedings on indictment are adversarial in nature, and that not only can the costs of representation have serious economic consequences, but that a conviction in indictable proceedings can in many cases entail more serious consequences than a conviction for a summary matter, and the necessity to diligently defend a charge on indictment can therefore in many cases be more pressing.

(e) At the same time, the provision of funds for costs awards in favour of accused persons in proceedings on indictment would add a significant financial burden to the State.

(f) It is noted that although the High Court in *Latoudis* was directly concerned with costs in summary proceedings, there are dicta in the various judgments which appear to support the view that costs awards should be available in criminal proceedings generally. Mason J held:[89]

> In ordinary circumstances it would not be just or reasonable to deprive a defendant who has secured the dismissal of a criminal charge brought against him or her of an order for costs. To burden a successful defendant with the entire payment of the costs of defending the proceedings is in effect to expose the defendant to a financial burden which may be substantial, perhaps crippling, by reason of the bringing of a criminal charge which, in the event, should not have been brought. It is inequitable that the defendant should be expected to bear the financial burden of exculpating himself or herself, though the circumstances of a particular case may be such as to make it just and reasonable to refuse an order for costs or to make a qualified order for costs ... If one thing is clear in the realm of costs, it is that, in criminal as well as civil proceedings, costs are not awarded by way of punishment of the unsuccessful party. They are compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings.[90]

It is also noted that in *McEwen v Siely*[91] the Court stated that it may seem anomalous that costs are not awarded in more serious matters heard on indictment and are awarded in less serious matters heard in Courts of Petty Sessions.

(g) Some argue that costs awards may impact on the reasonable doubt principle.[92] If costs are normally available to acquitted persons, the benefit of reasonable doubt may not be extended as readily in cases where it should be. As MacKinnon[93] puts it, this argument envisages judicial officers as possible unconscious guardians of the public treasury, reasoning that they will not acquit in some cases where otherwise they might if doing so also means that the accused will have his costs. Whatever the merits of this argument, it is noted that the vast majority of trials on indictment are, and may be expected to continue to be, before a jury rather than judge alone, and juries would be expected to be unaware of the possible costs ramifications of their verdict. Indeed, juries are standardly directed not to consider the possible consequences of their verdict.

In light of the above it is proposed that consideration be given to introducing a system of awarding costs to successful accused persons in proceedings on indictment, in one of the ways referred to by the WALRC in paragraph 29 of its report, namely:

(a) The court be given an unfettered discretion to award costs;

(b) The court be given a discretion to award costs but guidelines laid down to which the court would have regard; and

(c) The court be required to award costs except in limited circumstances.

A tentative preference is expressed at this stage in favour of (c) above, which mirrors the position in summary proceedings. It is considered that the view expressed in *Latoudis,* that a person who suffers economic loss in successfully defending criminal charges should be compensated for that loss, appears to be no less applicable to proceedings on indictment than to summary proceedings. In the everyday terms expressed in the parliamentary debates preceding the enactment of the *Costs Act:*

> If it is good enough for the provisions to apply to a man acquitted at a summary trial then it is good enough for them to apply to a man acquitted at a criminal trial in the Supreme Court.[94]

At the same time, there is the practical consideration that providing for costs awards in favour of acquitted persons in proceedings on indictment may place a considerable financial burden on the State's resources. Although matters heard on indictment are far fewer than those dealt with summarily, the defence costs in proceedings on indictment are generally considerably

higher than in summary proceedings. For this reason careful consideration needs to be given as to what is the most appropriate system to introduce and the most appropriate way to implement it.

While it is true that costs awards 'are compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings',[95] for practical reasons, as stated by the WALRC in its working paper[96], it may be considered appropriate to allow for a lower scale of costs or to allow for only a prescribed percentage of costs. It is suggested that economic analyses be undertaken as to the cost implications of different possible measures for awarding costs to persons acquitted in proceedings on indictment. Such analyses might have regard, *inter alia*, to the present and likely future conviction and acquittal rates,[97] and the amount of costs likely to be awarded in favour of the Crown as compared to the amount of costs likely to be awarded to successful accused persons[98] (on the assumption that a system of awarding costs in favour of the Crown in proceedings on indictment would also be implemented).

In the event of it being considered appropriate to introduce a system of costs awards in favour of accused persons as in (c) above, it is suggested that for the most part the statutory provisions presently relating to the awarding of costs to successful and partly successful[99] defendants in summary proceedings be adopted in relation to accused persons in proceedings on indictment, subject to possible changes as recommended above in relation to summary matters.

Proposal 9

Consideration be given to making legislative provision for costs awards in favour of successful accused persons in proceedings on indictment, either (a) by giving the court an unfettered discretion to award costs, or (b) by giving the court a discretion to award costs but providing guidelines to which the court would have regard, or (c) by providing that such persons be entitled to costs except in limited circumstances, as is the case in summary proceedings. It is also proposed that economic analyses be undertaken as to the cost implications of the different possible measures. A tentative preference is expressed for (c), in which event it is proposed that for the most part the statutory provisions presently relating to the awarding of costs to successful and partly successful defendants in summary proceedings be adopted.

Costs in favour of the Crown

The arguments against costs awards in favour of the Crown might be considered by some to be more compelling than those against allowing costs awards in favour of a successful accused.

The principal argument against providing for costs to be awarded to the Crown is that the expense of administering criminal justice should be borne by the state and not by the accused.[100]

A further argument is that allowing cost awards against the Crown may introduce inappropriate considerations in the exercise of the prosecutorial discretion whether to prosecute in a particular case. It is observed, however, that a prosecutorial discretion is exercised in relation to indictable matters which proceed summarily and where costs under the present law may be awarded against the prosecution.

It is also argued that it is the right of someone accused of committing a crime to put the prosecution to strict proof beyond reasonable doubt without placing his assets at risk.

A further argument is that the risk of an adverse costs order could have the effect of discouraging the defence from pursuing quite legitimate arguments and defences.[101]

As noted above, the ALRC has recommended[102] that the prosecution should not be able to recover costs unless the court is satisfied that the accused unreasonably failed to comply with the court's directions, or the legislation creating the offence provides for a right to recover costs. The ALRC's recommendation applies to proceedings on indictment as well to summary proceedings.

The ALRC stated, however, that the prosecution should be able to recover costs where a defendant has failed to comply with orders of the court, has unreasonably prolonged the proceedings or has unreasonably withheld significant evidence until a late stage of the proceedings.

In its 1972 working paper[103] the WALRC considered it arguable that if an accused is to be paid his costs when the prosecution fails, he should have to pay the prosecution costs if the prosecution succeeds. The WALRC noted that the statutes in England and New Zealand make provision for payment of costs by the accused. The WALRC pointed out[104], however, that the large majority of accused persons would not have the means to pay prosecution costs, and that orders for costs against only accused persons who could afford to pay them could be regarded as an additional and unjust penalty. The WALRC concluded[105] that it had no strong feelings on the issue though, on balance, it was of the view that provision should not be made for costs orders against accused persons. The WALRC repeated this view in its 1972 Report.[106]

The factors which justify the existence of the power to make costs awards in favour of the prosecution in summary matters may also justify the existence

of a similar power in proceedings on indictment. Apart from the question of just compensation, the court's power to award costs to the Crown may provide a useful sanction which may assist in discouraging or deterring conduct on the part of the defence which is unnecessarily wasteful of costs. It is also considered that a degree of equality in the position of the defence and the Crown with regard to costs is desirable.

It is proposed that consideration be given to the costs rules in summary proceedings being applied generally to proceedings on indictment, thereby giving the courts a discretion to award such costs when considered appropriate.

It is considered that the principles and guidelines stated by the superior courts regarding the exercise of the discretion to award costs in summary matters would prevail in respect of proceedings on indictment, in particular those which require the court to inquire into the means of the defendant and his or her ability to pay costs before ordering him or her to pay costs,[107] and in appropriate cases to scale down the amount of costs which a defendant should be ordered to pay in order to avoid the overall burden on the defendant being out of proportion to the offence.

Accordingly it is proposed that consideration be given to making legislative provision for costs awards in favour of the Crown in proceedings on indictment in similar terms to current legislative provisions relating to costs awards in favour of the prosecution in summary proceedings.

Proposal 10

Consideration be given to making legislative provision for costs awards in favour of the Crown in proceedings on indictment in similar terms to current legislative provisions relating to costs awards in favour of the prosecution in summary proceedings.

In the event of costs awards being introduced in proceedings on indictment, and the proposal in respect of costs in preliminary hearings being implemented, it may be appropriate to provide for a magistrate in committal proceedings to have the option of reserving the costs of the preliminary hearing to the superior trial court, and to empower the trial court to fix costs in respect of the preliminary hearing.

Proposal 11

In the event of costs awards being introduced in proceedings on indictment, and the proposal that legislative provision be made for costs awards in preliminary hearings being implemented, it is proposed that the magistrate

in committal proceedings should have the power to reserve the costs of the preliminary hearing to the trial court, and that courts hearing trials on indictment should be given the power to fix costs reserved at a preliminary hearing.

Appeals

With reference to the above proposals it is recommended that:

- The *Costs Act* be amended to provide that the Appeal Court may award costs in the appeal to a defendant who has been acquitted in summary proceedings and who successfully appeals in relation to the matter of costs;
- The *Costs Act* be amended to permit the Appeal Court to order that the amount of costs in the Appeal Court and in the summary court be determined on taxation.

In the event of costs awards being introduced in proceedings on indictment, it is also proposed that consideration be given to making provision for costs orders in appeals from proceedings on indictment along similar lines to provisions relating to costs orders in appeals from summary matters, subject to the changes which have been recommended above in relation to appeals in summary matters.[108]

Proposal 12

Consideration should be given to making legislative provision for costs orders in appeals from proceedings on indictment along similar lines to provisions which currently exist in relation to costs orders in appeals from summary matters.

SUMMARY OF PROPOSALS

1. A valid Scale of Costs be fixed by determination pursuant to section 5(5) of the *Costs Act* and that allowance be made in the Scale for maximum amounts which are in excess of those contained in the present Scale and which have regard to — although do not necessarily equate to — the reasonable costs of legal representation.

2. The relevant provisions of the *Justices Act* be amended to allow the Court to record a conviction or order a dismissal and to award costs but to leave the question of the amount of costs for agreement or later determination. This might be achieved by including in the *Justices Act* a provision similar to section 8 of the *Costs Act*.

3. Consideration be given to whether it may be appropriate to introduce provisions allowing a court to refuse a successful defendant some or all of his costs on the basis that he was acquitted on technical grounds.

4. Consideration be given to the desirability or otherwise of introducing legislative provision which allows a court, in determining whether a successful defendant should be awarded costs, to take into account whether the defendant has been shown to be innocent as opposed to merely not having been proved guilty.

5. Legislative provision be made for awards of costs in preliminary hearings.

6. Consideration be given to amending the *Costs Act* to provide that the Appeal Court may award costs in the appeal to a defendant who has been acquitted in summary proceedings and who successfully appeals in relation to the matter of costs.

7. The *Costs Act* be amended to permit the Appeal Court to order that the amount of costs in the Appeal Court and in the summary court be determined on taxation.

8. Consideration be given to whether it is appropriate to introduce provisions which specifically empower a court to make a punitive or disciplinary costs order against a convicted defendant to mark its disapproval of inappropriate conduct. Consideration also be given to whether it is appropriate to allow a court to deny a successful defendant all or part of his costs as a punitive or disciplinary measure.

9. Consideration be given to making legislative provision for costs awards in favour of successful accused persons in proceedings on indictment, either (a) by giving the court an unfettered discretion to award costs, or (b) by giving the court a discretion to award costs but providing guidelines to which the court would have regard, or (c) by providing that such persons be entitled to costs except in limited circumstances, as is the case in summary proceedings. It is also proposed that economic analyses be undertaken as to the cost implications of the different possible measures. A tentative preference is expressed for (c), in which event it is proposed that for the most part the statutory provisions presently relating to the awarding of costs to successful and partly successful defendants in summary proceedings be adopted.

10. Consideration be given to making legislative provision for costs awards in favour of the Crown in proceedings on indictment in similar terms to current legislative provisions relating to costs awards in favour of the prosecution in summary proceedings.

11. In the event of costs awards being introduced in proceedings on indictment, and the proposal that legislative provision be made for costs awards in preliminary hearings being implemented, it is proposed that the magistrate in committal proceedings should have the power to reserve the costs of the preliminary hearing to the trial court, and that courts hearing trials on indictment should be given the power to fix costs reserved at a preliminary hearing.

12. Consideration should be given to making legislative provision for costs orders in appeals from proceedings on indictment along similar lines to provisions which currently exist in relation to costs orders in appeals from summary matters.

ENDNOTES

1 (Unreported, Supreme Court of Western Australia, Library No 4511/1982, Wallace J, 19 May 1982).
2 See *In re Bastian* (1922) 24 WALR 119; *R v Jackson* (1962) WAR 130, 133.
3 [1972] 21 FLR 131, 133.
4 Ibid 134.
5 See *Klahn v Talbot* (1995) 83 A Crim R 535; *Williams v Beverley* (Unreported, Supreme Court of Western Australia, Library No 980474, Parker J, 24 August 1998).
6 Ibid.
7 *Klahn*, above n 5.
8 See *Bateman v Clarke* [1973] WAR 101; *Garstone v Sullivan* (1996) 14 WAR 480.
9 *Garstone,* above n 8, 482.
10 Ibid.
11 (Unreported, Supreme Court of Western Australia, Library No 980385, Walsh J, 23 June 1998).
12 *Morgan v Biddle* (Unreported, Supreme Court of Western Australia, Library No 2845/1980, Wallace J, 11 March 1980).
13 See *Flatow v Mullins* (Unreported, Supreme Court of Western Australia, Library No 5207/1984, Smith J, 1 January 1984); *Thomas v Schwager* (Unreported, Supreme Court of Western Australia, Library No 970719, Parker J, 18 December 1997).
14 (Unreported, Supreme Court of Western Australia, Library No 2547/1979, Full Court, 23 March 1979).
15 (Unreported, Supreme Court of Western Australia, Library No 920562, Scott J, 6 November 1992).
16 (Unreported, Supreme Court of Western Australia, Library No 980234, Anderson J, 6 May 1998).
17 (1990) 170 CLR 534, 565.
18 (1996) 90 A Crim R 376.
19 *Latoudis,* above n 17, 565.
20 Ibid 569.
21 See *Tovey v Ferre* [1981] WAR 21; *Mancini v Ward* (1997) 93 A Crim R 456.
22 See *O'Dea v Fletcher* (Unreported, Supreme Court of Western Australia, Library No 920666, Murray J, 20 November 1992).
23 See eg *Selbey v Pennings* (Unreported, Supreme Court of Western Australia, Library No 980480; Full Court; 26 August 1998).
24 See *Attorney-General of Queensland v Holland* (1912) 15 CLR 46; *R v Jackson* [1962] WAR 130; *R v J* (1983) 49 ALR 376, 379; *R v Goia* (1988) 19 FCR 212, 213; *R v Scott* (1993) 116 ALR 703, 713.
25 While strictly speaking summary prosecutions are not brought by the Crown, they are brought by state-appointed public officials acting in an official capacity.
26 *R v Goia,* above n 24.
27 Ibid 213.
28 *R v Scott,* above n 24, 713.
29 See further Dawson J in *Latoudis*, above n 17, 547 and following.
30 ALRC, *Costs Shifting: Who Pays for Litigation* (31 August 1995).
31 Ibid recommendation 27, 96.
32 Ibid 96, para 7.38.
33 Ibid 96, para 7.39.

34 (Unreported, Supreme Court of Western Australia, Library No 970719, Parker J, 18 December 1997).
35 *Latoudis,* above n 17.
36 Ibid 543.
37 Ibid 562-563.
38 Ibid 566-567.
39 [1971] SASR 398.
40 Ibid 402. This is not to suggest that the Court in *Latoudis* considered that criminal trials are in all respects to be equated with contests between civil litigants. On the contrary, see Mason J 543-544 and McHugh J 568.
41 See *Washbourne v State Energy Commission (WA)* (Unreported, Supreme Court of Western Australia, Library No 920498, Ipp J, 5 October 1992).
42 *Latoudis,* above n 17, 543.
43 See the *Legal Practitioners Act 1893* (WA) s 62A.
44 Western Australia Law Reform Committee, *Payment of Costs in Criminal Cases*, *Report,* Project No 12 (24 August 1972).
45 Ibid, para 26.
46 ALRC, above n 30, 91, para 7.23 and Recommendation 23, 92.
47 In Tasmania the *Costs in Criminal Cases Act 1976* (Tas), s 4 (2) requires the Court, in deciding whether to grant costs and the amount of any costs granted, to have regard, *inter alia*, to 'whether the evidence as a whole would support a finding of guilt but the defendant is discharged from the proceedings on a technical point'. See also *Costs in Criminal Cases Act 1967* (NZ), s 5.
48 Western Australia Law Reform Committee, above n 44.
49 Ibid, para 17.
50 P MacKinnon, 'Costs and Compensation for the Innocent Accused' (1988) 67 *Canadian Bar Review* 489, 498.
51 In jury trials there is the additional problem s 4(2) of the *Costs in Criminal Cases Act 1976* (Tas) of identifying reasons for an acquittal.
52 In Tasmania the Court, in deciding whether to grant costs and the amount of any costs granted, is required to have regard, *inter alia*, to 'whether the defendant is discharged from the proceedings because he established (either by the evidence of witnesses called by him or by cross examination of witnesses for the prosecution or otherwise) that he was not guilty. See also *Costs in Criminal Cases Act* 1967 (NZ) s 5.
53 Western Australia Law Reform Committee, above n 44.
54 Ibid, para 31.
55 Law Reform Commission of Canada, *Criminal Procedure: A Proposal for Costs in Criminal Cases: A Study Paper Prepared by the Project on Criminal Procedure* (August 1973).
56 Ibid 19.
57 British Columbia Law Reform Commission, *Costs of Accused on Acquital,* Working Paper No 9 (1973) 4.
58 Mackinnon, above n 50.
59 *Latoudis*, above n 17, 560.
60 Mackinnon, above n 50, 497.
61 Ibid.
62 Law Reform Commission of Canada, above n 55, 9.
63 Ibid 7.
64 See *Costs in Criminal Cases Act 1967* (NZ) s 5. See also the report of the Law Reform Commission of Canada, above n 55, 12.
65 See *Tovey v Ferre,* above n 21; *Mancini v Ward*, above n 21.
66 *Justices Act 1902* (NSW) s 41A. The appropriate exercise of the discretion is dealt with in *Acuthan v Coates* (1986) 6 NSWLR 472.
67 In the event of costs awards being introduced in proceedings on indictment, an alternative to awarding costs to the prosecution where a defendant is committed for trial is to reserve costs pending the outcome of the trial itself.
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70 WA Legislative Assembly, *Parliamentary Debates* (4 October 1973) 3680-3686; WA Legislative Council, *Parliamentary Debates* (16 October 1973) 3952-3953.
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95 *Latoudis*, above n 17, Mason J 543.
96 See above n 53, para 40.
97 The most recent statistics available from the Australian Bureau of Statistics in relation to higher criminal courts in Western Australia are in respect of the 12 months ending 30 June 1986 (Australian Bureau of Statistics, *Court Statistics: Higher Criminal Courts, Western Australia 1985-1986*, Catalogue No. 4501.5 (25 March 1987)). According to this, of the 4 538 charges finalised in the Supreme and District Courts during that period, 91 per cent resulted in a finding of guilty. For the 12 months ending 30 June 1985, of the 3 976 charges finalised 84.7 per cent resulted in a finding of guilty (Australian Bureau of Statistics, *Court Statistics: Higher Criminal Courts, Western Australia 1984-1985*, Catalogue No 4501.5 (25 February 1986)). In relation to charges in courts of petty sessions in Western Australia, in the 12 months ended 30 June 1997 there were 82,115 charges finalised resulting in 78 612 convictions - 95.73% - against 31,549 individuals. In the 12 months ended 30 June 1996 95.82 per cent of the 80 169 charges resulted in convictions (Australian Bureau of Statistics, *Court Statistics: Courts of Petty Sessions, Western Australia 1996-1997*, Catalogue No. 4502.5 (April 1998)).
98 Prosecutions by the Commonwealth DPP, where professional costs are generally incurred by the prosecution, might provide a helpful model.
99 As defined in the *Costs Act* s 4.
100 Law Reform Commission of Canada, above n 55, 15.
101 Ibid.
102 See above n 30, recommendation 27, 96.
103 Above n 53. para 46.
104 Ibid para 47.
105 Ibid para 48.
106 Above n 44, para 30.
107 In the ordinary course it is unusual for a defendant sentenced to imprisonment to be ordered to pay costs.
108 It is noted that s 12A of the *Suitors' Fund Act 1964* provides that where on an appeal against a conviction for an indictable offence the conviction is quashed without a new trial being ordered, the Supreme Court may, upon application by the appellant, grant to the appellant a costs certificate in respect of all or part of the costs of the appeal. The *Costs Act,* s 5 appears to go further than this in appeals against summary convictions by providing for costs of the appeal to be awarded to a successful defendant whether or not a new trial is ordered, and by providing for the Appeal Court to make an order as to the amount of costs in the summary court.

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SECTION

5

Special Areas

Section 5: Special Areas

5.1

Appeals

INTRODUCTION

Reforming the system of appeals

The right to appeal to a higher court from an adverse decision is an established feature of our justice system. The right of appeal applies to court decisions as well as the determinations of various licensing boards and specialist tribunals. Appeals generate a significant workload for courts at all levels and can significantly extend the time and cost of obtaining a final resolution to a case. With the increasing volume and complexity of demands on the State's judicial system the Law Reform Commission of Western Australia is examining the appellate court processes. Would restricting the right of appeal solve these problems? Restriction of appeal rights may simplify litigation and reduce costs, but any reform also must be consistent with the maintenance of a fair and equitable judicial system.

In his review of appellate procedure in the United Kingdom, Sir Jeffery Bowman described appeals as serving two purposes:

> the private purpose, which is to do justice in particular cases by correcting wrong decisions, and the public purpose, which is to ensure public confidence in the administration of justice by making such corrections and to clarify and develop the law and set precedents.[1]

This sub-section proposes a number of reforms to the existing system of civil and criminal appeals, bearing in mind the need to balance any gains achieved in terms of efficiency and costs against the over-riding purposes of appeal rights.

The court structure

Appeals from each level of court in Western Australia are generally to the next highest court although, in criminal matters, appeals from the Petty Sessions omit the District Court and generally go to a single judge of the Supreme

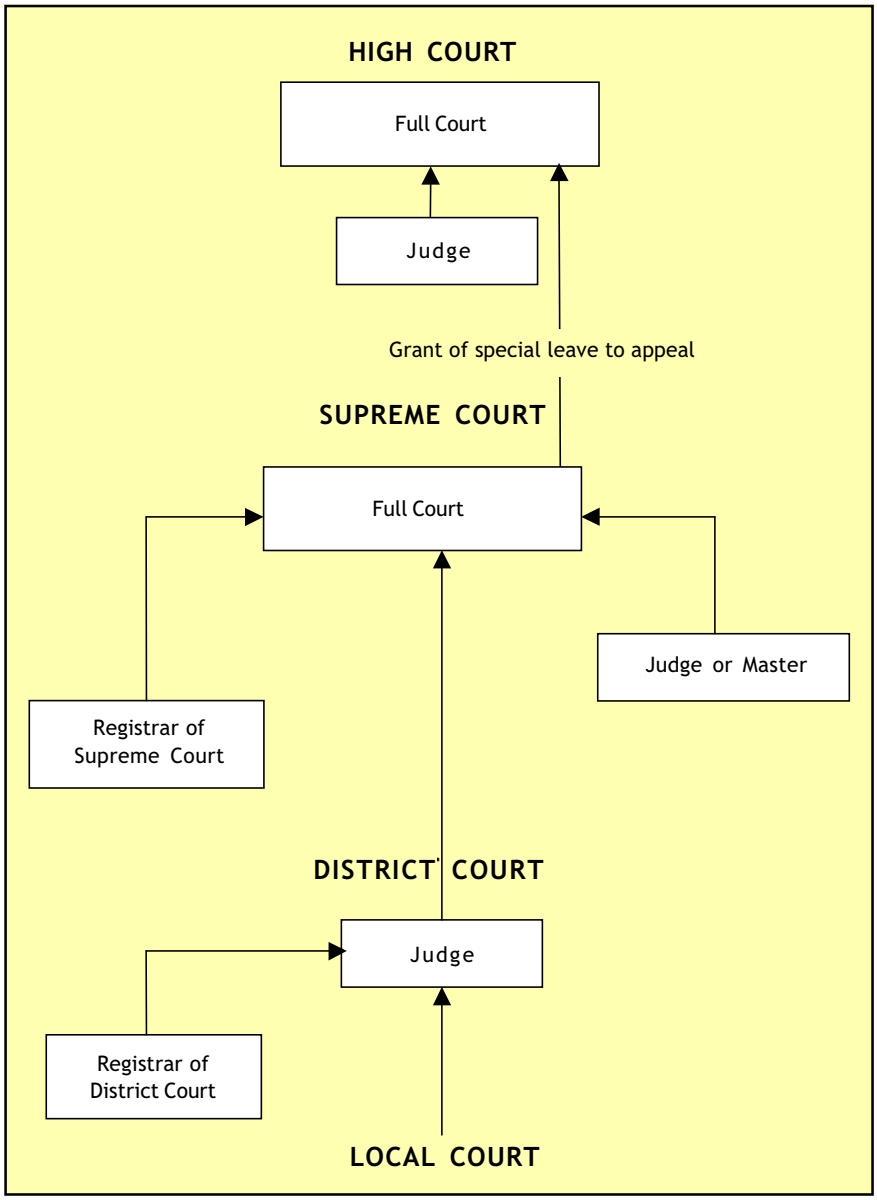

Figure 1: The Civil Courts[2]

Court. Appeals from the Full Court of the Supreme Court, which sits as the Court of Criminal Appeal for certain appeals under the *Criminal Code 1913* (WA), may, in limited circumstances, go to the High Court of Australia. (Refer to Figures 1 and 2.) Many of the decisions made by statutory boards and tribunals also may be appealed to the courts.

The right of appeal

There is no common law right of appeal. The jurisdiction to hear appeals is conferred on courts by legislation. This has resulted in a complex system of appeals. Inconsistencies exist. For some decisions there is no right of appeal.

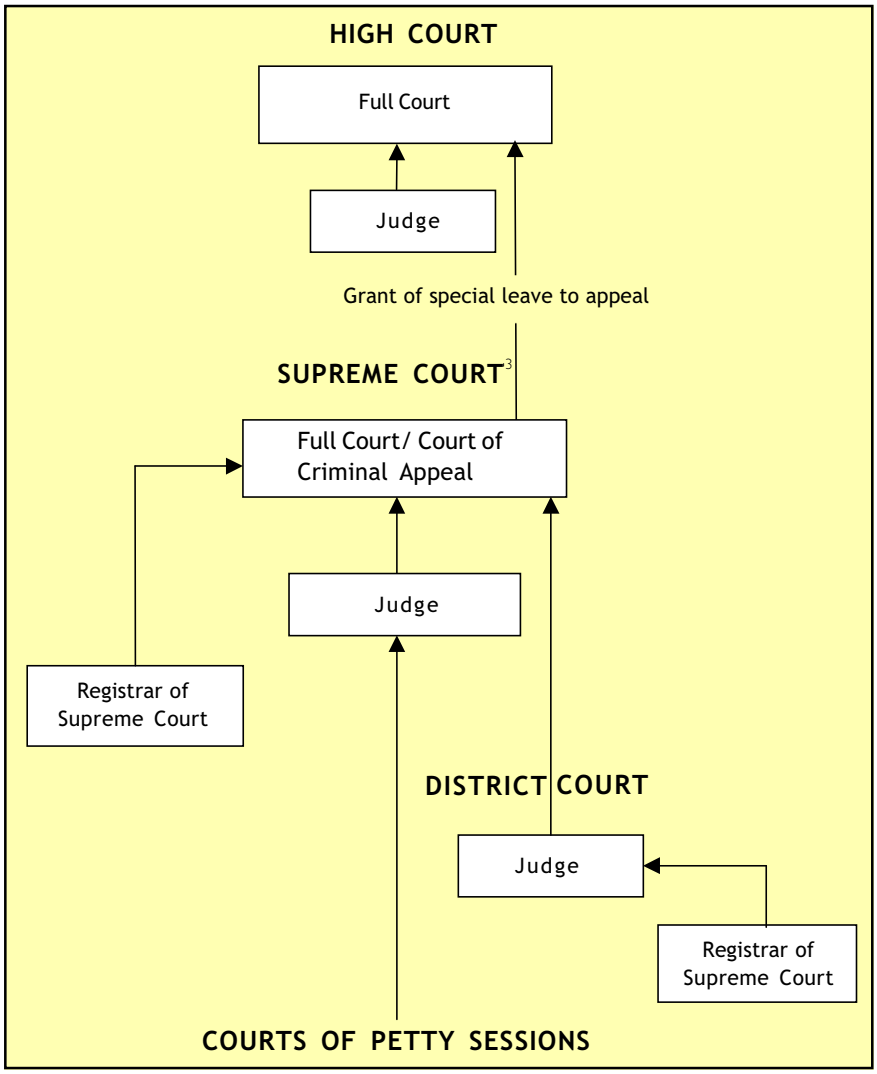

Figure 2: The Criminal Courts

For those with a right of appeal, there are a variety of kinds of appeal. There are also a range of restrictions which may be imposed on a right of appeal.

Unappealable decisions

There are some decisions which are declared to be unappealable. These tend to be in exceptional circumstances: for example, the initial determination by the courts on an election petition where a final result needs to be obtained quickly. Generally, however, an opportunity to have a matter reconsidered by a higher court is regarded as an important safeguard of the justice system.

Kinds of appeals

There are different kinds of appeal. It is necessary to distinguish between:

- Appeals in *stricto sensu* (in the strict sense)

Here the appeal court considers only whether the judgment appealed from was correct when given. No new evidence or changes in the law are considered.

- Appeals *de novo* (anew)

The appeal court hears the matter all over again, with new evidence, new argument and without regard to an exercise of discretion by the original decision-maker.

- Appeal by rehearing

The appeal court may take into account changes in the law since the date of the original hearing, receive additional evidence and draw new inferences from the evidence which was before the original decision-maker. However, it does not rehear the evidence and proceeds on the transcript of the evidence at the original hearing.

Sometimes it is not clear from the legislation that establishes a particular right of appeal which kind of appeal was intended to be permitted.

Restrictions on the right of appeal

An unrestricted right of appeal is an 'appeal as of right', which means that the person wishing to appeal from the existing decision, the appellant, has an unqualified right to have the matter reviewed. The appeal is not limited in scope. However, it is more usual for rights of appeal to be restricted. In some cases, 'leave' or permission of the court must be obtained before the appeal can be heard. Often only certain matters can be appealed: for example, questions of law may be appealed but not the original court's or tribunal's findings of fact.

A right of appeal also may be limited in practice by the findings of fact of the original court or tribunal. Appeal courts generally are reluctant to interfere with the findings of fact by the lower court or tribunal, particularly when the findings depend on the assessment of credibility of witnesses.[4] This is because, except in appeals which consist of a rehearing *de novo*, the appeal court does not have the opportunity to assess the witnesses for itself.

Because there is no general right of appeal, the relevant legislation under which a decision is made determines whether that decision is appealable; what kind of appeal is allowed; whether leave is required; and what matters can be appealed.

Warning

It is extremely difficult to generalise about appeal procedures. There are different procedures for appeal which may depend on:

- which court hears the appeal;
- whether the decision appealed from was made by a court, tribunal or statutory body; and
- whether the decision was one relating to civil or criminal proceedings.

In any event each appeal procedure is affected by the legislation creating the right of appeal in the particular case at hand. Therefore, the overall appeals

system has developed in a fragmentary fashion and cannot be simply reformed. For example, a change in the rules of court cannot override the existing procedures provided for in the individual pieces of legislation creating the appeal right.

As a result of its piecemeal development, the current appeal system is filled with inconsistencies and highly technical distinctions which have developed over the years. As an example of the kind of confusion that can result, currently the Supreme Court hears appeals from magistrates in criminal matters under civil rules, but does not hear appeals from magistrates in civil matters at all, as the appeal lies to the District Court. Unfortunately the technicality and unwieldiness of the appeals structure has inevitably affected this sub-section.

This sub-section deals with:

- the general appellate jurisdiction of the Supreme Court, which applies to both civil and criminal appeals from lower courts, but not necessarily to appeals from tribunals and boards;
- the procedures relating to civil appeals, and includes discussion of appeals from courts, tribunals and boards; and
- the procedures relating to criminal appeals, including criminal appeals under the *Justices Act 1902* (WA) which are heard under civil rules.

SUPREME COURT GENERAL APPELLATE JURISDICTION

Supreme court jurisdiction

The Supreme Court is the highest Western Australian civil and criminal court, although some of its decisions may be subject to review by the High Court of Australia. The jurisdiction of the Supreme Court over appeals from the inferior courts of Western Australia is conferred by section 20 of the *Supreme Court Act 1935* (WA). That jurisdiction is expressed, in part, in terms of the jurisdiction held by the court 'immediately before commencement of this Act'. This is similar to the general jurisdiction of the court in section 16 of the *Supreme Court Act*. However, the general jurisdiction of the court needs to preserve all inherent jurisdiction and so is appropriately expressed in historical terms. The same does not apply to the appellate jurisdiction because jurisdiction over appeals is purely statutory. The appellate jurisdiction of the Supreme Court over inferior courts should be more precisely expressed in the *Supreme Court Act*.

Proposal 1

Section 20 of the *Supreme Court Act* 1935 (WA) should be amended to delete any references to the appellate jurisdiction existing before the court was established.

A single judge of the Supreme Court

All causes or matters in the Supreme Court are heard and determined by either a single judge or what is referred to as 'the Full Court' or, in some criminal cases, the Court of Criminal Appeal. Unless the *Supreme Court Act*, rules of court or other statute give jurisdiction to the Full Court, all causes or matters, including appeals, are heard and determined by a single judge.[5] Also, unless excluded by statute, there is a further appeal from the decision of the single judge to the Full Court. Whether a particular Act makes the appeal to a single judge final seems to be a matter of chance. Appeals from statutory boards and tribunals to the Supreme Court are discussed separately, but even in relation to appeals within the court hierarchy, there is a need for greater consistency and limitation.

Proposal 2

Appeals from the appellate jurisdiction of a single judge of the Supreme Court to the Full Court in civil and criminal matters should be limited to questions of law only or by a requirement of leave to appeal.

Alternatively, the decision of a single judge of the Supreme Court exercising appellate jurisdiction in civil and criminal matters should be final. However, the single judge should have power to refer appropriate matters or questions of law arising in the appeal to the Full Court, having regard to issues such as complexity, conflicting decisions or other matters in the interests of justice.

The Full Court of the Supreme Court — Court of Criminal Appeal

In fact, what is known as the 'Full Court' does not consist of all the judges of the Supreme Court, but may consist of any two or more judges.[6] In practice the Full Court nearly always consists of three judges. One important exception, however, is in relation to interlocutory appeals where it is usual for only two judges to constitute the Full Court.[7] When sitting as the Court of Criminal Appeal, the court must consist of an uneven number of judges.[8]

In relation to many appeals the *Supreme Court Act* confers specific jurisdiction on the Full Court rather than a single judge. Section 58(1) provides that the Full Court may hear and determine, amongst other things:

- applications for a new trial or rehearing of any cause or matter tried by a judge or judge and jury;
- appeals from a judge or master, in court or chambers; and
- appeals to the Court of Criminal Appeal under Chapter LXIX of the *Criminal Code*.[9]

Section 58(1) also gives the Supreme Court jurisdiction over a range of specified matters including matters referred to it under other legislation, State,

Imperial or Commonwealth. As a result the Supreme Court not only exercises appellate jurisdiction as a consequence of the laws of Western Australia, but also can do so in relation to the laws of the Commonwealth. Recently, however, the legislation conferring State jurisdiction on the Federal Court was held to be unconstitutional by the High Court.[10]

Section 60 of the *Supreme Court Act* sets out further restrictions on the right of appeal to the Full Court of the Supreme Court. It specifies a number of matters on which there is no appeal and a number of others where appeal is allowed only with leave of the judge or master who made the original decision.

When the judges sitting as a Full Court are divided in opinion as to the answer on any question, the question is decided according to the decision of the majority.[11] If the court consists of three or more judges and the court is divided evenly on a question, the opinion of the senior judge prevails.[12] If a Full Court consisting of only two judges hears an appeal and there is a division of opinion, application can be made to have the matter reheard by a Full Court consisting of not less than three judges.[13] The *Supreme Court Act* does not prohibit the judge appealed against from sitting on the appeal and the *Criminal Code* expressly excludes objection to the same judge taking part in the appeal against his or her own decision.[14] However, in modern practice he or she never does so. We believe the *Supreme Court Act* and the *Criminal Code* should be amended to reflect the current practice so that the judge whose decision is under review does not sit with the court of appeal.

Proposal 3

The composition of any court of appeal should not include the judge whose decision is under review.

Overturning previous Full Court — Court of Criminal Appeal decisions

As an intermediate appeal court, being subject to review by the High Court, the Full Court or Court of Criminal Appeal may depart from its own previous decisions.[15] An enlarged court of five judges may be used when the Full Court or Court of Criminal Appeal is called upon to reconsider its own previous decision,[16] which also seems to be the practice in other jurisdictions.[17]

The powers of a single judge

Single judges not only may exercise appellate jurisdiction, they also have limited powers as a member of the Full Court. In an appeal pending before the Full Court, a judge can give incidental directions and may, during court vacation, make any interim order to prevent prejudice to the claims of the parties pending the hearing of appeal.[18] Following the decision and publication of the reasons, a Full Court judge may deal with matters in relation to costs of the appeal.[19] The position in relation to appeals under the *Criminal Code* is

clearer although limited, with section 702 granting a single judge specific powers of the Court of Criminal Appeal.

In Western Australia the Full Court normally convenes in order to deliver judgment and hand down its reasons. Frequently not all the members of the court who heard the appeal convene to hand down the judgment. The New South Wales Court of Appeal allows decisions to be handed down by any one or more members of the court. The High Court delivers judgment in open court, not necessarily in the State where the appeal was heard and without the parties present. Where all issues have been dealt with at the appeal, there is no need for the Full Court or Court of Criminal Appeal to reconvene and any one or more members of the court could hand down the judgment and reasons. In those cases where further submissions need to be made regarding the form of orders or incidental matters, these could be dealt with by the appointment of a single judge of the Full Court or Court of Criminal Appeal. This process could be assisted by greater use being made of the existing facility to publish reasons for decision to the lawyers for the parties before the reasons for decision are formally delivered. Parties would be able to advise the court if there will be need for the court to reconvene and the matters in contention.

Proposal 4

The powers of a single judge of the Full Court of the Supreme Court and the Court of Criminal Appeal with regard to the form of orders and incidental matters following the determination of an appeal should be specified.

Proposal 5

Where all issues have been dealt with, the Full Court of the Supreme Court and the Court of Criminal Appeal need not convene to deliver judgment and hand down its reasons and parties need not be present. Instead, any one or more members of the court should be able to deliver judgment in open court and hand down reasons. Where there are outstanding incidental issues such as the form of orders, these also should be dealt with by a single judge.

Proposal 6

The Full Court of the Supreme Court and the Court of Criminal Appeal should be encouraged to make greater use of the existing practice direction enabling limited publication of the reasons for decision the day before formal delivery of judgment.

Short form judgments

Not only is there no existing procedure in Western Australia to streamline the delivering of judgments, there is no provision for the court to give a short form of reasons where there is no general principle raised by the appeal. It would be appropriate in certain classes of case for only an abbreviated form of reasons to be adopted, for example, where the court is unanimously confirming the judgment of the court below in a case raising no significant issue of principle.

Proposal 7

The Supreme Court, including the Court of Criminal Appeal, should consider adopting a short form of judgment for particular classes of cases.

Procedural matters

Applications for leave to appeal

As a result of an examination of the civil Court of Appeal in the United Kingdom, the Bowman Report[20] proposed applications for leave to appeal be considered 'on the papers', that is, considered on the material filed with the court and in the absence of oral argument by the parties. The Bowman Report suggested that after consideration of the papers, the court would have the option:

- to allow the application for leave;
- to decide to hear argument on the application for leave;
- to increase the number on the bench to hear the application for leave; or
- if minded to refuse the application, to put the reasons in writing but to invite oral argument if the parties so desired. If the offer of oral argument is not accepted the application for leave would be dismissed with no right of renewal.

Where special leave to appeal is to be retained in criminal matters,[21] there seems no reason why this option should not be extended to those applications, as well as civil applications, subject to the comments below in relation to unrepresented litigants.

Proposal 8

Applications for leave to appeal, or at least specified types of applications, should be dealt with as often as possible without oral argument. After consideration of an application for leave to appeal, the court would have the option to:

- allow the application for leave on the papers without oral argument;
- hear argument on the application for leave;
- increase the number on the bench to hear the application for leave and hear argument at the same time as the appeal; or
- refuse the application.

Proposal 9

An application for leave to appeal either should be accompanied by a written submission or submissions should be filed very soon after the filing of the application.

Appeal books

One matter confronts almost anyone seeking to appeal a decision to the higher courts and that is the 'Appeal Book'. The preparation of an appeal book is one of the major expenses associated with appeals and is required by the various rules of court to contain all relevant documents of the original action. Multiple copies of appeal books must be produced, filed and served. For example, under the *Supreme Court Rules 1971* (WA) for civil appeals from a judge or master and criminal appeals under the *Justices Act,* an appellant normally is required to lodge five copies of the appeal book with the court and two copies with each respondent (the party against whom an appeal is lodged).[22] Many of the pages required to be included in appeal books are never referred to in the course of appellate proceedings and this creates needless costs. The same number of appeal books must be lodged if the Crown initiates an appeal under the *Criminal Practice Rules*,[23] although there is provision applying to appeals under the *Criminal Code* for settling and limiting the contents of the appeal books in these cases.[24]

Responsibility for preparation of appeal books lies with the parties, primarily the appellant, and an appellant who is eventually successful may nonetheless be refused costs of preparation of irrelevant material in the appeal book. Supreme Court of WA Practice Direction 6 of 1997 requires practitioners to give personal consideration to questions of relevance of materials, legibility of documents, duration of appeals, and their suitability for mediation. It also requires practitioners, whether they act for the appellant or the respondent to provide a detailed certificate of correctness. It seems, however, that much still is included in appeal books which is not essential in most cases.

The Victorian Court of Appeal is a comparatively recently created appeal court. It has instituted some reforms which limit the time and costs associated with the conduct of appeals, in particular appeal books.

Civil appeals in Victoria

A 1996 Practice Statement[25] requires parties in Victoria to cooperate in providing a summary of facts, issues and proceedings to the Court not later than seven days before the hearing date in the Court of Appeal.

The party obliged to serve the summary provides all other parties to the appeal with a draft of the summary no later than 21 days before the hearing. The parties are to consult concerning the contents of the summary no later

than 14 days before the hearing with a view to developing a non-contentious summary of relevant material. The two principle purposes of the summary are:

- to assist members of the court in their pre-reading of appeal papers; and
- to form the basis of the introductory statement of facts contained in the court's reasons for judgment.

Criminal appeals in Victoria

Under the Victorian Rules of the Court of Appeal the registrar may conduct a pre-hearing conference after a notice of appeal in a criminal matter has been filed. The appellant and respondent are required to attend the conference. The purpose is to ascertain the real issues in the appeal. If the appellant is not represented and in custody, the registrar may conduct the pre-hearing conference with the parties separately. The grounds of appeal should be settled at the pre-hearing conference and directions may be given with respect to the preparation for hearing of the appeal for the effective, complete and prompt disposal of the appeal.

While the Victorian practice is of interest, a concern lingers that scheduling backwards from the hearing date delays settling the issues on appeal until the period immediately preceding the hearing.

Taking into account proposals put forward by this Law Reform Commission in other relevant sub-sections,[26] suggested time lines for the civil and criminal appeal process could be as follows:

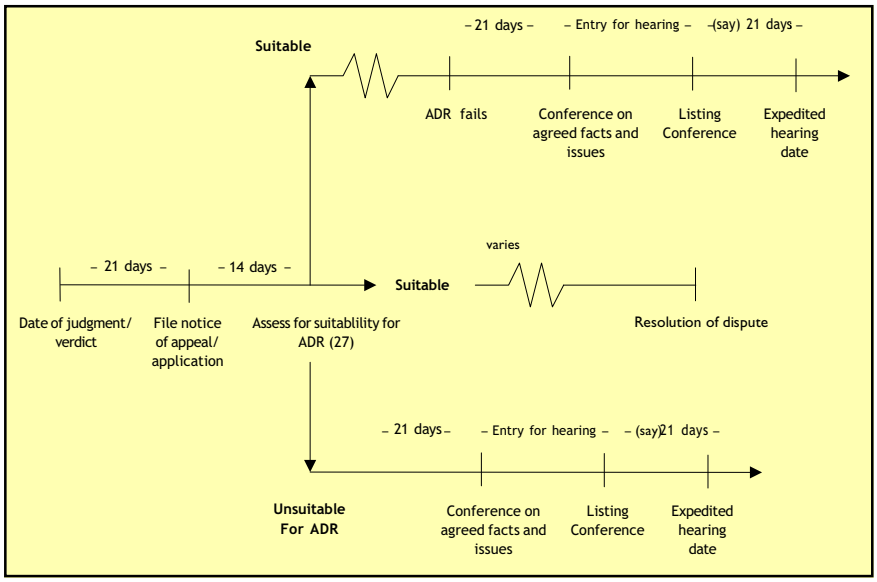

Figure 3: Time line for civil appeals

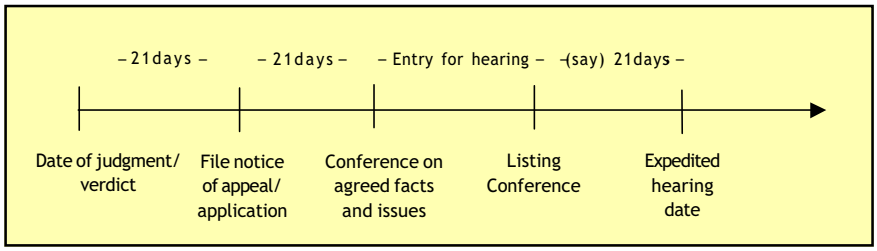

Figure 4: Time line for criminal appeals

This focus in both civil and criminal appeals would be on the requirement that parties reach agreement on the facts and issues of the appeal *prior* to securing a hearing date for the appeal. It should avoid having a hearing date and times allocated which later may need to be altered or vacated after the facts and issues have been agreed. The suggested process also may limit the matters at issue in the hearing and significantly reduce the volume of material included in the appeal book.

Proposal 10

Except for appeals under the *Criminal Code 1913* (WA), where a satisfactory process is already in place, the parties to an appeal should consult in order to agree and summarise the facts and proceedings from the court/tribunal/ board below and for determination on the appeal. Consolidated outlines should be agreed before a hearing date is set.

Proposal 11

Except for appeals under the *Criminal Code*, where a satisfactory process is already in place, appeal books should contain only the agreed facts and issues, and information relevant to matters in dispute on appeal together with other standard information as may be required by the appellate court.

Another means of reducing the expense associated with the production of appeal books would be to utilise further advances in information technology. The Western Australian Supreme Court has been active in a pilot project that may be a national prototype for electronic appeals. The pilot was initiated under the Electronic Appeals Project endorsed by the Council of Chief Justices of Australia and New Zealand in 1996. The court is now expanding its capacity to operate in this way.[28]

Proposal 12

All civil and criminal appellate courts should continue to develop electronic appeals procedures utilising advances in information technology.

Written briefs and limiting oral argument

Currently, all appeals are invariably determined after oral argument before an appeal court. Parties are required to file outlines of submissions and lists of authorities and, unless a direction has been made under Order 65B *Supreme Court Rules*, parties do not ordinarily file full written submissions. Order 65B was introduced as part of the reform of Supreme Court procedure in 1996. It provides an 'Appeals Registrar' with powers to case manage appeals in addition to the powers of the Full Court or judge to give directions in a particular case. An appeals registrar may, under that Order, direct the parties to attend a mediation conference for the purposes of identifying, resolving and narrowing the points of difference between them. Relevantly here, the appeals registrar may also give directions imposing a limit on the time to be taken by a party in presenting its case at the hearing. Issues which the appeals registrar may consider when setting time limits include: the complexity or simplicity of the appeal; the state of court lists; the time expected to be taken for the appeal; the importance of the issues and the case as a whole. The registrar may direct each party to file a written submission. If a broader rule is not adopted altering the balance towards increased written submissions, at the very least, judges of the appeal court should have the power to impose time limits and oral argument and require written submissions.

Proposal 13

All appellate courts should make greater use of written submissions.

Proposal 14

All appellate courts should limit the length of oral argument or dispense with oral argument altogether in appropriate cases, or by agreement of the parties.

Proposal 15

The power to direct the filing of written submissions and to limit the time for presenting an appeal should be exercised by a judge of any appellate court with reference to the criteria specified in *Supreme Court Rules 1971* (WA) Order 65B rule 3(3) including the complexity of the appeal and the importance of the issues in the case. These determinations should be made before the filing of outlines of the case.

To the extent that the balance shifts towards written submissions, greater time is required between the filing of submissions and hearing as both the court and opposing parties would require adequate opportunity to consider a written case. Timetables also must be fixed and strictly enforced.

In the United States primacy is given to the written brief with strict limitation of time for oral argument. The New York Court of Appeals, for example, hears oral argument after the judges have read and studied all the papers in the case, including a written brief of argument. Parties are strictly limited in the time allowed to put oral argument, with the time allocated for oral discussion often being taken up with question and answer with the bench on specific points. There are difficulties, however, in translating procedures from another jurisdiction, particularly from the state appeal courts in the United States which may be final courts in a system including intermediate appeal courts.

The Supreme Court of Western Australia cannot select its cases. Some state appeal courts in the United States may, by contrast, select those cases of general interest or principle in the same manner as the High Court of Australia filters matters by the requirement of special leave to appeal. While a change of balance need not be to the full written argument on the United States model, a halfway position may result in the courts having the benefit of neither an adequate written submission nor sufficient development of oral argument. It may also be that the halfway house will not limit costs. There will be in effect two arguments. The shift of balance to written submissions will only be sufficient to produce real benefits when parties realise that they must develop their case in the written submission because oral presentation may be too restricted to supplement an inadequate written submission.

The self-represented litigant

Self-represented litigants are dealt with in sub-section 2.10. It is worth noting, however, the extent to which these litigants may have an impact on the implementation of proposals relating to appeal procedure reform. The Chief Justice in his 1997 Review[29] noted that the proportion of self-represented persons before the Court of Criminal Appeal had increased in that year to more than one in three.

The *1998 Annual Review of Western Australian Courts*[30] notes generally that numbers of self-represented litigants are increasing. There is a greater delay in getting the cases of self-represented persons ready for hearing. Proposals placing greater obligations on the parties to prepare appeal books including detailed written submissions, and to present additional detailed material to the court (such as summaries of evidence and issues) in advance of the hearing will further disadvantage those who are not represented. People representing themselves in many cases will be less able, or completely unable, to comply. Represented applicants may, in effect, obtain priority in listing due to being able to comply with the time limits.

These reforms must except self-represented litigants unless resources are made available to assist persons unable to afford representation or to obtain legal aid. Particularly in criminal appeals, it may be appropriate for the

respondent, (usually the offices of the State and Commonwealth Directors of Public Prosecution) or the staff of the court to be responsible for compilation of material which the appellant would otherwise be required to prepare. Additional resources would be required to assist self-represented litigants with their appeals.

Proposal 16

Resources should be made available to assist self-represented persons in the conduct of appeals when they can not obtain legal aid or afford legal representation.

THE CIVIL APPEAL SYSTEM

Civil appeals to the Supreme Court

Appeals to the Full Court from a judge or master of the court

- Appeals from final decisions

Civil appeals to the Full Court of the Supreme Court from the final judgments or orders of Supreme Court judges and masters sitting in court are generally governed by Order 63 of the *Supreme Court Rules*. The appeal to the Full Court is by way of re-hearing[31] — but the court does not rehear the evidence. It proceeds on the transcript of the evidence from the trial. There is in most cases an appeal as of right against a final judgment or order of a judge.

Under Order 63 an appeal is commenced by notice of motion. The appeal may be from the whole or any part of any judgment or order and the motion must state briefly, but specifically, the grounds relied upon in support of the appeal, and what judgment the appellant seeks in lieu of that appealed from. A notice of motion by way of appeal must be served and filed within 21 days from the date of the judgment, order or verdict. An appeal must be entered for hearing within 12 weeks of institution of the appeal. The court copies of the appeal book must be lodged with the registry prior to entry of the appeal for hearing. Respondents' copies must be served on the day the appeal is entered for hearing. Where an appellant does not meet these requirements for entry for hearing, any respondent may apply to have the appeal struck out for want of prosecution.

- Appeals from interlocutory matters

Appeals from interlocutory orders and judgments which do not finally determine the outcome of a case are dealt with under Order 63A. Unless directed otherwise, appeals on interlocutory matters are not available as of right but only with leave to appeal. There is a broad discretion to grant or withhold leave in such appeals, balancing the need to discourage unnecessary interlocutory appeals against the need to prevent injustice between the

parties.[32] It is difficult, however, to formulate a satisfactory test of whether an order or decision is final or interlocutory.

Order 63A establishes an expedited appeal process for dealing with interlocutory matters. That process applies to both applications for leave to appeal and appeals in interlocutory matters. It dispenses with the need for appeal books and appeals are heard by a Full Court constituted by only two judges. The appeal papers consist only of a brief but specific notice of appeal or draft notice of appeal, and the papers which the appellant considers are necessary to determine the appeal. Leave should be sought in chambers, *ex parte* (without the other party being present), before the judge or master who made the order. In practice the judge or master will generally refuse leave and the question of whether leave should be granted will be left to the Full Court, if the applicant wants to pursue the matter further. This process introduces a step which is arguably pointless and which adds unnecessary time and cost. It also should be possible to have the application for leave dealt with by the Full Court, at least at first instance, on the papers alone.[33]

Proposal 17

Applications for leave to appeal against civil interlocutory matters should be made together with the appeal application directly to the Full Court, and determined under *Supreme Court Rules* Order 63A.

Order 63A also provides that a direction may be given, in appropriate circumstances, for the appeal or application for leave to appeal to proceed under Order 63 which requires a full appeal process.

- **Leave to appeal**

An appeal may be based on the ground that the original court's interpretation or application of the law or findings of fact is wrong. Other grounds of appeal may be based on a disagreement with how the court has exercised its discretion. In these cases, once it is accepted that the court applied the right law and was not mistaken as to the facts, the only way to have the decision overturned is on the limited grounds of showing that the judge gave weight to irrelevant matters or failed to give weight or sufficient weight to relevant matters. The appeal courts are particularly reluctant to uphold a challenge to the exercise of the court's discretion on a decision concerning practice or procedure.[34] Appeals against the assessment of damages are treated similarly to those with respect to discretionary judgments. Given the difficulties in upholding appeals against these kinds of decisions there is particularly good reason to require that leave to appeal be applied for before the full appeal application proceeds.

In the United Kingdom an expansion of the requirement to obtain leave to appeal has received considerable support. Following on the recommendations of Lord Woolf's review of the civil justice system of the United Kingdom,[35] the 1997 Bowman Report[36] stated that under the then existing leave requirements just over two thirds of potential appeals were eliminated at the leave stage. Further, that the success rate of appeals where leave was granted was twice that where there was appeal as of right. If such statistics apply more generally than to those limited classes of case where leave was required there is the potential for a significant reduction in the time and costs associated with appeals.

Proportionality is one of the touchstones of Lord Woolf's review of the civil procedure. If proportionality is to be maintained between the process of the law and the subject of the litigation, it may be necessary to consider imposing leave requirements by reference to amount or subject matter. In particular, if the leave stage is dealt with *ex parte* and quickly, the respondent may be saved further expense in the cases where there are insufficient grounds for the appeal to go further. The increase in expense for the prospective appellant who may prove successful is not a sufficient reason for permitting appeals to proceed as of right. A requirement of leave by reference to value of subject matter is in place in New South Wales. Section 127(2)(c) of the *District Court Act 1973* (NSW) requires leave of the Court of Appeal where the appeal involves any property or right with a value of less than $10 000. Creating expedited procedures for leave applications should in any event assist in limiting the time and costs involved.

Proposal 18

There should be an expansion of the requirement for a grant of leave to appeal in civil matters with clear specifications as to which matters require a grant of leave.

Proposal 19

The granting of leave to appeal should consider the value of the subject matter of the appeal and be required in civil matters involving any property or right with a value of less than the monetary jurisdictional limit of the Local Court.

Proposal 20

The expedited process under Order 63A of the *Supreme Court Rules* should extend to all civil leave to appeal applications.

Appeals to the Full Court from inferior courts and from arbiters

The rights of appeal from inferior courts are created by acts including: the *District Court of Western Australia Act 1969* (WA), the *Family Court Act 1975* (WA), the *Workers' Compensation and Rehabilitation Act 1981* (WA), the *Local Courts Act 1904* (WA), the *Liquor Licensing Act 1988* (WA) and the *Commercial Arbitration Act 1985* (WA). These appeals are generally by way of rehearing, although, as the nature of the right of appeal is in each case defined by the legislation which creates it, inconsistencies arise. Some examples illustrate this:

- Appeals from the District Court go to the Full Court of the Supreme Court. There is an appeal as of right to the Full Court from a final judgment of the District Court.[37] An appeal from any other judgment, order or other decision or determination of the District Court to the Full Court may be by leave of the Supreme Court or a judge of that court. Appeals from the District Court are conducted in the same way as an appeal from a judgment or order of the Supreme Court or a judge of that court. The practice and procedure of the Full Court to appeals within the Supreme Court applies to appeals from the District Court.[38] Anomalies arise however. For example, leave is required for appeal against a costs order made by a judge of the Supreme Court because of subsection 60(1)(e) of the *Supreme Court Act*. But the Supreme Court has held that that subsection does not apply to the District Court and an appeal from a costs order of the District Court may be brought without leave.[39]

- Appeals from the Local Court lie initially to the District Court. If the decision of the Local Court is final, appeal is as of right; if an interlocutory matter, leave is required.[40] A single judge of the District Court exercises the jurisdiction of that court. A further appeal may be brought to the Full Court of the Supreme Court against the decision of the District Court. However, the leave of the Supreme Court or a judge or master of that court must be obtained irrespective of whether the original decision was a final or an interlocutory matter.[41]

- Subsection 81(2a) of the *Family Court Act* creates an appeal to the Full Court of the Supreme Court from the decrees of the Family Court of Western Australia made in its original and non-federal jurisdiction. It has been suggested that there is a full appeal from all decrees as of right by way of rehearing with no leave requirement for interlocutory matters. This is not consistent with the procedure for obtaining appeals on interlocutory matters set out under subsection 60(1)f of the *Supreme Court Act*.

- The *Liquor Licensing Act* provides for a right of appeal to the Supreme Court under section 28. The right of appeal is restricted, however, to those which *involve* a question of law.[42] Read with section 3 of the *Liquor*

Licensing Act, section 28 creates a right of appeal for any party to proceedings, including an objector, against any decisions, order, direction or determination of the Licensing Court. Once a question of law is involved, the whole decision is open to review. The only exception to this is if the decision of the Liquor Licensing Court was made on review of a determination made by the Director, in which case the appeal must be *upon* a question of law.[43]

Justices Act appeals

The discussion of procedure for appeals under the *Justices Act* is included in Criminal Appeals, below, because although these appeals are dealt with under the civil jurisdiction of the Supreme Court, they are principally criminal in nature.

Appeals from boards and tribunals

Appeals lie to the Supreme Court from many boards and tribunals constituted under a range of Acts. The range includes the professional bodies regulating medical practitioners, optometrists and pharmacists; decisions under the *Human Reproductive Technology Act 1991* (WA), decisions by the Information Commissioner, awards of the Equal Opportunity Tribunal and decisions under the *Chicken Meat Industry Act 1977* (WA).

The statute creating a right of appeal determines its nature and cannot be changed by the rules of court.[44] Thus, for example, the procedure for appeals under the *Pharmacy Act 1964* (WA) is prescribed by regulations under that Act. Evidence is given orally or by affidavit together with the material before the Pharmaceutical Council and additional evidence may be led as of right.[45]

Order 65 of the *Supreme Court Rules* regulates appeals to the court from specified statutory boards or tribunals and those from any tribunal where the procedure to be followed is not specified. The Order provides that a single judge should hear such appeals. Unless the statute creating the right of appeal indicates otherwise, there is also a right of appeal from the decision of a single judge of the Supreme Court to the Full Court, under subsection 58(1)(b) of the *Supreme Court Act*,[46] referred to previously. So for example, a further appeal lies to the Full Court under the *Equal Opportunity Act 1984* (WA), whereas the *Medical Act 1894* (WA) provides that the decision of a single judge is final and no further appeal is competent.[47]

Many of these 'appeals' are really administrative reviews, that is, a rehearing of the evidence with the court substituting its own decision for that of the original administrative decision-maker.[48] In other cases, the word 'appeal' includes appeals in the usual sense, that is, a more narrowly confined reconsideration by the court of a decision, and also questions ordinarily resolved in proceedings for judicial review of administrative decisions.[49]

An administrative appeal body with a single right of appeal, with leave, or perhaps limited to questions of law, to the Supreme Court would simplify

the current position and introduce a degree of consistency. Alternatively, there might be consideration of a code of procedures for appeals from boards and tribunals. A code could ensure consistency on such matters as further rights of appeals, requirements of leave, whether appeal is confined to matters of law, and what is the nature of the appeal hearing.

The present division of appellate review of statutory boards and tribunals by a single judge of the Supreme Court with or without further appeal to the Full Court and according to different processes has no logic or consistency. A proper system of administrative appeals could regulate all such decisions and deal with them under a consistent procedure and jurisprudence. The appellate functions now exercised by the Supreme Court (and other courts), from various boards and tribunals should be given to a specialist administrative review body.

Proposal 21

An Administrative Appeal Court should be created to assume the Supreme Court's role in reviewing administrative decisions. A right of appeal to the Supreme Court, limited to questions of law or at the very least with leave, should be allowed.

Alternatively, there should be a code of procedure for administrative appeals from all boards and tribunals addressing:

- rights of appeal;
- requirements of leave;
- the nature of the appeal hearing; and
- limitations on issues which can be appealed.

Civil appeals to the lower courts

Because *Justices Act* appeals go straight to the Supreme Court, the appellate jurisdiction of the District Court is civil only. The District Court also reviews the decisions of registrars of the District Court, who, unlike Supreme Court registrars, are not members of the court and whose jurisdiction is entirely delegated. The orders of registrars are subject to review *de novo* by a judge of the District Court, and this is not strictly an appellate jurisdiction. There has been some discussion that the District Court should not exercise appellate jurisdiction at all. That is, civil appeals from the lower courts should go to a single judge of the Supreme Court as occurs in criminal matters. However, as indicated in sub-section 2.9 on civil costs, the scaled costs of appeals in the District Court are modest and the few steps involved mean that at least the maximum payable is ascertainable.[50]

Currently, appeals lie to the District Court from a range of tribunals as well as the Local Court.[51] A search of the consolidated Acts of Western Australia (there may be some omissions but it gives the general flavour) shows appeals to the District Court from various tribunals constituted under 21 Acts, ranging from decisions on the suspension and cancellation of the registration of certain professions (including architects and builders, surveyors and veterinary surgeons) to decisions of tribunals under the *Strata Titles Act 1985* and the *Retirement Villages Act 1992*. In two cases there is expressly an appeal to a judge of the District Court in chambers.[52] In some cases there is a further right of appeal to the Supreme Court.[53] In other cases the decision of the District Court is final.[54] Some appeals require leave[55] others do not. As stated previously, a single judge of the District Court sits on appeal from decisions of the Local Court under the *Local Courts Act*, with a further appeal, with leave, to the Full Court of the Supreme Court.[56]

The Local Court and the stipendiary magistrates in Petty Sessions also hear appeals under statute from boards and tribunals. It is difficult to identify the reason in a particular case why the appeal has been directed to one court rather than another. For example, in the field of occupational licensing and registration, appeals on decisions affecting an individual lie to: a stipendiary magistrate in Petty Sessions for a hairdresser, the Local Court for a nurse or chiropractor, the District Court for a real estate agent or a veterinary surgeon, and the Supreme Court for a doctor, optometrist or pharmacist.

An extensive study of 84 tribunals and tribunal-like bodies culminated in a 1996 report to the Attorney-General.[57] It recommends the creation of a Western Australian Administrative Appeals Tribunal with a right of appeal from its decisions to the Supreme Court by leave only. Leave would only be granted 'in accordance with expressed statutory criteria such as the matter being in the public interest or because of the unusual complexity of the case or the matter involves an important question of law'.[58]

Proposal 22

In the alternative to our proposal 21, the recommendations of the 1996 *Report of Tribunals Review* should be implemented.

Should there be a Court of Appeal?

The Commission has adopted the view that we will not be reporting on matters of court structure. In any event, under the circumstances, a proposal to create a separate Court of Appeal is under active consideration by others and it would be inappropriate for us to enter into that area at this time.

CRIMINAL APPEAL SYSTEM

Criminal appeals to the Supreme Court

Currently all criminal appeals go to the Supreme Court. The only issue is whether the appeal lies to a single judge of the Supreme Court, the Full Court or the Full Court sitting as the Court of Criminal Appeal. While this would indicate the appellate procedure for criminal matters is fairly simple, in fact there is a morass of legislative provisions and rules which determine this issue.

The key pieces of legislation governing criminal appeals are the *Supreme Court Act*, the *Criminal Code* and the *Justices Act*. The *Criminal Code* provides for specific rights of appeal to the Court of Criminal Appeal,[59] and, as stated, the *Supreme Court Act* confers jurisdiction on the Full Court of the Supreme Court to sit as the Court of Criminal Appeal. The *Justices Act* provides for rights of appeal to a single judge or the Full Court of the Supreme Court in relation to summary and other criminal matters under Part VIII, and Supreme Court jurisdiction is conferred under section 58(1)(h) of the *Supreme Court Act*.

But what are the detailed procedures for criminal appeals? The *Supreme Court Rules* state at Order 1 Rule 3: 'These Rules, save as expressly provided, shall not apply to — (a) any criminal proceedings.' Instead there are a separate set of rules known as the *Criminal Practice Rules*. However, the *Criminal Practice Rules* are made under the provisions of the *Criminal Code*, and therefore do not regulate appeals under the *Justices Act*. Confusingly, the rules which attach to *Justices Act* appeals are taken from the civil procedures outlined in the *Supreme Court Rules*.

For the appellate rights in relation to criminal proceedings subject to the *Criminal Code* and the *Criminal Practice Rules*, no appeal lies to the Full Court under section 58(1)(b) of the *Supreme Court Act*. Appeals lie only to the Court of Criminal Appeal. In contrast, the procedures for appeal established under the *Justices Act* and the *Supreme Court Rules* provide for an appeal to a single judge of the Supreme Court and a further appeal to the Full Court.[60] Similarly, section 53 of the *Bail Act 1982* (WA) sets up its own procedures for appeal, and gives an appeal to the Full Court of the Supreme Court from a judge on an application for bail.[61] The Full Court, under section 58(1)(b) of the *Supreme Court Act*, also has jurisdiction on appeal from the orders of a judge on applications to set aside subpoenas issued in criminal proceedings.[62]

Criminal appeals under the *Criminal Code*

As is usual with appeals, the statute creating the appeal determines the grounds of appeal and appeal process. The *Criminal Code* establishes separate appeal grounds for a convicted person and for the Crown. A convicted person has rights to appeal conviction and/or sentence and the Crown has a separate set of rights of appeal. All appeals under the *Criminal Code* involve final judgments and no appeal against interlocutory decisions is permitted.

A convicted person's appeal against conviction

Conviction on indictment

Appeal by a convicted person against conviction on indictment lies to the Court of Criminal Appeal under section 688 of the *Criminal Code*. There is an appeal as of right on any ground involving a question of law alone. Leave or a certificate of the trial judge (a procedure which seems unused) is required on any ground involving a question of fact or mixed law and fact 'or any other ground which appears to the court to be a sufficient ground of appeal'.[63]

Procedurally there appears to be no significant difference between the appeal as of right and that requiring leave. There is no separate leave hearing. Although a single judge may refuse leave, the applicant/appellant is entitled to have the application determined by the Court of Criminal Appeal.[64]

Section 701(2) of the *Criminal Code* allows the registrar to refer any notice of appeal on a ground involving a question of law alone to the Court of Criminal Appeal for summary determination if it appears to the registrar that it does not show any substantial ground of appeal. The court may then dismiss the appeal summarily without adjourning for a full hearing if it considers it to be frivolous or vexatious 'without calling on any persons to attend the hearing or to appear for the Crown thereon'. This also seems to be an unused power, and consideration should be given to whether it ought to be retained.

Section 689(1) of the *Criminal Code* provides broad bases upon which an appeal may be determined provided that the appeal be dismised if no substantial miscarriage of justice has actually occurred. Therefore, for example, the Court of Criminal Appeal may find there has been an error of law but dismiss an appeal if it considers no miscarriage of justice has actually occurred. If the court allows the appeal, it may direct a judgment and verdict of acquittal or order a new trial.[65]

Conviction after summary trial

In addition to matters tried on indictment, the *Criminal Code* creates offences which are tried summarily although it makes no provision for appeal against conviction on such offences. However, the *Justices Act* confers jurisdiction on the Courts of Petty Sessions:

> Whenever by any Act past or future, or by this 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.[66]

Appeals by a convicted person against conviction after summary trial for offences created under the *Criminal Code* accordingly are dealt with under the *Justices Act* appeal procedures, which are discussed below.

Appeals against sentence by a convicted person

- Sentence on indictment

A convicted person may appeal by right against a sentence of indefinite imprisonment under Part 14 of the *Sentencing Act 1995* (WA).[67] Otherwise an appeal against sentence on indictment is by leave of the Court of Criminal

Appeal.[68] Again, there is little procedurally to distinguish an application for leave from an appeal.

By section 143 of the *Sentencing Act* the Court of Criminal Appeal may in any proceeding considered appropriate give a 'guideline judgment' containing guidelines to be taken into account by courts sentencing offenders. There is no special procedure for appeals which may result in such judgments, for example, by providing for submissions to be made by parties other than the particular appellant and respondent or even giving notice that more general guidelines will be made. It is of note, however, that foreshadowed changes to sentencing laws may make the guideline judgment redundant in any event.

Proposal 23

Where a case raises appropriate matters for a guideline judgment, the Court of Criminal Appeal should give notice to the parties so that the Crown, or a friend of the court, by leave may address issues wider than those presented by the facts of the particular appeal.

- **Sentence after summary trial**

The *Criminal Code* makes no provision for appeal against sentence by a person sentenced by a court of summary jurisdiction after conviction for an offence created under the *Code*. However, as indicated previously the *Justices Act* confers jurisdiction in summary matters on the Courts of Petty Sessions and such appeals accordingly are dealt with under the procedures for *Justices Act* appeals, discussed below.

Crown appeals

- On indictment

The Crown has no appeal in relation to a verdict of acquittal by a jury, except where that verdict has been found at the direction of the judge.[69] The Crown may appeal against a range of other decisions, including a decision staying or adjourning proceedings on indictment.[70] The Crown also may appeal against a verdict given by a judge alone — by right on a question of law alone, otherwise with leave or upon the certificate of the judge.[71] Again there appears to be little purpose in retaining the requirement of leave as it is currently applied.

Traditionally there has been strong opposition to any review of acquittal by verdict of a jury. The deliberations of the jury, in any event, are beyond review. However, with the Crown's limited right of appeal against acquittal on the direction of the judge to a jury, it has been argued that the Crown's right of appeal against acquittal now should be expanded to include errors of law in the course of the trial to the disadvantage of the Crown. It is of note

that if a convicted person seeks to appeal against conviction, it is not sufficient to show that there has been an error but that the error has resulted in a miscarriage of justice. In fairness, the Crown would have to be required to meet at least the same standard as imposed on the person convicted. However, with narrowly confined grounds of appeal — to errors of law — and no access to the jury's deliberations to indicate what weight this error had in the acquittal verdict, it would be extremely difficult for an appeal court to determine whether or not there had been a miscarriage of justice.

While the Crown has no appeal against an acquittal by verdict of a jury, section 693A of the *Criminal Code* provides that the Attorney-General may, within 60 days of the judgment of the court before which a person was tried, have the trial judge refer to the Court of Criminal Appeal for its consideration and opinion any question of law which arose at the trial. The section applies to, though is apparently not limited to, circumstances where there has been an acquittal. The determination by the Court of Criminal Appeal of any question referred to it does not in any way affect the verdict given at trial. Provisions in this form are common in Australian jurisdictions. Tasmania is a notable exception. There the Attorney-General may appeal against an acquittal with leave of the Court of Criminal Appeal or a certificate of the trial judge on a question of law.[72]

The Crown has an appeal as of right against the punishment imposed or order made against a convicted person.[73] While the appeal lies of right, the Court of Criminal Appeal has regarded the power to increase or alter a sentence on a Crown appeal as one to be exercised sparingly. To uphold a Crown appeal the court must be satisfied that a sentence should be disallowed to establish and maintain adequate standards of punishment, to correct idiosyncratic views of individual judges, or to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience.[74]

The restrictions on Crown appeals against sentence have no basis in the language in the section of the *Criminal Code* granting the right of appeal. However, as noted elsewhere, appeal courts are reluctant to overturn discretionary judgments and sentencing is a primary example of this kind of judgment. If the leave requirement is retained in relation to other criminal appeals, there should be an expansion of the requirement to obtain leave in relation to such appeals to include the Crown's appeals against sentence.

- **After summary trial**

Once again, the *Criminal Code* provides only for appeals in relation to convictions, sentencing and other specified directions on indictment. Crown appeals in relation to the summary trial of *Code* offences, like appeals by convicted persons, are subject to the *Justices Act* procedures.

Criminal appeals under the *Justices Act*

The grounds of appeal, available to both the convicted person and the Crown, are set out in section 186(1) of the *Justices Act*:

> (a) … that the justices —
> (i) made an error of law or fact, or of both law and fact;
> (ii) acted without or in excess of jurisdiction;
> (iii) imposed a sentence that was inadequate or excessive;
> (b) that there is some other reason that is sufficient to justify a review of the decision.

Similar to the *Criminal Code*, appeals under the *Justices Act* are only updated if there has been a substantial miscarriage of justice: section 199(b). The treatment of *Justices Act* appeals, however, presents certain inconsistencies. The *Justices Act* confers criminal jurisdiction on justices of the peace and magistrates sitting as Courts of Petty Sessions to hear, amongst other things, any offence punishable on summary conviction. A summary conviction involves trial in a court of summary jurisdiction without a jury, and is to be contrasted with offences tried on indictment.[75] Although traditionally regarded as minor offences, summary offences, and consequently the jurisdiction of the Courts of Petty Sessions, have become increasingly serious. In spite of this, a significant distinction remains in that, for summary trials, parties are entitled to recover costs if successful; for matters tried on indictment neither the Crown nor the defendant can recover costs.

Justices Act appeals and costs

Justices Act appeals are often appeals over criminal offences tried summarily. These appeals generally go to a single judge of the Supreme Court and omit review by the District Court. Historically appeals under the *Justices Act* have been part of the supervisory jurisdiction of the Supreme Court and have been dealt with in the rules of court as part of that court's civil jurisdiction. For example, when the Supreme Court sits as a Full Court to hear *Justices Act* appeals from the decision of the single judge, it sits as the Full Court and not the Court of Criminal Appeal — even if it is hearing an appeal on a criminal matter. Costs also are awarded in these proceedings as they are in civil proceedings. In other words, loser pays, subject to the *Official Prosecutions (Defendants' Costs) Act 1973* (WA) and the *Justices Act*. Although giving the successful defendant the right to recover costs from the Crown, the *Official Prosecutions (Defendants' Costs) Act* restricts that defendant's ability to recover costs to a lower rate than those allowed the Crown should it obtain a conviction.

Paul Seaman AC, former Justice of the Supreme Court of Western Australia, suggests in his book, *Civil Procedure,*[76] that the general principles which govern costs in civil proceedings and which apply in *Justices Act* appeals are not necessarily appropriate to those appeals which are truly criminal in nature. At the very least, for appeals under the *Justices Act* which are recognised as

criminal appeals, costs should be specifically dealt with and put on the same footing as costs of appeal in other criminal matters. Problems remain with the appropriateness of the distinction between matters tried summarily and on indictment for costs purposes and the scale for the *Official Prosecutions (Defendants' Costs) Act*. We see no rational basis for perpetuating this distinction between summary and indictable matters for costs purposes.[77]

There should be no costs recovered by accused persons acquitted of criminal offences, whether in Petty Sessions or the superior courts. The obvious consequence of such an approach would be that the prosecution would, similarly, not be entitled to recover its costs of prosecution in any court. This would extend to denying the prosecution the right to recover the filing fees in respect of complaints in Petty Sessions.

This approach offers simplicity, avoiding the need to trouble busy courts with considerations regarding the cost of a prosecution, or of defence to prosecutions, and accordingly, obviates a necessity for there to be any appeals in respect of decisions of courts in any regard relating to costs.

Should a criminal case be wrongly determined as a consequence of an error by a magistrate or judge, then the accused person should not be inconvenienced or suffer any adverse costs as a consequence of the appeal and any retrial. Presently, the *Suitors' Fund Act 1964* (WA) enables some cost recovery in those circumstances. Moreover, the *Suitors' Fund Act* presently allows for an accused person who, through no fault of his or her own, incurs additional costs by reason of the fact that a criminal trial is aborted, either through illness of the presiding officer, at the request of the prosecution, or by disagreement by a jury, to recover these costs from the Fund.

Adopting such a model, persons charged with an offence would have to meet the costs of their defence. But this would be limited to the costs of one proceeding only. If, through no fault of his or her own, a person incurs additional costs through successful appeal, or another trial or trials, then his or her costs in that regard could be fully met by the appropriate amendments to the *Suitors' Fund Act.*

The obvious attraction of the above approach is its simplicity. The only 'unfairness' which would be created by the approach would be that those defendants who are acquitted before Petty Sessions would, under the proposal, lose their existing right to receive some contribution towards their costs. In this respect, the existing costs recovery is not absolute. Successful defendants only receive a sum related to a scale lower than that which applies to the prosecution. By achieving consistency with the superior courts and denying the prosecution the recovery of costs in all cases, 'unfairness' in respect of a few might properly be seen as outweighed by the fairness to all accused.

Moreover, upon conviction, the costs of the prosecution would not be a consideration for the sentencing court. The proper result would be to impose a penalty without the additional penalty component constituted by an attempt by the prosecution to reimburse some of the costs of enforcement.

Proposal 24

Where *Justices Act* appeals involve criminal matters, the costs of appeal should not be dealt with under the general civil jurisdiction of the Supreme Court but dealt with specifically and consistently with costs of appeal in other comparable criminal matters.

Proposal 25

The *Official Prosecutions (Defendants Costs) Act 1973* should be repealed.

Applications for leave to appeal under the Justices Act

Applications for leave to appeal from the appellate jurisdiction of a single judge of the Supreme Court to the Full Court have been discussed generally above on Supreme Court jurisdiction. At present the initial appeal under the *Justices Act*, generally to a single judge, also requires an application for leave. We believe most of these applications, if retained, can be considered on the papers in accordance with Proposal 8.

The *Justices Amendment Act 1989* replaced the procedure of the order *nisi* to review[78] the decisions of justices and magistrates and substituted a single appeal by leave of a judge of the Supreme Court to either a single judge or to the Full Court of that court. The application for leave to appeal must be made in the prescribed form to a judge in the absence of the other party. Leave to appeal shall be granted unless the judge considers the appeal to be frivolous or vexatious or the grounds of appeal advanced do not disclose an arguable case.[79] An arguable case is not merely one which is capable of being argued but one which has some prospect of success. The appeal is by way of rehearing. There has been occasion where the application for leave to appeal has been granted on the papers filed without the need for any party to attend a hearing.

Proposal 26

If application for leave to appeal from the decisions of magistrates and justices is retained under the *Justices Act* this should be considered on the papers without need for counsel to attend, unless the court directs otherwise, in accordance with Proposal 8.

Leave to appeal in criminal matters

The current procedure for criminal appeals in Western Australia is not difficult. Nevertheless, there are two areas where further simplification may improve the system: the requirement of leave, and the separate applications (and forms of application) for appeals regarding conviction and sentence.

The leave requirement for appeals against conviction does perhaps introduce an unnecessary complexity — is the question one of law only, or mixed law and fact. The court generally hears the application and appeal together, but a different form of application is required, and the parties are differently designated (applicant or appellant). The leave requirement, however, does not introduce significant complexity into the procedure for appeals against sentence where the requirement is general (except for the prosecution which may appeal as of right).

With hearings of applications for leave generally conducted as a hearing of the merits of the application, there are no delays arising from the requirement of leave. On the other hand, if the purpose of a leave requirement is to weed out hopeless applications, it currently does not appear to serve that purpose with all cases going to a full hearing. Curiously, the prosecution, which does not require leave, has the harder task in establishing that the court ought interfere with a sentence.

There appears to be no practical benefit from retaining the leave requirement with regard to appeals against conviction, and it is proposed that it should be abolished. The requirement for leave to appeal against sentence might also be removed without any real increase in the number of hopeless cases brought before the court.

Preferably, there should be the one application for appeal in criminal matters, whether against conviction or sentence or both.

Proposal 27

The requirements for leave to appeal against conviction and against sentence should be abolished.

Proposal 28

There should be one application to appeal in criminal matters, whether against conviction or sentence or both, with a single form and procedure.

Time limits for criminal appeals

By *Criminal Code* section 695, a convicted person must give notice of appeal or the application for leave within 21 days of conviction. A similar time limit applies for an appeal against sentence or other order — being 21 days from

the decision complained of. The notice requirement for appeals under the *Justices Act* is also 21 days.[80]

Where a person is convicted and then remanded for sentence, this creates different dates for conviction and sentence. This, in turn results in different days by which application or appeal against conviction and sentence must be notified and may require that the appeal against conviction be lodged before sentence is imposed. Should an appeal against sentence then be lodged once the sentence is handed down, two applications are required. Time to lodge the appeal or application can be extended in each case.

It is also possible that the time to lodge an appeal against conviction has expired before the convicted person knows whether the Crown is going to challenge sentence. So for example, a person may be prepared to allow a conviction to stand in spite of possible grounds for appeal if the sentence is not too onerous. However, if the Crown was subsequently to challenge the sentence the convicted person may well wish to pursue the possible appeal against conviction.

One solution to these difficulties would be to allow a single notice of appeal or application within the specified number of days from sentencing. However, in some instances it is important for a person to appeal conviction prior to sentence. So, for example, where a person is remanded to custody pending sentence and is seeking release on bail, it may be relevant that the remanded person is able to show the court that the conviction is being appealed. Therefore the possibility for flexibility in lodging notices of appeal or application against conviction and sentence remains important, although there is no reason why the actual hearings cannot be conducted simultaneously.

Proposal 29

Notice of appeal or application challenging conviction should be allowed to be made within a limited time from conviction to a specified number of days after the date of sentence or other order.

Proposal 30

There should be one appeal hearing in any criminal matter, whether against conviction or sentence or both.

CONCLUSION

At the close of 1997, Chief Justice Malcolm[81] reported a Supreme Court target for civil appeals listing within six months of entry, with a then current interval of two to three months and no delay in listing. During 1998 the listing interval stood at four months in civil matters and three to four months

in criminal matters.[82] Long trials and unfilled judicial vacancies apparently contributed to increasing delay in 1998. The listing interval was projected to be reduced to three to four months by April 1999.

A substantial backlog of civil appeals was reduced by a policy of listing heavily and discounting estimated hearing times for appeals. While effective in reducing this backlog this policy must increase the workload of the judges sitting in appeal, particularly if judgments are to be delivered within the time set in the court's policy.

In relation to criminal appeals, Chief Justice Malcolm[83] reported in 1997 that there was no delay in hearing criminal appeal applications which are listed as soon as they are ready. This has been maintained, together with a reduction in delay in hearing civil appeals, by the court where possible rostering five judges rather than four to hear appeals in any one month and on occasion sitting two Full Courts simultaneously for a month. Sitting two courts has only proved to be possible once or twice a year. In spite of the reforms, in the same address the Chief Justice reported that due to heavy workload, particularly at appellate level, there had been a few cases in which judgment had been delayed too long, although 90 per cent were within the benchmark set in 1993. Moreover, in criminal matters there was undue delay in getting cases of self-represented appellants ready for hearing.

There has already been substantial reform of the system of civil and criminal appeals in Western Australia which has significantly reduced the backlog of appeal cases in the Supreme Court. However, the overall system of appeals remains unnecessarily complex and frequently lacking in a rational basis. Much could be done to provide the system of civil and criminal appeals in Western Australia with a more coherent and streamlined procedure.

SUMMARY OF PROPOSALS

1. Section 20 of the *Supreme Court Act* 1935 (WA) should be amended to delete any references to the appellate jurisdiction existing before the Supreme Court was established.

2. Appeals from the appellate jurisdiction of a single judge of the Supreme Court to the Full Court in civil and criminal matters should be limited to questions of law only or by a requirement of leave to appeal.

Alternatively, the decision of a single judge of the Supreme Court exercising appellate jurisdiction in civil and criminal matters should be final. However, the single judge should have power to refer appropriate matters or questions of law arising in the appeal to the Full Court, having regard to issues such as complexity, conflicting decisions or other matters in the interests of justice.

3. The composition of any court of appeal should not include the judge whose decision is under review.

4. The powers of a single judge of the Full Court of the Supreme Court and the Court of Criminal Appeal with regard to the form of orders and incidental matters following the determination of an appeal should be specified.

5. Where all issues have been dealt with, the Full Court of the Supreme Court and the Court of Criminal Appeal need not convene to deliver judgment and hand down its reasons and parties need not be present. Instead, any one or more members of the court should be able to deliver judgment in open court and hand down reasons. Where there are outstanding incidental issues such as the form of orders, these also should be dealt with by a single judge.

6. The Full Court of the Supreme Court and the Court of Criminal Appeal should be encouraged to make greater use of the existing practice direction enabling limited publication of the reasons for decision the day before formal delivery of judgment.

7. The Supreme Court, including the Court of Criminal Appeal, should consider endorsing the adoption of a short form of judgments for particular classes of case.

8. Applications for leave to appeal, or at least specified types of applications, should be dealt with as often as possible without oral argument. After consideration of an application for leave to appeal, the court would have the option to:

- allow the application for leave on the papers without oral argument;
- hear argument on the application for leave;
- increase the number on the bench to hear the application for leave and hear argument at the same time as the appeal; or
- refuse the application.

9. An application for leave to appeal should either be accompanied by written submission or submissions should be filed very soon after the filing of the application.

10. Except for appeals under the *Criminal Code 1913* (WA), where a satisfactory process is already in place, the parties to an appeal should consult in order to agree and summarise the facts and proceedings from the court/tribunal/board below and for determination on the appeal. Consolidated outlines should be agreed before a hearing date is set.

11. Except for appeals under the *Criminal Code*, where a satisfactory process is already in place, appeal books should contain only the agreed facts and issues and information relevant to matters in dispute on appeal together with other standard information as may be required by the appellate court.

12. All appellate courts should continue to develop electronic appeals procedures utilising advances in information technology.

13. All appellate courts should make greater use of written submissions.

14. All appellate courts should limit the length of oral argument or dispense with oral argument altogether in appropriate cases or by agreement of the parties.

15. The power to direct the filing of written submissions and to limit the time for presenting an appeal should be exercised by the a judge of any appellate court with reference to the criteria specified in *Supreme Court Rules 1971* (WA) Order 65B rule 3(3) including the complexity of the appeal and the importance of the issues in the case. These determinations should be made before the filing of outlines of the case.

16. Resources should be made available to assist self-represented persons in the conduct of appeals when they can not obtain legal aid or afford legal representation.

17. Applications for leave to appeal against civil interlocutory matters should be made together with the appeal application directly to the Full Court, and determined under *Supreme Court Rules* Order 63A.

18. There should be an expansion of the requirement for a grant of leave to appeal in civil matters with clear specifications as to which matters require a grant of leave.

19. The granting of leave to appeal should consider the value of the subject matter of the appeal and be required in civil matters involving any property or right with a value of less than the monetary jurisdictional limit of the Local Court.

20. The expedited process under Order 63A of the *Supreme Court Rules* should extend to all civil leave to appeal applications.

21. An Administrative Appeal Court should be created to assume the Supreme Court's role in reviewing administrative decisions. A right of appeal to the Supreme Court, limited to questions of law or at the very least with leave, should be allowed.

Alternatively, there should be a code of procedure for administrative appeals from all boards and tribunals addressing:

- rights of appeal;
- requirements of leave;
- the nature of the appeal hearing; and
- limitations on issues which can be appealed.

22. In the alternative to our proposal 21 the recommendations of the 1996 *Report of Tribunals Review* should be implemented.

23. Where a case raises appropriate matters for a guideline judgment, the Court of Criminal Appeal should give notice to the parties so that the Crown, or a friend of the court, by leave may address issues wider than those presented by the facts of the particular appeal.

24. Where *Justices Act 1902* (WA) appeals involve criminal matters, the costs of appeal should not be dealt with under the general civil jurisdiction of the Supreme Court but dealt with specifically and consistently with costs of appeal in other comparable criminal matters.

25. The *Official Prosecutions (Defendants Costs) Act* 1973 (WA) should be repealed.

26. If application for leave to appeal from decisions by magistrates and justices is retained under the *Justices Act* this should be considered on the papers without need for counsel to attend, unless the court directs otherwise, in accordance with Proposal 8.

27. The requirements for leave to appeal against conviction and against sentence should be abolished.

28. There should be one application to appeal in criminal matters, whether against conviction or sentence or both, with a single form and procedure.

29. Notice of appeal or application challenging conviction should be allowed to be made within a limited time from conviction to a specified number of days after the date of sentence or other order.

30. There should be one appeal hearing in any criminal matter, whether against conviction or sentence or both.

ENDNOTES

1 Sir Jeffery Bowman, *Review of the Court of Appeal (Civil Division)* (1997) ch 14, 2 (The Bowman Report).

2 Modified from J Fiocco, M Brewer, S Owen-Conway QC and G Clarkson QC, *Civil Procedure in Western Australia* (1998) 394.

3 The Full Court of the Supreme Court sitting as the Court of Criminal Appeal hears certain appeals under the *Criminal Code*. Appeals on criminal matters tried under the *Justices Act 1902* (WA) generally are heard initially by a single judge of the Supreme Court and subsequently by the Full Court as part of its civil jurisdiction and not sitting as a Court of Criminal Appeal. Discussed further at p 998.

4 See, for example, *Devries v Australian National Railway Commission* (1993) 177 CLR 472; *Abalos v Australian Postal Commission* (1990) 171 CLR 167.

5 *Supreme Court Act*, s 41

6 *Supreme Court Act*, s 57(1).

7 *Supreme Court Rules*, Order 63A. Interlocutory matters are decisions and orders made before the final resolution of a case.

8 *Criminal Code*, s 687(7).

9 As stated previously, the Full Court sits as the Court of Criminal Appeal when it hears appeals under the *Criminal Code*.

10 *Re Wakin; Ex parte McNally* [1999] HCA 27.

11 *Supreme Court Act*, s 62(1).

12 *Supreme Court Act*, s 62(2). Because the Court of Criminal Appeal must consist of an uneven number of judges, matters in that court are decided either unanimously or by majority: *Criminal Code,* s 687(2).

13 *Supreme Court Act*, s 62(3).

14 *Criminal Code,* s 687(6)

15 *Nguyen v Nguyen* (1990) 169 CLR 245.

16 See *Turan v The Queen* (1989) 2 WAR 140 (in the CCA).

17 See, for example, *Byrne v Australian Airlines Ltd* (1994) FCR 300.

18 *Supreme Court Act*, s 61.

19 *Monaco v Amedo Pty Ltd* (1994) 143 WAR 522.

20 Refer above n 1.

21 See pp 1006-1007.

22 *Supreme Court Rules*, O 63 r 7.

23 *Criminal Practice Rules*, O 9 r 22.

24 Supreme Court of WA Practice Direction 4 of 1999.

25 Practice Statement CA 2 of 1995 [1996] 1 VR 251.

26 Sub-section 2.3: 'Court-Based or Community Alternative Dispute Resolution and Alternative Forums for Adjudication' Proposal 16; Sub-section 2.2: Case Management' ; Sub-section 4.3: 'The Use of Alternative Dispute Resolution in the Criminal Justice System'.

27 ADR in appeals should principally concern identifying and narrowing the issues for appeal. It may be that ADR resolves the appeal without further litigation. Alternatively, it is likely that the appeal may be assessed as suitable for ADR but that ADR does not resolve all issues. The time involved in this phase would depend on how long before the neutral determined that there was no further agreement to be gained through the ADR option. If assessed as unsuitable for ADR, the litigation process would proceed immediately.

28 Refer to web site< http://www.hcourt.gov.au/> for further information on the Council of Chief Justices of Australia and New Zealand Electronic Appeals Project Electronic Appeals Project.

29 D Malcolm AC, '1997 Review: Address at the Closing of the 1997 Legal Year of the Supreme Court of Western Australia' (Perth, December 1997).

30 D Malcolm AC, *Annual Review of Western Australian Courts* (1998).

31 *Supreme Court Rules*, O 63 r 2(1).

32 *Wing Luck Foods v Lay Choo Lim* [1989] WAR 35, 360; and see *Cash v Morris* (1993) 10 WAR 518.

33 Discussed further below.

34 See *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170.

35 Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996).

36 Refer above n 1; and see Bowman Committee, *Proposal to Extend the Requirement for Leave to Appeal to the Court of Appeal (Civil Division)* (1998).

37 *District Court Act*, s 79(1).

38 *District Court Act,* s 79(2).

39 *Anderson v Littlemore* [1985] WAR 157.

40 *Local Courts Act*, s 107(1).

41 *Local Courts Act*, s 107(3).

42 *Liquor Licensing Act*, s 28(2).

43 Refer *Liquor Licensing Act*, s 28(3).

44 *Bradshaw v Medical Board of WA* (1990) 3 WAR 322.

45 *Moursellas v Pharmaceutical Council of WA* (1992) 10 WAR 240.

46 *Aintree Holdings Pty Ltd v Corderoy* (1996) 16 WAR 416.

47 *Bradshaw v Medical Board of WA* (1991) 4 WAR 303.

48 Refer, for example, to appeals under the *Petroleum Act 1967* (WA) and the *Petroleum (Submerged Lands) Act 1982* (WA).

49 *Isaachsen v Medical Board of WA* (1991) 4 WAR 303.

50 Sub-section 2.9: 'Costs', 467-468.

51 The Local Court, like the Courts of Petty Sessions, may consist of magistrates (but not justices of the peace), and exercises a civil jurisdiction.

52 *Energy Coordination Act 1995* (WA) and *Water Services Coordination Act 1995* (WA).

53 Eg, *Workplace Agreements Act 1993* (WA).

54 Eg, *Builders' Registration Act 1939* (WA), s 14.

55 Eg, *Builders' Registration Act 1939* (WA) s 41.

56 *Local Courts Act*, s 107(3).

57 J Gotjamanos and G Merton, *Report of Tribunals Review to the Attorney General* (August 1996).

58 Ibid, 11.

59 *Criminal Code*, Ch LXIX.

60 *Justices Act*, ss 185, 186, 189; *Supreme Court Rules* O 65A, r 12.

61 *Jemielita v The Queen* (1994) 12 WAR 362.

62 *Connell v The Queen (No. 5)* (1993) 10 WAR 424.

63 *Criminal Code,* s 688(1).

64 *Criminal Code,* s 702. Refusal of leave by the Court of Criminal Appeal, rather than dismissal of the appeal, may have implications for any application for special leave to the High Court as until leave is granted there is no appeal before the court.

65 *Criminal Code,* s 689(2).

66 *Justices Act,* s 20(1).

67 *Criminal Code,* s 688(1a)(a).

68 *Criminal Code,* s 688(1a)(b).

69 *Criminal Code,* s 688(2).

70 Such as a *Dietrich* application, where the matter is stayed if the accused is unable to obtain legal representation on serious charges: *Code* s 689(2)(a). See *Dietrich v The Queen* (1992) 177 CLR 292.

71 *Criminal Code,* s 688(2)(ba).

72 *Criminal Code 1924* (Tas), s 401(2)(b)

73 *Criminal Code,* s 688(2)(d).

74 See eg *Peel v The Queen* (1971) 125 CLR 447; *R v Tait* (1979) 46 FLR 386; *Malvaso v The Queen* (1989) 168 CLR 227.

75 A judge and jury in the District or Supreme Court generally try indictable offences. Some indictable offences, however, are allowed to be tried summarily at the option of the accused person. If tried summarily, that is, in the Court of Petty Sessions, the procedures, including appeals, are governed by the civil rules, as apply to summary offences. A judge sitting alone in a superior court also may try some indictable offences. Although the judge determines the charge in the absence of a jury, this is not a summary disposition of the charge because the charge is not heard in a court of summary jurisdiction.

76 P Seaman, *Civil Procedure, Western Australia* (1987).

77 We believe part of the original rationale for the *Official Prosecutions (Defendants Costs) Act* has been ameliorated with the switch to the DPP from police prosecutions in the Court of Petty Sessions: see Law Reform Commission WA Consultation Draft: 'Pre-Trial and Trial Practice in the Court of Petty Sessions' (1999). The Suitor's Fund exists to remedy wrongs and we encourage its retention.

78 An order sought by a party, in this case the appellant, who feels aggrieved by the court's decision and calls on the other party to show why the decision should not be reviewed.

79 *Justices Act,* s 187(2).

80 *Justices Act*, s 191; *Supreme Court Rules*, O 65A, r2.

81 Refer above n 29.

82 Refer above n 30.

83 Refer above n 29.

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Commercial Arbitration Act 1985 (WA)

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District Court of Western Australia Act 1969

Energy Coordination Act 1995 (WA)

Equal Opportunity Act 1984 (WA)

Family Court Act 1975 (WA)

Human Reproductive Technology Act 1991 (WA)

Justices Act 1902 (WA)

Justices Amendment Act 1989 (WA)

Liquor Licensing Act 1988 (WA)

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5.2

Court Perspectives: Architecture, Psychology and Law Reform in Western Australia

INTRODUCTION

Court buildings can be understood as living systems or cultural environments in which decisions are made about people's lives, property and rights. A court is not just a set of rooms, corridors and entrances; it is a social and emotional world. Court users' needs for psychological comfort and security can be addressed environmentally. If court procedures and practices are not felt by lay users to be just, what changes can be made to better meet user needs while preserving the integrity of the process? What messages are given to users of court services, the public and participants in the system by: the layout of waiting rooms or jury rooms; the way parties are seated in court rooms; or the differences in accommodation provided to judges, vulnerable witnesses, and prisoners? These are some of the issues this sub-section considers.

Winston Churchill believed the physical context of public life *was* important. He argued that democratic institutions required suitable architectural embodiment. 'We shape our buildings and afterwards our buildings shape us'.[1] Churchill's observation poses two questions for court design. What visions do court buildings embody? How do they 'shape us'? These questions draw on architectural, sociological and psychological experience to provide the general framework of this sub-section.

Submissions to the Law Reform Commission of Western Australia from the lay consumers, victims, witnesses, jurors and some litigants[2] reveal that many are disadvantaged and confused by insufficient information concerning court procedures and the process of litigation. Delays are common[3]. Increasing

numbers of litigants represent themselves, without adequate support.[4] The costs involved prevent access to justice for some people. A number of submissions revealed that going to court is often frustrating, sometimes humiliating, and, for some, an ultimately unhelpful experience.[5] Judges and magistrates appear remote, while lawyers questioning witnesses are considered intimidating and even rude according to some individuals interviewed in connection with this sub-section. Deliberating jurors tend to be confined to small rooms without natural light or an outside view. Some participants[6] perceive the adversarial 'game' as being valued more by the system than truth and justice. A number of users find courts are uncomfortable and, sometimes, unsafe.

This sub-section approaches law reform from an architectural psychology perspective. It considers how the court 'environment', in the broadest sense,[7] influences the experience people have of justice. The physical organisation of Court space gives social and psychological messages. The layout of waiting rooms and jury rooms, the way parties are seated in court, and the differences in accommodation provided to judges, witnesses and prisoners all communicate non-verbally to those using each space. The court environment is not just a set of rooms, corridors and entrances; it is a cultural, intellectual and emotional world. One focus of this sub-section is on how courts are designed, organised and operated and addresses the needs of court users for psychological comfort and security.

This sub-section suggests ways in which the public experience of the system of justice, both civil and criminal, in this State might be significantly improved by considering the psychological effects of both the physical architecture and the social environment in which justice is administered — principally, but not only, in courts. This perspective is a new one for law reform. In so far as the members of the Law Reform Commission of Western Australia are aware, no previous justice system review has included this topic. This approach was made possible by engaging consultants through the firm of Louise St John Kennedy & Associates Architects. Ms St John Kennedy is a specialist in architectural psychology,[8] and Dr David Tait, a criminologist with a significant background in sociology.[9]

There is a surprising lack of reliable information about the impact of the architectural environment on court users' behaviour and experience of the process.[10] Most courts are designed with detailed knowledge of the properties of the architectural materials, but almost no knowledge of users' experience within the architectural environment, or the effects of that environment on behaviour and access to justice.

As a preliminary step, this sub-section identifies some issues of architectural psychology relevant to court design. It develops some detailed propositions

about aspects of court architectural psychology and makes concrete proposals both for immediate consideration and for further investigation. As in any area of research, there are a variety of positions on any question. Some of the views expressed here may be widely held. Others may be plausible but misguided. Some may be contentious. Hopefully readers will treat this sub-section as an attempt to open discussion and guide debate rather than viewing it as an authoritative statement of the field.

LITERATURE REVIEW

There are many reports, studies, articles and books about the relationship between the design of public buildings and the way they are understood and experienced. This review highlights a limited number of these studies and provides an overview of others. Most sources, apart from a few about French courts, are not about courts at all. This review attempts to draw on works dealing with other types of public buildings to develop a basic understanding of the architectural psychology of courts.

The literature review considers procedural matters in relation to the adversarial character of trials. We examine the architectural and psychological aspects of inquisitorial procedures[11] in France and Italy in relation to two specific trials.[12] The University of Wollongong Department of Law hosted a conference in June 1998, which provided a range of perspectives on issues related to this sub-section.[13] Speakers at the Wollongong Conference identified some of the shortcomings in the present system and produced suggestions which have been considered in the analysis and development of proposals for this paper. On the whole, however, this study found very little Australian (or, indeed, international) research on the issues covered. There is a need for this type of information in planning new courts and renovating older ones. This sub-section may provide a preliminary theoretical foundation for further research.

Civic buildings and the representation of authority

Public buildings express political values.[14] Democratic regimes appear to have a preference for buildings with prominent windows and doors located in open spaces in the heart of the community they serve. More repressive regimes seem to prefer enclosed spaces, sometimes in inaccessible locations, built in an intimidating style.[15]

The link between politics and design has been studied systematically in the United States. Three quite distinct styles in city or town council chamber design exist according to political scientist, Charles Goodsell.[16] Before the Civil War (1860-1865), councils often met in multi-use rooms where prominent citizens might be seen walking around art displays, sitting at council tables or, if deceased, lying in state.

Council chambers built between 1865 and 1920 illustrate 'imposed authority'.[17] Rulers asserted power openly and the public knew its place. Chambers

were located upstairs and accessed via imposing staircases. Councillors sat facing the mayor, while the public, cramped onto benches, looked at the councillors' backs. Chambers were grand, symmetrical and well-lit. Those built between 1920 and 1960, are lower, longer and plainer than their predecessors. The public sat at the back, facing the decision-makers but cut off by symbolic barriers such as railings. Chambers built after 1960 suggest a 'joined authority' in which the 'very distinction between governors and the governed becomes clouded'.[18] Spaces are more subtle, with greater use of curved and circular spaces creating a sense of intimacy and equality[19]. Seating is more comfortable for the public and there are less likely to be barriers between the council and the public. Contemporary chambers display two radically different patterns in relation to windows: some are very open, others are completely sealed off. However, chamber designs tend to segregate executive from administrative areas, and provide escape routes to protect the safety of councillors.

The study of United States council debating chambers provides a useful starting point for a study of courts. Practical aspects include: shape (rectangular, square, round); location of the formal courtroom and other facilities within the building and the use of staircases; placement of officials, flags, and public galleries. Issues include, but are not limited to: whether views of faces or backs are provided to the public; what symbols and artwork are used in the building; design of the chairs on which the participants sit; use of doors, windows and skylights, acoustics and lighting.

The value of the council chamber study is not merely its documentation of the physical details of civic design, but the way it links design to changing political views about the relationship between citizen and the state. Planners, in Winston Churchill's words 'shape our buildings'[20] according to three different political visions: imposed authority, confrontation, or inclusion. What visions shape or should shape court buildings in Western Australia? Is there a trend towards inclusiveness and democratic practices in the courts or should there be?[21]

It can be argued that courts are inherently hierarchical places and the integrity of justice might be compromised by attempts at intimacy or equality. At the Wollongong Conference Justice Michael Black, Chief Justice of the Federal Court of Australia, asserted that the key principle of court design should be reconciliation rather than majesty.[22] Should this approach guide court design in the future? These various visions of court architecture and others could be explored in a public forum before any major court construction or renovation begins. Any discussion of appropriate architectural design for courts could explore the sort of authority to be represented, and the relationship between the legal system and the individual.

Architecture in use: ambiguous messages

There are several works on courts in the Civil Code tradition which deal with issues of architectural psychology.[23] It should be noted that these courts operate largely within an inquisitorial tradition, considered in more detail in sub-section 1.2.

One of the most comprehensive and contemporary studies of this tradition is provided by the French judge and sociologist, Antoine Garapon.[24] He considers court architecture, furniture, costumes, judicial practice and langauage. Garapon argues that careful attention must be paid to court symbolism, appearances and design to ensure that justice is executed in an orderly and accountable way. He argues that today's legal decisions are given credibility by legitimate authority inherited from the past. This raises the question of 'communication'. What do particular aspects of court buildings, or the rituals that take place therein, 'say' about justice, access, truth, or authority? Whereas the onward march of progress towards democracy and citizen participation can be traced in the design of the council chambers, courts tend to be relatively conservative.[25]

Art historian, Katherine Taylor, provides a detailed example of how architecture and court practice intersect.[26] She examines a single courtroom at one point in time, the *Palais de Justice* in Paris in 1869, and the trial of Troppmann, an Alsatian, accused of murdering an entire family to steal their savings. Unlike Garapon, she does not see the building and the trial as based on a single source of authority. Instead she identifies a clash between different principles. This places her at odds with the 'a building expresses a single vision' view (exemplified in the council chamber study); and takes her beyond the romantic view of the judiciary articulated by Garapon.

According to Taylor's analysis, in the France of the Second Empire, courts were caught between several loyalties. Under the Napoleonic Code the judge had a duty to enforce a universal impersonal standard, but he had sworn a personal oath of allegiance to the Emperor. The presence of the jury suggested sovereignty lay with the people, while the robes judges wore provided a direct link to the monarchy. The judges themselves (both presiding judge and prosecutor) were part of the imperial state machinery. Lavish ornamentation and murals indicated the aspirations of the Empire. There was a degree of 'ambivalence' about how to represent authority,[27] and 'the instability of the visual signs and social values at stake'.[28] These ambiguities in sources of court authority can similarly be identified in Australia. [29]

How did the defendant 'read' the elaborate appearance of the courtroom? One contemporary critic observed of the *Palais de Justice*:

> I confess that I myself have some difficulty with a criminal courtroom so grandiosely decorated. I conjure up a poor man, in the grip of poverty,

> having been stupefied by ignorance, who is brought here in worker's clothing to account for a theft or murder, under these gilded ceilings, vermilioned and illustrated with splendid paintings. What will that poor man think of a society that spends so much money to condemn him and so little to instruct him?[30]

This concern summarises a major issue faced as acutely by contemporary court planners: how can society provide a significant building which indicates to visitors the high value placed on justice without inviting a comparison with less-generously funded public services?

Court furniture placement also may have symbolic implications.[31] Sitting the prosecutor alongside the defence lawyer at a bar table seems to indicate equality and a greater respect for the individual in the common law court, while placing the prosecution beside the presiding judge in the civil system may denote a lack of independence. Putting the judge on a raised podium in centre-stage may designate him or her as an 'impartial arbiter'.[32]

While these are possible readings of the space, and admittedly the most obvious, they fail to go behind the surface reading.[33] To show how spaces are constituted, used, and contested requires further study. The Vichy judges also sat in centre stage, but they were not widely regarded as impartial. Alternatively, the French king in *the ancien régime*, when he attended the *parlements* to deliver justice, sat to the side at the front of the room. This was not an indication that he was a bystander or a suggestion that his deliberations were partial.

Searching for truth by systemic reforms

The influential French philosopher, Michel Foucault, makes a distinction between modern and pre-modern forms of truth.[34] *L'enquête* (investigation) was the sort of truth produced in a rational inquiry, in which anyone with the right disciplinary training would be likely to come up with the same result. *L'épreuve,* the ordeal, meanwhile produced truth through a ritual such as a duel or torture. Surviving the ordeal established truth. Foucault suggests that modern justice operates rationally within the terms of its own disciplinary framework. However, linguist Marco Jacquemet, in his study of the Cammora trials[35] in Naples, Italy in the 1980's, disputes this view. Jacquemet suggests trials are more akin to ordeals.

The characterization of a trial as an ordeal may also be closer to the experience of some witnesses.[36] Some sociologists consider the criminal trial as the quintessential case of a degradation ritual.[37] Others argue the process, rather than the formal sanction, is the real punishment.[38] In other words, the trial, perhaps even more than the sentencing process, can be understood as a punishing ordeal. If the trial is, indeed, an ordeal, then the 'needs' of witnesses may not only be for the 'rational' sorts of information about what the legislation says or where the toilets are, but also how to respond to questions

experienced as insults, interruptions, or distortions. In short, witnesses may need to know how to endure and survive an ordeal.[39]

A leading Australian criminologist, John Braithwaite, takes the symbolic and emotional aspects of court procedures seriously, arguing that court ceremonies need to be re-configured.[40] He argues for 'reintegrative shaming'. It seems that Braithwaite accepts the nature of the trial as an ordeal: an emotional and, possibly transformative, confrontation to be examined in itself and not seen simply in terms of any decisions made. This correlates with a body of international literature on circle sentencing, family group conferences and mediation models.[41]

The possibility of diverting cases from civil and criminal courts[42] raises various practical considerations as well as important architectural and psychological issues. Can, or should, trials be designed to minimise the humiliation experienced by some participants or is this inherent in the adversarial system? Can authority be shared by including victims and other interested parties into the decision-making process? Should justice and authority be represented in an inclusive way? Should traditional status be respected and acknowledged in the way courts are run and laid out? Should judges interrogate witnesses or suspects? In an Australian setting, should indigenous terms of respect and protocols be used in dealing with respected elders? What terms of address should be used? Practical issues are also brought into question such as whether defendants should be viewed by the jury in profile (the 'criminal' perspective)? Should witnesses be protected from badgering or hostile questioning and, if so, how?

The literature reviewed emphasises the interaction between court design, judicial practices and legal culture. However, there is no simple relationship between the way courts are laid out and the nature of the legal culture nor are there obvious links between particular practices and how participants in the trial process feel. What these studies suggest is that understandings are culturally specific and grounded within particular local contexts. They point to the need for local consumer surveys. Court processes and trial procedures should not be viewed simply as legislation being enforced, but as ordeals being endured by ordinary people in a variety of different conditions and contexts. The question is: must court proceedings be an ordeal? Can court processes be reformed to make them more intelligible and less stressful for lay users?

ARCHITECTURAL PSYCHOLOGY

This sub-section is not merely about the physical characteristics and features of the buildings, although these are clearly a crucial part of the investigation. It is about 'architecture in use': the way court users interact with space; how they utilise facilities and 'make sense of' or 'feel' in an environment. This sub-section draws on a range of sources and summarises what is known about

sociological and psychological issues in an architectural context. There is much written on nursing homes, hospitals, schools, shopping malls and many other public areas, but almost nothing on courts.

Buildings convey information

Court buildings convey information about justice. Good court design may communicate that justice is accessible; safety and privacy respected; and contributions to the process are welcomed. All too frequently, however, architecture may send out other messages: the court is isolated from its physical and cultural environment; people are not equals in the court; jury service is not valued; participants and the public are not entitled to understand the proceedings; and court management needs are more important than the time commitments of civilian or lay participants in the justice system.

There are several models within the Western Australian legal system which, in some ways, already appear to be providing environments conducive to justice by:

- Developing dignified and respectful practices;
- Responding seriously to user feedback;
- Transforming the physical environment as well as some aspects of judicial decision making; and
- Minimising stress and confusion in obtaining and giving evidence.

These models should be evaluated carefully to see to what extent, and in what form, their good practices and designs can be applied more generally in civil and criminal courts.[43]

Court users unfamiliar with the justice system frequently find court processes unsatisfactory. Although many court users have negative experiences, all participants in the justice system should be treated with dignity and respect. Legal processes and trials can be alienating, frustrating, and humiliating for witnesses, victims, defendants and, particularly, self-represented litigants. Physical, psychological and social factors, in combination, influence these experiences. Issues include:

- Lack of privacy, comfort and safety in waiting areas;
- Delays in waiting for cases to get to court and poor scheduling on the day of court appearance;
- Isolation of victims and other particularly vulnerable witnesses from their support team (in the witness box, or in remote facilities for closed circuit television);
- Distances between speakers which may make some participants uncomfortable and unable to communicate effectively in court proceedings;
- Seating arrangements which result in many participants and members of the public viewing the backs of lawyers' heads;

- Lack of information about, and/or understanding of, legal proceedings; and
- The financial, emotional and psychological expense of litigation.

One assumption of this sub-section is that it is not possible to separate matters of physical or architectural space from the social environment. It is the combination of effects which determines how users experience legal proceedings and the justice system. Proposal 1, below, makes explicit this sub-section's assumption about the principal aim for the social psychology of the administration of justice.[44]

If the psychological needs of court users are understood so they are treated with respect and consideration, users are more likely to feel they are being treated fairly and have confidence in a justice system which consistently treats them with dignity and respect. The Western Australian Court Services' Customer Service Charter commits the courts' staff to 'treat all our customers with courtesy, respect and dignity, by providing services which meet their needs'. [45] This statement accepts the relevance to successful court operations of meeting, to the extent possible, the emotional and psychological needs of court users.

Unfortunately, the Charter does not have a counterpart generally governing all professional participants in the justice system. The courts and all individuals acting within them including lawyers, judges, magistrates, court staff, police and other justice system workers should act, at all times, as the Charter requires. If procedures, processes, or attitudes conflict with the Charter, they should be reviewed.[46]

Proposal 1

Court design and operations should encourage all professional participants in the justice system to treat each and every court user with courtesy, respect, and dignity. To the extent possible, courts should provide services to meet users' needs. Procedures, processes, and attitudes should be reviewed to ensure that all participants in the justice system deal with all users courteously, respectfully and fairly.

Why the architecture of public buildings matters

Architecture traditionally has been understood in terms of aesthetic responses to physical structures. 'Architecturally the emphasis throughout history has been on the aesthetic experience or mental associations that the built environment evokes rather than on the evocation of behaviour; with the image rather than the result'.[47] What sorts of spaces, designs, layouts and colours make users more or less likely to be relaxed, anxious, aggressive or

confused? As well as 'shaping' attitudes in a general cultural sense, how do the physical spaces of courts contribute to the behaviour, emotional wellbeing and experiences of court users?

External court architecture can inform the public about:

- Accessibility of justice;
- Status accorded to professionals in the justice system; and
- Link between law enforcement agencies and judicial authorities.

The architecture may also:

- Present images of sovereignty vested in a monarch or in popular will;
- Suggest an authority based on origins in classical antiquity; and
- Indicate contemporary power by use of strong lines and a strategic location in close proximity to the police station.

The word 'court' comes from an Old French word simply meaning 'an enclosed space'. [48] We think of 'courtyards' as open spaces enclosed by walls which are used for the purposes of leisure. Law courts display a myriad of approaches to space enclosures, courtroom layout, and circulation management. Many courts evoke classical themes with a strong infusion of hierarchy and clear delineation of space. The 'vision' many courts embody is one of authority, tradition and exclusion. The spaces are not just separated from the outside world. Each internal space is discrete; courtrooms, registry areas, galleries, chambers, jury box, deliberation room and in the courtroom itself the bench, the bar tables and the dock. The enclosing may be as much psychological as physical. Not only are there walls, railings and barriers; there are also language, traditions and rules. Courts are perhaps the most segregated and segregating public buildings in contemporary cities.

The counterpoint to 'enclosed' is 'open'. Are the courts open to the sky and air, to public complaint, scrutiny and accountability? Is court business conducted in a way which is 'accessible and audible to all participants'? 'Open' might also be regarded negatively as 'open' to terrorist threats, corruption and political interference. Openness can be seen as both a characteristic of architectural design and of the imagination of those who manage and occupy the space.

The German cultural critic, Walter Benjamin, commented that architecture was 'consummated by a collectivity in a state of distraction'.[49] Many court visitors are too distracted by the pressures of the moment to notice consciously the historical or political allusions of the court façade. Some courthouse visitors may regard the grand entrances merely as places to chat or wait anxiously. However, witnesses, defendants, victims and their supporters need

spaces to prepare, compose themselves, speak confidentially to lawyers, or just wait.

The characteristics of courthouse spaces tacitly inform users of their status before the law. Some courts inform citizens they have the same rights as others. Others inform citizens they must defer to their 'betters'. Still other design aspects and behaviours signal that an accused is 'criminal'. Court facilities and staff signal to parties and victims whether or not their claims are being taken seriously. Although users may not be conscious of 'reading' the environment in these terms, they may feel more or less comfortable in different court spaces and by the way they are treated by court staff and legal professionals.

Depending on their circumstances, various court users experience the facility differently. Defendants who walk from the cells along cold corridors accompanied by security guards and seeing stark walls and furnishings under artificial lighting experience different emotions from those defendants who enter the building freely through the front door. Witnesses and victims may feel anxious not only about the present proceeding, but also the painful past the case causes them to re-live. For some, the courthouse may be a place of anxious waiting in a noisy corridor or a quiet corner, seated on a hard bench or a cold vinyl-covered chair.

Courts are the everyday work environment of judges. Judges are supported by more comfort and privacy than the defendants who appear before them. There are allusions to classical architectural forms in the court façades and fittings. Judges move along private corridors which may feature paintings of their predecessors. The value of judges' contributions to the justice system is reinforced. One of the many challenges for court architects is to take account of the disparate needs of users, yet attain some consistency in treatment and general appearance of internal spaces throughout the building.

Proposal 2

Careful psychological studies of the effects of court environments should be made prior to commencing any significant construction or renovation projects in order to determine user needs.

THE COURT IN THE COMMUNITY

In this part the sub-section takes a wide perspective and narrows the focus. It looks at the court in the community:

- Its location, physical presence and contribution to local heritage;
- The symbolic presence and role of the court;

- The relationship of the court to political authority;
- The court building (the external and internal architecture of the court building including its entrances, circulation patterns, public and private areas, art, other services and facilities); and
- The courtroom (shape, layout, lighting. acoustics, seating and furniture).

Very little literature directly addresses these issues.[50] Sketches and discussions of court facilities in Western Australia and other states illustrate some issues. However, a systematic analysis remains to be done with careful observations of all the various court operations in a variety of settings.[51] In addition, where certain features are found to be unsatisfactory, a careful evaluation of the impact of proposed remedial changes should be undertaken.

Architectural symbolism

Courts are usually significant public buildings, positioned centrally, sometimes competing for the town's high spot with churches or the town hall. Some recently designed courts are in high rise buildings. This may reflect an attempt to retain prominence and centrality alongside the symbols of corporate power: office towers.[52]

In addition to their judicial role, many courthouses are of aesthetic and historical interest. In smaller communities, courthouses may be marketed as a community asset,[53] or a tourist attraction.[54] In some towns a civic zone may incorporate the town hall, the court and the public library. In larger cities courts may be located near lawyers' chambers to constitute a legal precinct. Regardless of the size of community, courts usually declare by their location and visibility that they are a central part of the area's civic life.

A building can express authority by the use of solid materials. It gains an aura of permanence and, in many cases, the reality of longevity. In the past, the use of gargoyles, domes, triangulated pediments and pillars in court designs expressed authority and stability with classical resonances. These aspects of court buildings implicitly sought to remind users that the justice meted out within would not be arbitrary or capricious but based on a long and legitimate tradition with fairness as its objective.

Some modern courts attempt to express the power, importance and authority of the law through architecture. Architectural attempts to make new courts sensitive to tradition should not necessarily be seen as reflecting a reactionary inclination. Traditional court designs could well be part of the attempt to give the justice system credibility by grounding the court in the past. But are these designs effective? Why is so much emphasis placed on authority from the past? Understandably there is a reluctance to tie the credibility of judges to the mandate of the government which appointed them, but why do so many Australian courts appear to avoid architectural reference to popular sovereignty?

The Central Law Courts and the Family Court complexes in Perth clearly communicate the power and importance of the law without nostalgia or excessive historical allusion. The monumental size, strong geometry, limited window areas, and separation from the outside world, are the elements of this communication. The monolithic solidity of each building complex conveys a message of exclusion: the law is closed and inaccessible. Is this the most suitable message to give a public concerned about the seeming remoteness of the judicial system? [55]

Arthur Erikson, architect of the Vancouver Law Courts in British Columbia, Canada, expressed the intent and philosophy which helped determine the form of his design.

> The courts, in presenting the necessary dignity of the law, should not exclude or inhibit the true participation of the public.… The courts are the servants of the society, reflecting its ideals in the basic premise of British justice, that a man (person) is innocent until proven guilty. The courts often unwittingly intimidate through their arrangement or architectural ponderousness, thereby effecting the opposite of their ideas. In most modern courthouses there is very little that offers reassurance to the distressed, or even basic amenities for the participants forced to spend long hours in the court precincts.[56]

Erikson explicitly designed his court to be inclusive of the community in order to represent openness:

> [T]he large glass-roofed gallery with indoor terraces promoting public participation and a sense of unrestricted movement, provides striking architectural spaces significant for their expression of the relationship of the community to the judicial process. The organisation of the public spaces was critical to the architects design concept. The north south pedestrian spine of Robinson Square passes under the four storey high glass roofed lobby. As a major civic space, it is intended to invite public awareness and involvement in the judicial process.[57]

Erikson wanted to assert the importance of the law as well as to include the community. Instead of heaviness and size, he used openness, day-light, open space and community facilities including public gardens to emphasise that the courts are not isolated from life and the community:

> The linear pools of water, cascading waterfalls, information centre, exhibition centre, restaurants, adjacent art gallery and conference centre, plazas, fountains, landscaping and pedestrian facilities, use of daylight and grand scale express the importance the law and of the users.[58]

It could be illuminating to have public debate on the appropriate messages that court architecture in Western Australia should convey. The nature of proposed projects should dictate whether the debate is community — or region — specific or state-wide. Encouraging public discussion of how the

law should be represented architecturally prior to the commencement of major design projects and the expenditure of public funds could enhance a sense of public ownership of the courts and support for the justice system.[59]

Proposal 3

Public input and discussion concerning the values expressed and the means of representing the law through architectural design should be encouraged prior to the commencement of significant architectural projects involving courts.

Accessibility and centrality

Centrally located buildings tend to be more accessible by public transport, although parking is more expensive and difficult. Proximity to public transit is relevant both for the large volume of occasional short-visit users of local courts and tribunals, and for the smaller numbers of longer-visit users of higher courts. The availability of and proximity to other relevant services is another aspect of accessibility. Does the frequent co-location of courts with police stations say something about the relationship between the two institutions?[60]

The placement of courts adjacent to police stations visually implies judges and the police are part of the same team. From the perspective of an indigenous accused, the criminal justice system may appear to be a single homogeneous entity working harmoniously to process offenders. To counter this (mis)reading, courts are frequently made of different (usually more expensive) materials than the police station. The co-location is partly for practical reasons. It allows quick movement of persons in police custody into court without the need for holding cells in the courthouse. But the closeness of the two facilities can give rise to the assumption that the two institutions share common views.

Proposal 4

To demonstrate the independence of the courts from police, court and police buildings should be visually separate and clearly demarcated architecturally.

Transitions

Should courts simply blend into their urban skyscapes and environments, or should they stand out as symbols of order and justice turning back the forces of chaos and curbing corruption? Thus the question arises: how should

courts be integrated into the social and commercial life of the neighbourhood? A medical centre in the United States was designed to blend into its environment and connect residential and industrial parts of Boston:

> The Tufts-New England Medical Centre Project adopted the strategy of seeking to mesh the complex with its surroundings at all edges, to become a part of the community. It was decided to let the normal neighbourhood life flow under the medical facilities by creating shopping plazas and pedestrian walkways connecting with the new station of the transit system.[61]

Instead of acting as a 'barrier', the medical centre became a gateway or transition between residential and industrial areas of the city.

Similar questions can be raised in relation to courts: should they be self-contained blocks or porous membranes soaking in the life of the surrounding city? Should they be integrated with shopping and leisure activities, eating facilities, social and health services, churches, schools and banks? Should they be integrated (as some already are in country towns) with other public services such as the local council and library?

The Family Court in Melbourne features a café where people can wait, prepare for hearings and consult with lawyers.[62] When a party is represented, usually the lawyer monitors when the case is to be called. Clients relax in relative comfort awaiting the hearing. Spaces in the café are sufficiently private to avoid disputing parties overhearing each other's conversations or being in direct visual contact.

Proposal 5

Court planners should consider incorporating user friendly facilities including cafés or other eating facilities in court buildings.

COURT BUILDINGS AND SPACES

This part of the sub-section goes inside the court building to look at the way spaces are designed, used and experienced. How is access to justice facilitated or obstructed by interior court architecture? The following sections discuss how the various spaces in court buildings affect users' experiences of justice; their perceptions of whether they are treated fairly and respectfully; the ease with which people can participate in the legal process. We begin by examining briefly various psychological and hierarchical issues and then consider specific spaces, participants and elements of the justice system.

Psychological effects of court design

An important aspect of group psychology relevant to a court building is whether the layout encourages people to be more or less aggressive, communicative or stressed.[63] Studies of nursing homes suggest that careful design makes a considerable difference in levels of aggression, conversation and useful activity of elderly people.[64] Chairs grouped around tables adorned with fresh flowers produce less aggressive behaviour than chairs lined up around the wall. In hospitals and nursing homes physical appearances are important: 'colour, lights, sounds and smells can become active elements of therapy'.[65] Similar careful observational studies of ecological patterns should be applied to court layouts. If elderly people in nursing homes, lacking mobility and frequently sedated, can become more aggressive because of the design of living spaces, it is not unreasonable to suppose that court users may be similarly influenced.

Court users and those operating the justice system may not share the same design objectives. Staff focus on dealing with matters expeditiously. Criminal defence lawyers have different objectives than do prosecutors. Police want those they charge convicted while victims want justice, restitution, retribution or even revenge. Judges focus on applying the law and procedures fairly to those appearing before them. Even if all views are somehow balanced, there are also the needs of other users: the parties and their witnesses, friends and families, and members of the general public.

To address these diverse objectives effectively from an architectural design perspective, surveys and thoughtful study in the early planning stages could be beneficial and, moreover, it would be helpful. The ultimate goal would be to create a safe and comfortable environment for all participants by examining the psychological effects of design on the various users in the diverse spaces of court buildings.

Proposal 6

Prior to commencing significant renovations or new construction of court buildings, psychological research should be reviewed and appropriately tailored studies undertaken to consider the design variables which may influence aggressive behaviour and affect the safety of participants in the justice system.

Hierarchy

The importance and value of the various participants in the legal system is indicated by the quality and quantity of space each occupies. Courts can be 'read' consciously or unconsciously by various users according to location, access to natural light and/or views, and the cost and quality of furnishings. Traditionally the use of prestigious materials and finishes such as timber

panelling, classical detailing, marble and leather in combination with generous spaces indicated importance to the system. Thus visual clues denoted importance and power in the hierarchy of the courts.

In the Perth Central Law Courts judges and magistrates have comfortable offices on the top levels at the front of the building.[66] The facilities for children waiting to appear as witnesses in Perth are in a small, narrow room in a remote corner of the building. The provision of cuddly toys in the children's area is a supportive gesture. However, the journey through the building to the child witness area, with its location in the rear corner of the building, and the depressing fit-out in the child's witness box sends a non verbal message of the value of child witnesses in the system.[67]

Consistent design standards throughout court buildings including courtrooms, judges' chambers, jury areas, registry offices, waiting areas, children's facilities and detention cells might visually indicate equality and help recognise the dignity of each participant in the justice system. Appropriate seating, lighting and safety measures are as much occupational or public health issues as matters of equity and aesthetics.

Proposal 7

In future design briefs for courts there should be consideration of the degree to which hierarchy should be reflected. As far as possible there should be consistent design standards and equality of furnishings and fittings throughout court buildings. Design should indicate to users that all participants in the justice system are seen to be equal and respected by providing facilities appropriate to their particular needs.

Foyers, registries, waiting areas and interview rooms

This part considers the public parts of a court building: the foyer, the registry, waiting areas, interview rooms, information areas, shared service areas and jury spaces. Spaces which serve the legal profession also deserve attention. However, as non-legal users have the least voice in the design of courts, it is their needs which are the focus of this paper.

Proposal 8

The design requirements and practical needs of all court users should be surveyed prior to developing or renovating future court facilities.

Foyers

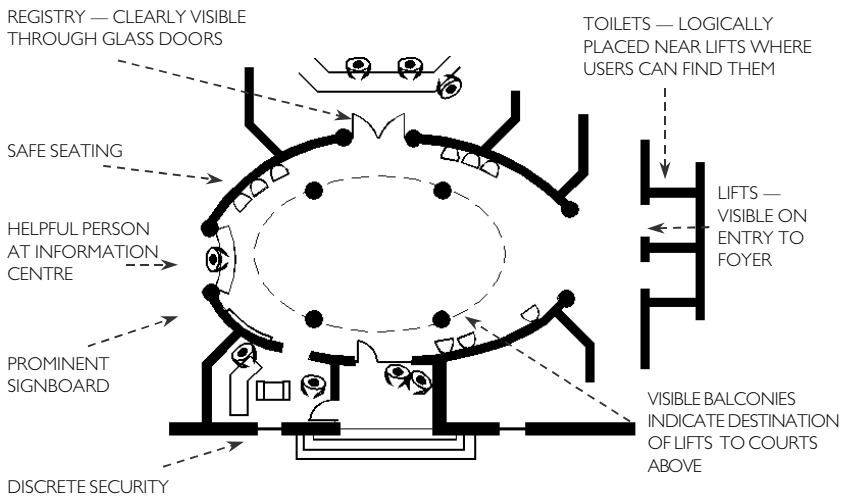
Foyers are places where people enter the courthouse, orientate themselves, meet others, and access services such as the Registry. People also enter the 'culture' of the courts in the foyer. In some courts the entrance foyers are physically removed from the main waiting areas.[68] Waiting areas adjacent to court rooms serve both as places for people to wait for their cases to be called and as casual conference and negotiating areas. These spaces often are full of people who are anxious,[69] bored, impatient, angry and occasionally violent. Foyers and waiting areas pose particular problems for drug users.[70]

Entering a court building may be stressful for some users. This has implications for communication both of basic information and more subtle, symbolic messages about access to justice and fairness. People in a state of distraction, on entering an unfamiliar court building, may not be able to take in signs, instructions and warnings.[71] Visual cues in the architectural design can assist people to find their way. Visual support, through good design, may reduce stress and confusion. Staffed reception desks, with obvious, adjacent, clear listings boards assist by indicating that the system is concerned with the individual.[72]

A crucial issue involving foyer spaces is the design and location of information services. In some cases, this can be provided in a central waiting area close to the entrance. If there are several foyers near the entrances to groups of courts, each area may require an information service.

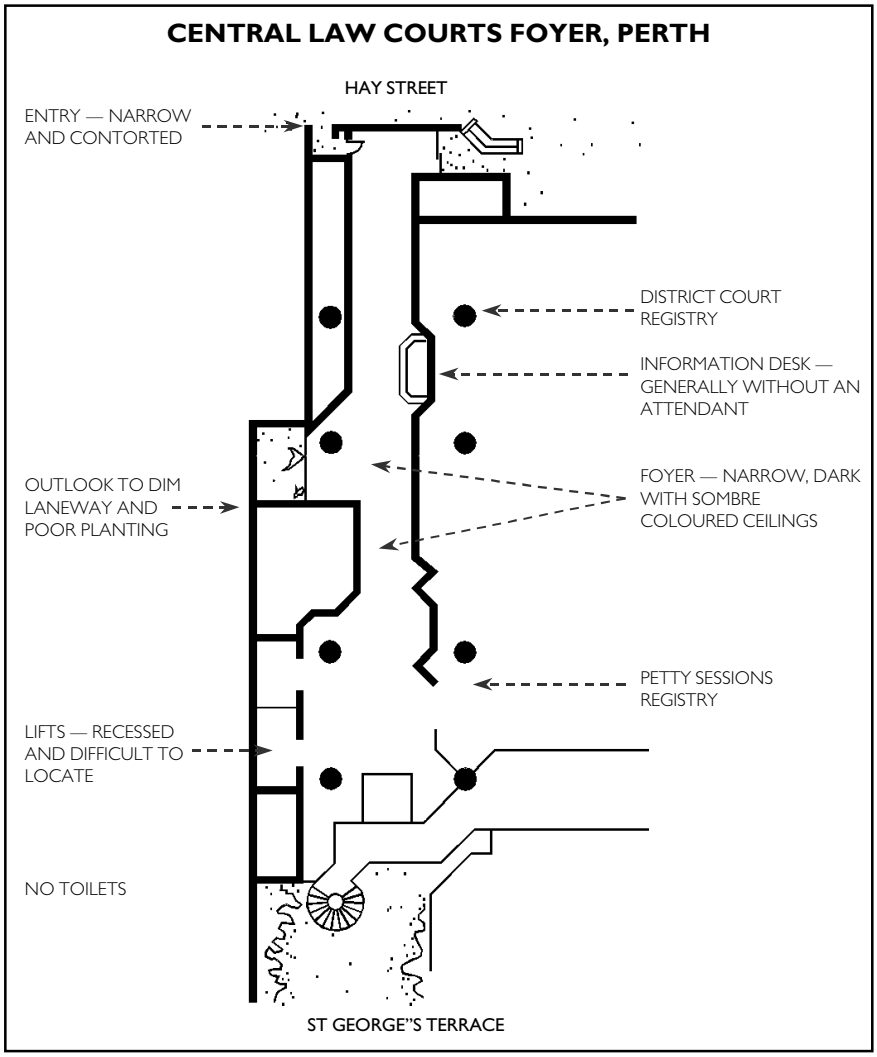
The Family Court in Sydney has an excellent foyer. Courteous security staff usher users into a discrete security area, set off to the side so the security

SYDNEY FAMILY COURT FOYER



equipment[73] does not detract from the open welcome indicated by the visible main entrance. A friendly staff person at an information desk values court users and signals their importance. By contrast, grand staircases inform users of the majesty of the law. Lifts, going up to the courtrooms, are clearly visible off to the side. There are toilet facilities located nearby with obvious signage. The Registry is clearly visible through glass doors. The architecture and design of the space reduces stress and seems to communicate the importance of the individual. The following diagram of the Sydney Family Court foyer illustrates these good design aspects by allowing easy access to required services and facilities.

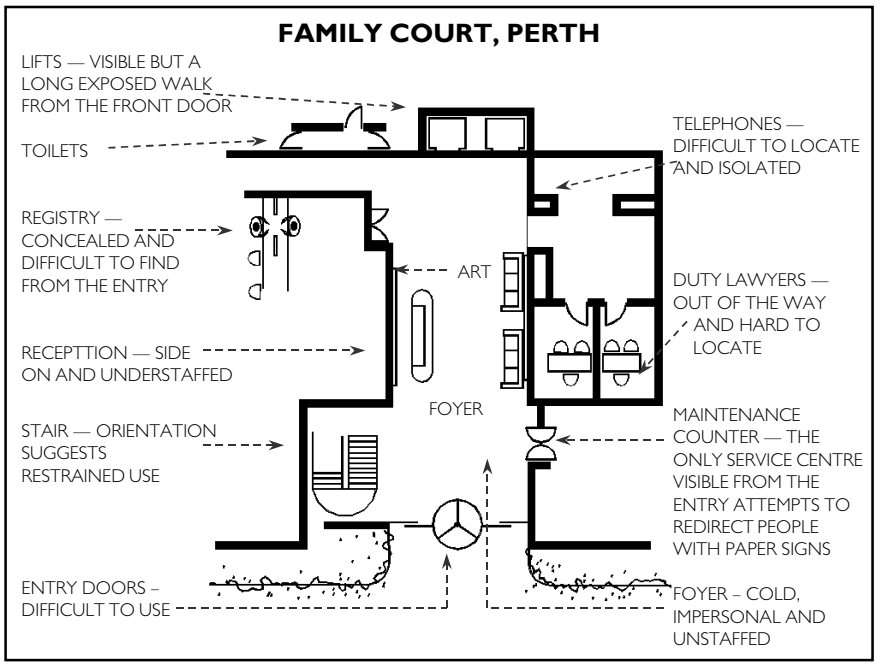
The foyer of the Perth Central Law Courts is a less successful way of addressing the building entry issue. There are two entries on different levels. The foyer is a long narrow thoroughfare running between two main city streets. The



thoroughfare through the building is a good concept however. It is dimly lit with comparatively low ceilings and somewhat depressing ambience. The design makes it difficult to find required destinations and services. The outlook to natural light is limited, overlooking a dingy laneway. The St George's terrace entry is through an inhospitable small plaza. The thoroughfare is accessed from a dim basement with lift buttons which are difficult to locate, or by a circular outside staircase which may be experienced by some users as uncomfortable to use. The Hay Street entry is indirect, narrow and not welcoming.

The Perth Central Law Courts foyer accesses two Registries which have separate functions. The two Registries are difficult to distinguish from one another. The lack of effective sign posting in the thoroughfare foyer makes each registry hard to find from the opposite entry. The information desk is not always staffed. The lifts are recessed at the end of the thoroughfare and the location of the courts is not clear to first time users. With better lighting the floor would appear more inviting. Public toilets are not provided on the two entry levels of the building and are not easy to find on the upper levels where the courtrooms are located.

The Family Court in Perth is a modern building with a marble floored foyer with good natural light. However, it has a cold and impersonal entry in contrast to the adjacent Federal Court entry which has floor rugs and softer interior architecture. As no staff or amenities are apparent when entering the foyer, first time Family Court users may feel the system is cold and impersonal



because the building is. It is difficult to find where to go when there are no indicators in the design. The services that people require such as telephones, the registry, listings, child care, counselling, security staff and the duty solicitor are not visible upon entry. The orientation of the staircase indicates it may be intended for use only by court personnel and lawyers and does not make clear its destination nor availability for public use.

The entry doors are not inviting. The revolving door is difficult for people with children, and people in wheelchairs. The automatic sliding door is not immediately apparent. Inside, the reception is not staffed.[74] The counter is isolated with one end facing the user on entry. There is no listings board. Instead pieces of paper lying on the counter highlight the names of the judges and magistrates. Listing information should be presented in a user-friendly format.

The only visibly staffed area on entry to the Western Australian Family Court building is the 'Maintenance' section. This office seems to receive unwanted questions from users because the walls in the area when visited feature an array of paper signs in an attempt to re-direct people to necessary services. The Registry door is concealed in a recess beyond the deserted reception counter. Another paper sign attempts to overcome the problem by pointing out that the Registry is nearby.

The telephones are difficult to locate in an isolated and potentially dangerous area away from the Registry and unseen by any staff. The duty lawyers are located in an alcove behind closed doors off the foyer with no indication of how to reach them. Although the lifts are central and visible in the foyer there is no indication that they lead to the courtrooms, childcare, counselling or other family court services. The entire foyer design does not assist in getting people to the information they require or to their destinations. There are, however, two lovely tapestries which provide a pleasant aspect to the environment.

Court registries

Court Registry staff are the first contact many people have with the civil and criminal justice system. They answer enquiries, accept or reject documents for filing, refer people to specialist services, and urge the unrepresented to obtain legal advice. Registry staff regularly deal with annoyed and angry users. Wide counters and glass screens may offer a degree of physical safety from people who become frustrated. The Ministry of Justice survey reported satisfaction with the level of service provided by Court Services staff but noted that there are insufficient numbers of staff and the amount of training staff receive is inadequate.[75] Training staff to deal with anger and abuse in such skills as active listening can provide some degree of psychological and workplace safety. However, providing information, assistance, and services may ultimately be a more effective way to reduce users' hostility.[76]

A readily accessible area that looks safe and semi-private is needed in court registries. Some users are dealing with sensitive applications such as restraining orders. When attending in person, applicants require acoustic privacy and supportive staff.[77] A domestic violence victim seeking a restraining order reported leaving the registry unable to make an application because she felt uncomfortable about being overheard by other registry users.[78] Registry design problems are particularly acute in small country courthouses. At a public consultation meeting in Albany in connection with the justice system review one speaker observed that there is only one entrance at the Mt Barker courthouse so that anyone seeking a restraining order, for example, has no private means of entering the Registry at the court.

Private rooms are provided in the registries at the Westrn Australian Family Court, Central Law Courts in Perth and in the Geraldton Courts building. However, these are not offered to or visible to potential users or signposted to indicate availability. When not in use these spaces should be visible and designed to indicate ready availability for those who need privacy.[79]

Waiting areas

Waiting areas are important for many users, particularly in courts where scheduling procedures designed around the court's convenience require lay participants to wait long periods for cases to be heard.[80] Waiting area design must cater for two conflicting possibilities: chosen contact or safe separation. Generally, waiting areas are immediately outside the court room to allow people to be called into the court when their case is to be heard. Opposing parties are likely to come into contact with one another in the waiting areas, lifts or access ways leading to these spaces. This can be a positive opportunity when it leads to last minute negotiation and settlement between the parties before going into court. However, victims of violent crimes may be subject to intimidation, distress or further violence by contact in the waiting area. Court users can experience stress and insecurity by unnecessary contact with the opposing party. Some victims need complete separation from alleged perpetrators. While some courts provide for separation of children and vulnerable witnesses, in others waiting facilities often place victims in inappropriate contact situations with perpetrators. Distress may be experienced by users denied this respect by court building layouts.

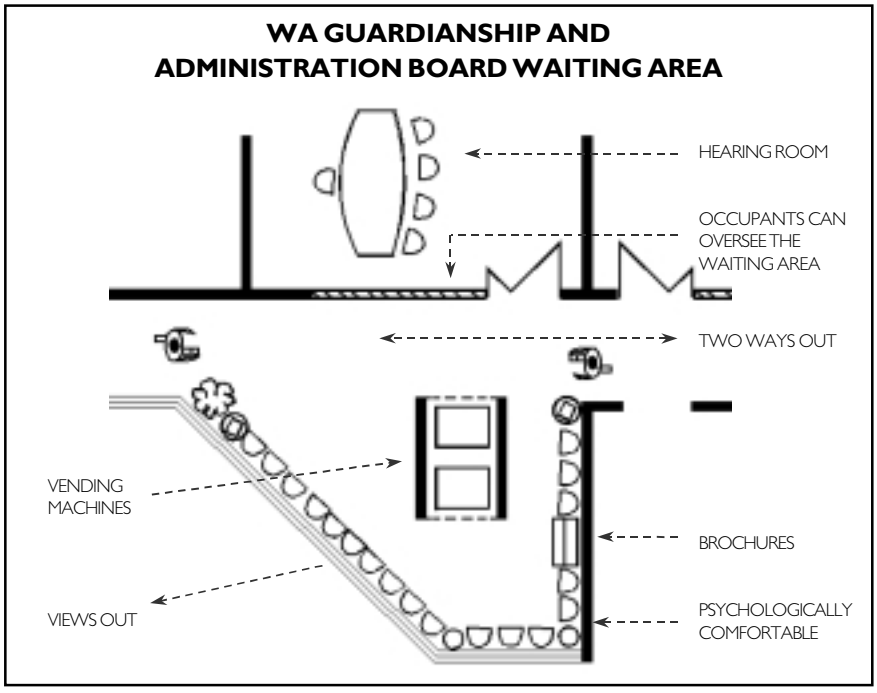
Appropriate design of seating can assist in providing physically comfortable and psychologically safe waiting areas. Clusters of comfortable chairs and couches are preferable to rows of hard institutional seats. Separations for acoustic privacy allow comfortable discussion to occur. Court staff should be positioned to oversee seating which helps people to feel secure and reduces the likelihood of physical violence. Alternate entrance and exit routes allow people to avoid coming face to face, particularly unexpectedly, with opposing parties or having to walk close to the other party. Some people

may be comfortable when the seating arrangement puts them opposite the other parties and eye contact is difficult to avoid. Anxiety may result if seats face away from entrances or windows or when seating positions do not permit people to see who is nearby or approaching from behind.

The circulation areas, lift areas and waiting areas are high use areas in the Perth Central Law Courts. This is particularly true for the Local Court and the Court of Petty Sessions. People are often forced into close contact with others.[81] Users often come face to face with opposing parties when lift doors open onto corridor areas. Staircases are the only alternate avoidance routes.

Other design aspects of the waiting space can also assist users. Natural light and an outside view provide psychological relief. An alcove at a window area away form the main waiting area provides an emotional break from the intensity of proceedings or long waiting periods. Warm artificial lighting which varies in intensity rather than institutional lighting is more restful and calming. Some soft finishes rather than a predominance of hard, reflective or reverberating surfaces as well as artworks, information services and cafe facilities can also assist in making the waiting experience less tedious and stressful.

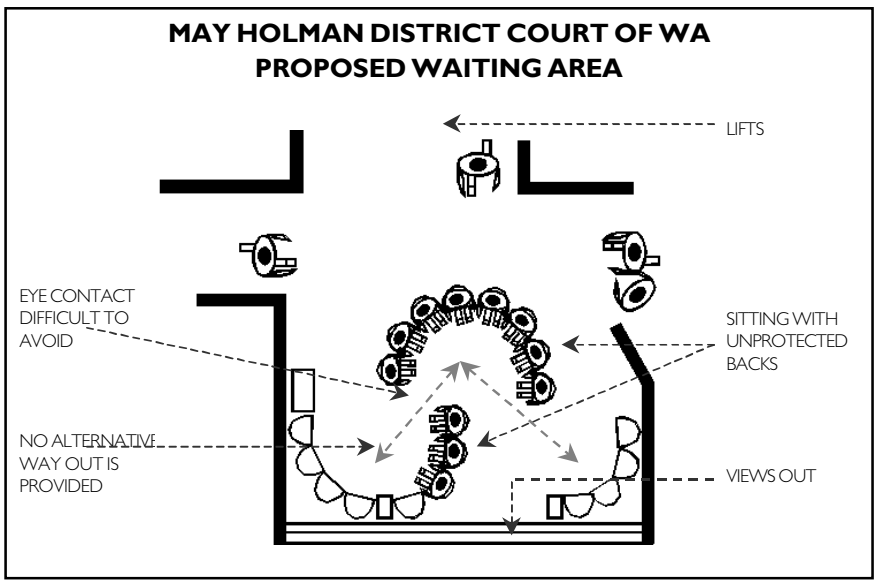
The Western Australian Guardianship and Administration Board waiting area has certain positive design aspects for the user's physical and psychological comfort. The waiting area has an exterior view. It feels safe for vulnerable users. It is overseen through louvre windows from an adjacent room. The waiting area has two ways out from any seat position to allow avoidance if required. It also provides areas which, while screened from each other, are



not hidden. The openness, natural light and visibility of the adjacent corridor provides a feeling of safety and comfort. A central island unit containing brochures and vending machines also provides screening to separate areas and prevents unavoidable eye contact. The area has a light, open, safe, and comfortable 'feel' to it.

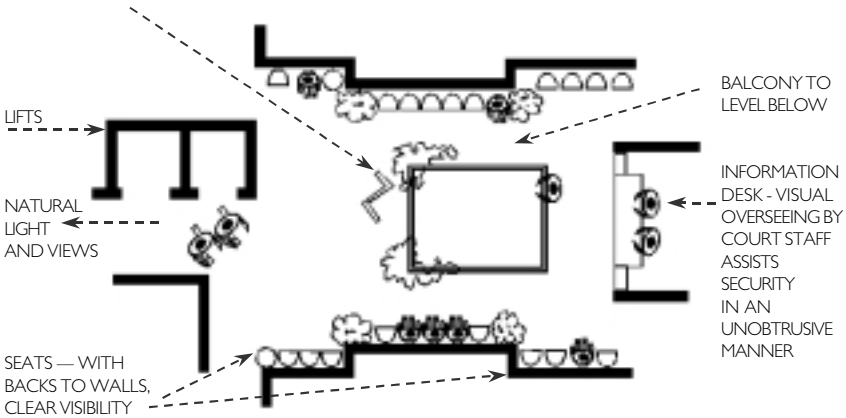
The design of vending machine enclosures is an issue.[82] In the Guardianship and Administration Board machines are placed back to back in the centre of the waiting area and are enclosed with projecting side panels to minimise their visual intrusion while providing ready access for users.

The proposed May Holman Courts indicate a well considered architectural design in many aspects. However, the seating in the waiting areas does not fully provide for users' psychological comfort. Chairs facing away from pedestrian traffic and other seats increase discomfort because peoples' backs are exposed. Users are not safely separated from those they wish to avoid nor can they escape unwelcome eye-contact when seats are directly opposite each other. Stress and tension between parties may be increased during waiting periods. While a separate room is provided adjacent to one of the courts for distressed witnesses, to access the room users must walk past the main seating area and other parties to reach the court. There are remote witness areas but only two of these have the benefit of natural light.



The Victorian Magistrates' Court in Melbourne provides open waiting areas with natural light, alternate avoidance routes, alcove seating areas with backs to walls and visual oversight by court staff to promote security. These factors

MAGISTRATES' COURT OF VICTORIA (MELBOURNE) WAITING AREA

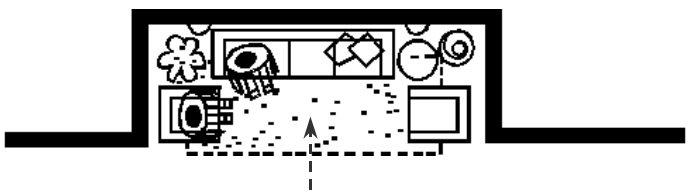


assist in creating a physically and psychologically safe waiting area. Display stands show photographs of the different 'players' in court proceedings and explain their roles. This is an effective way to communicate information and it gives people something useful to look at while waiting.

The Federal Court in Perth has a waiting area in an alcove opposite the ground floor lifts which also provides a good model for a discrete, yet open, waiting arrangement. The alcove has a couch and two comfortable chairs in a conversational grouping. There is a clear view out of the alcove. Wall lights provide varied lighting intensity. Together with a floor rug, the lighting and comfortable seating create a pleasant, non-institutional environment.

The Geraldton Court is an historic building with impressive court spaces and good quality natural light. However, the waiting areas on the upper level have hard chairs lined up along the edges of a corridor exposing users to unavoidable contact. There is no opportunity for opposing parties to wait in separated areas and this can increase tension.

FEDERAL COURT, PERTH – SEATING ALCOVE



FLOOR RUGS, WALL LIGHTS AND ARTWORK GIVE THE SEATING AREA A COMFORTABLE, NON INSTITUTIONAL CHARACTER

Proposal 9

There should be user surveys as a basis for developing design guidelines for high traffic public access areas including foyers, registries and waiting areas. From the information received it should be possible to create protocols for the upgrading of existing, and design of new, court facilities.

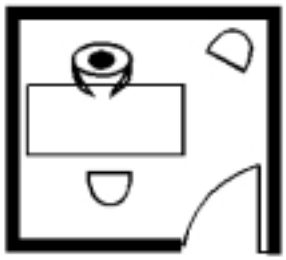
Interview rooms

Corridors and waiting areas are often used to conduct aspects of legal proceedings. Parties may negotiate with lawyers. Judges can send parties outside the court room to discuss settlement. Many courts provide small interview rooms in the waiting areas for this purpose. The Family Courts in Australia provide facilities for this type of negotiation. The following reviews of various architectural configurations seen in Family Courts have relevance to civil and criminal courts.

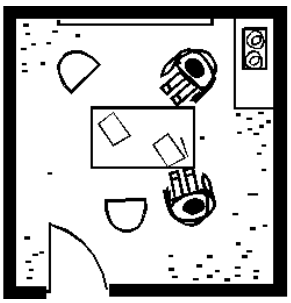
The Family Court in Perth has small interview rooms, each filled with a table and chairs. There is no natural light, only a low level of artificial light. Solid doors have small peep holes. For some, these rooms may be depressing and isolating, like cells. Litigants can be left in these tiny spaces for lengthy periods without water or visual relief. This may unnecessarily increase the stress felt by users.

Other courts such as the Family Court in Sydney provide discrete seating alcoves within the waiting area. Seating alcoves provide a suitable degree of acoustic privacy and distance between

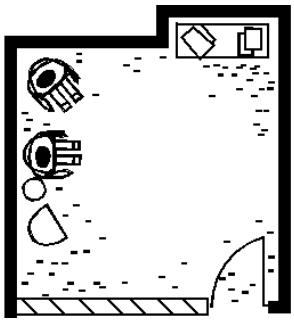
INTERVIEW ROOMS



CENTRAL LAW COURTS – PERTH, FAMILY COURT OF WA AND GERALDTON COURT — SMALL, DIMLY LIT, CELL-LIKE INTERVIEW ROOMS WITH NO NATURAL LIGHT OR VENTILATION, SPARSELY FURNISHED



ANTI-CORRUPTION COMMISSION OF WA — THE INTERVIEW ROOM HAS A MORE COMFORTABLE AND SPACIOUS FITOUT THAT WOULD BENEFIT FROM ARTWORK AND A GLASS WALL



ANTI-CORRUPTION COMMISSION OF WA — PRISONER INTERVIEW ROOM/ HOLDING CELL — THE WALL OF GLASS WITH LOUVRES AVOIDS AN ENCLOSED CELL-LIKE ATMOSPHERE; THE CARPET IS THE SAME AS IN THE DIRECTOR'S OFFICE; THE PRISONER'S CHAIR IN THE CORNER IS IN A PSYCHOLOGICALLY COMFORTABLE POSITION

parties. Users can partially see others and are not left feeling excluded and isolated during negotiations. The practice of lawyers negotiating out of the client's sight and hearing may protect their clients' interests, however, it may seem to some users that they are prevented from participating in their own cases.

Instead of enclosed interview rooms, courts should provide comfortable seating with work space in waiting areas, designed to allow privacy and separation of parties. There should be tables at working height in both open and 'defensible' locations.

In some circumstances, for reasons of anonymity or security, enclosed interview rooms are necessary. For example, the Anti-Corruption Commission of Western Australia provides comfortable, spacious, private interview rooms. The Anti-Corruption Commission also has a prisoner interview room/holding area which provides a model that courts might consider. A security glass wall prevents an enclosed cell-like atmosphere. The respect shown to prisoners by providing a pleasant yet secure environment may assist in reducing problem behaviour.

Communication facilitation

User feedback

Effective communication between busy governmental service providers and the citizens who utilise those services presents particular difficulties in the justice system. Being able to continuously obtain quality feedback from court users would enable the manager of court facilities to monitor the effects of changes implemented. Courts, like other public institutions, are now required to establish and meet performance objectives. In order to achieve a cycle of continuous improvement an effective feedback collection, evaluation and implementation scheme would be beneficial.

We believe communication between the users of the justice system, the legal profession and court staff could be improved by installing user feedback booths in every court waiting area. The Western Australian Ministry of Justice has a user feedback system of loose leaf forms placed in registries and waiting areas of the courts. This is potentially a positive and important way for the community to give constructive feedback so that the courts can understand and address users' needs. However, because the forms are in unobtrusive (though central) locations in the waiting and registry areas, many people are not aware of the forms. An informal survey elicited concerns about whether it would be safe to make a complaint while a case was in progress. Some users felt the forms were invisible to discourage use. Thus, the benefit of the court's innovation in providing for feedback was minimised due to the forms' design, placement and presentation in the physical environment.

The following are some ideas to be considered in developing an effective user feedback booth system:

- Placing the forms in a user-friendly context such as a 'booth' might encourage greater participation in the feedback collection process.
- The physical design of user feedback booths could encourage users to approach the booth, provide feedback, and feel comfortable using the service.
- Providing tea, coffee and water might encourage hesitant users to interact with booth staff and use the service.
- Booths should be staffed by well-trained volunteers and court officers representative of user groups[83] (including indigenous Australians, women and young people) trained to allow users to feel comfortable in seeking out information and discussing sensitive matters.
- Feedback booth staff should be pro-active and offer assistance rather than wait for enquiries.
- The feedback booths should provide referrals to other agencies, such as legal aid and victim support groups, and arrange appointments if required.
- Having a trained courts' representative with access to a telephone can maximise security and be helpful in emergency situations.
- A committee should regularly review information needs, user demands or complaints and recommend actions.

Proposal 10

Courts should consider providing user-friendly feedback booths in foyers, registries and waiting areas, staffed by suitably trained representatives of user groups to pro-actively seek feedback. Courts should introduce a review procedure to act on users' suggestions and make changes as appropriate.

Court communications

A significant part of the frustration people feel with the justice system seems to revolve around communication. The names of the courts are confusing to people in that the names do not communicate jurisdictional distinctions effectively. The tendency of justice system participants is to say 'people don't understand' when, in fact, sometimes the efforts at communication are ineffective because they are difficult to understand.[84]

Courts provide various brochures describing legal procedures. There are three issues concerning brochures or information pamphlets: content, display and location. With respect to content, general brochures may not provide information which is detailed or specific enough to be helpful.[85] While some very relevant information may be provided, one court user complained the

content is 'what I'd need for a school project and not what I need to work out what's going on and what to do in court'.[86] Written information pamphlets should be in plain English and other languages covering key issues including options for parties without legal representation and suggestions for witnesses. For example, witnesses need to know how to operate in the court: how to ask and answer questions, what is acceptable as evidence and what is not. This type of information should be delivered to every witness concurrently with the summons to appear.

Brochures and information pamphlets are often displayed as a confusing array of similar looking documents in a display stand located in an entry foyer, the registry[87] or a waiting area. The Family Court of Western Australia has a brochure stand in an exposed entry area of the counselling foyer, distant from the seating area. Although very visible, the location requires deliberate rather than 'discrete' access. Discrete brochure placement encourages use so that people will not feel self-conscious perusing the brochures. The Guardianship and Administration Board in Perth has brochures in the seating area displayed adjacent to the chairs for casual and discrete access.

A fair and just system must respond to the need for information effectively. Some forms and communications which courts send to users are unintelligible to non-lawyers. Orders, judgments, notices and letters should as much as possible be able to be understood by people without the need for translation by lawyers.[88] Information sessions should be available to the public to attend at anytime in order to ask questions about court procedures. All courts in Western Australia should consider offering information sessions, similar to those provided by the Family Court.[89] An aspect which requires further investigation is whether to provide information on the life disruption and stress associated with legal proceedings and, if so, what information should be provided and how.[90]

Proposal 11

Court communications and procedures should be simple, straight forward and clear enough to be understood by ordinary users.

Information services

For the law both to be, and to be perceived as, fair and just, all court users should be entitled to understand what is happening and to participate in an informed manner in their cases. The cost of accessing the justice system increasingly prevents ordinary users from being represented by lawyers. Currently many litigants who represent themselves report being disadvantaged and treated like hindrances.[91] Some users feel they cannot receive a fair hearing without having a lawyer.

There are currently no statistics kept by the Ministry of Justice on the increasing numbers of people representing themselves. However, with limits on the availability of legal aid and a majority of the community unable to access legal aid in any event, it is necessary to acknowledge the phenomenon and deal with the psychological consequences of people who feel closed out of the justice system. Many people do not qualify for legal assistance or, they cannot afford or do not wish to spend money on lawyers. Because the court's language and procedures are so complex and the system cannot be understood or used without lawyers, people feel they are denied access to the courts. These people may feel resentful and abused because they must participate in a system they can neither understand nor afford. The psychological results are evident in the submissions received by the Law Reform Commission of Western Australia.[92]

To address this problem consideration should be given to the development of information services,[93] with the object of communicating a sense of openness and accessibility of the justice system. The following is a list of ideas, not necessary exclusive or comprehensive, which might be considered when developing information materials and associated facilities.

Facilities:

- Access to computers, standardised forms and facilities for photocopying, faxing and telephone conferencing;[94]
- Access to translating and interpreting services;
- Telephone connections to other agencies such as Legal Aid, the ALS, and other social services and organisations;
- Information sessions with mediators, lawyers and court personnel;
- Helpful, well-trained and understanding staff;
- Videos, guide books and audio tapes available for loan and on the internet to allow users to prepare documents away from the court;
- Cafés and eating areas in the centre, adjacent to it or nearby;
- Safe, affordable child care facilities; and
- Ready access to shop front legal advice.[95]

To be effective these facilities must be visually accessible, safe and user-friendly.

Services:

User information needs should be determined after comprehensive studies,[96] particularly of the requirements of self-represented persons. This should

include enabling materials, 'how to do it yourself', in addition to information about the law in a variety of user friendly formats.[97]

Content:

- Examples of how to prepare documents, mediate or negotiate, and, as a last resort, suggestions for 'how to do it' in court;
- Do-it-yourself checklists and guides;
- Case studies and examples of actual cases as well as simulation guides;
- Library facilities, including relevant law books, manuals and self-help discussion papers;
- Reports of past users' legal and life experiences with the justice system; and
- Computerised and Internet information.[98]

These materials may already exist and be available from Community Law Centres, Legal Aid, the Australian Legal Service and other sources. The object would be to bring all materials together in one place at the Court.

Proposal 12

Courts should consider providing self-help centres to facilitate access to information and services for all users but particularly for self-represented litigants.

Special needs

There is a range of special needs for users which the justice system should accommodate.

Access for users with disabilities

Access for court users with disabilities should be convenient and respectful of their needs.[99] Rear service lifts, temporary ramps and wheel chairs placed in exposed positions in front of inaccessible witness boxes marginalise people with disabilities. Some counter space seating should be provided in Registries and at least one space should be at wheelchair height. The Supreme Court Registry and the Guardianship and Administration Board have wheelchair accessible counter space. Other courts should provide similar facilities for disabled people.

Most court designs prevent or limit access by people with disabilities to jury boxes, witness stands, defendants' docks, bar tables and judges' benches. The tradition of judges and juries being raised above the floor of the court causes these difficulties. Creating these different levels within court rooms is expensive, providing access to all court room facilities for disabled people is even more so.[100]

Other people with special needs include the aged and frail, those with hearing or visual impairments, intellectual disabilities or psychiatric illnesses, and those who speak a language other than English as a first language. Australia, as a multicultural society, has many citizens who experience language barriers. It is necessary that interpreters be available and accessible before, during and after court proceedings. Some people have negative reactions to crowds, to enclosed spaces or to police officers walking around carrying guns. While not all needs can be fully met in all courts, court planning processes should avoid stigmatising or marginalising people with special needs.

Indigenous Australians and others

The scope of this study does not permit any significant examination of the needs of indigenous people nor those without English as a first language. Any systematic study of court consumers' needs should include full consultations with indigenous and migrant groups. Some research involving indigenous Australians has already identified architectural and psychological issues in court design.[101] Concepts of space, cultural practices and the use of public art should be addressed in future research.

The justice system should consider alternative dispute resolution strategies specifically tailored to the cultural requirements of indigenous Australians and others.[102] A circle is a traditional model of aboriginal dispute resolution. The elders are at one point; the 'plaintiff' with his or her family and supporters at another; and the 'defendant' and his or her family and support group at another. They make a triangle within the circle. The equal prominence and inclusion of all participants, the emotional support available for victims and defendants, and the equality of the elders provides a model which may be relevant for other users. Further research should be considered.[103]

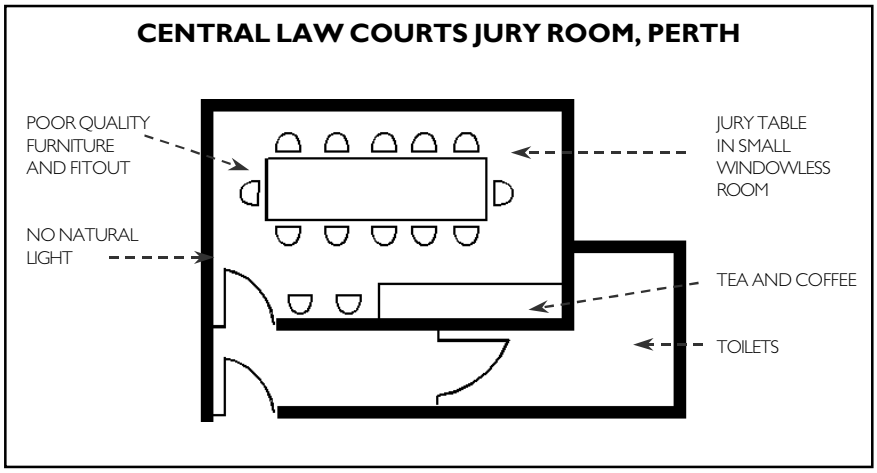
Proposal 13

A study of the involvement of indigenous Australians with the justice system, with particular emphasis on alternative dispute resolution and developing services and facilities which meet the needs of indigenous Australians and other population groups from non-English speaking backgrounds, should be considered.

Juries

Jury room design

The jury system depends on the support and good will of the community. Yet many jury rooms are cell like spaces with low quality fittings.[104] The design of jury rooms is often physically adequate but psychologically impoverished. Jurors, while doing a service for the community, are confined for long periods in small, dark, crowded rooms with no windows. Deliberations can be tense and the atmosphere stressful.[105] Jurors have to cope, generally unassisted, with the emotional stress and life disruption associated with jury service and exposure to traumatic details of cases.[106]

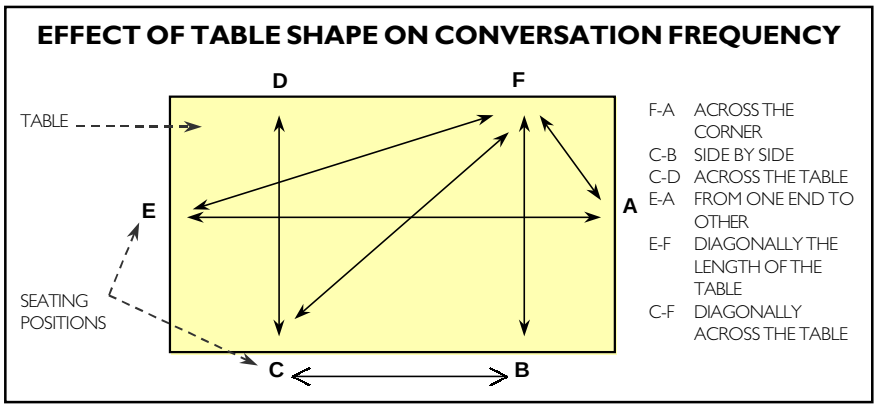


The disproportionately small allocation of architectural funds and space in existing courts by implication may indicate to jurors that they are not important. Respectful treatment would provide jurors with quality space and fittings comparable to that enjoyed by other participants in the justice system.

Natural light, an outside view that does not compromise jury isolation, comfortable furniture, art work and psychological withdrawal space, in which to retire for a break from tensions in the deliberation process, are necessities to be considered in future court design.

Jury tables: rectangular vs round

Tables in all jury rooms inspected were rectangular. Seating at rectangular as opposed to round tables has an impact on speaking patterns and deference behaviour.[107] More dominant jurors are likely to seat themselves at the head of the jury table. It is more likely that a person at the head of the table will be selected to be jury chairperson.[108] Round tables are more likely to accord equal status to all participants.[109]



Women are often disadvantaged in conference table situations by the social habits of men who interrupt, raise their voices in discussions, and silence others by often unnoticed social dominance behaviours.[110] Giving jurors written instructions about how to provide equal opportunities for all members to speak and be heard may be of some value.

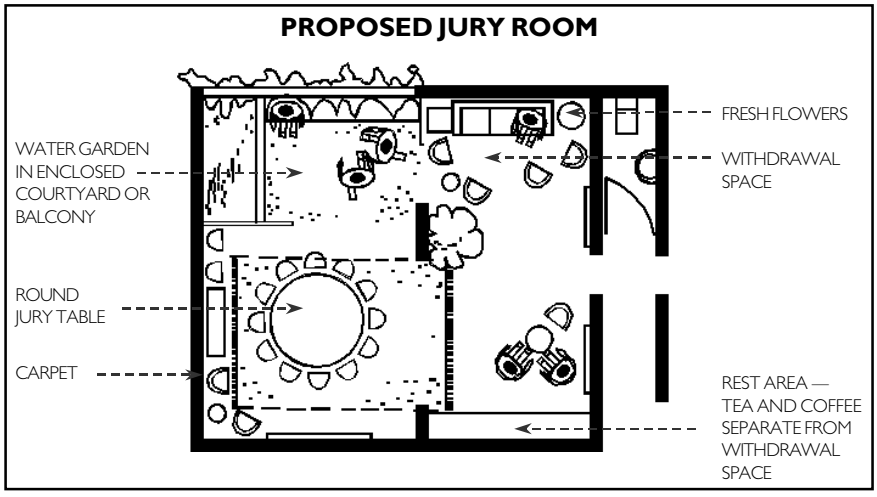
However, proper design messages should be considered.[111] No psychological distance or withdrawal space away from the jury table was available in the jury rooms observed in Western Australia. The possibility of a dominant personality or group controlling the jury increases without a withdrawal space. Particular jurors may feel that their psychological space is violated. This increases the possibility of stress related difficulties or distortions in the decision making process.

Courtroom contact

There are a number of unresolved issues about courtroom contact between jurors and other court participants. As there is little or no research on this topic, it is useful to identify some of the issues which merit further examination.

Some judges leave jurors in court when absent because it is preferable to confining jurors to small, windowless jury rooms. This practice raises a number of questions:

- Should jurors remain in the court room when the judge is absent if there is the potential to be influenced by the conduct of others in the court
- Should jurors see witnesses and families of victims and offenders without having the judge present?
- Given that courtroom architecture currently places jurors in contact with others, should the jury box have a screen or baffle to reduce contact between jurors and parties, witnesses and their families in the court room? Is contact desirable?
- Can a jury complex be designed to serve several court rooms?



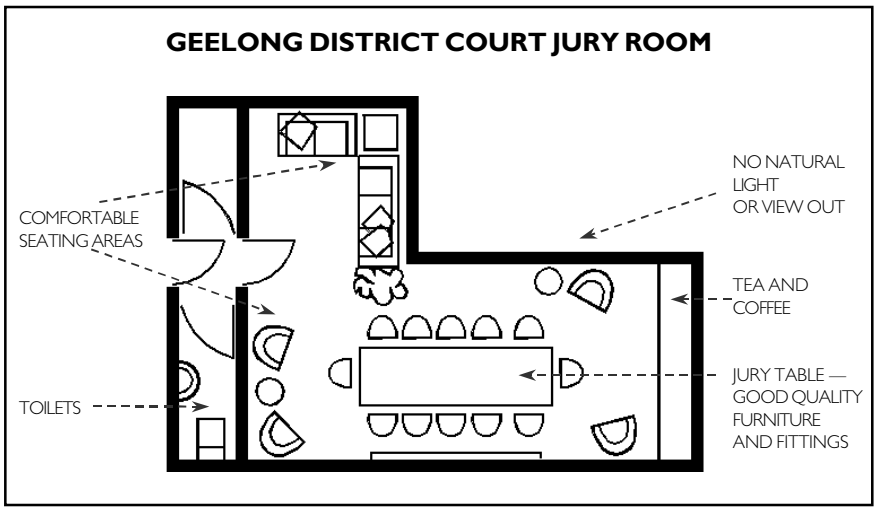
Emotional ties with parties, witnesses and their families may develop, particularly during long trials. Contact with the parties and their families permits jurors to see the other participants in the court room drama as people with whom they bond emotionally. In criminal cases, defendants and victims become real, not abstract, persons. Does that affect the likelihood of the defendant being found guilty? This is a complex area requiring further investigation.

Proposal 14

Research should be undertaken to develop instructions for juries to allow each juror an equal opportunity to speak and be heard during deliberations.

Good models

A jury room at Geelong Combined Courts in Victoria provides an alcove with comfortable couches and lounge chairs away from the jury table. Jurors are able to separate physically, and more importantly psychologically, from others. Withdrawal space can assist in reducing tension among jurors.[112] In long or difficult cases the opportunity to relieve stress or break an impasse, by withdrawing for a time, is particularly important.



Proposal 15

Jury service should be recognised by providing pleasant jury room facilities including round tables, natural light, outside views, withdrawal spaces, comfortable seating, and good quality fittings and furnishings.

Security

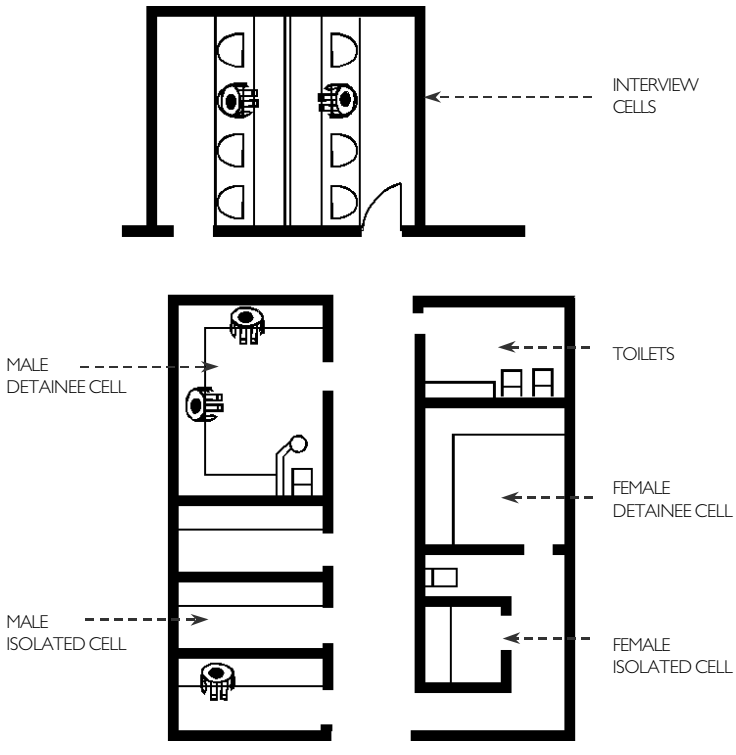
This topic, perhaps more than any other noted in this sub-section, requires further in-depth study. The current power to provide adequate court security is limited and legislative change is required in order to enable proper security screening at courts in Western Australia. Security is more than providing locks, closed-circuit television and monitoring equipment. Good architectural design can help people feel safe. Moreover it is possible to make necessary security procedures discrete.[113]

Holding cells and detention areas

One might assume that the people experiencing the most stress on entering a court building arrive at court in a secure prison vehicle or from a police station. Some of these individuals may be aggressive or violent. The environment provided for their care is of utmost importance. Cells in all facilities inspected for this project except one[114] had concrete floors, stark 'anti graffiti' painted walls, hard benches, and no natural light or outlook. These holding cells and detention facilities are psychologically deprivational. There is an absence of sensory stimulation which can cause immediate and depressing effect on users.[115]

Some believe this is appropriate accommodation for people in custody who have been charged, are unable to get bail or have been denied bail and are

CENTRAL LAW COURTS CELLS, PERTH



awaiting court hearings. However, to hold individuals in demeaning conditions before their case has been heard merely because they cannot obtain bail, contradicts notions of justice, and signals that accuseds are considered guilty before their cases have been heard.[116]

From a simple design point of view, respectful waiting areas for accused people may reduce disrespectful or aggressive responses by them to furniture, fittings and officials. Studies indicate that environments of deprivation make residents devalue themselves and lose self-esteem and self-respect.[117] A vicious cycle of damage, repair and ever greater damage is the inevitable result.[118] Respectful design is likely to reduce maintenance costs and may reduce the level of hostility to which police and court staff are subjected.[119] This area merits further research.

Some structures are capable of catering to heavy duty public use while at the same time providing a reasonable level of comfort appropriately respectful to users.[120] Respectful design does not preclude the safety requirements necessary for deaths in custody issues.[121] Concrete terrazzo floors for example are durable, tough, easy to clean and provide visual relief. They permit simple artistic inlay patterns which can communicate to the user and provide some psychological relief during waiting periods. Similarly, walls can have detailing without compromising safety.

More importantly, respectful design of secure facilities may present a vision of equality before the law. This may be particularly relevant where users are from traditionally marginalised groups and have experienced hostility those associated with the justice system. Design improvements can be also be achieved by holding the charged person in a secure waiting area with access to natural light and a secure garden or courtyard space.

Prisoner detention areas and interview rooms at the Anti-Corruption Commission are carpeted with the same carpet as is used in the Directors office. Prisoner areas are spacious. They have comfortable chairs and glass walls with louvres to allow an outside view. Current newspapers and magazines are available for prisoners to read while waiting. There are stringent security measures as high risk prisoners appear before the commission. The Chairman of the Anti-Corruption Commission, Mr O'Connor QC, has a policy of respectful and humane treatment of interviewees and prisoners. People are treated with respect and given a pleasant soothing environment to encourage them to return respect and reduce hostility and anger.

Just as the visible physical connection of the police buildings to the courts may reduce the community understanding of the courts as independent, a lack of clear distinction between police cells and court holding areas may have a similar message. When corridors connect police and court facilities,[122]

a clear change in the architecture and interiors, design, surfaces, colours and finishes can visually indicate the independence of the courts from the police.

Work areas for police in courts are of a noticeably lower standard than those provided for some other users in court buildings. Improving the conditions of secure areas is not just for the benefit of prisoners. Security staff and police are essential participants in the court system. Their value to the justice system should be recognised by providing more pleasant working environments.

Art work

As well as being pleasing to the eye, art may also have a didactic function. It may symbolise justice, openness, fairness, protection, order and benefit society is accorded by the law. Some classical sculptors symbolised justice as a maiden holding scales who would evenhandedly adjudicate between the parties. German artists in the sixteenth century put a blindfold on the figure to indicate the corruption of the courts. Blindfolded *Justitia* became so well-known it is almost an artistic cliché. Ironically, the bandage which first indicated the folly of the law reversed its meaning and came to represent impartiality.

There are many individuals and events in Western Australia's legal and community history which could be celebrated, commemorated or recalled in shame, for example, women's franchise, stolen children, aboriginal citizenship and ownership, past judges and legal milestones. Any of these might make suitable themes for court art work, which could become part of a stock of publicly owned art. Temporary exhibitions reflecting anniversaries or issues of contemporary concern might also be considered.

Art can communicate belonging and inclusion to various user groups. Art values the diverse nature of the community. The Aboriginal Land Rights Tribunal in the Federal Court in Western Australia features traditional and modern indigenous art.

In addition to the symbolic aspect there is a less obvious role art and architecture can play in the courts. The physical surroundings and atmosphere of the courts may influence behaviour and impressions of legal proceedings. Surroundings which are experienced as 'institutional' and cold may communicate negative impressions, while considered surroundings may enhance respect for the justice system.

This can be done in a playful and even witty way. A painting hangs at the top of the stairs at Geelong Combined Courts in Victoria. It is of a youth casually sitting on an old stone set of steps leading up to the old courthouse. The new court stairs appear to continue into the painting. The very grand and serious staircase turns into a modest set of steps. The new leads into the old. And sitting at the top, looking down over all this pomp, is a teenager.

An art connoisseur might recall political engravings created during the peasant wars in Germany where the medieval pyramid of authority was subverted by placing a peasant at the top. To young people, all too frequent users of the courts, the painting might say that they belong, they're on top. To the general public, it communicates warmth and permission for comfortable behaviour in a formal setting. The grand staircase indicates the importance of the courts. The painting dismisses notions of intimidation and supports users comfortably participating in a grand experience. Formality and intimidation or informality and disrespectful behaviour are not the only options. Art can assist by communicating respectful celebration of the justice system and its relevance to communities and individuals. As most lay users spend considerable time in court buildings waiting: waiting for their case to be heard; waiting to be called; waiting for the jury to deliberate; waiting for the judge to come back from lunch. Art can help to make the time flow more easily and take the mind off court business.

Some courts have made a good attempt to integrate art. The Family Court of Western Australia has a good basic colour scheme and a collection of prints. The use of natural light and views in both the public waiting and court areas provides a positive background. However the prints are small and tend to disappear in the large spaces in which they are displayed. Symbols and sensory stimulation are minimised. According to a court counsellor, the overall atmosphere is perceived as somewhat sterile and bland by some users.

The Central Law Courts (Petty Sessions, Local and District Courts) have, as one person interviewed for this study commented, 'police station aesthetics'. This was perhaps unfair to some police stations which display constantly changing portrait galleries to brighten up their public waiting areas. The Central Law Courts, however, lack artistic or other community and legal symbols. If the Family Court is considered bland, the public entry and waiting areas of the Central Law Courts can be described as austere.

Tribunals sometimes are more innovative than courts. The Western Australian Guardianship and Administration Board is investigating the most appropriate type of art for its client group. The Board is considering the impact of art works on particular users who may have special mental states and perceptual sensitivities. For example, schizophrenics may have emotional reactions to certain shapes and colours. This issue is relevant in courts, where users may experience a range of emotions, including fear, hatred, anxiety, boredom and relief.

Appropriate design, together with appropriate art work, can symbolise the often important life events people experience in the courts. Art serves not just as something to look at, but a practical device to help people come to terms with the emotional, social and psychological experience of the court proceedings.

Proposal 16

Art should be integrated into courts to assist in making a respectful environment. This might include temporary exhibitions, works commissioned and integrated with architectural design, fittings, and gardens. Particular attention might be paid to works by local artists, diverse cultural representations or items of local or state significance.

COURTROOMS

Courtrooms are complex spaces. They require separate entrances and circulation systems for judges, prisoners, the public and, in some cases, juries. Courts use different height elevations for different participants. Courtrooms increasingly include security devices, computerised information systems and closed-circuit television systems. Separation, elevation, information; these pressures make the design of courtrooms a costly and difficult procedure.

These concepts are also being reviewed in light of new demands on the court system. Separation may be needed to protect vulnerable witnesses from alleged abusers, and estranged partners from each other. Prisoners are not the only ones who pose a security risk. Separation of prosecution and defence from a shared table may be useful to provide more effective participation by other court users. Elevation of judges has served to ensure that the tallest standing lawyer cannot look down on the shortest sitting judge. This practice may need to be rethought in relation to psychological evidence about how people experience space. The information needs of 'the court' (usually meaning the judge) are given precedence over the information needs of witnesses, self-represented litigants, and members of the general public.

Courtrooms in Australia have remained largely unchanged in their traditional configurations for at least a century, while new technology has been added around the existing shapes and spaces. Judges sit in the middle at the front on an elevated bench. Prosecution and defence lawyers sit side-by-side in the space below the bench facing the judge. Witness boxes are usually on one side, jury boxes on the other. Prisoners' docks are at the back in some criminal courtrooms, or on the side, opposite the witness box, in others and both are elevated. It can be argued that this layout has been so thoroughly tested over such a long period it would be unwise to tamper with it.

There are, however, some problems with traditional courtroom layouts.[123] There are also issues related to pressures of time and space and flexibility. Below we examine options for the three principles: separation, elevation and information.

Space and distance

Psychological researchers, pre-eminently Edward T Hall, have theories about the way distances are developed, maintained and experienced in social interactions.[124] Hall's study of the communication function of spatial behaviour focuses on what he calls proxemics or 'the interrelated observations and theories of man's use of space'. Not everyone experiences space in the same way. The variation is due to individual styles and diverse cultural constructs.

In Western culture, according to Hall, 'intimate' distance, from touch to 45cm, is for intimate exchanges between very close friends. Subjects of a personal nature can be discussed at this distance. In certain situations this intimate space is invaded unavoidably by strangers, for example, in a crowded lift. But, this situation is usually handled by avoiding eye contact and squeezing in stomachs. Insults delivered at this distance could be particularly threatening.

Personal distance, 45cm to 75cm, expresses a certain degree of familiarity. A whispered conversation between barrister and solicitor might occur at this distance. However if a violent prisoner was to pass this close to a vulnerable witness, it might be experienced as intimidation.

'Social distance', 1.2 metres to 4 metres, is suitable for impersonal business. People working together tend to use this distance. It is easier to talk informally, use overlapping speech, and adopt a casual pose when conversing over this distance. During conversations of any significant length it is more important to maintain visual contact at this distance than it is at closer distance. This is the distance participants are placed from each other in most tribunal settings and in some children's courts.

'Public' distance, 4 metres and over, is appropriate for declarations, speeches, and other formal exchanges. Normally a careful choice of words and phrasing of sentences as well as grammatical or syntactic shifts occur at this distance. The term 'formal style' is appropriately descriptive. This is the distance lawyers usually are from judges, a situation both find comfortable. There is cultural shaping of distance perceptions. However as this is also the distance witnesses and other trial participants are from judges and lawyers, the distance may cause discomfort, hesitation, and inability to speak in a natural or fluent manner and an inability to comprehend what is being said to due to the formal nature of the exchange.

Another elaboration of the relationship between space and psychology was provided by Sommer using the concept of 'personal space'.

Personal space refers to an area with invisible boundaries surrounding a person's body into which intruders may not come.[125] That is the 'territory' a person carries and regards as his or her own. It is an emotionally charged space which can evoke reactions if penetrated. It is also culturally constructed.

The personal space bubble can be conceived as an extension of 'self' that contracts and expands according to circumstances, culture and the person's own perception (conscious or unconscious) of how much protection the 'self' requires. The amount of protection required depends, in turn, on the degree of perceived threat and the degree to which some persons are perceived as persons more threatening than others.

The adversarial nature of cross-examination is an unfamiliar psychological experience for many people. It would not be surprising if research revealed that many women and members of some minority groups are not socialised to accept adversarial or aggressive questioning in a personally neutral way and this subject is one which merits further investigation. Hostile questioning can be interpreted as personally insulting and debilitating by court users expecting a 'level playing field' rather than a 'football field'.

Violations of culturally defined distance rules or boundaries of social space can cause a range of reactions: misunderstanding, discomfort, and feelings of violation, anger and hostility. These violations could be in either direction: inappropriate intimacy or excessive distancing. And, as noted above, it is probable that the distances will be experienced differently by people from various cultural, social or occupational groups. According to one study, schizophrenics try to retain a larger 'extension of self' ' personal space ' than non-schizophrenics. Another report[126] found that the body buffer zone of a group of violent prisoners was generally larger when compared to a group of non-violent prisoners. Rear zones were generally larger than front zones in the violent group.

It is likely that court users represent many groups in society, including persons with a mental illness or those associated with violence. Research studies indicate it is important to consider the needs of court users when providing for and varying amounts of personal space. It might be useful in some situations to have some court facilities which permit a degree of flexibility in the distances between participants.

Audibility

As a general principle defendants should be able to hear and see the evidence presented against them. The design guide for Magistrates Courts in England and Wales[127] specifies that acoustic and environmental conditions in the dock should be the same as those prevailing in the body of the court.[128] Generally it is harder to make out what speakers are saying if the listener must look at the speaker's back. In many courts most participants including the victims, witnesses and defendants sit at the rear of the court separated by railings or barriers facing the backs of the lawyers.

The furniture layout, the distances involved, the exposed nature of the witness box, the lack of adjacent support people and the adversarial nature of the

questioning combined with the formality and lack of familiarity of the proceedings mean that most people may not be comfortable speaking in court. Unlike lawyers, most people are not trained to be verbally competent in the courtroom situation and are at a disadvantage.

Defendants are on the side of the courtroom and are able to see the lawyers' faces rather than the backs of the participants, however victims, family members and members of the public are usually treated to a row of backs. This makes it harder to decipher the proceedings. The distance of observers from witnesses, often at least twice the distance of the judge from the witness box, means that quietly spoken responses are frequently inaudible.

The other side of audibility is not being overheard in private conversations. Participants should be able to instruct their lawyers without being overheard. Thin partitions can make private interview rooms at the back of the prisoner's dock somewhat more private. Although solicitors and barristers are usually conveniently placed in relation to each other and can usually transact business confidentially, other participants in the trial process are less able or unable to communicate privately with their lawyers.

Audibility is a problem which many modern courts have overcome by microphones, carpeting and good acoustical design. Listening also involves seeing and interpreting non-verbal language such as raised eyebrows , mouth expressions, or nervous expressions. These are all signals which juries may take into account in weighing up the credibility of witnesses and defendants. Perhaps other parties should have a similar opportunity to be able to more effectively instruct or monitor their lawyers.

Other non-verbal gestures, including everyday facial expressions are used infrequently in the formal setting of the courtroom. Smiling and eye contact are more than social courtesies for many people. They provide cues indicating that it is acceptable to speak. Without these silent visual invitations, it is more stressful to answer questions in the witness box. For members of some cultural groups on the other hand, eye contact with superiors is rude. Thus issues of audibility, broadly defined, raise further issues of gender and culture and are not addressed merely by better acoustics.

Visibility

Visibility is both a security and an information issue. Surveillance over court users by security staff can help provide protection for participants. Increasingly surveillance is supplemented or replaced by cameras or electronic systems, monitored in a central location.

For those in the courtroom, appropriate visibility requires being able to see the faces of speakers. Judges, juries, witnesses in the box, and defendants in the dock (except where the dock is at the back of the courtroom) can usually see the speakers' faces. But others may be disadvantaged.

Visibility may signal being 'on display' or being an exhibit. In part this is a physical issue. Court designers sometimes build in modesty panels on witness boxes to shield witnesses legs from the viewing public and to maintain a degree of privacy. However, the court process itself may expose personal matters to scrutiny by outsiders. Sometimes a person may be shamed by the very fact that charges have been laid. In some cases applications may be made for the suppression of names, or for closed hearings. As with audibility, it may not be in the interests of justice for complete visibility to be achieved.

One aspect of visibility (or invisibility or concealment) relevant to the experience users may have of the courtroom is the judge. Not only is the judicial body shielded from public view by a robe and the bench, but the wig elaborately covers the hair. In a religious setting the covering of the legs and hair might indicate modesty. In the court room it denotes power and tradition. In the higher Western Australian courts, it is not only judges who wear purple or red gowns and cover their head. Barristers, similarly, wear wigs and gowns. Changes to these traditions are happening in Western Australia. In recent years magistrates have changed to wearing business clothing and lawyers appearing in the lower courts dress similarly.

Arguments to retain traditional legal attire include the reminder that judges are acting as impartial servants of the law, not as individuals. Judges in 'full attire' are treated with more respect. Plaintiffs and defendants feel that they are served by a 'real' judge during their 'day in court' if they receive the full ceremonial treatment. Judges are more anonymous and, perhaps, safer if concealed behind their traditional attire. These propositions are at best speculative. If judges need reminding to be impartial, surely magistrates need even more. Magistrates are not necessarily treated with less respect because of their lack of judicial robe, nor are Supreme Court judges sitting on Parole Boards. The 'day in court' argument might relate more to whether the judge listened to the person's story rather than what the judge was wearing.

This is not to suggest that there are not very real advantages in having the courtroom enhanced by handsomely-attired judicial officials. However, most of the arguments advanced for the visible displays of costume are not based on empirical research. As Garapon, the French judge and sociologist points out, ceremonial displays are important for every society.[129] The issue, however, is about the messages given and received by the use of judicial robes and wigs.

Flexibility

One of the few predictions that can be made with any certainty is that demands placed on courtrooms are likely to change in ways which cannot be foreseen. In such technologically evolving society, flexibility of furniture and layout are highly desirable. One common view amongst court officials is that only furniture bolted to the floor is strong, durable and able to withstand

abuse. However, careful design can ensure that flexible furniture is just as strong as permanently attached equivalents. Just as importantly, good design can reduce the risk of abuse. It is also reasonable to build in a budget for repair and replacement to ensure that the facilities are maintained in good condition.

New technologies require cabling and power connections. Flexible furniture needs to incorporate adaptable connection systems designed to suit the requirements of computer screens, video displays and microphones. Consideration should be given to integrating these facilities so they do not dominate the court environment.

Flexible court buildings, amenities and fittings will allow courts to respond more quickly to user needs. This flexibility may involve minimising the number of levels in courtrooms, circulation systems and layout styles. It may also permit greater use of court rooms for pre-hearing consultation or mediation sessions, smaller and less traditional court layouts, and more attention to comfort.

The table and layout used for the hearing can be re-arranged readily in both size and layout to suit different needs and types of cases. The table should be able to be separated to increase the distance from the judge in some cases where greater security is required.

The needs of judges and other court workers for actual and psychological security is an important consideration as it is for users and these needs should be examined further. Court models with flexible furniture and chairs not bolted to the ground may challenge traditional notions of a court. However, the ideas may provide significant opportunities to improve user participation, access to justice and community satisfaction while reducing construction costs of courts, providing flexibility, easing the difficulty and cost implications of predicting future court facility needs, and assisting in the reduction of case delays associated with inflexible court rooms.

Proposal 17

Prior to commencing significant renovations or construction of court buildings, new flexible models for civil and criminal courts should be researched, developed and trialled.[130]

Support for participants

Court proceedings can be stressful experiences, particularly for those facing severe penalties, those who have been victims of serious crimes and those who are unfamiliar with the court setting. Some lawyers guide, protect and provide reassurance for their own clients and witnesses. But this is less realistic in the high-volume lower courts, and is not available for self-

represented litigants. Nor are lawyers necessarily the best qualified people to provide moral and emotional support. Many defendants, applicants, witnesses and other participants bring along their own support team of family members, friends, or colleagues.

Where should the support team sit in the court? Generally they sit at the back. If the participant is self-represented, he or she may be 'allowed' to sit at the bar table, but the supporters remain in the public seating area. In such a case, either the participant sits alone without support, or he or she has to turn around using unfamiliar poses to consult support group members.[131]

Witnesses are usually placed in a box removed from anyone in court who might provide support. This may be important in cases where contamination of witness evidence is considered a real possibility. But in other situations it may increase stress, both because of the social isolation produced and the imposition of a 'public distance' in questioning. The witness being placed in an exposed witness box, being looked down on by a robed and wigged figure, speaking across an unfamiliar distance, and subjected to unfamiliar scrutiny may enhance visibility but may also be experienced as something akin to abandonment and isolation.

Re-thinking time and space

Courts are bustling places, with people entering, being processed and leaving. This is particularly so in the lower courts. Despite the busyness of the court, registries and foyers, court rooms are empty a majority of the time. Most Western Australian courts operate between 10am and 1pm and from 2pm to 4pm giving an operational time of five hours per day. There are many reasons for the limited use of such costly public facilities given the delays many people experience.

Scheduling is obviously a complex administrative issue. Greater use of mediation for civil matters has reduced the number of cases settled 'on the steps' of the court which allows for better scheduling. Pre-trial conferences can reduce contested issues and produce better estimates of likely trial lengths. Not too much faith should be placed on such measures to reduce demands for court space. The most comprehensive study done in Australia on a 'sentencing indication scheme' (getting judges to indicate what the likely sentences would be if the case went to trial) suggested that it had no net effect, and should be abandoned. There are many positive reasons for encouraging mediation, pre-trial discussions and shortening trials. But it is unlikely that such measures will have a major impact on demand for court space.

Night courts and weekend courts are rare. The few trials of such arrangements in Australia[132] were abandoned because of professional resistance and logistical difficulties for court staff. The experience in Prahran in Victoria reportedly suggested that it may have been used disproportionately by high-profile

people trying to avoid publicity. Nevertheless, the current hours of use do not cater to some users' convenience and mean more physical court space and cost is required.[133]

Greater use of shared community facilities such as local authority council chambers and meeting rooms for community courts might alleviate some of the demands for space. As computer and video technology becomes more widespread it may also be possible that suitable spaces for court business could be shared with multi-media teaching laboratories, Internet cafés, or graphic design studios. More reliance on tribunals, mediation and other alternate dispute resolution facilities will also have an impact on demands for court space.

The use of 'virtual' courtrooms may be an appropriate strategy to relieve stresses on court space and time. To some extent, virtual courtrooms are currently used with regard to on-the-spot fines, and parking offences. In South Australia they are used for some drug use and possession offences, and speed camera infringements notified through the mail. Prisons and other spaces can be incorporated into a court hearing through the use of video linkage. This practice is now fully operational in Victoria, and allows more efficient remand and mentions hearings. Litigants can be separated physically, but brought together electronically in a single real courtroom. This is particularly effective for vulnerable witnesses, or offenders who are a potential threat to other participants. The various participants can be in the same court building or in different parts of the world.

There are a number of psychological and legal issues resulting from technological procedures which require further consideration. These include whether juries respond differently to witnesses appearing in person from those appearing via a television monitor, or whether remand hearings are more likely to result in refusal of bail if the suspect appears via closed-circuit television from a prison setting. These issues require further study[134].

Other factors affecting the perception of remote witnesses may include:

- The inability to make eye contact;
- Lighting: bright and clear or dark and shadowy;
- The camera angle: the accused's side profile or face on;
- The background: bland and striped or warm with dappled light;
- The distance from the camera: head and shoulders or full body shots;
- Scale and size references;
- Reverberation times of the voice recording; and
- The context or lack of context.

Lawyers regularly advise their clients on what colour and type of clothing to wear in court in the knowledge that it affects how they are perceived. This

raises issues of the control, choice, and knowledge people have about how they project themselves through visual media. How will outcomes and justice be affected by different projections? Who will have the opportunity to create these spaces? Further research is needed into the psychology of virtual architecture and its effect on legal outcomes and justice.

Increased use of video links might increase clear-up rate of cases where the suspect is in custody interstate. For persons pleading guilty, the use of video sentencing hearings could avoid costly transfers under secure conditions. For those pleading not guilty, mentions procedures and possibly even committals could be handled in this way. The issue relevant to this sub-section is that electronic technologies will be used in a variety of ways. By implication, the architectural and psychological implications should be examined.

The cost of sophisticated high-technology court facilities which can handle cases nation-wide or internationally is high. The technology is evolving so rapidly that the 'state of the art' is obsolete in a few years or, even months, in some cases. Telephone companies, computer vendors, translating and interpreting services and computer-assisted telephone interviewing services can operate their systems from a single place. Judges in Perth could hear cases about litigants in Broome using a 'virtual courtroom' located on a computer in Sydney, forensic tests analysed and entered in Adelaide, and witnesses called from Dublin.

Some suggest the evolving technology will mean increasingly fewer cases are heard in smaller regional and country courts, as more pressure is placed on the capital city courts to go 'high tech'. However there is another possibility, running counter to the centralising hypothesis, namely, that hand-held technologies will allow justice to be dispensed almost anywhere. Just as police are able to administer breath tests by the side of the road, so judicial officers could adjudicate on matters in dispersed locations with full access to on-line information. Rather than having one massive mega-court in Perth with expensive equipment, we could see a variety of small dispersed rooms used as courts, with magistrates and judges carrying around satellite phones linked to computers.

In Singapore, some persons charged with minor offences can already plead guilty electronically, and have their case adjudicated on-line by a (real) judge. The Family Court in Queensland has developed a simulation package to estimate the likely property settlement in divorce cases. It would require only one extra step for the parties to agree electronically to the proposed settlement. This could be seen as accepting the decision of a 'virtual judge'. Various civil matters could be similarly handled, although this might be conceptualised as an electronic equivalent of mediation rather than a transfer of real judicial business to cyber space.

Cyber technologies imply radical changes for users of the justice system.[135]

Users may feel their cases will be prioritised or minimised, serviced like telephone customers or debited like on-line credit card users.

Court users who find the current legal process too anonymous may experience the impact of technological changes with increasing anxiety, fear or exclusion. These issues require thoughtful consideration.[136] Any changes made to the system as a result of technology and innovations should be monitored carefully. Cyber technologies may, in fact, exclude users from the justice system.

Alternative procedures

In this sub-section, 'courts' have been discussed as homogeneous units. Different courts, in fact, vary procedurally, in complexity and in psychological impact. Many judicial, quasi-judicial or administrative procedures attempt to resolve matters without entering a formal courtroom. One of the most promising of these, at least in juvenile matters, is the introduction of family group conferencing, offender-victim mediation and similar procedures. In Australia, a key theoretical aim is 'reintegrative shaming'. That is, attempting to bring offenders back into society by getting them to recognise the damage their actions have caused. This is a radical attempt to reshape the psychology of the court process by incorporating participants more fully into the punishment process and inviting them to share in responsibility decisions. If these experiments prove successful, greater demands will be placed on other parts of the judicial system to more effectively involve other participants.

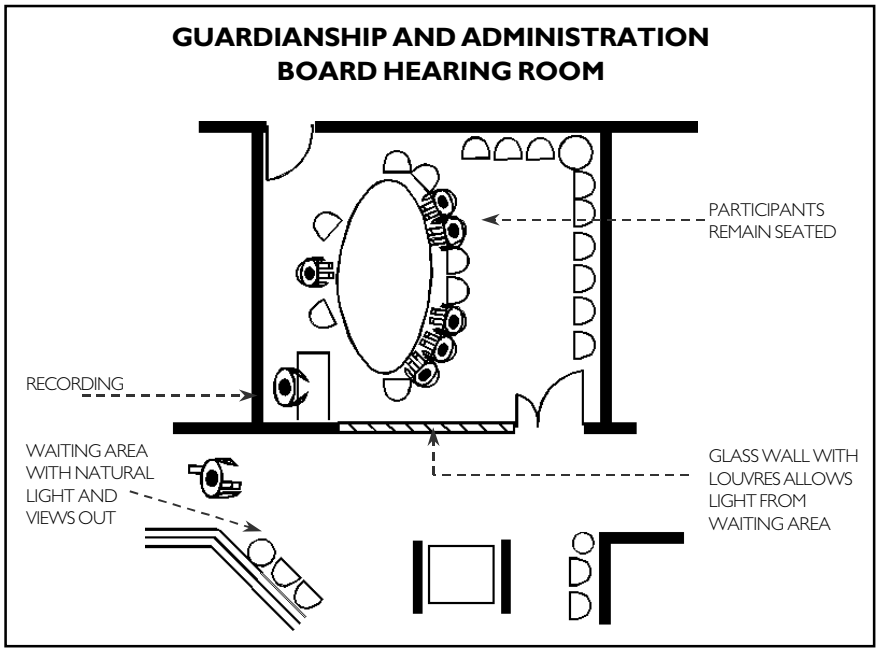
A greater degree of user participation and satisfaction has been reported by tribunals and the ombudsman. It may be that these procedures are newer and less formal and the satisfaction represents the energy associated with new organisations. Or the case types dealt with by these bodies may be easier.

It is often argued that it would be very hard to make changes in court design and rituals, because they are so well-established. However, it is useful to consider alternative ways of doing legal business. The following examples currently operate in Western Australia.

'Flexible' is a characteristic of the Western Australian Guardianship and Administration Board hearings. The Board may use whatever evidence is appropriate. In practice, this means that written evidence is usually supplemented and tested by oral evidence.

Guardianship and Administration Board

The medium-sized hearing rooms have one wall of glass with adjustable louvres bringing in borrowed natural light from adjacent windows. Some psychological relief is provided by the exterior view. Contact with the outside world expresses openness of the system. The tribunal chairperson or judge, sits in a central position in a comfortable chair. After other participants are

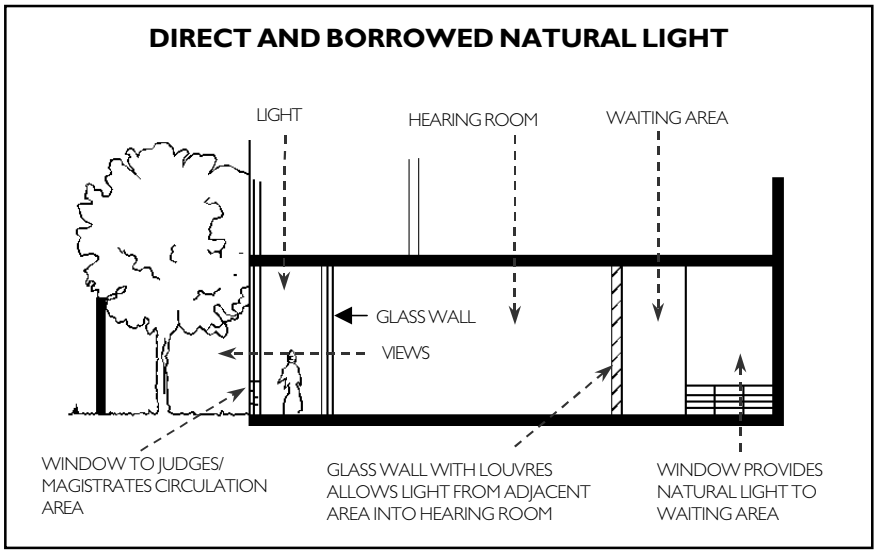


seated, proceedings follow formal entry rituals. This symbolises the importance of the law and the respect due to the tribunal member.

The hearing is conducted at a large oval timber table. A sophisticated series of sections with modesty panels elegantly fit together to produce an oval shaped table which can be adjusted to vary in size to suit different needs. The table can be readily separated to produce a space along its centre if, for security reasons, a greater separation is appropriate between the tribunal member and the other participants. Safety issues can be considered in arranging the seating and configuring the table. Planters block the space between the table and the walls to provide a discrete security system.

The person who is before the tribunal is seated opposite the tribunal member in a position that acknowledges his or her importance in the hearing. Family or other support persons sit alongside. Visitors sit along the adjacent wall. Participants are individually welcomed by name and can sit to speak. They are asked at various times in the proceedings if they have questions and are able to speak in their own words without interruption. They are accorded respect. The questioning is inquisitorial rather than adversarial and seeks to obtain relevant information. The Board may be assisted in its enquiries by an investigator from the Public Advocate's office, who can be asked to provide a report.

The tribunal is located in a building that is difficult to find and is separated from the other courts. Despite the positive and user friendly procedures



and design of the hearing rooms, a lack of openness to public scrutiny and difficult accessibility are relevant issues. Location of tribunals in the court buildings may preserve the openness and visibility of the legal process. On the other hand, court environments may contribute to an atmosphere of legalism and authority which the tribunals may not seek.

Tribunals appear to be more relaxed and participants are able to act in a more personal style. The lessons from tribunal practices cannot be simply applied to courts. The imaginative use of light and space in tribunals, however, could provide a useful model for incorporation into court designs and standard procedures.

Proposal 18

The models of the Guardianship and Administration Board and the Western Australian State Ombudsman should be evaluated carefully to determine to what extent, and in what form, their good practices, architectural psychology and designs can be applied more generally in civil and criminal courts.

Ombudsman

The Western Australian State Ombudsman provides another model of dispute resolution which may be suitable for some cases. Despite recent publicity there is reportedly a high level of user satisfaction due to a user friendly process. Factors contributing to this satisfaction include:

- Inquisitorial interactive approach;
- Telephone discussions, personal interviews, written submissions or a combination of communication methods;

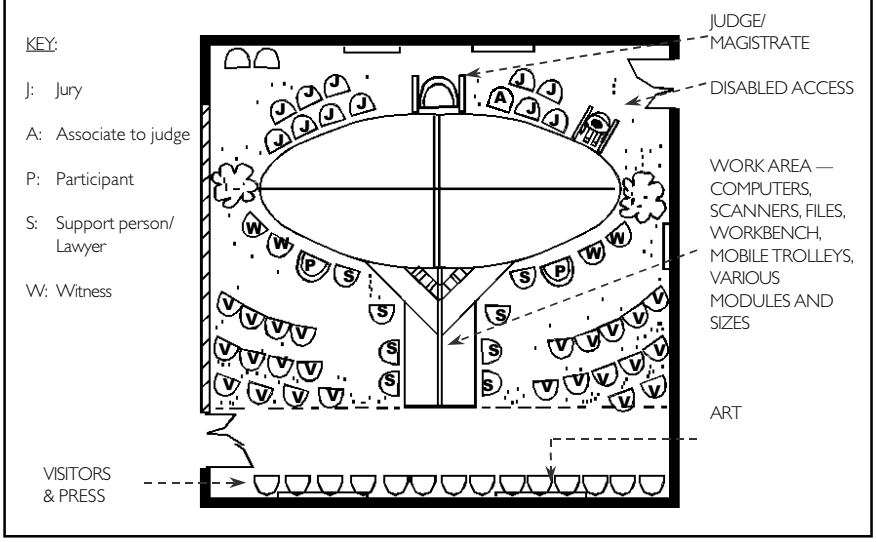
- Personal conversations are available;
- Ready access to the specific person who handles the complaint;
- Immediate feedback;
- Polite and respectful treatment of the complainant;
- Opportunity for complainants to tell their stories in their own words and to ask and answer questions in a normal manner;
- Provision of a clear understandable judgement with reasons and opportunity to discuss the judgment;
- Summary of the evidence; and
- Costs, time and stress to users are minimised by the process.

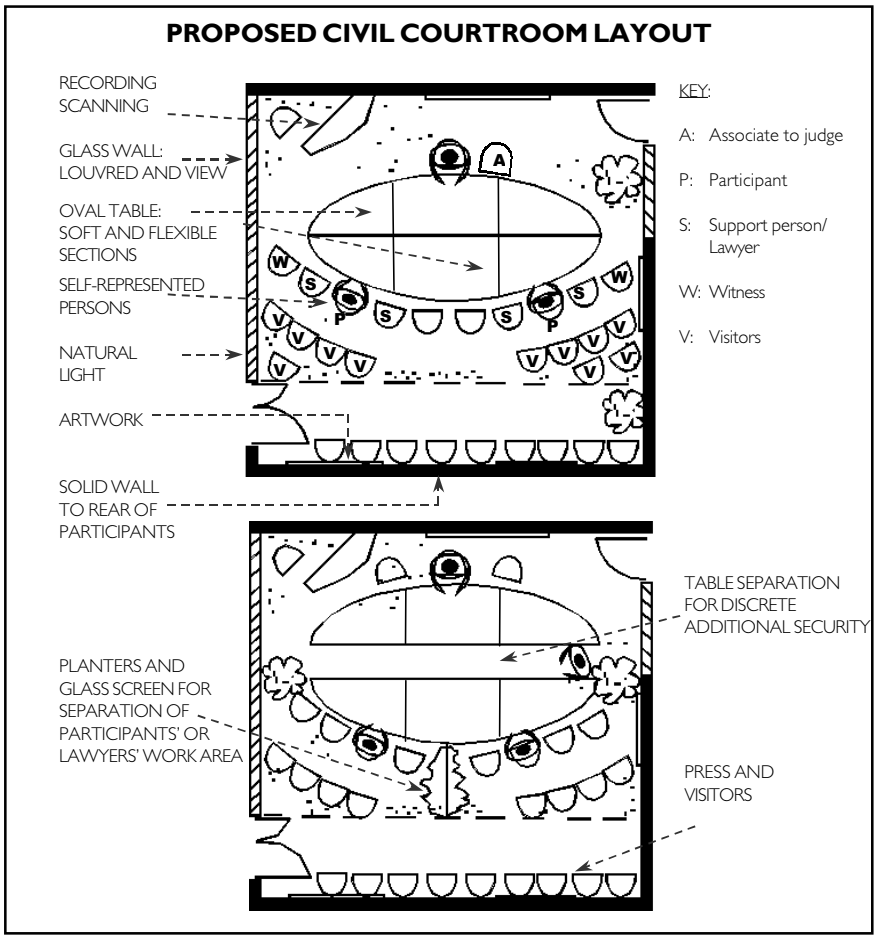
The ability of the ombudsman process to provide feedback to the government system in a general sense as opposed to the specific case is another positive aspect of the system.

Lessons from these case studies

Several features of these models could be relevant to courts more generally. The use of board-directed pre-trial or pre-hearing investigations similar to that used in Civil Code countries works effectively in the Guardianship and Administration Board to shorten and focus hearings. Similarly, the private investigative procedure of the Ombudsman allows most matters to be determined without the need for a hearing, through use of a cost effective technology, the telephone. These features might be investigated for use in other jurisdictions and may be compatible with the move towards case management being particularly suitable for civil matters.

PROPOSED CRIMINAL COURTROOM LAYOUT





This approach might be particularly helpful for civil and criminal matters involving self-represented persons. Possible architectural design concepts which might be suitable for consideration are included in the proposed courtroom layout diagrams above for both jury and non-jury hearings in criminal and civil hearings.

Alternative configurations of some court rooms and procedural changes in all jurisdictions should be investigated in order to facilitate more effective participation of lay users. These proposed layouts may suit some types of cases in particular jurisdictions, but further study will be required to determine if these would be effective.

CONCLUSION

Court architecture is conservative. Over the last century most public places and spaces have undergone dramatic change. Supermarket browsing aisles have replaced grocery shop counters. In primary schools, intimate table clusters have replaced rigid rows of desks. Post office queues converge on multiple service points. Transformations have taken place in hospital wards,

dental surgeries, hotel foyers, libraries, taverns, laboratories, concert halls, council chambers, and just about any public space one can think of except courtrooms.

Public expectations of the justice system and its services have changed in line with changes in other institutions. Yet, despite changes in the wider society, courtrooms largely follow the same layout they had a century ago. Courts still have elevated judges. Lawyers show their backs to the public. Docks are isolated. Boxes confine witnesses. Modern construction materials may be used, but the configuration of court rooms remains frozen in time.[137]

This sub-section summarises briefly what is known about architectural psychology, drawing on a range of state, national and international sources. It addresses the fact that, although much is written about public medical buildings including hospitals and nursing homes, little has been written about the justice system and its courts.

Fictional courtroom drama has long fascinated the public imagination.[138] However, judges, lawyers, parties, witnesses and juries play out real human dramas of desire, greed, evil and hypocrisy. Judges and juries must interpret motive and responsibility, make sense of interactions and activities, and manage the process of allocating blame and apportioning punishment. Most studies of courtroom psychology focus on the mind of the alleged criminal and counsels' strategy.

This sub-section, by contrast, considers the less dramatic and often overlooked courtroom participants: the victims, witnesses, jurors, court staff, security personnel, and members of the public. Rather than the 'deep' psychology of guilt and responsibility, the focus here is on everyday social and psychological concerns in an architectural context, namely comfort, security, understanding and satisfaction. These issues have important implications for delivering credible justice. Without public confidence in the operation of the courts, there is a danger that the justice system will lose public support.

The following summarises the issues discussed and proposals made in this sub-section.

1. Court buildings convey information about justice

Good court design may communicate that justice is accessible safety and privacy is respected and contributions to the legal process are welcomed. All too frequently architecture sends other sociological and psychological messages: the court is isolated from its physical and cultural environment, people are not equal before the law, jury service is not valued, participants and the public are not entitled to understand the proceedings and court

management needs are more important than the time commitments of 'civilian' participants in the justice system.

Several models within the Western Australian justice system appear to be providing environments conducive to justice by:

- developing and implementing dignified and respectful practices;
- providing an architectural environment that facilitates user participation;
- responding seriously to user feedback;
- allowing participants to speak normally;
- modifying some aspects of judicial decision making and communicating decisions more effectively; and
- reducing the stress and confusion associated with obtaining and giving evidence.

These models should be evaluated carefully to determine to what extent, and in what form, good practices and designs can be applied more generally in civil and criminal courts.

2. Many court users have negative experiences, yet all participants in the justice system should be treated with dignity and respect

Court users unfamiliar with the legal profession frequently find court processes unsatisfactory. Legal processes and trials can be alienating, frustrating, and humiliating for witnesses, victims, defendants and, particularly self-represented litigants. Physical and social factors in combination influence these experiences. Issues include:

- Lack of privacy, comfort and safety in waiting and other public areas;
- Delays in waiting for cases to get to court and poor scheduling on the day;
- Isolation of victims and witnesses from their support team;
- Court layouts and the distances between speakers, making non-legal participants uncomfortable and unable to participate effectively in court proceedings;
- Seating arrangements causing many participants and members of the public to see only the backs of lawyers' heads and to feel excluded;
- Information, or the lack of it, about legal proceedings
- Emotional and psychological impacts including the costs, delay and the lack of certainty in the process and ultimate outcome; and
- The combination of the effects of architectural space and the social environment cannot be separated. These factors impact on users' psychological experience of legal proceedings and the justice system. [139]

3. Ongoing feedback from and information for users

Courts could better understand and meet the needs of users if they developed more comprehensive information about users' experiences with court processes, information needs and perceived obstacles to achieving justice. User feedback might be obtained from an enhanced complaints system, supplemented by surveys and observations of procedures carried out by independent researchers.

Public perception can be measured by the collection and analysis of data (such as waiting times), or by surveying users and others who are affected by court procedures. Did the self-represented plaintiff *really* understand the judge's explanation?[140] More generally, how do the participants experience the spaces, the procedures and the decisions?

Court users need to have better access to information. Information centres and an effective system for gathering user feedback are proposed. Improved communication could enable people to participate more fully in the court process and promote positive community support for the justice system. The Supreme Court is making efforts in this regard with its pilot program of making sentencing decisions available in a simplified form. Perhaps all decisions by judges in all courts can be similarly simplified.

4. Technology will change the courts of the future

A major transformation of court facilities has already begun in response to technological change. However, little thought has been paid to how this transformation will affect people and how the environment of the justice system can assist or impede this transformation. Issues which should be considered include: the possibilities of making more effective use of less expensive telephone technology; providing better facilities for protected witnesses when closed circuit television is used; and monitoring the effect of evidence presented by television including psychological research analysing virtual space backgrounds, colour, light and the psychological effect of projecting images into the courtroom from remote locations. Court architecture is required which is flexible and adaptable to future unpredicted requirements of both technology and to the amount and type of court space.

5. The relevance of architectural psychology to law reform

Law reform reflects the hopes, fears and frustration of ordinary people whose experiences influence their acceptance of the 'justice system'. Whether or not people feel the system has given them a 'fair go' depends on whether they:

- are treated with respect and dignity;

- understand the processes and procedures;
- are kept appropriately informed;
- have their concerns dealt with expeditiously; and
- feel adequately protected from violence and intimidation.

Unaddressed court-related psychological and emotional issues can leave users feeling punished, dissatisfied and marginalised in the legal process irrespective of the outcome of the case in legal terms.

Court architecture, management, services and facilities need to reflect support, compassion, dignity and respect for people. A holistic approach to the needs of the whole person is required. People can suffer emotional distress, life disruption, family and social damage, career damage, depression and health damage as a result of their participation in the legal process, irrespective of any impact of the problem which gave rise to the hearing.

Changes to the law and the justice system procedures alone cannot solve people's often complex problems. However the system and the experience of going to court should not compound these problems. Courts should be sensitive to users' needs and adapt physical, social and psychological environments to better support all participants in the justice system.

SUMMARY OF PROPOSALS

1. Court design and operations should encourage all professional participants in the justice system to treat each and every court user with courtesy, respect and dignity. To the extent possible, courts should provide services to meet users' needs. Procedures, processes, and attitudes should be reviewed to ensure that all participants in the justice system deal with all users courteously, respectfully and fairly.

2. Careful psychological studies of the effects of court environments should be made prior to commencing any significant construction or renovation projects in order to determine user needs.

3. Public input and discussion concerning the values expressed and the means of representing the law through architectural design should be encouraged prior to the commencement of significant architectural projects involving courts.

4. To demonstrate the independence of the courts from police, court and police buildings should be visually separate and clearly demarcated architecturally.

5. Court planners should consider incorporating user friendly facilities including cafés or other eating facilities in court buildings.

6. Prior to commencing significant renovations or new construction of court buildings, psychological research should be reviewed and appropriately tailored studies undertaken to consider the design variables which may influence aggressive behaviour and affect the safety of participants in the justice system.

7. In future design briefs for courts there should be consideration of the degree to which hierarchy should be reflected. As far as possible there should be consistent design standards and equality of furnishings and fittings throughout court buildings. Design should indicate to users that all participants in the justice system are seen to be equal and respected by providing facilities appropriate to their particular needs.

8. The design requirements and practical needs of the legal profession as regular court facility users, and indeed all litigants, should be surveyed prior to developing or renovating future court facilities.

9. There should be user surveys as a basis for developing design guidelines for high traffic public access areas including foyers, registries and waiting areas. From the information received it should be possible to create protocols for the upgrading of existing, and design of, new court facilities.

10. Courts should consider providing user-friendly feedback booths in foyers, registries and waiting areas, staffed by suitably trained representatives of user groups to pro-actively seek feedback. Courts should introduce a review procedure to act on users' suggestions and make changes as appropriate.

11. Court communications and procedures should be simple, straight forward and clear enough to be understood by ordinary users.

12. Courts should consider providing self-help centres to facilitate access to information and services for all users but particularly for self-represented litigants.

13. A study of the involvement of indigenous Australians with the justice system, with particular emphasis on alternative dispute resolution and developing services and facilities which meet the needs of indigenous Australians and other population groups from non-English speaking backgrounds, should be considered.

14. Research should be undertaken to develop instructions for juries to allow each juror an equal opportunity to speak and be heard during deliberations.

15. Jury service should be recognised by providing pleasant jury room facilities including round tables with natural light, outside views, withdrawal spaces, comfortable seating, and good quality fittings and furnishings.

16. Art should be integrated into courts to assist in making a respectful environment. This might include temporary exhibitions, works commissioned and integrated with architectural design, fittings, and gardens. Particular attention might be paid to works by local artists, diverse cultural representations or items of local or State significance.

17. Prior to commencing significant renovations or construction of court buildings that new flexible models for civil and criminal courts should be researched, developed and trialled.

18. The models of the Guardianship and Administration Board and the Western Australian State Ombudsman should be evaluated carefully to determine to what extent, and in what form, their good practices, architectural psychology and designs can be applied more generally in civil and criminal courts.

ENDNOTES

* The Law Reform Commission of Western Australia commissioned Louise St John Kennedy and Associates Architects to produce this sub-section. The project team consisted of: Louise St John Kennedy: B Arch University of Melbourne, B Sc (Psych) The University of Western Australia, ARIAA; and Dr David Tait, MA (Hons) (Political Science) University of Canterbury, PhD (Social Administration) London School of Economics, Senior Lecturer in Criminology at the University of Melbourne.; with editorial assistance from Marion Brewer, BA (Dist) (Communication) Stanford University, JD Georgetown University and LLM candidate (UWA), Administrative Officer of the Law Reform Commission of Western Australia. Ms Kennedy's drawings were formatted electronically by John Dicker of the Policy and Legislation Branch of the Ministry of Justice.

1 C Goodsell, *The Social Meaning of Civil Space: Studying Political Authority through Architecture* (1988) 5.

2 One judge's written submission to the Law Reform Commission of Western Australia (LRCWA) suggested the system of administering justice in Western Australia is in crisis noting that '[s]ome solutions must be found and practical solutions are likely to be radical.'

3 The LRCWA received 36 written and oral submissions from people attending public meetings complaining about delay.

4 More 20 submissions concerned the growing self-represented litigants phenomenon with many coming from stakeholders in the justice system. As one writer observed: 'Litigants in person … are classed as the 'feral public', despised by the judiciary and legal profession alike. … [t]hey …demonstrate the idiocy of antiquated and inefficient practice, … the system should respond to these people by abolishing the law of precedence, overhaul or abolish the majority of court rules …and accept a simple form of submission for the case.'

5 As one submission writer complained '…the legal system has penalised my health, distracted me from pursuing my career and has consumed my finances. I have experienced intense frustration, disempowerment and abandonment by [the] …system..'

6 A number of people attending public meetings held by the Law Reform Commission voiced this view.

7 The environment of the justice system consists of a combination of the physical with the social and psychological experience people have in the court setting. As an academic discipline architectural psychology examines the psychological and social experience people have in an environment.

This inseparable combination of the experience people have of the physical setting provides the fundamental framework for this sub-section.

8 Louise St John Kennedy is a practising architect with projects completed in Perth (Western Australia), Sydney, Melbourne and New York. She is the recipient of design awards for architecture from the Royal Australian Institute of Architects including the national Robin Boyd award. She has a B.Sc. in psychology from The University of Western Australia and a B. Architecture from the University of Melbourne. She was on the founding board of PICA the Perth Institute of Contemporary Arts She was involved in designing user feedback studies for new Canberra suburbs in 1975/6; worked with the Danish architect Jahn Ghel on architecture and its implications for public use of civic spaces; and specialises in the relationship between architecture and psychology.

9 Dr David Tait is a senior lecturer in criminology at the University of Melbourne. He has an M.A. (Hons) in political science from the University of Canterbury. His Ph.D. in social administration from the London School of Economics looked at issues of space and justice. He conducted (with Dr Ken Polk) a study of the use of imprisonment by Victorian magistrates for the Starke Sentencing Committee in 1986-87, and carried out evaluations of guardianship tribunals in Victoria and NSW (with Professor Terry Carney). His most recent book is *The Adult Guardianship Experiment: Tribunals and Popular Justice* (with Terry Carney) which looked at how well guardianship tribunals met the needs of their users, promoted accessibility and balanced freedom and protection interests. He is currently working on a Criminology Research Council-funded project entitled the *Effectiveness of Sanctions*, with data from NSW local courts. He has written several papers on judicial rituals, court practices and the use of space, using a social psychological approach.

10 'Reliable' information is the critical issue. The authors reviewed submissions to the LRCWA and conducted an informal survey of 60 individuals who had personally participated in a court case either as a victim, party, an expert witness, a witness or a juror, as well as members of the community including women, indigenous Australians, and others for whom English is not a first language. Another 40 individuals were interviewed for this sub-section including a range of judges, magistrates, architects, lawyers, academics, tribunal members, court officers, security, property and other court staff. For various practical reasons there were some omissions in the range of people interviewed. Three important groups of court users were not interviewed in any significant number: victims, prisoners and criminal defendants. A comprehensive study of court users should sample these groups. Concurrently with concluding this sub-section the Ministry of Justice (WA) Court Services released an Executive Summary of a Customer Survey which considered satisfaction with court buildings. Their results are reasonably comparable with the authors' informal survey findings. See Appendix 2.

11 Two other sub-sections in this Review of the Criminal and Civil Justice System deal specifically with a comparison between the adversarial and inquisitorial systems: see sub-sections 1.2 and 1.3.

12 Two best practice models currently working in Western Australia are described below. Each has elements of the inquisitorial process, including non-public investigation procedures and the use of dossiers or investigation reports.

13 Papers presented at Representing Justice, An International Conference on Court Architecture in Practice and Theory, Wollongong, 26 -27 June 1998, <http://www.uow.edu.au/law/repjustice/>.

14 H Lasswell and M Fox, *The Signature of Power: Buildings, Communication, and Policy* (1970).

15 For a discussion of German architecture under Hitler see Goodsell, above n 1.

16 Ibid.

17 Ibid 53.

18 Ibid 142.

19 Ibid 159.

20 Ibid 5; discussed further below.

21 These issues are taken up for an earlier period by Robert Jacob, *Images de la justice. Essai sur l'iconographie judiciaire du Môyen Âge a l'Âge classique*, (1994) Le Leopard d'Or.

22 See above n 13 although Mr Justice Black's presentation is not included.

23 LRCWA *Reforming the Justice System : An Issues Paper* (Perth, 1998).

24 *Bien juger: essai sur le rituel judiciaire* (1997).

25 In one sense, Garapon's approach is more contemporary than the US study of city council chambers described above. The council building study was about the past. Garapon's court designs study is about the present. Courts are living spaces. The building, the practices and the core-shared values all contribute to the production of justice. The spatial and psychological environment of courts helps to shape the context within which consumers experience justice.

26 KF Taylor, *In the Theater of Criminal Justice* (1993).

27 Ibid 94.

28 Ibid 95.

29 Australian justice is similarly ambiguous in its images and rituals. The recitation of charges in terms of statutory provisions illustrates the supremacy of Parliament (the people's representatives) in the unwritten British Constitution from which Australia draws. Yet the use of the Common Law indicates a loyalty to something much older than the will of recent legislators. Judges frequently send messages to the community through their decisions. They refer to the importance of 'protecting the community' and respond to changing public sensibilities about particular crimes. This suggests an immediate and personal link between the judges and the people they serve. The use of juries in major criminal and civil trials indicates the faith placed in a popular body to make decisions about guilt or innocence.

The robes, the hierarchy of judicial authority, the use of a flag incorporating the Union Jack, the terms 'Queens Counsel', and state insignia all suggest a grounding of authority in the monarch, however qualified this link may have become. On the other hand, the placing of the prosecutor (the representative of the state) at the same level as the defence lawyer suggests that the judge (and usually the jury) sitting above them are outside and beyond the prosecution power of the state. Thus the fact finders and decision makers can balance impartially the interests of the state and the individual citizen. In this view, the judge and jury are impervious to public opinion, clamours for vengeance and moral panic.

30 Taylor, above n 26, 100.

31 J Hazard, 'Furniture Arrangement as a Symbol of Judicial Roles' (1962) 19(2) *ETC* 181-188.

32 This is discussed in Goodsell, above n 1, 19.

33 As Taylor has done, above n 26.

34 M Foucault, *Discipline and Punish: the Birth of the Prison* (1997).

35 On trial were members, turned informers, of a crime syndicate, the Camorra. The presiding judge required the evidence of the informers to secure the convictions of other accused. The judge allowed the informers to present their evidence in their dialectal style based on codes of honour and the importance of patronage. Jacquemet noted that witnesses used 'elliptical and formulaic' expression to identify their status. The judge allowed witnesses to become more relaxed, confident and plausible in presenting their evidence. This in turn enhanced the credibility of the testimony and helped to secure some 800 convictions.

36 GM Matoesian, *Reproducing Rape: Domination Through Talk in the Courtroom*, (1993); H Beaman 'Abused Women and Legal Discourse: The Exclusionary Power of Legal Method' (1996) 1 *Canadian Journal of Law and Society* 125.

37 H Garfinkel, 'Conditions of Successful Degradation Ceremonies' (1965) 61 *American Journal of Sociology* 420-424; P Carlen, *Magistrates' Justice* (1976); D McBarnet, 'Two Tiers of Justice' in *Conviction: Law, the State and the Construction of Justice* (1981).

38 M Feeley, *The Process is the Punishment* (1979).

39 P Rock, 'Witnesses and space in a crown court' (1991) 31(3) *British Journal of Criminology* 266.

40 J Braithwaite, *Crime, Shame and Reintegration* (1989).

41 G Maxwell and A Morris, *Family, Victims and Culture: Youth Justice in New Zealand* (1993).

42 This issue is considered in other consultation drafts in this series dealing with alternative dispute resolution.

43 These models are discussed below.

44 Other Consultation Drafts in this series mention some of the social and psychological issues in the administration of justice. However, this sub-section address some topics covered elsewhere from a different perspective.

45 Ministry of Justice, *Western Australia Court Services Customer Service Charter* (Perth) <http//www.justice.wa.gov.au>.

46 Dozens of submissions received by the Law Reform Commission suggest that people feel abused by the treatment they have received from judges, lawyers and others involved in the justice system.

47 C Mercer, *Living in Cities: Psychology and the Urban Environment* (1975) 16.

48 The Oxford English Dictionary (1989)

49 W Benjamin, 'The Work of Art in the Age of Mechanical Reproduction', in *Illuminations* (1973) 241.

50 This sub-section attempts to collate material on somewhat related topics dealing with such other public facilities as the architecture of nursing homes, designs of civic chambers and furniture arrangements in psychiatric hospitals.

51 Further work on this project would involve systematic observations within courts and interviews with representative samples of court users. This would allow examination of how spaces are used by different users at different times and for different cases; how the spaces are experienced; and how court forms, procedures and practices use, transform and occupy the space. It is possible to describe the design features of the buildings based on site inspections but to understand the psychology of the courtroom experience, more observational and interview material is required.

52 An example of this is the Family Law Courts in Melbourne.

53 A major dilemma is that Australian court design reflects a stable past which is rarely the experience of many residents of the local community, whose backgrounds may include migration, isolation, dispossession or displacement. Colonial buildings represented colonial values and imperial majesty. Australian court building carry out tasks in the English Common Law tradition and the design of courtrooms reflects this tradition. So there may be something of a disjuncture between the contemporary ethos of a community (or at least part of the community) and the statements being asserted by the design of the courthouse. The clash between court architecture and contemporary expectations may be softened by treating the buildings as part-museum or preserved 'heritage' precisely because the values expressed may seem archaic. This 'recasting' may result in citizens feeling more warmly about the building. But regardless of the way historical memory can be re-shaped, many court buildings present as faintly archaic or even obsolete.

54 The Broome Courthouse in Western Australia hosts a regular Saturday market in its grounds.

55 US Circuit Court Judge Sandra Lynch observes 'Courthouses ought to look like the place people receive justice. The symbolic value of this building [the new Federal Court in Boston] is that it communicates the principles of American law rather than the principles of oppression. This building conveys all of the appropriate messages for a democracy. It is possible to do that and still build a secure building.' *The Third Branch*, 'The Courthouse as a Center of Civic Life' <http://www.uscourts.gov/ttb/nov98ttb/ interview.html>.

56 The Harvard University Graduate School of Design considered Erikson's work at a Professional Development Program on The New American Courthouse, 21-23 July 1998.

57 Ibid.

58 Ibid.

59 The public support for the new federal court house in Boston, Massachusetts illustrates *The Third Branch*, 'The Courthouse as a Center of Civic Life', TTB interviewed Judge Sandra L Lynch (1st Cir) and Judge Douglas P Woodlock (D Mass) on the opening of the Boston, Massachusetts courthouse. <http://www.uscourts.gov/ttb/nov98ttb/interview.html>.

60 WH Auden commented on building juxtapositions in the Portugese colony, Macao: 'Churches beside the brothels testify that faith can pardon natural behaviour.'

61 A Saarinen, *Environment Planning, Perception and Behaviour* (1976) 62.

62 One QC interviewed for this study reported this facility is of enormous value and something which other courts seriously should consider. The NSW Guardianship Board includes a café in the building in its search criteria for a new building. There is a growing recognition that cafes or other eating facilities can contribute to making stressful encounters less so.

63 General layouts of buildings have been subject to a range of tests and experiments. One of the most interesting in this context was an experiment in hospital ward design according to Saarinen, above n 61. Three layouts were tried: a single corridor, a double corridor (with the service areas in between), and a radial design with all the rooms off a central hub. The radial design was not only more efficient in terms of travel time, it resulted in less absenteeism, fewer accidents and better patient care. This radial design has been applied to both older and newer courts, but usually without a strong service hub.

A number of US courts have adopted this design, see D Hardenbergh, *Retrospective of Courtroom Design, 1980-1991 National Centre for State Courts (1992)*. A primary school in Darwin NT reportedly also experienced success with the radial design.

64 Ibid 35.

65 Ibid 49.

66 Similarly the Western Australian Family Court judges have jarrah furniture and leather couches with arms. The spectacular views from top floor locations of the judges' chambers in the Perth Family Court indicate that judges are more important than the magistrates who have blond wood furniture and leather couches without arms in offices on lower levels with pleasant, but not magnificent, views.

67 While some believe the elegance of the accommodation afforded judges and magistrates is appropriate, the issue is equality. When television cameras capture impressive judicial chamber

interiors during interviews, the visual contrast with other court facilities is readily apparent.

68 Both the Perth Central Law Courts and Western Australian Family Court feature waiting areas and courts located on floors above the foyer accessed by lifts and staircases.

69 Many people still smoke particularly in times of stress despite the exclusion of smokers from public buildings by law in Western Australia. Smokers must smoke outside the courts. From the viewpoint of public health the law is sensible and encouraging smoking is obviously inappropriate. It is important, however, to recognise smokers' needs. Providing appropriate exterior smoking areas and visible but suitably isolated and ventilated areas near waiting areas would reduce stress for smokers in difficult and often lengthy court situations.

70 The Sydney Downing Centre has a security check in the foyer which encourages needle disposal before entry into the court building. Some users dispose of needles unsafely in the nearby planter boxes and public bins. Safe needle disposal facilities are a contentious issue not unique to this Sydney court. If provided, a syringe disposal location needs careful design consideration and placement. Safe disposal would be encouraged if the bins were visually obvious to those looking for them and yet able to be used without being seen by others. Disposal bins should be discretely placed, in a recess off to one side of the external entry as opposed to in an open area in view of the entry.

71 This is significant given the inadequate signage and information weakness identified by the recent Western Australian Ministry of Justice survey: see Appendix 2.

72 Other weaknesses indicated by the Western Australian Ministry of Justice survey question concerning satisfaction with court buildings include 'inadequate facilities for the public', 'waiting rooms for litigants are not comfortable' and 'courts are not user-friendly': see Appendix 2.

73 Security facilities pose particular problems in Western Australia as noted below.

74 The Sydney Family Court reception design enables a staff member to be at the counter at all times in order to greet users and provide information. However, when no one needs assistance, the design allows the court staff member to carry on with other work thereby easing reception staffing costs and avoiding that deserted feeling in the foyer.

75 See Ministry of Justice Executive Summary, Appendix 2. This survey is a positive first step but it may have some defects which should be analysed before further survey work is undertaken.

76 This issue is particularly important when dealing with self-represented litigants and is discussed in greater detail below.

77 As suggested by Lord Woolf: 'The courts should provide reasonable facilities, preferably in private, for filling in forms'. *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (July 1996) 325.

78 Observation and interview, Court of Petty Sessions, Perth, Western Australia (June 1998).

79 These rooms should not be cell-like. An alcove, for example, with sliding doors and a clear table could indicate accessibility to users, whereas a room fitted out like a normal office or interview room communicates that permission is needed before entry. This may discourage some people.

80 The Executive Summary of the recent Ministry of Justice Survey (Appendix 2) noted that 'All customer groups were dissatisfied with the time it takes to get a case to court and the time spent waiting at the court. This was one area where dissatisfaction was higher in country courts.' The survey also observed at 7.1, as noted above, that '[w]aiting rooms for litigants are not comfortable' and there are '[i]nadequate facilities for the public.'

81 These waiting areas increase the possibility of violence according to staff interviewed.

82 A surprising number of judges interviewed expressed concern over the appearance of vending machines in court foyers and waiting areas. The suggestion of including cafes in court complexes discussed below could alleviate this problem to some degree.

83 Training for court staff and volunteers is critical so that they can be emotionally comfortable enough to give feedback on their court or legal experience. A distressed user may need to speak with a person who can listen with apparent understanding.

84. The names of some courts are confusing to most non lawyers — the Court of Petty Sessions, the Local Court, the District Court and Supreme Court are distinctions with jurisdictional significance only to members of the legal profession; only the name 'Family Court' is clear. If court names are meaningful to the public it could increase feelings that the justice system is accessible to ordinary people. The Court of Petty Sessions is a name as archaic as the layout of court rooms.

85 Appendix 3 shows a copy of a current Family Court brochure concerning an information session provided by the Court. Basically all of the session times listed have changed since the document was prepared so a small scrap of paper is stapled on top with new times effective since March 1998. The staples make it impossible to fully open the brochure without tearing it. Brochures should address the information needs of court users. A description of the system is not sufficient. Some people want to represent themselves or they want to better understand what is happening

when they are represented by a lawyer or they are participating in court proceedings in another capacity. Brochure writers should approach the task from a user's 'need to know' perspective.

86 This is a particular problem for self-represented litigants: see sub-section 2.10. It is also an issue for people whose first language is not English or who require the services of an interpreter.

87 The Geraldton court, for example, has an old display stand in the Registry which required that the new brochures must be folded in order to fit in the old display stand. The folding ruined the cover design. The titles couldn ot be read without removing each bundle of brochures from the stand. Thus the mismatch between brochure design and displays made the brochures visually and physically inaccessible.

88 Even the word 'subpoena' is not a simple, clear name. It does not explain by its name what its purpose is. As the Executive Summary confirms 'courts are not user-friendly' and with archaic terminology to describe the threshold invitation to attend court it is no wonder that users are confused.

89 The information sessions at the Family Court outline some aspects of court procedures and the Family Law Act. See Appendix 3.

90 Submissions to the LRCWA indicate that some users have horrific personal experiences with the justice system. At the Karratha public meeting one speaker observed there is no mechanism to address real or perceived injustice. Appeals may not be available or affordable either financially or emotionally. It is particularly frustrating to some who have lost cases that there is no way to communicate with decision makers in the justice system. There is no assistance in the form of counselling for people seeking to come to terms with a system they do not understand which has made decisions that have personally devastating financial, emotional or familial consequences. The following section on self-help centres offers some suggestions and the feedback booth concept noted above may assist in addressing these issues.

91 As one submission noted: '[l]itigants in person are regarded as fools.'

92 Frustration, anger and hostility towards the system and the lawyers who are seen to control it and benefit from its complexity are expressed repeatedly, as noted in the separate report on public submissions.

93 This could assist in addressing the weaknesses identified in the recent Ministry of Justice Court Services survey questions concerning court buildings and access to justice that courts and facilities are not 'user-friendly': see Appendix 2.

94 These should be provided at cost or on a subsidised basis.

95 Access to legal advice is financially difficult for many people. A shop front law service is available in Barrack Street, Perth. However, it is located away from the courts and many people never hear of this service. Shop front law services should be provided in the court foyers in visually accessible locations at an affordable cost with adjacent childcare and access to an self-help centre. The Perth office allocates half of each day to prior bookings and half a day for bookings made that on day. Scheduling caters for last minute urgent situations as well as situations known in advance. The cost is $20 for 20 minutes.

96 This suggestion parallels Lord Woolf's recommendation no 284: Woolf, above n 77, 325.

97 These could include video and audio tapes, braille, and packages of paper forms and instructions in plain English and foreign languages.

98 Computer packages have been developed in some jurisdictions to help in preparing cases and to predict outcomes with specific legal problems. These ideas merit further investigation. Similar ideas are discussed in the Information and Technology paper prepared as part of this Review of the Justice System.

99 Being placed in unequal or unpleasant facilities before being allowed to participate instils a feeling that they are not as able as others to participate and are therefore not equal before the court.

100 The proposed new Ballarat Courts in Victoria have been designed with expensive floor slabs that change levels to facilitate disabled access and accommodate elevated judges. Maintaining judges in elevated positions in court rooms has significant cost implications and complex architectural implications.

101 Other issues to note are that indigenous litigants often require child care facilities. Separate legal services to assist women when ALS staff represent men in domestic and criminal matters are particularly needed.

102 The needs of migrants and others from non-English speaking backgrounds should also be considered.

103 The equality of elevation among participants and the enhanced communication resulting from the circular seating arrangement are concepts explored later in this paper in a discussion of jury tables in the following section and several proposals for more effective contemporary court room lay-outs in Part VII.

104 The jury rooms in the Perth Central Law Courts and the Supreme Court are small spaces with

limited or no natural light, no outlook, minimal facilities, and basic fittings and furnishings. Oppressive surroundings show little respect for the contribution of jurors.

105 For smokers these sessions can be particularly difficult when smoking is prohibited in court buildings. A separately ventilated or external smoking area could provide stress reduction for jurors to smoke in a manner that does not compromise others. A small recess with a cushioned bench, ash tray and something to look at, such as a painting or sculpture, in a corridor to the jury and toilet facility would be suitable where a balcony or other external space is not possible.

106 Proper personal thanks by a judge after service and, when necessary, debriefing can assist with the stress and life disruption caused by jury service. The Ministry of Justice has facilitated counselling for jurors on an occasional basis following certain unusually stressful trials. Further consideration of this issue is suggested.

107 Edward Hall *The Hidden Dimension* (1966), wherein Osmond observed seating dependent behaviours in female geriatric wards. Sommer observed people at a 36 x 72-inch rectangular table for 6 people in a hospital cafeteria. He found corner situations with people at right angles to each other produced six times as many conversations as face-to-face situations across the 36-inch span of the table, and twice as many as the side-by-side arrangement: at 109. Fifty observations of conversations revealed that F-A (cross corner) conversations were twice as frequent as the C-B (side by side) type, which in turn were three times as frequent as those at C-D (across the table). No conversations were observed by Sommer for the other positions.

108 Saarinen, above n 61.

109 The legendary King Arthur pioneered the use of round tables for this purpose. Research or trials are needed to give conclusive information concerning the advantages of round jury tables. Oval tables are planned for the proposed May Holman Centre. The expectation is that some positions at an oval table would accord more speaking rights than others, but that the speakers at oval tables would be more likely to have an equal opportunity to speak compared to those at rectangular tables.

110 Glenda Jackson and Carmen Lawrence, 'Share of Power' *Late Line* 20 September 1994.

111 The Swedish parliament, for example, has a publication used by women politicians outlining the gender issues involved in speaking in committee situations and indicating the socialised habits that prevent women having equal opportunity to speak. It is unlikely that over a short jury deliberation such deep-seated customs will be overturned, however instructions to the jury chair can detail procedures to ensure more equality of input into the decision making process.

112 Space for less assertive jurors to separate from others and engage in quiet discussions apart from the larger group can enable those who may otherwise feel silenced to gain the confidence to speak in the group situation. Some people (such as lawyers) generally are practiced in speaking out; others are not and require facilities to help them address the social imbalance in order to contribute to the jury process.

113 The external bollards at the Perth Family Law Courts are a positive example as is the security at the Sydney Family Law Courts.

114 The Anti-corruption Commission in WA offers a best practice model discussed below.

115 Indeed, a number of the court staff and judiciary surveyed for this paper had never visited the facilities in which many people wait before entering court.

116 While other court users might consume the public architecture in a 'state of distraction' (to recall Benjamin's words quoted above), people waiting in custody often have the time to contemplate their surroundings in a state of concentration. Physical surroundings are, perhaps, more important for them than any other single group of court users.

117 Institutional spaces in public housing can communicate: 'the message is defiance, a physical challenge to those who do not wish to be contained to show that they are superior to their symbolic (in this case literal) prison walls': Oscar Newman *Design Guidelines for Creating Defensible Space* (1972).

118 Ibid cited in Mercer, above n 47, 93.

119 The recent problems at the Melbourne Magistrates Court may be considered in this respect.

120 Sports facilities, airports etc.

121 Hangings, 'crocodile rolls' etc.

122 For example, as planned at Geraldton Courts.

123 These are discussed below under the headings of Space and Distance, Audibility, Visibility, Flexibility and Support.

124 Hall, above n 107.

125 Ibid, 109.

126 Kinzel (1971).

127 Design Guide (1991).

128 Ibid 54.

129 Above n 24.

130 We suggest extensive user surveys based on architectural psychology. We recommend evaluation of the Western Australian Guardianship and Administration Board and the Ombudsman's facilities. Flexibility, technology and user participation should be relevant issues in the research.

131 The Western Australian Central Law Courts' positive programme of victim support service can provide volunteers to accompany and support some users in court. The inclusion of new technologies into the court room has significant implications for both design and planning of courts. Flexibility in architectural solutions will be increasingly relevant both to accommodate rapidly changing technologies and also to cater to the difficulties of predicting future requirements for court space and types. Technology, future needs, planning, cost considerations and user participation all indicate the desirability of court architecture which has flexible furniture layouts, readily adaptable spaces and level floors.

132 Eg in Bankstown in Sydney, New South Wales, and Prahran in Victoria.

133 Woolf recommends that '[t]he possibility of holding evening or weekend courts should be re-examined': above n 77, 325.

134 A juror interviewed for this paper had acted in a carnal knowledge case. A young girl's likelihood of being restrained by the defendant was in question. The girl had appeared much larger on the television screen than she did when the juror happened to see her in the corridor with her family. She was tiny. Seeing her in person affected the decision the juror made.

135 These concepts and others are explored in sub-section 5.3.

136 As one speaker at the Bunbury public meeting suggested: some pensioners prefer the old fashioned or familiar technology. 'People here know about a fishnet, not the internet! The elderly are battling to sign their names let alone to sign on to a computer.' High tech solutions may not help everyone access the justice system. Flexibility is essential.

137 An instructive comparison with churches can be made in terms of use of elevation and participants facing each other. Preachers used to be high up in pulpits; in many mainstream churches they are now down on the same level as their congregation, usually with a microphone. The Catholic Mass used to be intoned by the priest facing away from the congregation; now the priest faces the people.

138 Most recently through the medium of TV shows such as *Sea Change* to *Law and Order*. See J Brigham, 'Architectures of Justice: The Private and the Privatized', presented at Representing Justice Conference, Wollongong, 26 June 1998 < http://www.uow.edu.au/law/repjustice/brigabs.html>. Moreover there may appear to be a growing misconception about the WA justice system because increasingly Australian users are consumers of American court room drama and on television.

139 Proposal 1, in fact, makes explicit the assumption about the principal aim for the social psychology of the administration of justice. Some of the social psychological issues in the administration of justice are mentioned in other sub-sections of this Review. But, reflections on some topics covered elsewhere, such Self-represented Litigants (sub-section 2.10), also appear in this sub-section.

140 A development during the course of this Review is the trial program implemented by the Supreme Court to release plain English explanations of sentencing decisions.

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Appendix 1

Courts and Their Users

COURTS

Western Australian Courts relevant to this sub-section were:

- The Court of Petty Sessions - Criminal cases without juries.
- The Local Court - simple Civil cases
- The District Court - Criminal indictable offences and Civil disputes over $250 000 and personal injury.
- The Family Court of WA - Family and child support cases.
- Supreme Court - Appeals and Life imprisonment criminal cases.
- Tribunals - special areas.
- The Country and regional Courts.

USERS

- Applicants - Self-represented or represented
- Respondents - Self-represented or represented
- Witnesses
- Charged people without bail
- Defendants - Self-represented or represented
- Prisoners
- Victims
- Women
- Children
- Aboriginies
- Cultural groups
- Expert witnesses
- Self-represented
- People with disabilities
- People with mental illness or mental disabilities or other special users
- Lawyers
- Judges
- Magistrates
- Counselling and Mediation staff
- Court officials and staff
- Security Personnel and Police
- Volunteers
- Press
- Visitors

Appendix 2

Customer Survey Executive Summary

Ministry of Justice, Court Services Division

EXECUTIVE SUMMARY

Driven by a commitment to customer service and continuous improvement, and an obligation under the Financial Administration and Audit Act 1985, the Court Services Division of the Ministry of Justice commissioned an independent study into the effectiveness of the services, which it provides.

The Customer Survey was to report on the effectiveness of the Court Services Division regarding services they provide to customers in two of four outputs related to the outcome 'Court Services that meet the needs of the judiciary and the community'. The two outputs put to the test were case processing and the enforcement of criminal and civil court orders.

The survey was not designed to cover the perceived effectiveness of the judiciary.

HOW THE RESEARCH WAS CONDUCTED

The research amongst the judiciary, practitioners, Fines Enforcement Registry (FER) clients, litigants and jurors comprised:

- In-depth interviews and/or group discussions were held with all groups to develop and pilot test the questionnaires.
- Quantitative surveys were carried out with:
  - 78 judiciary
  - 200 practitioners
  - 37 FER clients
  - 2558
  - litigants
  - 107 jurors
- Contact was made via an introductory letter from Court Services followed by a telephone interview, except with jurors, where contact was made in person during jury service on two consecutive Thursday mornings.

WHAT WE DISCOVERED

A question at the end of the survey acted as a barometer to determine overall satisfaction with services provided by Court Services. Responses were mostly positive with four out of five judiciary, three out of five practitioners and seven out of ten litigants saying they were satisfied. Jurors were not asked this question. See Table 1 for actual results.

Table 1: Taking all things we have covered into consideration how satisfied or dissatisfied are you with the service provided by Court Services Division?

	Judiciary (78) %	Practitioners (200) %	Litigants (255) %
Very satisfied	29	6	24
Satisfied	55	57	48
Neither satisfied nor dissatisfied	10	26	13
Somewhat dissatisfied	3	11	11
Very satisfied	3	1	3
TOTAL satisfied	84	63	72
TOTAL dissatisfied	6	12	12

Trends

- Dissatisfaction with services provided by Court Services is low, particularly amongst the judiciary where only 6% indicated dissatisfaction.
- Justices of the Peace gave higher ratings than judges or magistrates.
- Country practitioners were more likely to be 'very satisfied' than metropolitan practitioners.
- Users of the Children's Court gave higher ratings than users of the Supreme, District and Magistrates Courts. 81 percent versus 73 percent and 70 percent.
- 'First time users' were more likely to be satisfied than 'subsequent users'.
- No significant differences in satisfaction can be observed between litigants who had 'won' or 'lost' their case or between those who were 'represented' and 'unrepresented'.
- Practitioners revealed that service from staff was the most influential factor in determining overall satisfaction. This was followed by satisfaction with listing, court buildings and management of case backlogs.
- Litigants also rated service from staff as the most influential factor in determining overall satisfaction. This was followed by satisfaction with case processing, waiting to be heard, ease of use without a solicitor and fair treatment of people using the courts.
- Between 25 and 40 percent of judiciary and practitioner respondents have seen an improvement in key focus areas identified in the Court

Services Strategic Plan such as partnership with the judiciary, case management, responsiveness, customer focus, planning and being proactive. No more than 10 percent said that the Division were declining in any of these areas.

CASE PROCESSING

Case Processing was one of two key areas placed under the spotlight in this survey. Respondents were asked to rate a number of individual aspects of Case Processing, and then taking all these aspects into account, give an overall satisfaction rating for Court Processing.

While ratings from judiciary, practitioners and jurors were strong, this area attracted higher levels of dissatisfaction than other service aspects from litigants. Note that jurors were only asked about their overall satisfaction with the jury process.

Table 2: Overall how satisfied or dissatisfied are you with how well the system worked at court?

	Judiciary (78) %	Practitioners (200) %	Litigants (255) %	Jurors (107) %
Very satisfied	39	6	15	15
Satisfied	52	63	49	66
Neither satisfied nor dissatisfied	4	22	11	16
Somewhat dissatisfied	1	9	14	1
Very dissatisfied	0	0	8	-
Unable to say	4	1	1	2
TOTAL satisfied	91	69	64	81
TOTAL dissatisfied	1	9	23	1

A number of strengths and weaknesses were identified by all customer groups.

Strengths

- The valuable role of the bench clerks was recognised by both practitioners and judiciary and high satisfaction with their service was recorded.
- Information at the court building about where to go was seen to be good.
- Courts were seen to run efficiently. However, dissatisfaction in this area was higher amongst 'subsequent users' than amongst 'first time users'.
- The jury process was seen to work well.
- Information about jury service and about how to behave in court was seen to be sufficient and good.

Weaknesses

- Registry problems focussed in the Local Court.
- Listing problems focussed in the Court of Petty Sessions.

- Problems with the speed at which transcripts are available and orders sent out. This problem is particularly acute in the county.
- Problems with the ability in listings to respond quickly to changed circumstances.
- All customer groups were dissatisfied with the time it takes to get a case to court and the time spent waiting at the court. This was one area where dissatisfaction was higher in country courts.
- There was concern with the order in which cases were called.
- The length of time spent by jurors in the assembly room.

Suggested future service initiatives

Future service initiative to reduce waiting times and backlogs and to improve case processing were put forward. Seen as high priorities are:

- Improved computing services.
- Staffing levels in listings, registry and secretarial support for judiciary.
- Assigning bench clerks to magistrates on more than a day to day basis.
- Ensuring defendants seek advice prior to their case being called.

ENFORCEMENT OF FINES

Many of the judiciary and practitioners were reluctant to comment on fines enforcement given their lesser involvement in this area. Corporate clients of the Fines Enforcement Registry also answered in relation to enforcement. In the case of litigants, the question about satisfaction with Enforcement of Fines was asked only of respondents who had a court order made for or against them — 73 per cent of litigants were interviewed on this question. The question was not asked of jurors.

Trends

- The judiciary and practitioners displayed a higher dissatisfaction with the enforcement of fines than with case processing.
- In contrast dissatisfaction amongst litigants is lower with enforcement of fines than case processing.

	Judiciary (78) %	Practitioners (200) %	FER Clients (37) %	Litigants (187) %
Very satisfied	11	4	27	14
Satisfied	44	34	41	58
Neither satisfied nor dissatisfied	6	23	24	11
Somewhat dissatisfied	7	12	0	5
Very dissatisfied	4	1	0	9
Unable to say	28	29	8	2
TOTAL satisfied	55	38	68	72
TOTAL dissatisfied	11	13	0	11

Table 3: How satisfied or dissatisfied are you that Court Services do all within their ability to ensure the production and service of court orders and the enforcement of criminal fines and penalties?

- Satisfaction was considerably higher amongst litigants who had had an order made against them, than those who had an order made for them.
- Practitioners were asked to provide detail when answering this question. This highlighted dissatisfaction with the effectiveness of the bailiff service and the speed at which fines are enforced.
- FER clients displayed very high levels of satisfaction about all aspects of the FER service, especially the helpfulness of staff and the speed to which they respond to queries.

COURT SERVICES STAFF

All customer groups rates Court Services staff very highly. The staff factor had the greatest influence when determining overall satisfaction.

Table 4: How satisfied or dissatisfied are you with the level of service provided to you by Court Services staff?

	Judiciary (78) %	Practitioners (200) %	Litigants (255) %	Jurors (107) %
Very satisfied	62	13	31	53
Satisfied	32	58	53	41
Neither satisfied nor dissatisfied	3	24	7	1
Somewhat dissatisfied	2	6	3	-
Very satisfied	-	0	2	1
Unable to say	1	1	3	3
Total satisfied	94	71	84	95
Total dissatisfied	2	6	5	1

Strengths

- Helpfullness.
- Friendliness and approachability.
- Ability to answer questions.
- Staff in District and Country courts were highly praised.
- Staff were seen to deal with people fairly.

Weaknesses

- Insufficient numbers of Staff.
- Amount of training received by staff.
- The telephone service.

COURT BUILDINGS

Respondents were asked to rate a number of specific aspects of the Court Buildings and to rate their overall satisfaction. The judiciary and practitioners voiced higher levels of dissatisfaction with court buildings than with any other service. In contrast litigants and jurors show high levels of satisfaction with court buildings. These results could reflect the limited frequency of contact that litigants and jurors have with the courts compared to the level of contact amongst practitioners and the judiciary.

Table 5: How satisfied or dissatisfied are you with the court buildings — this includes accommodation and furniture?

	Judiciary (78) %	Practitioners (200) %	Litigants (255) %	Jurors (107) %
Very satisfied	33	3	16	12
Satisfied	37	39	58	63
Neither satisfied nor dissatisfied	5	31	15	18
Somewhat dissatisfied	12	18	9	6
Very dissatisfied	12	11	2	1
Unable to say	-	-	-	1
TOTAL satisfied	33	42	74	75
TOTAL dissatisfied	25	29	11	7

Weaknesses

- Inadequate security.
- Courts are not user-friendly
- Inadequate pre-trial conference facilities and detention areas.
- Inadequate facilities in court such as VCRs and CCTV.
- Too few courts.
- Waiting rooms for litigants are not comfortable.
- Inadequate facilities for the public.
- Inadequate signage and information.

Priorities for improvement

- Security.
- A greater number of secure courts.
- Increasing 'user-friendliness' (this included more user-friendly signage and facilities and information for minority groups).

TRIAL COURT PERFORMANCE STANDARDS

The tentative Trial Court Performance Standard identify 22 performance standards which trial courts should aim to accomplish. These standards were developed by The National Centre for State Courts and the Bureau of Justice Assistance, United States Department of Justice in 1989. The 22 standards are grouped into five categories:

- Access to Justice;
- Expedition and timeliness;
- Equality, fairness and integrity;
- Independence and accountability; and
- Public trust and confidence.

Aspects of Court Services service were measured against these criteria.

Access to justice

Aspects measured: Accessibility of the buildings, effective participation, being treated with courtesy, responsiveness and respect and affordability, in terms of time and money.

Satisfaction with:
- customer service.

Concerned about:
- accessibility of buildings.
- 'user-friendliness' of facilities.
- sufficiency of resources.
- accessibility in terms of time and money, but especially time taken to get to court and time spent once at court.
- cost of transcripts.
- access for disabled people.

Expedition and timeliness

Aspects measured: Case processing and prompt implementation of laws and procedures.

Satisfied with:
- court processing as a whole (except timeliness: see weaknesses).
- prompt implementation of laws and procedures.

Concerned about:
- timeliness

Equality, fairness and integrity

Aspects measured: Fairness, equality, representativeness of juries, clarity of court decisions and the enforcement of orders.

Satisfied with:
- the extent to which juries are representative.
- everyone using the courts being treated fairly.
- everyone using the courts being treated equally.

Concerned about:
- the clarity of court decisions.
- the effectiveness of enforcement amongst practitioners and those with an order for them.

Independence and accountability

Aspects measured: Separation of powers, judicial independence, professional integrity and dignity of the courts. It was difficult to measure these aspects within the survey particularly amongst the general public for whom concepts such as the separation of powers and judicial independence are largely unfamiliar.

Satisfied with:
- the professional integrity and dignity of the courts.

Concerned about:

- waiting times, adjournments, which may lead to disparity in procedure by the court.

Public trust and confidence

Aspects measured: Many of these aspects relate to other standards in terms of ease of access to justice and fair and reliable court functions.

Satisfied with:

- courts being easy to use without a solicitor, increasing accessibility in terms of cost.
- courts being fair.

Concerned about:

- courts not always being accessible, given delays in getting to court and at court.

Appendix 3

Family Court Brochure

AS FROM 1 MARCH 1998 ***INFORMATION SESSIONS***

WILL BE HELD EVERY THURSDAY AT 10.00AM

AND FRIDAY AT 2.00 PM.

(NOT WEDNESDAY AT 3.30PM AND

THURSDAY AT 10.00AM.)

***INFORMATION SESSIONS* FOR PROCEEDINGS**

INVOLVING CHILDREN WHO ARE NOT CHILDREN

OF A MARRIAGE WILL STILL BE HELD
AT 2.00PM ON ALTERNATIVE WEDNESDAYS.

Note stapled to front page.

Front page

FAMILY COURT OF WESTERN AUSTRALIA

INFORMATION SESSION

COMPULSORY ATTENDANCE

All parties to applications before the Family Court MUST attend an ***Information Session.***

Friday 2pm Thursday 10am

The Information Sessions are held every ~~Wednesday at 3.30pm~~ and ~~Thursday at 10.00am~~ at the Family Court and no appointment is necessary.

Compulsory attendance is required as the Court aims to encourage parties to resolve differences without the delay, expense, trauma and inconvenience of the matter proceeding to a hearing.

DETAILS OF SESSIONS OVERLEAF

Family Court Counselling Service:
9224 8248/1 800 199 228

Details on inside of Family Court brochure:

For parties to proceedings involving children *who are not children of a marriage*, Information Sessions will be held at 2.00 PM on **alternate Wednesday afternoons.**

Contact the Family Court Counselling Service on the telephone numbers opposite should you require session dates or any further information.

The sessions provide parties with information about:

- the formal procedure involved in an application before the Court
- the major principles of the law of parental responsibility, maintenance, child support and property settlement
- the role of the Counselling Service of the Family Court
- using the services of a lawyer.

TIMES: ~~Wednesday at 3.30pm or Thursdays at 10.00am~~ *Friday 2pm*

DURATION: 1½ hours

VENUE: Family Court of Western Australia,
Information Session Room
Level 3, 150 Terrace Road, Perth
(Access via Concert Hall Concourse)

SPEAKERS: Qualified Legal Practitioner/Court Counsellor

NOTE:

- Attendance is compulsory for all parties to applications for parenting orders, property settlement and injunctions (not dissolution of marriage, summary maintenance or contravention of child order applications)
- Attendance must be, if possible, prior to the first hearing date of your matter at the Court
- The Information Sessions are a free service. Limited free child minding facilities are available at the Family Court during the Thursday morning session. Childminding facilities are NOT available to persons attending the 3.30pm Wednesday afternoon session
- A record of your attendance will be provided and should be retained by you
- Sessions are conducted at the Bunbury Court House once per month. For details telephone (08) 9224 8248 or 1 800 199 228
- Any concerns or queries about attendance at an Information Session can be discussed with a counsellor at the Family Court Counselling Service by telephoning the above numbers.

5.3

Justice and Technology

INTRODUCTION

The speed of change

In 1750 BC the Code of Hammurabi was inscribed on a diorite[1] stela[2] chiselled in cuneiform[3] script. Almost 3,000 years later, in 1215 AD, King John granted a charter of English liberties known as the Magna Carta,[4] written by a quill pen on parchment. Another 685 years later, the Australian Commonwealth Constitution was signed into law in 1900, also by quill pen.

The use of pen and paper (quill pens were finally superseded by fountain pens) continued throughout the 20th century, until 60 years later typewriters made their way into the hands of those producing legislation and other lawyers.

It was only another 20 years before the typewriters were replaced by 'standalone' word processors[5] for the production of legislation, followed in less than fifteen years by a networked computer system that not only processes words but also provides sophisticated search and retrieval capabilities. Now the complete body of legislation for the State of Western Australia can be stored on a circular plastic disk of little more than 5cm in diameter, rather than in volumes of books several feet across (and weighing significantly more than the disk replacing them).

2 965 years to 685 years to 60 years to 20 years to 15 years.

The pace of change in technology is moving rapidly and will continue to do so. Moore's law[6] states that the number of transistors on a microchip doubles every 18 months.[7] This means that computers continue to become more powerful all the time, at an ever increasing rate.

Some commentators view this and other related phenomena as 'technological churn' — the continual changes wrought by technology before previous technologies have fully matured or outlived their usefulness.

George Lindamood contends that

> Moore's law … tends to drive technological change faster than demand would otherwise require it.… People have to invent software to stimulate demand to use up all these MIPS.[8] Otherwise, there is no reason for people to buy new hardware. Then all the new stuff comes crashing in even though the old stuff still works perfectly well — and will for another 10 years. But for some reason, to keep up with the Joneses, you have to get the new stuff. So on and on and on it goes. The technological churn is going to continue, and maybe even intensify.[9]

Dealing with technology can be difficult. What is stated now in this paper may seem hopelessly outdated and inadequate in five years time — possibly in two years' time! Nevertheless technology is all pervasive. It currently affects the law and the justice system in many ways, and will continue this 'affect' to an increasing extent in the future.

This paper attempts to highlight a range of areas where technology, the law and the justice system intersect. Technology has the power to assist in some areas while it raises concerns in others. All require serious consideration and informed debate, rather than blind denial or, worse still, blind acceptance.

The impact of technology on the law and justice

Technology affects all areas of the law as technology affects all aspects of business. Technology must be considered not only in relation to how it may affect or assist the operation of the criminal and civil justice system — such as in the electronic lodgement of documents, videoconferencing and electronic trials, but also as to how changes in business, personal and social interactions are affected and implemented by and through technology — thereby causing those appearing before the courts to consider technological issues.

The totality of these technological impacts can not be completely explored in this sub-section. Many areas must be given cursory attention, whereas others simply cannot be addressed. One example is the area of copyright, where the emergence of more ubiquitous communications technology (through the Internet) has meant the greater penetration of digital copies, in a variety of different circumstances, mostly out of the control of the author of the work. With the advent of purely digital technologies, copying is a very simple exercise. Indeed, the provision of information across the Internet is essentially a copying exercise — copying digital bit streams from one location to another.[10] As such, infringing copyright can now be very easy — in fact, so easy that in many cases, people do not realise they may be infringing copyright.

Another example is the area of privacy law which is undergoing substantial change with the advent of the electronic world. The ease with which computing systems capture, store, process and match information concerning people — who they are, who they are related to, where they are, what they do and have done, what they own and buy, and where they go, has increased

exponentially in recent times and will continue unabated into the future. The increasing interconnection between computing and communications[11] systems can also readily determine where one is now, with whom one is speaking to now and has spoken to in the past, what one is looking at and what one requests. These capabilities raise difficult questions because their application can be used for useful and legitimate purposes as well as invasive and criminal purposes. Sometimes the line between these purposes is difficult to discern. Further research into the privacy aspects of the digital world is warranted.

Proposal 1

Western Australia should implement specific privacy legislation.

The privacy legislation in Western Australia should not necessarily follow the approach of other jurisdictions. More radical approaches should be considered including free gathering, storage and matching of data, provided that all access to and use of information by personnel within an organisation is logged. Members of the community should be able to access all information pertaining to themselves held by any organisation, as well as full details of the access to and use made of that information including who made the access and the reasons for doing so. Members of the community may then correct the content of the data and limit the use of such information by the organisation. These facilities should be implemented as individual rights, with very few exceptions, typically relating only to criminal investigations.

JUSTICE IN A DIGITAL WORLD

'The telecommunications revolution, driven by liberalisation and the Internet, will change the way people live and work'.[12] In a similar manner, the impact of information technology will affect all aspects of the law. To address these dramatic changes this paper proposes a conceptual framework for the interaction of information technology with the justice system and legal environment.

This conceptual framework for a '21st Century Justice System' deals with the 'Digital Representation'[13] of:

- The Paper
- The Thing
- The Person
- The Event
- The Activity
- The Judging

Digital representation of ... the paper

Paper is ubiquitous throughout the justice system. In many instances, representation of facts, information and knowledge on paper constitutes the only official form for the facts upon which legal decisions are based. It can be said that technology is making paper obsolete (or has the capacity to do so). The heavy reliance of the current justice system on paper is at odds with the standard commercial and social practice, which is rapidly moving to an almost

exclusive digital representation of information. Word processed documents, sent by electronic mail between parties, stored in digital form on computers and further processed, is the norm rather than the exception today. Data stored in databases processed by a wide variety of application systems is the standard way that businesses operate today.

But the replacement of paper into an all digital world is still problematical from a legal and justice perspective. Issues of evidence, maintaining business transactions for legal, evidentiary and historical purposes, universal access to digital representations, maintaining access to digital information over long periods, and access to the digital stores world-wide must all be addressed in the future, within a new legal and judicial regime.

One of the key aspects of the digital representation of paper relates to standardisation of information representation in digital forms.

Digital representation of ... the thing

Representation of facts, information and knowledge on paper is not the only area where digital representation of the 'real' world is making a 'virtual revolution'.

Actual physical objects, and other things, can now be faithfully rendered in an entirely digital form. Most manufactured items are now designed and modelled digitally. These same techniques can apply to representation of physical evidence in a legal environment.

There is a variety of such digital representations of physical evidence. Using a digital representation, rather than the real thing, can provide substantial benefits to the justice system. These benefits can not be fully realised unless a number of issues are addressed, including those relating to chains of evidence, proof, admissibility, among other things. Many of the issues are similar to those relating to paper representations, since digital formats can reduce the representation of many different types of things into a lowest common denominator.

Digital representation of ... the person

People can also be represented digitally. Substantial research into 'digital people' with the ability to interact has resulted in the creation of 'avatars' — anthropomorphic representations of behaviour in a computing environment.

In a future legal and justice system, lawyers could be replaced by artificial intelligence based avatars that would provide advice and representation to individuals. Initially this may only be for simple matters,[14] but with the passage of time, may apply to all legal matters. How will such a situation modify the legal process, particularly in relation to 'fairness' to all parties?

If the above scenario seems a little far-fetched, digital representations of persons are already being used in relation to videoconferencing and Internet

video.[15] Rather than having to be physically co-located, participants in the legal process can be involved at a distance. This can include expert witnesses and legal representatives, saving valuable and expensive travelling and attendance time, as well as allowing for particular legal expertise to be provided that might not otherwise be available,[16] and even the judiciary.

Digital representation of ... the event

The logical extension to the digital representation of persons is the development of a digital, virtual form of the complete event — that is, the trial or hearing. Currently, this is achieved using videoconferencing and closed circuit television (CCTV) technologies. In the near future the entire proceeding will move into a comprehensive digital format.

There are many issues surrounding the use of such technologies, many relating to the change in immediacy of the situation for the participants, but substantial benefits can be accrued.

Questions of how the current event of a trial will be changed by using such technologies, and the social impacts of such a technological introduction, must be addressed.

Digital representation of ... the activity

The complete event itself may not only be digitally or virtually represented, but also many activities in the legal and justice environment will move into an all-digital domain. Thus, the institution of proceedings, filing of documents, discovery, for example, will be conducted in a purely digital form. This will bring the justice system in line with the way that much business is conducted to a large extent today — a trend that can only increase in the future.

Conducting the business of justice in a digital form will provide substantial benefits, including the capability to reduce cycle times throughout the whole justice system. But the advent of such an environment also raises questions, in particular whether everyone in society will have the same access to the justice system, and whether the main participants in the system — lawyers, judges, clerical staff and police — will be able to readily adapt to such a system.

Digital representation of ... the judging

Finally, the new digital world may also have some impact on what could be classified as the core of the legal and justice system — adjudication itself.

Will advances in artificial intelligence allow decisions that would have been made by judges to now be made by computers? Will members of the lay community, using the Internet and entering the relevant facts, be able to preview a likely decision to a legal problem that might be handed down by a court, so that they can determine whether they should proceed with the case or not?

Or, will the capabilities of computing systems now allow various alternative models for adjudication to be introduced into the justice system?

DIGITAL REPRESENTATION OF ... THE PAPER

It is a truism to state that paper is no longer the sole medium of formal communication between parties in business transactions. It could be argued that this has not been the case for many years, yet in many legal instances, the presumption remains that a paper record is the *only* official record of an occurrence.

The ease of using paper has meant that material that may have been originally produced in an all-digital format (say, using a word processor) will be rendered in paper form (printed by the word processing package) before it is used, that is, provided to other parties. Even when the digital form of the material is used — say, a word processed document is e-mailed to another party for review, typically when an official record of the business transaction is required, the material is reduced to paper form for signing and filing.

This situation is generally not mandated, but rather, is a result of the level of convenience and readiness-to-hand[17] of paper. There is a substantial number of examples where business transactions are enacted without using paper. These include electronic data interchange,[18] electronic funds transfer, transfer of government notices, tender advice and notification, financial information reporting, insurance premium payments, insurance claims notifications, reinsurance claims, and many other examples. There are even proposed electronic data interchange messages for case initiation and case response for courts, which are in use in some jurisdictions. In fact, the UN/EDIFACT[19] Standard currently defines over 170 such messages to be used for conducting business in a totally electronic manner.

The use of electronic means to conduct business is generally covered by trading agreements, giving such means of conduct a similar weight as paper transactions. The overwhelming impetus of all business and societal interactions is towards a more digital world. Current Western Australian legislation does not directly address this issue, which is critical from a commercial or business perspective, and from an evidentiary point of view.

Proposal 2

Western Australia should develop legislation to ensure that digital representation of information is given the same weight as paper and other forms of communication.

To paraphrase Nicholas Negroponte: 'Bits must have the same rights as Atoms'.[20]

Documentation

The obvious starting point for the consideration of the move to digital representation of paper is in the area of basic documentation.

As mentioned above, the majority of formal documents used today are first produced using digital means such as word processors and then printed.

Business transactions (records)

Simple documents do not constitute the only business records in use today. For more than 40 years computers have been used in businesses to process data, maintain records and produce information. Today, computers are increasingly used for the same purposes in individual and personal areas.

Business transactions or records created and maintained by computer systems have been and are now of a different nature to paper based records in most instances. This has led to a somewhat ambivalent attitude to such records in the eyes of the law, as evidenced by the following extract:

> Historically, the judicial attitude toward the introduction of computer records into evidence has resembled a ping-pong ball. In the early days of mainframe computers, the proponent of computer-based evidence was often required to satisfy the … equivalent of 'authentication proof of process.' They were required to prove, with the testimony of programmers, that the proferred [sic] computer print-outs accurately reflected the ultimate facts for which the printouts were introduced as proof.
>
> After computers in business became commonplace, however, judicial notice of the computer print-out process became more common. Courts (and perhaps litigants opposing the introduction of the computer evidence) tended to develop a complacent attitude which assumed that 'if it's from a computer, it must be accurate,' and developed a tendency to give short shrift to the requirement of authentication of electronic evidence introduced in the form of computer print-outs. This tendency, which continues to the current day, means that any argument of untrustworthiness … or challenge to authentication … will likely result in the challenge affecting merely the weight of the evidence, and not its admissibility.[21]
>
> However, there are situations where zealous cross-examination of the custodian of the computer-based evidence, who is called as a … witness … to identify the record under the business records exception to the hearsay rule, demonstrates that both continuous custody of the records and credible anti-tampering security procedures were entirely lacking. Perhaps there was once a time when a corporate manager of information services could testify credibly that all access to the computer data was under his or her control in a guarded central computer room, but this became a rare situation with the spread of distributed computer power throughout the enterprise and beyond.
>
> If continuous control and robust non-tampering procedures are both effectively rebutted (especially if the custodian is the employee of a party who is the proponent of the computer-based evidence), then the court and the fact finder may have very little hard evidence upon which to base a critical finding that the computer evidence has or has not been modified, innocently or intentionally. Paper records have objective differences because they are made of atoms,[22] but digital

> records are composed of bits (binary digits) which are all identical, and therefore cannot be proved to be correct or incorrect.…
>
> There are a number of technological methods for bolstering trustworthiness and authentication of both genuineness and identity in the case of digital records. The digital signature process … includes a 'one-way hash process' which assures that there has been no modification of the record since the digital signature was affixed. In addition, the digital signature authenticates the identity of the signer, so that the 'who' and the 'what' (but not the 'when') of the document are assured. Perhaps an even more elegant approach to mitigating the risk of stored [sic] digital records is the strategy of the patented Digital Notary System,[23] which does not require the public key/private key management necessary for digital signatures. Digital Notary fixes the message integrity of the document to a non-repudiable time-date stamp, to provide robust assurance that there has been no modification of the record since the time-date stamp. This strategy assures the 'what' and the 'when' (but not the 'who') of the document.[24]

Thus, after viewing computer based records with suspicion and rejecting them in the first instance, their widespread use has led to almost the opposite position — an unquestioning acceptance of such records. This somewhat ill-informed position is now rife with difficulties, not the least being certain of the information contained in purported business records maintained by computer systems. This was not as problematic when computer systems were used for processing purposes, and the 'actual business record' was the printed output from the computer system (and in many instances, the paper used to convey information and data to be entered into the computer system). The computer system could almost be ignored, and the paper could be relied on. Today, the paper may never have existed, or, if it has, it may have been destroyed long ago.

The validity of the information maintained by many, if not most, current computer systems may not satisfy strict record keeping requirements — certainly from a legal perspective — when challenged.

A range of technological solutions is currently available to address these issues, some of which have been mentioned in the extract quoted above.

Digital signatures and associated legislation relating to operating in a digital environment are a key requirements for addressing these issues.

Substantial work is occurring in this area throughout the world. A summary of recent updates in the electronic commerce legislation area[25] identified more than 200 initiatives in a variety of areas world-wide. A substantial number of precedents can be obtained from these sources to assist Western Australia in formulating its electronic commerce legislation.

In dealing with electronic interchange and commerce, two general approaches can be taken. The first approach would be to modify all current legislation to explicitly accommodate electronic documents, electronic data and electronic interchange with respect to the requirements outlined in the specific legislation. The second approach would be to promulgate a single, general-purpose piece of legislation which gives electronic documents, electronic data and electronic interchange the same legal weight and results as physical documents, and their interchange, currently enjoy.

The second approach would cover such issues as:

1. Wherever documents, forms or other physical representation of data are mentioned, then an electronic alternative of such a document, form, etc, could be substituted with the same legal consequence;
2. Electronic and digital signatures would have the same legal presumption as physical signatures currently do;
3. The certification and authentication of digital signatures;
4. The status and principles associated with evidence in digital form (giving such evidence the same weight and operation as evidence currently in physical form); and
5. Electronic commerce, including electronic trading and the conduct of business electronically, and payments in electronic form.

The second approach would have to be drafted in such a manner that its general provisions would cover all legislation currently in force.

The second approach was effectively promulgated by the United Nations in their UNCITRAL[26] *Model Law On Electronic Commerce*,[27] which has been used as the framework for further work in a number of jurisdictions, particularly in America, but also elsewhere in the world. This framework for legislation has been recommended by Commonwealth and other state investigations into electronic commerce legislation. The most recent example of such an approach is in Victoria where an Electronic Commerce Framework Law Bill has been proposed.[28]

The second approach to legislation is to be preferred, in that its general provisions could cover not only the current situation and all legislation in one pass — requiring less effort, but could also be drafted in a manner to accommodate future changes.

Drafting such legislation can be in two 'strengths':

- A minimalist approach — as evidenced by the above Victorian legislation; and
- A highly prescriptive approach — as evidenced by the *Utah Digital Signature Act 1996*.[29]

It is interesting to note that the UNCITRAL *Model Law On Electronic Commerce* is virtually half way between a minimalist approach and a highly prescriptive approach. The Guide to Enactment accompanying the framework model is more extensive (explaining each section in detail) and provides a more prescriptive element to the framework.

The minimalist approach allows for electronic commerce to be pursued within a jurisdiction, but the details associated with actually operating in an electronic commerce environment must be determined subsequently to enacting the legislation. This allows a jurisdiction to gradually specify, develop and implement the required regulations, rules, policies, and other details required to make the whole system work. It also allows a jurisdiction to accommodate improvements and updates in relation to technology and other initiatives, especially those that may occur elsewhere.

One of the problems associated with this approach is that the complete set of 'legislation'[30] is developed in a patchwork manner, potentially leading to inconsistencies and problems with situations falling through the gap.

The highly prescriptive approach — incorporating the Act,[31] its Rules[32] and Commentary,[33] defines all aspects associated with electronic commerce in a jurisdiction. Full definitions of all elements in such a system are promulgated, together with specific descriptions of the operation of the complete system, including such items as, inter alia:

- Electronic and Digital Signatures;
- Certification Authorities (licensing, regulation);
- Duties — of all parties;
- Certificates — Authentication, Revocation, Suspension, Expiration;
- Public key infrastructure;
- Formation of contracts electronically;
- Time and place of receipt and dispatch of electronic communications, including acknowledgments;
- Records and Retention;
- Evidence in Digital Form;
- Accreditation;
- Standards of Care, Negligence;
- Crimes including forgery, etc;
- Consumer Protection; and
- State Services and Repositories.

Such a detailed piece of legislation can also prescribe examples of operation in business under the act.[34]

Guidelines in relation to these issues with respect to Australia are provided via the following recent Commonwealth Government-based publications:

- The Gatekeeper Report (June 1998), Office of Government Information Technology (OGIT);[35]
- Criteria for Public Key Certification Authority — Draft 3 (June 1998), OGIT;[36] and
- Electronic Commerce: Building the Legal Framework (March 1998), Electronic Commerce Expert Group (ECEG) Report to the Attorney-General.[37]

Proposal 3

Western Australia should initially enact a minimalist Electronic Dealings Framework Act.

Western Australia should then, in the light of experience, including change in Commonwealth law and international models, give consideration to amending its initial Electronic Dealings Framework Act. A more comprehensive legislative model, based on the UNCITRAL framework, the Electronic Commerce Expert Group recommendations and relevant aspects of other external legislation is needed. The new Western Australian legislation should encompass, remain consistent with, and replicate, to the extent appropriate, the draft Commonwealth legislation in this area.[38] Western Australia could best use this draft legislation as a framework and enact detailed regulation as required.

Disclosure of records

The move to a more electronic mode of operation throughout enterprises, replacing both paper and other methods of communication such as telephone conversations presents some further legal dilemmas. For instance, the use of e-mail may cause some surprising problems for lawyers.

> The problem is that as practitioners … discover how productive e-mail is in their legal practice, there is a tendency to use it for internal conversations which would formerly have been in person or by phone, and for external conversations which would formerly have taken place by phone. To the extent that the stored e-mail conversations are retained, and are relevant and not privileged, they are discoverable and subject to proactive disclosure under Rule 26(a)(1)(B), as well as Rule 34.[39] A further problem is that e-mail which is deleted might still exist in the mailbox of the other internal or external correspondent. Even if deleted by both, it might reside temporarily or permanently in the central tape backup system of the enterprise. If the backup tape has been reused and over-written, it may actually be possible to restore deleted information from an ancient backup tape. So, when an action commences, is there a duty to preserve evidence by immediately taking a snapshot of the system, so as to avoid over-writing potentially relevant backups?

> These e-mail implications have led to a variety of suggestions, none of which are entirely satisfactory: (1) e-mail should not be used; (2) if e-mail is used, it should be deleted immediately; (3) a records retention procedure should delete e-mail after a short, fixed interval; (4) no tape backups of e-mail; (5) if you must keep e-mail as your correspondence file, then periodically delete potentially sensitive messages. Alternatives (1), (2) and (4) destroy much of the effectiveness of e-mail as a practice tool. Alternative (3) may make sense under some circumstances, but it has been held that a records retention policy is not a complete defence to the adverse consequences of a charge of destruction of evidence, particularly where some records are selectively excepted from the retention policy by premature destruction or exemption from destruction.[40] Alternative (5) is the same as (3), but with stronger adverse implications.
>
> Until this disruptive Catch-22 situation is changed by legislation or rule, many practitioners have adopted what they believe to be a balancing of the advantages and risks of e-mail. As they have become experienced users of e-mail, they have simply developed the commonsense habit and instinct of picking up the phone or walking down the hall in a situation where they would not want the e-mail disclosed in a related litigation.[41]

Thus, the use of a new technology such as e-mail, may actually cause more problems for lawyers rather than assist them, in some circumstances. As can be seen from the commentary above, this may lead to a restriction on the use of the technology, thereby reducing the effectiveness and efficiency of the medium.

At the very least, the issues of discovery of such technological materials must be explicitly addressed by those relying on the technology, or by legislation within Western Australia.

Historical records

In passing, mention must be made of the issues associated with the maintenance of information stored in electronic form for historical record keeping and archiving purposes.

> The advent of electronic information introduces new preservation requirements. In contrast with print materials, where to preserve the artefact is to preserve the information contained in it, electronic information is easily transferred from one medium to another with no loss.[42]

This means of transfer raises serious problems in relation to maintaining the integrity of materials, especially over many years. These issues have been addressed by many organisations, most particularly libraries around the world[43] and in Australia,[44] and work has turned to the legal ramifications of maintaining historical records. Locally, the National Library of Australia has produced a draft report: 'Management and Preservation of Physical-Format Digital Publications — A National Library Position Paper on the Role of Australian Legal Deposit Libraries'.[45]

Although not directly related to the practice and procedure in the justice system, these issues relate to the ability of the justice system to refer to historical materials in the pursuit of justice because of the importance of precedent in legal decision making.[46]

Proposal 4

Western Australia should enact legislation and policy to ensure electronic materials are properly maintained for historical purposes.

Information resources

The law and the justice world are steeped in history and can be rather complicated (at times more than actually necessary according to some commentators and possibly many lay-persons).

The trite cliché: 'Knowledge is Power' applies in this arena. If justice is to be done, the community must have access to legal resources and the justice system.

But what is the community? And what sort of resources and access are appropriate? Some issues concerning these questions (and more) are addressed below.

Access for the whole community

The community here is not restricted to the legal community, government and other agencies but embraces the public at large. The community is no longer regarded as this State (Western Australia) or the Commonwealth. Due to technology and telecommunications, we must acknowledge the global view, as the world becomes an interconnected and smaller place if not physically, at least virtually. In this context there is a need for change in, and further development of, policy by the justice community, including libraries, to accommodate the increasing requirements of 'width' and 'breadth' of access to information for the *whole* community of the State of Western Australia.

To deliver such access to legal resources raises a range of issues relating particularly to education and implementation of services to provide access to information. The public may or may not embrace the concepts proposed in this sub-section, but it is recognised that there is a growing expectation and demand for information in all formats.

The current and future education system is preparing a new generation of computer and information literate users who appear to have higher expectations of systems, services and society.

Self-represented litigants: the 'do it yourself' group

The 'do-it-yourself' (DIY) group, also known as self-represented litigants in the legal community, continues to grow in this age of rising costs, shrinking

incomes and escalating information. The phenomenon is 'in sync' with the rest of society: witness the proliferation of lifestyle and 'do-it-yourself' programmes on television.

Compared to this increasingly vocal and visible group, one must also remain aware that there are persons who have no facility or desire for such 'do-it-yourself' service and will always prefer traditional assistance. Some members of this group may include the disabled, such as blind, deaf, handicapped and those having English language difficulties. In some instances, there are difficulties associated with obtaining traditional assistance that increasingly pushes these people to help themselves.

Those living in isolated areas of this vast State may be considered to be handicapped in relation to access to services and information. What resources can be provided for these members of our society? Because they live far away, are they always destined to be second class citizens?

Dietrich v The Queen[47] has set a precedent that has highlighted the right to access of representation and information for litigants (admittedly only in serious criminal matters though). This is also reflected in the *Bounds v Lewis*[48] case in the United States relating to 'meaningful access to the courts' in the provision of law library services for prisoners.

Types of information and levels of knowledge requirements by clients

Given that specialist legal information collections of paper and electronic materials exist now and continue to grow alarmingly, it is argued that public access is severely limited to either information source.

The State libraries have by 'legal deposit' the hard copy materials published in this State and a range of other government print publications from other states, the Commonwealth and overseas, but typically have limited resources to provide legal information services.

Internet use is growing, which makes information available to those who have access and the ability to use it. There is little public availability for those not connected. Support for Internet access for public libraries in Western Australia has been a slow process, with support necessary from both the Federal and State governments to implement it. The Library and Information Service of Western Australia (LISWA) intended that all local government authorities have access to the Internet by June 1999, in order to access LISWA library management systems for the public library network.[49]

The problems of access are further highlighted by difficulties of users interpreting the information. The futuristic approach is said to be the use of artificial intelligence, but this development will take time, money and further

education. Kiosks,[50] using templates to assist with information entry, will be seen as forerunners to this approach. There will remain a need for the personal interactive support role, which could be supplied by the legal profession, or through libraries — two options currently available.

Given that vast quantities of information are being delivered, navigating the information is the major challenge to be faced. Some electronic information must be regarded as 'bad' information. When information is not current it must be regarded dubiously. When the source of the information is unknown, or the authority of the information is unknown, or of unknown or dubious quality, then the information could be considered 'bad'. How many times have searches on the Internet returned sources that are assignments by high school and college students (that may have received a low grade)? Sometimes it is difficult to tell whether the material returned is high quality or not. Maybe one wanted to see high school assignments, but typically one would want a known, authoritative and high quality source.

There is a need for a responsibility to be taken for quality control of information distribution. Who will accept this role? The webmaster? The publisher? What disclaimers are required to protect all concerned? The much vaunted 'disintermediation[51] capability of the World Wide Web might now have to be replaced by the on-line version of refereeing, broking and publishing.[52]

This concept of 'bad' information is not confined to electronic material but also exists in libraries today. Again it is a responsibility which should be questioned in regard to legal information. Supervision and monitoring of information to produce 'good' information is a requirement for the inexperienced user.

To develop useful, reliable and timely information resources will require specialists having skills in both electronic and paper materials. There also needs to be an integrated delivery and validation process. This, combined with pathfinders, checklists and other navigational tools will make public access more user friendly, in the provision of timely and accurate detail.

There is a need for plain language for retrieval purposes, but would this cover all cases of specialised semantics and jargon that builds up over the years in any field of endeavour, including the law? How would old pre-electronic law be interpreted? Would a thesaurus need to be developed?

The requirements of the general user

Consideration of the major requirements for community access to legal information, and how best to deliver service to these people, include the following items,:

- Legislation: as a major part of daily life in running homes and businesses, the knowledge of past, present and future regulation of society where ignorance is not considered an excuse will increasingly become important. The electronic delivery of legislation still suffers from considerable delays in publishing and is not considered authorised for court purposes at this time. Eventually it will be available simultaneously with paper copies, as in the case where commercial publishers make delivery of hard and soft copy at the same time;

- Law reports: Some are available on-line and on CDROM commercially;

- Unreported judgments: including decisions of the various courts and tribunals which are not all available in hard copy. Not all courts will accept prints of electronic versions for court purposes, due to the variations in pagination and cumbersome presentation. The discussion of potential to tamper with the electronic version of unreported judgments continues and in Western Australia, it is considered to be the responsibility of the officer of the court to provide the authorised information;

- Text and treatise: are not anticipated to be available retrospectively and are generally limited to hard copy. New products are being developed for professional needs, with information packages relating to particular subjects being developed commercially. Copyright in text materials is an area for investigation, especially in relation to copying in an all electronic world;[53]

- Journals and databases: are currently available in both Internet and CDROM versions, but only for certain products. The number of electronic law journals in academic areas is growing, but paper requirements are still seen as a parallel requirement for years to come.

Evan Predavec of Butterworths has predicted that by the year 2000, 80 per cent of all legal research materials will be available electronically through on-line services, with the CDROM virtually non existent.[54]

Basic information — free of charge (and the role of Government)

One position is that basic information in all areas, not just in relation to justice, should be available through the government, at no cost to the public. This would include access to the proposed information 'verandah'[55] and channels such as the Internet, Western Australian Government developed co-located education 'telecentres', public libraries and kiosks — in the courts or elsewhere.

The cost of providing these services and the support, development, maintenance, operation and education of staff and users may require strategic

partnerships to be developed. In the age of right-sizing, it is unlikely that government would be able to absorb this enormous role. If so, it could be subject to considerable delays of funding and implementation.

Value-added services and the use of navigators

Any additional information processing would need to be thought of as a value-added service, subject to cost recovery.

Research services including searching and processing of information to suit the requirements of the user are currently available in some university library faculties. There is potential to develop such services within the public library sector with the specialist assistance of 'navigators.'

Specialist subject libraries have always performed this type of service within organisations and more recently will account for services rendered. This already occurs in law firms on the client account. Could this also be offered through law firms to outsiders or members of the public on the do-it-yourself basis? Would this produce ethical problems?

After the navigator has performed the research, the information gathered could then be assessed by the 'quality controller', that is, the professional of the firm, as to whether the information is valued as worthy of action. This would vertically integrate the legal information business within the law firm, adding a new dimension to the client service.

Quality controllers — fee based assistance

The concept of a Quality Controller of Information (charging charge fees for such services) would embody offering the services to those people who wish to pursue litigation and desire to give an informed presentation to the profession and ultimately to the court. Such a service could be provided by a government entity, such as a Legal Aid Commission, or by Courts Services (if duly funded).

The role of libraries

To most people the term 'library' implies books, but there is a transition currently taking place. Libraries of all types have in more recent times come to mean information access and information distribution to a client group. This concept requires parallel use of materials and continuing development of both manual and automated systems to meet client needs. This is now the prime raison d'etre for the library business.

Not all users will desire electronic access — and not all materials will be available electronically. All libraries will continue to have a book role as well as an information role to fulfil, which can be expanded and combined in the management of access and navigation of information channels.

The style of the law library is already changing, with many collections being trimmed of paper in favour of electronic resources. It is notable that this is happening in financially well-endowed institutions and firms as well as those less well-off. Similarly the value of book collections is dropping.

The cost of multiple access and on-line services are still prohibitive to many libraries. Budgeting for unknown cost factors and accounting for the un-patterned use of on-line services, are nightmares in a world of shrinking resources. At least the cost of a book is known when purchased, even if rarely used. It can be retained as an asset but electronic data is transitory.

Due to the changing face of the business, libraries will need to adjust to the market place to provide products and services for the client group. They may tailor specific products for specialist groups within their client base. Community groups may fall into this specialist group.

The library is best placed to become the information resource centre, using staff combined with technology as the distribution vehicle.

The need for libraries will still exist, as information retrieval skills reside within libraries. Librarians must take a greater role as navigators of the information. Librarians therefore must look beyond their traditional role, accepting alternative and co-operative solutions to sustain their position in the information marketplace.

The subject is currently being addressed throughout the world and in Australia, as demonstrated by the range of papers at the 1998 ALIA Biennial Conference. The concepts of the Australian National Library working toward the Australian Digital Library, establishment of virtual libraries, change management and crossing boundaries to develop better outcomes for the clients along with knowledge management becoming the 21st century task for librarians are all under examination.

Improved structuring of legal information

The traditional law reports are the major source of judicial precedent and the root of the law of doctrine which bind the practice and procedure of the legal profession. Law reporting bodies exist to maintain standards in selection, production and delivery of the law reports and in doing so serve a principle of accountability to the profession and the law.

The introduction of standards for electronic materials such as those implemented and maintained by the Law Reporting Council should be considered essential to any electronic development. Again it must be asked: who will take the lead and the responsibility for this? There is much support in the legal community for the implementation of electronic publishing and a keen interest to address the problems of implementation. The Council of

Chief Justices Electronic Appeal Book project is supported as a prime solution to the introduction of electronic use across the courts.[56]

While it is evident that there are W3C[57] and specific national IT standards published by Standards Australia[58], it has been noted that the most significant impediment to the introduction of an electronic appeal system is the lack of uniform standards across jurisdictions.

The format of standards will require attention to accuracy, integrity, selection and editing of the material. All appellate courts are anticipated to have implemented changes to formatting and citation during 1999. Medium neutral citation using paragraph numbering will alleviate some of the complication of the use of electronic versions.[59]

With the commencement of common data repositories for judgments, rules, practice directions and notes for uniform practice in the courts of Australia as a vehicle using agreed standards and software, there is potential. Such an environment would make it possible to filter all this information to the profession and enable retrieval to the whole community. It would provide a positive start to delivery of standard information that would benefit the entire community and not just the courts and the legal profession. In turn, it would deliver eventual savings to courts.

Justice information and its structure

In order understand the benefits that can accrue to a justice system through the effective structuring and use of information in a technological sense, one needs to first consider the basic issues of what is a justice system (as a system), and then the associated issues of information provision and analysis within organisations and their application to the justice system.

The application of General Systems Theory[60] to social and business organisations by Peter Checkland[61] and others has identified several types of systems, including:

(a) *Natural systems* Physical systems which make up the Universe in a hierarchy from subatomic systems through the systems of ecology to galactic systems.

(b) *Designed systems* These can be both physical (tools, bridges, automated complexes) and abstract (mathematics, language, philosophy).

(c) *Human activity systems* Generally described by human beings undertaking purposeful activity such as man-machine systems, industrial activity, political systems.

(d) *Social and cultural systems* Most human activity will exist within a social system where the elemetns will be human beings and the relationships will be interpersonal. This is different in nature to the other three classes in that it spans the interface between natural and human activity systems.[62]

The 'justice' system in our society is both a designed system (an abstract designed system at that) and a human activity system.

Systems must conform to the concepts of the 'formal systems model', stating that a system must have:

(a) objectives, purpose, etc;[63]
(b) connectivity;[64]
(c) measures of performance;[65]
(d) monitoring and control mechanisms;[66]
(e) decision-taking procedures;[67]
(f) boundary;[68]
(g) resources;[69] and
(h) systems hierarchy.[70,71]

A simple analysis would indicate that the 'justice system' satisfies all the components of the 'formal systems model'. Although not all these components need be analysed in this paper, the objective of the justice system could be described as the 'Restoration of Peace in the Community'.[72] The measure of performance for the justice system would then be a measurement of the level of peace within the community.

As soon as it is said that systems need to be measured in order to check their performance, it is implied that data needs to be gathered, stored and analysed, so that information can be presented to inform observers that the system is, or is not, performing as expected. Information can be categorised as support for analysis in the following areas:

(a) Decisions on individuals and matters within the justice system;
(b) Reports on the status of the various justice system processes; and
(c) Research into criminology that supports the creation of state-based strategic policy (for particular application to the criminal justice system).

To do all of this requires the ability to gather and store information properly.

The performance information may lead to calls for change in the justice system. Any proposed change will need to be researched in order to understand some detailed aspect of the justice system and estimate the impact of the proposal. This, then, forms the basis of state-based strategic policy making. The storage of data needs to be designed with these purposes in mind. The information needs to be structured so that consistent observations can be made over time and observation compared against different time periods. It needs to be stored in a form that lends itself to rapid and easily manipulation. Paper is not a storage medium that lends itself to these criteria. To store such information properly structures must be defined.

To define the information properly requires actors in the justice system to identify the things that are important to them in operating and understanding the workings of the justice system. This cannot be left to technologists. It is actors within the system who require answers and they are in the best position to define what is important to them. Technologists provide advice to design efficient implementations of the definitions and to ensure the questions can be answered.

The work associated with defining data structures is an essential precursor of work required for Electronic Data Interchange — to ensure that all parties talk the same 'language'.

Proposal 5

Western Australia should develop a common set of information definitions endorsed and supported by all participants in the justice system.

Tracking essential things

There are objects or things that need to be tracked throughout the justice system in order to support decision making at an operational level. (The need for tracking is more obvious in the criminal justice system and the discussion that follows focuses on the criminal rather than civil system.) The tracking of people, information, warrants, orders, evidence, bail and parole conditions all require the system to identify the correct person or piece of information at each inquiry.

An important and high profile requirement of any justice system is the ability to report the status of an individual subject to the criminal justice system. The popular media has made much of events where alleged offenders were on parole or on bail when committing further offences only to be released on bail again. Severe embarrassment occurs when, unknown to the judicial officers involved, the defendants were already under supervision.

Besides having the ability to track people, the criminal justice system needs to be able to track other objects such as complaints, certificates of arraigns, and orders of commitment (to name a few).

These items of information are shared across the processes of the justice system, across many organisational boundaries. The items and information flow from one process to another, but they have not (currently) been formally accepted as information shared. Agreement needs to be reached by all parties in the justice system to define precisely these data items and to answer issues of ownership and accountability.

Proposal 6

Western Australia should rationalise the information items used throughout the justice system, and determine the issues of ownership and accountability in relation to each information item.

Identification of persons

An identifier is a mechanism that uniquely distinguishes one item or individual from another.

Each individual object has a unique identity that is represented in information systems as a primary key. Many items have a primary key, especially those that are created by human beings, for example, a warrant, charge or indictment. Some objects or things do not have a 'natural' readily identifiable primary key. The most significant example is people. While two people can be called John Smith and have the same date of birth, they are still two unique people.[73] The problem is then one of defining the mechanism to uniquely identify an individual.

The criminal justice system currently has a multiplicity of identifiers for people:

(a) The Police Service has an identifier for people;

(b) Each of the various functional information systems managed by the Ministry of Justice has its separate identifier for a person;

(c) The Director of Public Prosecutions has an identifier for a defendant; and

(d) Law firms will typically have an identifier for the parties they represent.

The impact is that a justice organisation, when making an inquiry on an individual in another organisation, cannot be guaranteed that it is referring to the same individual. The justice system requires an architecture that allows the many organisations participating in the justice system to use a single and simple mechanism to support the flexible assignment of a unique identifier for individuals.

Standards

Standardisation of coding and data

There is a number of data items the definition of which requires coordination at the highest level. These items would be constituted as core data items to manage and control.

The development of a standard for the definition of data held on persons is essential to justice agencies and the courts. Currently, the justice system does not have an agreed minimum standard that defines what data will be held on a person.

Such a standard would facilitate the transmission of electronic messages and data between agencies.

Additionally, the set of offence codes also requires agreement across those agencies providing justice services. This means the definition of a structure to record an offence as well as any classification system relating to offences.

Just as there is duplication of records pertaining to people within information systems in the justice system there is duplication of offence codes. The Ministry of Justice has eight individual sets of offence codes held in three distinct formats. Data cannot be shared between those systems in such a manner that will guarantee a known level of data quality.

Having a well-defined standard of offence codes will facilitate data exchange between justice agencies. The Police Service can transmit charge information to other justice agencies knowing that the meaning of the offence is agreed.

The Ministry of Justice and the Police Service also report to government by offences. Yet the definition and agreement of what constitutes an offence definition has not been formally agreed.

In 1987, the Australian Bureau of Statistics[74] developed Australian National Classification of Offences (ANCO) and in 1997, in conjunction with justice agencies around Australia, released the new Australian Standard Offence Classification (ASOC). The Ministry of Justice has developed a classifications system of 17 categories for reporting to Government and the Public. This should be used to report on sentencing outcomes of the Western Australian courts.

Management of standards (coding and data) within the justice system — Justice Joint Agency Office

A structured approach to information that involves the adoption of a standardised justice data model, agreement on identity, and agreement on standards for data and codes, would imply the creation of a body that would coordinate this work and ensure the maintenance of the data structures. As the justice system overall matures in the use of its information, the body would continue to enhance and refine such standards and models.

This body would need to have a management group comprised of chief executive officers and senior executives within the justice system, who would be directly impacted by this initiative. The executives are, in some way, sharing responsibility for the good management of data with each other. Each executive will rely on the quality of data from the other. It is imperative that senior executives who are responsible for the processes within the justice system fully participate in the initiative.

Proposal 7

Western Australia should create a Justice Joint Agency Office with a board of management representing all justice stakeholders that will establish and maintain the definition of:

(1) essential data structures to support the analysis and measurement of justice system performance;
(2) essential data structures to support the effective and efficient operations of the justice systems (transfer of information);
(3) the processes of the justice system; and
(4) the outputs and outcomes of the justice system.

DIGITAL REPRESENTATION OF ... THE THING (OBJECT)

Evidence

The precise status of digital only documentation/data constituting evidence for legal purposes is currently unclear.

The simplest interpretation of the current situation is that only evidence in physical form is legally acceptable within the justice system. This position preserves the status quo, but unfortunately, does not effectively represent either the current or future situation.

There are a variety of business transactions which are totally created in digital form, maintained in digital form and never translated to paper form. Current examples include the use of email, as well as operational on-line computer systems (such as those used to record accounting transactions within organisations).

Current wisdom suggests that if the transaction must be kept (for evidentiary purposes), then it should be printed and maintained in paper form. As business becomes more automated and electronic, this option will become less feasible, if not impossible in some instances.

Legislation must be introduced to give effect to evidence in digital form (see above, under the proposal for general 'Electronic Dealings' legislation).

This legislation must specify that material in digital form can be used as best evidence in legal proceedings, provided that certain data validity processes are followed.

Such data validity processes may include the use of digital signature technology to ensure that the business transaction data is confidential, integral, authentic, and non-repudiable. The digital signature technology should also be combined with time-stamping technology, to ensure that the date and time that a digital piece of material (ie digital document) was created and/or received is always accurate and can never be tampered with.[75]

The *Commonwealth Evidence Act 1995*[76] has been amended to give effect to digital material as best evidence.

The UNCITRAL *Model Law On Electronic Commerce* has also addressed this issue, as has much of the legislation in other jurisdictions based on this model.

Such evidentiary laws must also deal with the retention of material (in wholly digital form) for evidentiary and record-keeping purposes. For instance, in Western Australia, section 233 of the *Justices Act 1902* deals with the interpretation of a court record, and following sections deal with the making of negatives of court records and the retention and destruction of court records. Legislation proposed must encompass the definition of digital material to incorporate court records and the retention and destruction of such records (as well as more generally, any records which must be maintained).

Proposal 8

Western Australia should amend its *Evidence Act 1906* and incorporate sections into its (initial) Electronic Dealings Framework Act, (and any other such acts as may be enacted from time to time) to accommodate evidence (of all types) in digital form — allowing digital evidence to be accorded such best evidence status as is required.

Images of evidence

In addition to the usual documentary and real evidence, trial lawyers have long used photographs, charts, diagrams, models, and other forms of demonstrative evidence. Now, modern imaging systems can display sophisticated images at a relatively low cost. Such images may be used for a variety of evidentiary purposes, including merits evidence, demonstrative evidence, and the augmentation of opening statements and closing arguments.

Presenting computer-animated tort and crime re-enactments often raises traditional evidentiary problems. Unfair prejudice can be a particular problem when persuasive animations and graphics are used.

Some lawyers have always had access to sophisticated aids for closing argument. Recently, in a suit against Price Waterhouse, counsel made their closing argument via a professionally produced videotape that intercut images of a major movie ('A Night to Remember,' a movie about the Titanic) with their argument. Does the use of such video enhance the already existing risk that poorer clients and less creative lawyers will be placed at a competitive disadvantage? If so, would the disparity in available presentation tools create an unacceptable risk of unfairness in result? Given the unfortunate fact that disparity of resources and legal talent is a daily aspect of legal life, absent unusual reason we should be hesitant to consider limitations on technology based solely on such disparity. On the other hand, the use of technology-based

> presentation evidence in criminal prosecutions against indigents might justify special assistance to the defence.
>
> If electronic evidence is presented, presumably the jury should have access to it in the jury deliberation room. What complications will this present?[77]

Does Western Australia require special legislation (or rules, practice or procedure) to ensure that parties with deep pockets do not overwhelm their opposition with advanced technologies — especially those technologies that readily present a virtual world as reality?

3D animation of evidence and situations

> The LAN in a technology court can provide a Litigation Support System (LSS). The LSS permits lawyers to present their case with the aid of graphics and multi-media. Lawyers are allowed to use the LSS to tender opening statements and written submission in the electronic format. Photographs, video clips and sound clips can be digitised and presented as electronic evidence. The LSS can also be extremely useful to an expert witness to show to the court with much greater ease how a particular mechanism or system works or show tests or experiments that he had conducted. Computers can also be used to simulate events and even 'create' events. Such simulated events and fabricated events can appear as real as if they had been captured by the use of a camera. These capabilities have been amply demonstrated by recent films such as the 'Jurassic Park, The Lost World'and 'Forrest Gump'. In the court environment, one of the obvious forensic uses of such a technology is to re-create a factual scene such as vehicle accidents or industrial accidents. There is of course the inherent danger that such types of electronic evidence may have been tailored to suit the cause and purpose of the creator. It must be recognised that the use of electronic evidence poses serious challenges to the rules of evidence and must be adequately addressed to ensure that the use of such technology are only used for the furtherance of the cause of justice.[78]

Does Western Australia require legislation (or rules, practice or procedure) to regulate the use of such advanced technologies as outlined above, or to ensure the absolute veracity of the material produced using such technologies and techniques? Who will be required to give evidence as to the construction of such presentations?

Benefits of digital representation of objects

Some of the uses of digital technologies to represent situations, events and objects (as evidence), and potential issues or problems having been identified, it is relevant to also consider whether digitally representing objects may have benefits for the justice system.

Currently, the Western Australia Police Service (and to a lesser extent the Director of Public Prosecutions) expend a substantial amount of money and time managing physical and paper exhibits subject to criminal matters. Some of these objects are difficult to handle and store. Furthermore, many pieces of evidence must be handled/viewed by many personnel, in different offices,

before they are (physically) needed in court during a criminal trial. This requirement in relation to the evidence requires the object to be physically moved between sites, and control transferred from one body to another. Each of these movements, and other handling, increases the likelihood of evidence being lost, or damaged, or otherwise mishandled. To avoid such occurrences, the cost increases.

If the object in evidence was digitised,[79] then the original, physical object of evidence could be securely stored in a single locked location until required in court, if at all. Renditions[80] of the object could be readily transferred between all parties requiring access to the evidence, in a purely digital form. Multiple copies of the rendition could be maintained in multiple locations (for instance, all police officers involved in a criminal matter, the DPP prosecutors, and the defence counsel, could have a rendition copy of the evidence at the same time, to use for their own purposes).

The risk of mishandling and losing evidence would be greatly reduced (or eliminated). The cost of handling evidence would be substantially reduced. The Western Australia Police Service could maintain a single central store for evidence, under secure control and management, and achieve economies of scale in such management.[81]

The time and effort taken in preparing certain criminal matters may be reduced, due to the ready availability of evidence to all parties. An additional benefit would be earlier access to materials for the defence.

Digital renditions of evidence could be adduced in court, and the physical object may only need to be produced if absolutely required (only for certain specific purposes relating to proving or disproving points in the trial). The use of digital renditions of evidence in court would result in the same benefits in hearing time and cost as has occurred with the introduction of all electronic appeals and other cases.

Proposal 9

Western Australia should consider implementation of an integrated digital evidence management system, for use by the Western Australia Police Service, Director of Public Prosecutions, all Western Australian courts and defence counsel.

Proposal 10

Western Australia should amend or enact legislation to allow digital renditions of evidence to be used in court.

DIGITAL REPRESENTATION OF ... THE PERSON

It is relevant to enquire whether digital representation can be extended to a special category of things, namely people.

People can be digitally represented, by either image taking (still pictures or moving pictures — video) or by digitisation (virtual reality modelling and representations).

Will the justice system progress to the stage where all the participants are represented digitally — a totally virtual justice system with a totally virtual court, totally virtual prosecutors, counsel, litigants and other parties?

Some of the issues in this area are raised below (digitally representing the event — since people are those populating the events at the moment — and thus these two areas merge), but there are some issues which can be raised here.

Expertise at a distance

Expert witnesses — from a distance

> Even if the legal questions raised by remote witness testimony are resolved, the human impact of such testimony is unclear. To what extent, if any, would remote testimony be more or less persuasive to a fact-finder than in-court testimony? At present, remote testimony holds the greatest promise for cases in which distant experts would testify. Great savings in money and time would occur if experts could testify from locations nearer to their homes and offices. Should lawyers pragmatically attempt such testimony, even if admissible?[82]

The efficacy of virtual representation of people in court hearings, such as remote witness testimony, has been barely tested in many jurisdictions. It has occurred so infrequently that it remains a novelty. The novelty factor greatly outweighs any serious consideration of efficacy for court hearing purposes of the use of such technology. Further research must be performed in this area before wholesale use of the technology throughout the court system can be considered for implementation.

Legal advice from a distance

Issues associated with the provision of information required in the justice system, to those in the community have already been discussed. Points were raised about how 'ordinary' member of the community could access, and more importantly, use the information that is extant concerning the legal and justice system.

Another means of achieving a similar result — allowing members of the community to fully participate in the justice system in the State — involves some advanced technology, as described below.

Legal assistance as avatars

An avatar can be defined 'as a personal representative that can provide useful information or other utility when the avatar's owner cannot be present'.[83] Avatars are digital representations of 'real' people, providing a service that a person would normally provide, but with the benefits of always being available 24 hours a day and less expensive.

The renowned Palo Alto Laboraties operated by Xerox outline the results of their research into the use of avatars in the office as follows:

> Office Avatars provide a number of benefits over other media for personal representation, such as personal web pages:
>
> - More channels of communication. Avatars can express emotion through facial expressions and body posture, and can point at artefacts being discussed.
> - Avatars lend themselves to collaborative user interfaces in which a user engages in a dialog with the system in order to accomplish a task.
> - Avatars as personal representatives can maintain a sense of presence and cohesiveness within workgroups when members are absent.
> - Office Avatars can play a role in corporate strategic knowledge capture, by enticing authors to encode their knowledge for the benefit of their co-workers.[84]

For a sample of some early instances of such technology, refer to the online tour provided by Extempo Corporation,[85] where their 'Imp Characters work as salespeople in on-line showrooms, tour guides for company web sites, and moderators in on-line communities'.[86] These 'interactive characters [have] applications in e-commerce, entertainment, and corporate communications and training'[87] and possibly, in the law.

Rather than requiring relatively expensive legal assistance in person, a series of legal avatars could provide relevant legal advice in an anthropomorphic manner over the Internet. Issues of cost and distance would be drastically reduced (particularly important for a state such as Western Australia with its vast distances between centres and from Perth[88]), as well as providing members of the community with access to the best possible advice on a subject.

Provision of a wide range of Internet available legal advice avatars would bring knowledge regarding justice to more people throughout the community, achieving access to justice on a wider basis than is currently available. The access to basic advice on rights and obligations will continue to be an imperative in the future. Some of the initiatives outlined in this Review of the Criminal and Civil Justice System will require access to legal advice with respect to commencing and/or progressing a matter through the courts (alternative dispute resolution or not). This advice must be available to the whole community at the least possible cost.

The potential benefit from the implementation of this type of technology must be weighed against some outstanding issues:

- The lack of current commercial implementations of this technology in the legal arena;

- How much authority should an avatar be granted;
- Could an avatar make commitments on behalf of the State, or other (selected) parties?;[89] or
- How will potential misinterpretations be effectively and efficiently handled?

Proposal 11

Western Australia should initiate pilot projects to research and implement legal advice avatars for general public use over the Internet.

DIGITAL REPRESENTATION OF ... THE EVENT

The digital court room — future alternative for adjudication

The actual event associated with adjudication will increasingly become more subject to 'digital incursions'. Many commentators accept that a human will still be required to perform the adjudication in the justice system, but even so, the means whereby this adjudication is performed, as an event, will change over time.

Some of the first changes in this area have already commenced, with the use of video technology — both CCTV[90] and video conferences, in selected courts in Western Australia, and further changes are to occur in the near future.

What follows is an outline of the current status of video technology use in the courts, the plans for the near future, and some issues and concerns which may be raised concerning this area.

Current Status of Video in the Courts

In December 1994, the Video Technology in Courts Steering Committee (with representation from all interested parties in the justice system) was established to oversee the development and implementation of video technologies in courts of Western Australia. Since that time the following milestones have been achieved:

1. In March 1996, video-conferencing systems were installed in the Supreme Court, the Central Law Courts and the CW Campbell Remand Centre to enable prisoners on remand to appear before CBD[91] courts by a video link;

2. Furthermore, in a number of cases in various jurisdictions, the video-conferencing facilities have been utilised for taking evidence from intrastate, interstate and overseas witnesses;

3. In August 1998, a video system was established at the Kalgoorlie Court and the capacity of the District Court expanded by another two courtrooms. In March 1999, to better manage cases at country circuit

courts, the District Court commenced a pilot of the video-conferencing facilities for callovers one week prior to the circuit sitting; and

4. The *Acts Amendment (Video and Audio Links) Act 1998* established safeguards and powers for Western Australian courts to receive evidence and submissions from persons intrastate, interstate and overseas (and vice versa). The *Sentencing Act* has also been amended to enable persons to be sentenced by video.[92]

Current and near term plans

The Video Technology in Courts Steering Committee has endorsed an implementation plan whereby major metropolitan and regional courts will be equipped with video facilities to eventually establish a state-wide video network. In conjunction with the *Acts Amendment (Video and Audio Links) Act*, the network will enable a significant amount of court- and justice-related business to be effected by video. This will reduce travel costs to the Crown and other parties, improve access to justice in regional locations, create a better system for managing country circuit lists and enhance communications between city and country personnel working in the justice system.

Four District Court courtrooms are currently being constructed on floors 6 to 9 of the May Holman Building in Perth. Each courtroom will be total digital environments, enabling the electronic presentation of almost any document/exhibit/computer generated re-enactment/video application, and providing access to court computer systems and internet services, and digital recording facilities. This project is attracting international interest in the use, design and integration of the various technologies into one effective operating environment.

Funds are available and work is now in progress to have video systems operational at the Bunbury, Geraldton and South Hedland courthouses by late 1999. Video systems will be an automatic installation in the construction of future courthouses and justice complexes. This will apply to the new Fremantle, Rockingham and Busselton justice complexes presently in the planning stage of construction.

To maximise the government's investment in the technology, the court's video facilities at each location will be made available to other government departments and for justice-related purposes.

Possible futures for 'virtual' adjudication and process

Thus, in the future, courtrooms will be specifically designed to accommodate the extensive range of technology equipment and facilities required for the conduct of the 'trial of the future' (rapidly becoming the norm today). How, then, will these courtrooms of the future operate?

Video monitors and screens will be built in to the judges bench, associate/ judicial-support officers' bench and tables for counsel. Flat screen monitors will be located on walls around the court, for all participants to view.

Counsel and other participants will be able to bring portable computers into the court, but instead of using unsightly cables, a wireless local area network will connect all computers in the courtroom to a specialised network and server for that courtroom (holding all material pertinent to the trial). The network and server will receive electronic feeds from other sources, such as real-time transcript production, running transcript, and other outside sources (including legal library materials and the Internet for various research and other resources).

Results from the hearing will be automatically fed from the courtroom to other systems, as appropriate.

In the longer term, a completely virtual courtroom may be implemented, whereby the parties or the judge (and other support staff) would not physically appear in a courtroom. Instead the hearing would be held using only electronic connections.

Whether such a scenario eventuates will depend more on the social and psychological needs of the justice system's participants than the available technology (in fact, much of the required technology is available now, and is used by many large corporations[93]). Once participants in the justice system have become comfortable using video technology, it can begin to be expanded and diversified to reach greater levels of sophistication.

For instance, presently, civil interlocutory matters such as matters heard in chambers, and criminal proceedings, such as callovers and direction hearings, require a large number of lawyers and others to attend a particular court at a particular time. Lawyers consume a large amount of time and resources travelling to the court and then waiting until a particular matter is called. As technology develops and telecommunications costs continue to fall, judges, magistrates and registrars will be able to deal with these matters in their chambers, or perhaps their private residences, by video via personal computers with large screens.

Either the court can establish calls to the various parties at a pre-arranged time or parties can dial into a 'bridge' facility whereby they can listen to the proceedings, have their end muted and proceed with other work until they hear their matter called. They can then de-activate the mute facility and participate in their case until an order is made.

Video-conferencing systems already enable documents and images to be transmitted between remote sites so that parties can interact with information, for example, a particular portion of a photograph can be circled to support an argument. Accordingly, documentation can be submitted to the court immediately if required.

Parties to criminal and civil proceedings, and their lawyers, will be able to participate in their trial remotely. The quality of video transmission continues to improve and undoubtedly will soon equal television broadcast standards. Consequently, remote parties will not suffer from a low quality presentation of the evidence. They may also be given the power to control camera views so that they can choose to see a particular party the same as they would in open court. Improved security and reduced travel costs would be the determining factors when the court decides to proceed with this type of application.

Virtually any court matter can be conducted from any location in this State to anywhere in the world. The *Acts Amendment (Video and Audio Links) Act* automatically designates the far end to be part of the court. Furthermore, it has a provision whereby any court in the world with similar legislative provisions to this State can automatically establish video and audio links to persons in this State and vice versa. Alternatively, the government will be able to prescribe a country, a state in a country or even an individual court in a country with the power to establish video links to persons in this State for their court business. This would also apply to Western Australian courts.

Issues/impediments/ barriers to the video future

There are various barriers that may impede progress in this area and there are still several issues to be resolved.

Video systems are currently expensive to install and therefore usage should be maximised. This requires all parties to understand how most effectively to use such technology. As a consequence, promotional and information packages will be produced and distributed to assist parties in this area, including advice on how to arrange a matter to proceed by video, who to contact, likely costs and the conditions associated with use of the technology.

All participants in the court process must adopt a receptive attitude toward the technology. Furthermore, court officers responsible for arranging and establishing video links must develop the skills required to operate these modern technologies. Attendance at training and the acquisition of skills are essential as courts become more technologically oriented.

Socio-technical system impact

One of the dangers of conducting a large portion of court business by video is the remoteness or the 'virtualness' of the way the justice system works and its impact upon the individual. Appearing before a court by video is not the same as appearing before a court in person.

Will a sentence for a serious offence have the same impact by video compared to a judge addressing the offender in an open court before affected families and friends and members of the public? Many of the judiciary currently presiding in crime believe that sentencing by video will not have the same

impact, particularly for serious offences. This is supported by the judiciary in the United States who considered that a virtual appearance provides a lesser deterrent.[94]

On the other hand, with the (albeit limited) experience Western Australia has had with video thus far, some anecdotal evidence has been received that video was very effective for certain witnesses as all parties were focussed on the television screens and listened to the evidence intently. A close-up of the face had the effect of allowing the court to better observe facial expressions. Conversely, feedback has also been received that other body language (for instance, what the witness does with his or her hands or feet) is unable to be observed if not captured by the camera.

Such issues will require careful consideration by all parties involved in such matters. The Video Technology in Courts Steering Committee debated which particular types of cases would be suitable to be conducted by video and came to the conclusion that it could be suitable for use in almost any type of case. The Committee also concluded that this approach should not be problematic as long as safeguards are in place to protect the rights of all parties in a proceeding. Accordingly, the *Acts Amendment (Video and Audio Links) Act* gives the court the power to make an order for a video appearance or sentence as long as it is in the interests of justice. The defence and prosecution are able to present their arguments for or against a video appearance, which can then be considered by a judicial officer before an order is made.

Once judicial officers and the legal profession gain more experience in the use of video in various court matters, they will invariably attain a greater understanding as to which cases and types of witnesses are suitable for video and which are not. Some of the issues the court will possibly consider prior to making such orders include:

- Cost to the Crown or to a particular party;
- The safety of the general community in having certain high risk prisoners transported outside the prison environment;
- The inconvenience and/or loss of earnings for a particular witness;
- The nature of the evidence to be given and how (for example, does something have to be drawn or demonstrated that will be difficult to capture or ineffective on video?);
- The critical nature of the evidence to the extent that it necessitates a personal appearance by a particular witness;
- The protection of the accused or other parties' rights in having participants actually present in the courtroom;
- The likelihood of a particular remote witness refusing to appear if video was not be used (some matters have settled because remote witnesses

were not prepared to travel to Western Australia to give their evidence in person but were prepared to give evidence by video); and/or
- The effective control over witnesses at the far end.[95]

The negative or positive impact that an increasing use of video will have upon the individual courtroom participants and the quality of justice is difficult to determine at this stage. Although video conferences have been used with success for various court matters in different countries and in Australia, it has mainly been used for examining particular witnesses or for interlocutory proceedings. The use of video in court proceedings has not yet reached the point where, for a trial, all or most parties appear by video and thereby create a virtual courtroom.

Question 8.3 of the Australian Law Reform Commission paper, 'Technology — What It Means for Federal Dispute Resolution',[96] asks what current court processes should be preserved against the virtual courtroom and why?

Proposal 12

Prior to proceeding down the virtual courtroom path, Western Australia should conduct further research into the likely impact of video technologies on the individual participants and on the quality of justice that ultimately results.

Through actual experiences of virtual court proceedings, judicial officers and lawyers will gain a greater understanding of its benefits and pitfalls. Future experimentation and subsequent evaluations and reporting of those evaluations will provide some direction on this question.

The same Australian Law Reform Commission paper[97] suggests that video records of the hearing would provide appellate courts with the ability to observe the demeanour of a witness. This is a contentious issue, since many in the judiciary consider that having too much information to sift through would considerably slow down the appeal process. It would conceivably make the appeal longer than the original trial, unless substantial work was performed marking elements of the video tape. Further investigation must be conducted in this area before video appeal records are adopted.

DIGITAL REPRESENTATION OF ... THE ACTIVITY

Courts within the justice system are (in an era of shrinking resources) increasingly turning to more sophisticated business practices in order to manage the increasing workload and complexity of court administration.

The 'information enabled' justice process — the future of case management

Case management, including specialised concepts such as differentiated case management, is one of the key improvements being made by courts in this area.

> Differentiated case management (DCM) is a technique courts can use to tailor the case management process to the requirements of individual cases.…
>
> Inherent in the concept of DCM is the recognition that some cases can — and should — proceed through the court system at a faster pace than others. In a DCM system, the traditional 'first-in-first-out' rule for case scheduling and disposition is replaced by a case management system that accommodates the diversity of case processing events and timeframes appropriate to the individual cases filed.[98]

DCM may be adopted to achieve the following goals:

> - 'Make more efficient use of justice system resources by tailoring their use to the needs of the individual cases;
> - Serve the public more efficiently by providing different processing paths with different time frames and procedural requirements geared to the characteristics of each case;
> - Achieve a just disposition according to the specific tasks and timeframe.' [99]

Some of the benefits that may accrue from the effective implementation of a DCM process include:

- Better use of judicial and staff resources;
- Reduction in the time to disposition of cases;
- Improvement in the quality of the judicial process;
- Increased cooperation among judicial system agencies;
- Reduction in litigation costs (overall — not necessarily on individual cases);
- Enhancing the respect and credibility of the court among the legal community and the general public through the efficiency and predicability achieved by a well-functioning DCM program;
- Various direct cost savings.[100]

Effective implementation of Case Flow Management, including DCM, eventually requires information technology support, in a variety of areas which include:

1. Defining the case flow, milestones, and tracks for DCM, as well as objectives to be met for the DCM system;
2. Registering cases and associated information;
3. Registering filings, documents and other case events;
4. Maintaining details of time frames between events — expected and actual;
5. Monitoring and reporting against milestones, on individual cases as well as on all cases progressing through the court overall;

6. Maintaining statistics concerning the disposition of cases through the court; and
7. Reporting on progress towards achieving the system's goals and objectives.

The technology support for Case Flow Management and DCM systems should be integrated with the other systems implemented in the court, including the case systems (principally the Case Registry and Listing systems, for the registration of documents and production of notices).

An often overlooked, but critical, component of information technology implementation for any Case Flow Management or DCM system is the means of determining exactly what the costs and benefits are in relation to the implementation of the overall system in the court — not just the information technology component.

Evidence from some jurisdictions suggests that case flow management reduces court delays. However, it may increase costs in certain matters, particularly short and simple matters, while reducing costs in longer and more complex matters.

DCM can best be implemented when sufficient management information concerning the operation of the court (effectively a basic case inventory of types, events and time-frames) is available. Computer systems should preferably be implemented to provide this information prior to consideration of DCM being implemented.

Proposal 13

Western Australia should ensure that all courts and other justice-related jurisdictions implement a single consistent advanced computerised system. The system should record all details of cases and their processes as they progress through the courts, and provide management information to assist in improving the operations of the courts.

Self-represented litigants

The vision of computer systems operating throughout the justice system may imply that only those with substantial resources and associated knowledge and training will be able to participate in the new all-digital justice system.

This must never be the situation. To paraphrase from another social arena: justice must be 'of the people and for the people'. This translates into the requirement that whatever systems are put into place they must allow the individual litigant in person, in all circumstances, the same level of access and capability as the largest corporation.

Issues then arise as to whether this applies to all litigants in person, particularly those who are in prison. Should prisoners be provided with the same access to computer systems that self-represented litigants may be able to access by going to a courthouse, or by going to a 'telecentre' in the country, or to a legal community aid centre, or across the Internet using their home computer?

Furthermore, how should computer systems be implemented so as to allow high volume work by experienced participants to be transacted quickly and efficiently as well as to provide substantial assistance to inexperienced parties who have never been involved in justice proceedings before? All at the least cost?[101]

Will cost be the deciding issue? Will cost constraints mean that the self-represented litigant is placed last in priorities — since it is typically much more expensive to build systems for the totally inexperienced that it is to build them for those with extensive training who use the system constantly. Will we find that lack of funding by the Government will disadvantage precisely those to whom the justice system should provide equality?

This is an extremely vexed issue, which is currently under consideration in relation to legal aid, criminal representation, and many other justice-related issues. The point to be made is that the technological arena is not immune from such considerations. Issues of social equity can be just as much technological in nature as they are sociological.

Nevertheless, it is a contention here that technology and associated solutions in the justice area must address all elements of the community on as equal a basis as possible, leading to the following proposal:

Proposal 14

Western Australia should ensure that all systems implemented in the justice arena, but particularly court systems, have facilities to allow litigants in person to participate on an equal basis with all other parties.

Electronic and digital signatures

Digital signatures are one technological solution to the issue of authenticating information — particularly digital information.[102]

It is worthy to note that the use of signatures has developed over the years. The meaning attributed to signatures today is not the same as it was three hundred years ago. As indicated in the American Bar Association's tutorial:

> The formal requirements for legal transactions, including the need for signatures, vary in different legal systems, and also vary with the passage of time. [103]

Thus, the law has the ability to change to accommodate technological innovations, given the need to recognise such changes are required.

Digital signature technology is currently available in products for use with the Internet, such as Netscape Communicator,[104] for use with submitting Web pages and sending (and receiving) electronic mail. The technology can also be incorporated into other systems, such as those used within courts (for example, for lodgement of documents and electronic data interchange). It is of note that the use of digital signatures can provide evidence of the authenticity of a person who has 'signed' an electronic document so they can not deny it (non-repudiation). A digital signature can also ensure that the document has not been tampered with, thereby maintaining its integrity, and can keep the contents of the document secure and confidential.

The use of digital signatures can provide a greater level of security and a more automated approach to the processing of documents and their signatures than is currently available with manual analogue signatures.

Recommendations in relation to digital signatures and their use within Western Australia have already been made (see under the heading 'Documentation').

Electronic filing

> An Electronic Filing System (EFS) allows a direct exchange of information between computers. Technologies that could be incorporated in the EFS include Electronic Data Interchange (EDI), imaging and portable document format. The EFS permits lawyers to file court documents such as writs of summons and pleadings created in the electronic form and transmitted by modem and telephone line from their offices to the courts. Where a lawyer represents the other party to the civil proceedings, the document can also be served electronically with speed and ease. Thus, the EFS ensures timely and accurate submission and service of documents 24 hours a day. It also minimises the need for human intervention. The reduction in reliance on courts clerks and process servers is especially beneficial and significantly felt in a tight labour market. Lawyers can also obtain extracts of case information from the court files that are stored in the central database of the EFS. The system further facilitates the management of the documents by lawyers as documents filed in the case are accessible from the central database. All these benefits in practical terms can be translated into savings costs in manpower, transport and office space that would in turn mean the lowering of litigant cost.[105]

Many jurisdictions have approached the use of electronic facilities as almost a direct replacement for paper. Thus, the Administrative Office of the United States Courts has stated as its first standard (S1): 'All documents filed electronically must be capable of being printed as paper documents without loss of content or appearance.' To complement this standard, later in the same document, the Office proposes its first guideline (G1), suggesting 'The preferred document format for electronic filings is text in a Portable Document Format (PDF) file'.[106]

Thus, the concept from the Administrative Office of the United States Courts is that the current set of court forms remain in place, but a PDF[107] electronic file replaces the paper document.

Electronic data interchange (messaging)

The approach of retaining current court forms and simply replacing the paper with an electronic file is the simplest and most expeditious means of electronically communicating with the 'external' world.

Unfortunately, this approach does not allow any systems to be implemented to provide computer-readable documents that can interact with other computer-based systems (this being one of the advantages of electronic interaction). For example, a document giving notice of an upcoming hearing could interact with computerised calendaring software. Without the implementation of computer-readable documents, the workload on court staff will only be partially reduced. Simply translating paper documents into an electronic image does little to reduce clerical workload, although it will substantially reduce storage space requirements.

The logical extension to electronic filing of paper 'surrogates' is to extract the information content from each of the court forms, and then to lodge only the information, in a structured manner, rather than all the other ancillary detail contained on the paper form. To paraphrase Nicholas Negroponte: the courts should accept 'bits' — the structured information content, rather than 'atoms' — the paper or its surrogate.

The electronic transfer of structured information between parties is known as Electronic Data Interchange (EDI). It is also known as 'messaging', as a more general concept. EDI has been successfully implemented by many organisations and industries, over many years. Industries as diverse as banking, transport, automotive, travel and others have used EDI to connect disparate organisations and computer systems. Typically, EDI has been used for high volume and simple, repetitive transactions, such as electronic transfer of funds, airline seat booking and ordering of automobile parts.

Some courts have implemented pilot programs using EDI for certain high volume repetitive business areas, such as in bankruptcy filings.[108] The bankruptcy filings use a specific EDI message format — standard transaction 176, known as 'Court Submission'.

The Utah courts have implemented another approach to Messaging/EDI, using the Standard Generalized Markup Language (SGML). SGML provides a mechanism of structuring documents, so that a computer program can automatically read the document, 'understand' the components and elements of the document, and then perform further processing on those components such as automatically storing elements of the document in a database.

This approach incorporates the advantages of providing both a document format, as well as separating out the information content in that document in a structured manner.

Messaging, using either EDI standard transactions or SGML documents, has the potential to radically improve the operations of courts. Courts will have the ability to receive filings, automatically process those filings — check them, enter them into a database, perform further processing — and automatically provide a receipt and further documents to the sender as well as to other parties involved in the matter. In the most extreme case, court staff may not need to handle 'documents' until the time of the actual hearing.

Recently,[109] the World Wide Web Consortium[110] promulgated a standard known as XML, which stands for Extensible Markup Language.[111] XML is a large subset of SGML.[112] XML is also planned as the successor to HTML,[113] the language of the World Wide Web.[114]

Recent work in Western Australia has identified XML as the most appropriate means of structuring and transferring information between agencies in the criminal justice system and by extension, throughout the whole justice system. This includes transfer with the private profession and individuals or parties.

XML offers the advantage that it can operate with the lowest entry level of technology (a single personal computer configured with a Web Browser and an Internet connection), as well as with larger and more complicated computing environments.

Proposal 15

Western Australia should rapidly implement systems in the justice system that are based on the transfer of information within the system using XML in standard structures and formats, as defined by a Justice Joint Agency Office.

DIGITAL REPRESENTATION OF ... THE JUDGING

Adjudicative assistance

Artificial intelligence in adjudication

The last of the future technologies to be considered is that of Artificial Intelligence (AI). In a similar manner to speech recognition, AI has long been a dream in the computer industry. The dream has been to create a computer that thinks like a human and is indistinguishable from a human (in mental terms at least). In the early 1960s, researchers confidently predicted that before the end of the decade, a computer would be able to pass the 'Turing' test, whereby a person would not be able to tell the difference between a conversation held with a hidden person or one held with a hidden computer.[115]

This dream has been a little harder to realise than initially anticipated. Notwithstanding the recent success of the 'Deep Blue' computer in beating

the world chess champion in a chess tournament,[116] no computer system can pass even a relatively simple Turing test (although some people can be fooled[117]).

Nevertheless, many advances have been made in the field of AI and its related fields of expert systems and neural networks. AI techniques are being successfully used for speech recognition, visual recognition, navigation, robotics, automatic text parsing and document understanding, optical character recognition, automated stock market trading and many other applications.

> For example, the Daimler-Benz demonstrator vehicle VITA II, as shown in the European Prometheus project's final presentation, can drive autonomously on highways and perform overtaking maneuvers (sic) without any interaction.[118]

The application of the law is a mental activity, with rules and precedents to be applied, and text to be understood. The application of AI to the law has long been recognised as a field of endeavour in both the computer sciences and legal research fields.

A recent conference on judicial systems listed 62 papers on the subjects of AI, expert systems and the law. The papers covered a wide variety of legal applications, and demonstrated the healthy nature of research into this area.[119]

AI and the law cover a wide gamut of potential applications and legal areas including such areas as:

- Analysing the facts presented to the system, retrieve relevant cases and statutes from a civil law code, and determine the consequent legal effects;[120]
- Understanding the liability issues surrounding the use of so-called Intelligent Agents (also known as AI Agents), for situations where the agent causes problems;[121]
- Determining how expert systems must behave in order to emulate the mental processes of lawyers.[122]

With respect to the adjudicative process, some approaches have been considered the most applicable.

> The first approach is the use of a Case-based Reasoning system. In simple terms, what it does is to match the problem at hand with previous cases in the database and retrieving (sic) them. The computer then suggests a solution based on the 'experience' of the cases that had been matched. When the suggested solution is modified to suit the circumstances of the current case, the new solution is added to the database and in so doing expand its database. At first glance, this matching technique may appear to be similar to the word matching process commonly utilised by computerised search tools. The matching in a Case-based Reasoning system has the ability to match a weighted

> sum of features or the application of induction algorithms for the purpose of deciding the features to distinguish one case from another.
>
> The second approach takes the form of an Expert System. An expert system suggests solutions to problems based on the knowledge that are stored in its database and through the application of business logic rules. The system is able to furnish the reasoning that formed the basis for the suggested solution. The central and crucial task in implementing an expert system is to frame the rules that are to be applied in solving the problem.[123]

Despite the efforts and research being applied to AI and the law, there are few mainstream applications of this technology in common use in courts and law firms around the world. Development of *practical* AI systems for use in such areas will require a thorough analysis of the information processing tasks required for:

(a) legal problem representation;
(b) judicial problem solving;
(c) identification of artificial intelligence techniques appropriate to these tasks;
(d) development of representation formalisms;
(e) development of knowledge acquisition methods suited to the knowledge required for these legal and judicial tasks; and
(f) implementation of computer-human interface techniques tailored to the experience, outlook and training of legal and judicial personnel desiring to use the systems.[124]

The tasks outlined in the list above are not simple. They require much further work to be conducted, however, as in other areas of computing, advances are being made rapidly in line with advances in hardware and software sophistication of other applications. It may not be too long before judicial decisions are made using the assistance of a computer and an AI program.

Electronic magistrates

South Australia already has a simple type of electronic magistrate in the form of its penalty enforcement system, which could be extended as follows:

> There is another role for people who are judges and magistrates when the magistrate is electronic, a role with its roots in the doctrines of natural justice: the role of reviewing and controlling what the electronic magistrate is doing in the particular case. The electronic magistrate can outline the case against an individual to the individual. The electronic magistrate cannot know whether it is outlining the case to the right person, for to the electronic magistrate human identity has no meaning. The electronic magistrate cannot provide the solution when the individual wishes to challenge the case against them (sic).
>
> Other people in the community have reason to fear the electronic magistrate, but judges and magistrates have no reason to be frightened

> by the electronic magistrate if the electronic magistrate is confined to the tasks it is good at.
>
> An electronic magistrate can be created for use as a 'sifter' in the cases so factually complex that they are beyond the capacity of one person to absorb. An electronic magistrate can find and explain the strengths and weaknesses inherent, in each case, so both parties can assess the risks associated with litigation before they are forced into entrenched positions. Once the case of each is explained to the other, it may became (sic) clear that the real disputes are disputes the parties can resolve between themselves without going to a 'real' judge and drowning him in years of litigation and filling buildings with exhibit documents.
>
> Judges and magistrates know what it is hard for them to do, and they know what they do well. Judges and magistrates need to say what these things are, in terms that IT people can grasp. Judges and magistrates need to learn enough about IT to be able to find ways of using IT to do the things judges and magistrates cannot do well, to free themselves to do what they do well.[125]

Artificial decision making

Will advances in AI allow decisions that would have been made by judges to now be made by computers? Will such systems advance to a stage where the complete judicial system could be made by the computer in the manner that the 'Big Blue' computer completely plays the game of chess to defeat a human opponent? Will such systems be a powerful aid assisting a human judge in his difficult decision-making role thereby always allowing the human element to be central to decisions made in the justice system?

In the same manner that use of remote video-conferencing systems may affect the *impact* of the judicial process on those involved in the process (particularly the parties to a matter), will the provision of a decision by artificial means similarly affect the *impact* of that decision? It is interesting to speculate on whether an 'artificial decision' would have lesser or greater weight for those involved.

Could AI be used to streamline the justice system? Could members of the lay community, using the Internet, have the ability to preview a likely decision to a (legal) problem that might be handed down by a court, based on the facts as entered by the community member, so that he or she can determine whether he or she should proceed with the case or not?

Would this reduce the number of matters going through the courts? Would it encourage parties to settle early, or settle using alternative means of justice (mediation or conciliation rather than adversarial adjudication)?

Would such a situation determine the 'default' judgment to be made — and any deviation from this default would have to be carefully and succinctly explained by the judiciary?

Could such an 'artificial decision' facility constitute the means of entry into the formal justice system? Possibly only those matters which are not susceptible of an easy 'artificial decision' would be allowed into the formal justice system, with other matters not meeting that criterion (that is, the decision is theoretically already known) costing parties substantially more money to pursue through the formal justice system. Would such a system reduce the cost of justice to ordinary citizens, yet still allow cases to proceed through the courts if and as necessary?

Would AI systems to make decisions be more susceptible of government control, allowing politicians, administrators and possibly other parties such as academics to define the 'rules' of the artificial decision-making system in a more controlled and interventionist manner? Would this satisfy the public wish for quick responses to perceived community pressures?[126] Alternatively would it result in a justice system that did not dispense justice impartially, but rather, implemented executive policy — subject to abuse of power and continual pressure based on ill-informed changes to perceptions and not to basic principles? Would such a system break down because too many changes are made in too short a time frame, causing the system to oscillate out of control?

Alternative models for adjudication

AI is not the only advanced technology that may drastically change the nature of justice in our society. Technology can and will affect many aspects of the justice system to a greater or lesser extent. Some of those aspects relate to the processes of adjudication — but typically they are within the basic structure of adjudication that has existed for hundreds of years.

Is there a possibility that technology may offer alternative forms of adjudication?

Community Adjudication

One of the means whereby technology may assist in other forms of adjudication is by the implementation of more community-based adjudication.

Rather than requiring a centralised physical location for adjudication (being the courthouses currently used for processing and hearing matters brought before a court), adjudication could be performed within communities, allowing members of one's own community to adjudicate.

Geographically based communities of adjudication

Technology can be used to assist communities located within a geographical boundary to perform their own adjudication. This could be an extension of the use of video-conferencing and the virtual court. This model has been described above — a judge may sit in one location, the parties may be in another location — all linked through video technology. The judge may be from a central authority, or from a local environment. The technology of the future will be such that appearance in the virtual courtroom will not require

specialised rooms or equipment, but rather, will be from one's living room, using equipment as part of the 'home theatre.'[127] This model is predicated on the principle that a hearing is co-located in time, that is, all the parties participate in and make input to the hearing at the same time or in the same time-frame.

An alternative model for adjudication is to relax the constraint for the hearing to be time co-located (everything happening in the same time frame). A set of current technologies used on the Internet known as 'news groups', 'online conferences', 'discussion groups' and 'collaboration systems' allows people to maintain an on-line structure similar to an extensive conversation. Items raised by one of the participants can be viewed by all participants, and responded to by any participants. Responses can be further responded to *ad infinitum*, and additional 'threads' of the conversation can be readily created, merged, split or expanded. Searching facilities are generally provided to easily find all items of the overall discussion as well as report on discussions.

These systems allow participants in a group to gradually investigate an area of interest, recording all involvement in the 'investigation',[128] for all to see, and maintaining a complete historical record of what has happened and the current status of the investigation. The advantage of such systems is that all participants do not have to participate at the same time. Entries can be made at any time, whether other participants are on-line or not.[129] When a participant rejoins the discussion group, he or she will see the entries made by others when he or she was off-line. Responses can now be made[130] and left for other participants to see when they next come on-line. Thus the discussion group or 'investigation' can progress at the rate natural to the group, without forcing members of the group to participate at the same time according to a schedule possibly imposed from outside the group, or by a dominant party in the group.

These types of facilities have been used successfully in the formulation and promulgation of new standards in the Internet community, in particular used for voting on individual items in proposed standards. These facilities offer an alternative model for adjudication that is not based on time. A particular collaboration group could be convened for a hearing into a matter, to be subject to adjudication. The collaboration group could be 'moderated'[131] by the adjudicating person,[132] who may set the guidelines for the progression of the matter or not, as the case may be.

Participants in the matter would 'post' items to the collaboration group, respectively putting their cases. Responses would be 'posted' to each item, some being further questions, some being answers to those questions. Questions and answers could either be driven by an adjudicating person, or they could naturally generate amongst the parties.[133] The database of the

postings to the collaboration group would constitute the complete record of the hearing — a natural on-line transcript of proceedings. The final act of the group would be for the adjudicating person to make his or her decision, when all parties had determined they had put and answered all items under discussion.[134]

This proposal would assume many of the same characteristics as current court hearings, but with a number of significant differences. The hearing would be totally on-line. Participants would not need to be physically co-located, nor would they need to participate through a time co-location. The parties could progress at a rate natural to the matter at hand.[135] The need to allocate or 'list' expensive resources such as court rooms, judges and lawyers would be obviated. Indeed, expensive physical resources would be unnecessary. Judges, lawyers and parties would participate in multiple matters, allocated to on-line matters and responding based on their current and future workload.

Adjudicating persons would not necessarily need to be in the same physical location as the participants, thereby allowing for the potential to better allocate workload on a more even basis across adjudicators.

The last point raises another possibility for alternative adjudication.

Communities of Interest for Adjudication

Rather than adjudicating persons being generalists, and assuming an adjudicative role based on general geographical principles — ie, the judiciary in Western Australia typically hear Western Australian matters, adjudication could be on a 'community of interest' basis using the on-line model outlined above.

The choice of an adjudicator or adjudicating panel — as may be more appropriate, would be based on its expertise in relation to a particular area. Thus, a maritime dispute may result in the three best maritime adjudicators from around the world[136] sitting on an on-line adjudication panel, whereby the parties put their cases and adjudication is made across multiple time zones and thousands of kilometres. Thus, in the future, parties to a dispute may pick their adjudicators, or have their adjudicators picked based on the nature of the issues to be resolved, not on where they happen to live or where the dispute occurred. This obviously would impact on national laws, the concept of sovereignty, the nature of a dispute and its resolution, laws of evidence, the conduct of hearings, and what it means to obtain justice.

Is this vision a too far-fetched? Consider the following:

> Relations between governments and their citizens will become subtly different too. As a study by the Harvard Information Infrastructure

> Project puts it, 'Our experience of geographic space has been transformed by the information revolution, as it was by the railroad and air travel . . . The transformation now under way . . . gives individuals instant, affordable access to other individuals, wherever they may be, and it enables each to publish to the world.' People will increasingly belong to constituencies—environmental groups, professional bodies, self-help groups—which are united electronically, not geographically. 'The differences between people as individuals and as citizens become more distinct,' says Deborah Hurley, who runs the Harvard Information Infrastructure Project.[137]

Are the alternative models for adjudication, based on an on-line version of the world feasible? If they are feasible, would they then be desirable?[138]

Will any of the alternatives outlined actually assist in the better provision of justice to the community? What further models could be contemplated, as technology progresses? How can the justice system and society experiment with different models for adjudication and dispute resolution, so that the *set* of best models can be used whenever required?

CONCLUSIONS

As mentioned in the introduction, technology affects all areas of the law as technology affects all aspects of business. Technology must be considered not only in relation to how it may affect or assist the operation of the criminal and civil justice system — such as in the electronic lodgement of documents, videoconferencing and electronic trials, but also importantly, how changes in business, personal and social interactions are affected and implemented by and through technology. This will cause those appearing before the courts to consider technological issues.

The impact of technology will affect copyright, privacy, the keeping of business records, recording business transactions, evidence, transfer of information, libraries, information access, preparation of legal cases, signing and proving documents and the type of case brought before the courts, whether criminal or civil.

Information technology will be used to track persons moving through the criminal justice system, track documents and evidence, present one's case (including evidence), hold court at a distance, and provide legal advice to participants in the system. Information technology may even be used to make the final adjudication itself.

To illustrate the potential impact of technology on the justice system a theoretical case study sometime in the (near) future may assist.

Case study of Joe Normal — WA citizen no 41391297

Joe has taken up the green cause, due to his observation of commercial activity within forested areas — logging activity is taking place in State reserve forests — with the removal of now rare jarrah trees for the United States export market.

How does Joe approach this burning issue?

There are many aspects to be researched including local, state and federal law, as well as United States and international law on treaties before he can take any action. Joe goes about it by:

- accessing basic information services to isolate all relevant legislation and any treaties applicable;
- building a picture of government agency involvement through examination of charters, programmes and policy documents;
- examining company records through the Stock Exchange for shareholding and trading data;
- reviewing milling and transport records, packing and shipping records, customs and quarantine records.

All this information is readily available over the World Wide Web, and it takes Joe a little more than a few hours to collect it.[139] Joe has now collated his information package. What does he do with the information that he has successfully retrieved?

With the help of a navigator at the local 'commscentre' — English is not Joe's first language — Joe ascertains the basic data relating to an infringement. This data includes the relevant precedents that are still applicable in this era. As the process progresses, Joe becomes aware that the navigator is actually a shareholder of the company under investigation, but under the Ethics in the Workplace Agreement Act[140] the navigator cannot disclose the consultative process that has been undertaken.

Having determined a potential infringement from the point of view of a possible class action, what are Joe's options before being able to proceed with litigation? Joe could:

- deliver the information to a media outlet for distribution as a story through a multi-media news packaging service formerly known as 'the newspaper', in order to develop public support and alert government to the problem;
- refer his research to an appropriate body of a quality controller — eg the revamped Public Legal Assistor,[141] as Joe cannot afford to pay a quality controller from the legal profession;
- attend a court kiosk, using his e-Wallet to pay his fees, electronically, to present the research materials via the 'WA Courts Justice Access' system to an 'electronic magistrate', which by artificial intelligence means will 'hear' his submission for action against the company in relation to the alleged offences; or
- make the same submissions to the 'electronic magistrate' from his home 'telecentre' or the local 'commscentre', using Internet facilities. In this

instance, Joe has more time to further question and interact with the 'electronic magistrate', continually refining his cause of action.

Given that the 'electronic magistrate' declares there is an action to defend — according to the stored data and precedents, using the artificial intelligence synthesis mechanism built-in to the 'electronic magistrate', the defendant will then be notified electronically of an action to proceed to a 'formal court' for mediation, adjudication and reparation as appropriate.

Joe and the defendant corporation choose a means of progressing the action, including the type of adjudication. After discussion, they opt for a panel of experts from around the world to adjudicate. The hearing will take place using on-line collaborative and conferencing systems, with the occasional video-conference for particular evidence of witnesses which the adjudication panel wants to see 'live'. The complete hearing will be completed in non-real-time. Joe will participate from his home 'telecentre', and will involve many other interested parties in his action (from their own 'telecentres' — many of them living in the affected areas).

The panel of experts will make its determination, after collaborating on the judgment using an integrated multi-person document production facility. The actual judgment will be automatically sent to all involved parties, including the media, and importantly, the Western Australian Consolidated Judgments Library[142]. The media will also receive a video-feed of the panel members making the adjudication, to be placed on the news distribution service.

Technology and the justice system

This sub-section is about technology and the justice system. Dealing with these issues raises an obvious question: what is the justice system? The question poses considerations of the nature of systems (which have been dealt with earlier in this sub-section), and their relation to justice and technology.

The 'justice system' conforms to a valid systems model concept, having:

(a) objectives, purpose;
(b) connectivity;
(c) measures of performance;
(d) monitoring and control mechanisms;
(e) decision-taking procedures;
(f) boundary;
(g) resources; and
(h) systems hierarchy.

Technology will not define many of these elements of the justice system,[143] but rather, technology will determine the *means* whereby the ends required of the justice system are actually achieved.

Technology will affect the ability to connect, and the efficiency of the connectivity, of the components[144] in the justice system. This ability may be improved by technology to the extent that the objectives of the justice system are more readily and easily achieved for all members of the community rather than a select few.

Technology will assist in measuring the performance[145] of the justice system, finally allowing for more fine grained monitoring and control of the system — once again, allowing the system to more readily respond to community needs.

On the other hand, technology may be used as an oppressive means of continuing the distinction between those that are empowered within a technologically sophisticated society, and those that are not.

Technology is the means, and must not be confused with the ends required of a justice system. The ends must be chosen by the community, and the technology implementations must be wisely selected so that the means do not subsume the ends.

SUMMARY OF PROPOSALS

1. Western Australia should implement specific privacy legislation.

2. Western Australia should develop legislation to ensure that digital representation of information is given the same weight as paper and other forms of communication.

3. Western Australia should initially enact a minimalist Electronic Dealings Framework Act.

4. Western Australia should enact legislation and policy to ensure electronic materials are properly maintained for historical purposes.

5. Western Australia should develop a common set of information definitions endorsed and supported by all participants in the justice system.

6. Western Australia should rationalise the information items used throughout the justice system, and determine the issues of ownership and accountability in relation to each information item.

7. Western Australia should create a Justice Joint Agency Office with a board of management representing all justice stakeholders that will establish and maintain the definition of:

(1) essential data structures to support the analysis and measurement of justice system performance;

(2) essential data structures to support the effective and efficient operations of the justice systems (transfer of information);

(3) the processes of the justice system; and

(4) the outputs and outcomes of the justice system.

8. Western Australia should amend its *Evidence Act 1906* and incorporate sections into its (initial) Electronic Dealings Framework Act, (and any other such acts as may be enacted from time to time) to accommodate evidence (of all types) in digital form — allowing digital evidence to be accorded such best evidence status as is required.

9. Western Australia should consider implementation of an integrated digital evidence management system, for use by the Western Australia Police Service, Director of Public Prosecutions, all Western Australian courts and defence counsel.

10. Western Australia should amend or enact legislation to allow digital renditions of evidence to be used in court.

11. Western Australia should initiate pilot projects to research and implement legal advice avatars for general public use over the Internet.

12. Prior to proceeding down the virtual courtroom path, Western Australia should conduct further research into the likely impact of video technologies on the individual participants and on the quality of justice that ultimately results.

13. Western Australia should ensure that all courts and other justice-related jurisdictions implement a single consistent advanced computerised system. The system should record all details of cases and their processes as they progress through the courts, and provide management information to assist in improving the operations of the courts.

14. Western Australia should ensure that all systems implemented in the justice arena, but particularly court systems, have facilities to allow litigants in person to participate on an equal basis with all other parties.

15. Western Australia should rapidly implement systems in the justice system that are based on the transfer of information within the system using XML in standard structures and formats, as defined by a Justice Joint Agency Office.

ENDNOTES

1 A medium- to coarse-grained intrusive igneous rock (Encyclopædia Britannica, Multimedia Ed, 1999).

2 Ibid. Standing stone slab used in the ancient world primarily as a grave marker but also for dedication, commemoration, and demarcation.

3 Ibid. A writing invented by the ancient Sumerians and used in the Middle East in the last three millennia BC.

4 Ibid. The Great Charter.

5 Specialised computing equipment designed specifically for document production. The equipment was not connected to other computers, hence the term 'standalone'.

6 Named after one of the founders of Intel – makers of the silicon microchips powering today's computers.

7 'Moore's Law: /morz law/ prov. The observation that the logic density of silicon integrated circuits has closely followed the curve (bits per square inch) = 2^((t - 1962)) where t is time in years; that is, the amount of information storable on a given amount of silicon has roughly doubled every year since the technology was invented.' <http://sunsite.informatik.rwth-aachen.de/jargon300/Moore_sLaw.html>.

8 Millions of Instructions Per Second.

9 In Blake Harris, 'Technology and the Future of Government' <http://www.interlog.com/~blake/techandt.htm>.

10 Ben Gross 'CFP96 Paper on Copyright and Freedom of Expression in Digital Networked Environment' in *Copyright and Freedom of Expression, The Sixth Conference on Computers, Freedom and Privacy CFP96 Newsletter* <http://www-swiss.ai.mit.edu/~switz/cfp96/newsletter/copyright.html> (last accessed October 1997).

11 Including radio, telephony (telephones – both fixed and mobile) and television/video.

12 Frances Cairncross, 'A Connected World', *The Economist* (13 September 1997).

13 Currently there is no single representation in the digital world that could claim to be able to provide the same universality of use and understanding as a sheet of paper.

14 This will require some substantial advances in artificial intelligence and related technologies.

15 For instance, NetMeeting and ICQ.

16 In the same manner that in the medical field, surgery and other medical procedures are now being performed in a virtual environment, allowing medical experts at a distance to participate and provide their specialist expertise.

17 Terry Winograd and Fernando Flores *Understanding Computers and Cognition : A New Foundation for Design* (1995). Readiness-to-hand is a relatively simple concept that is difficult to explain simply and precisely in few words. An example of the concept (at p 36) is 'that of a hammer being used by someone engaged in driving a nail. To the person doing the hammering, the hammer as such does not exist. It is part of the background of *readiness-to-hand* that is taken for granted without explicit recognition or identification as an object. It is part of the hammerer's world, but is not present any more than are the tendons of the hammerer's arm.' Thus, the use of paper can be viewed in the same 'readiness-to-hand' manner as the hammer in the previous example. People are not normally consciously aware of the paper as a separate object in their use of it in everyday occurrences. Mostly, paper is used without further thought. If the use of paper required substantial thought and effort (apart from the content being applied to the paper), business interactions would take substantially longer.

18 Such as purchasing parts and supplies in various industries, eg purchase orders, consolidated service invoices and statements, motor carrier freight details and invoices, air freight details and invoices, payments.

19 United Nations Electronic Data Interchange for Administration, Commerce and Transport.

20 Nicholas Negroponte, *Being Digital* (1995).

21 Note – this is an American position, and not necessarily reflected in the current status in all circumstances in Australia.

22 'Atoms of Ink Squeezed onto Atoms of Dead Trees' in Negroponte, above n 20. ('The best way to appreciate the merits and consequences of being digital is to reflect on the differences between bits and atoms.')

23 Marketed by Surety Technologies Inc, NJ Chatham <http://www. surety.com>.

24 Charles R Merrill, 'Toward a Paperless Federal Practice by the Year 2000' (1996) 10 *New Jersey Lawyer Magazine* 178.

25 McBride Baker & Coles (Chicago law firm) 'Updates To Electronic Commerce Legislation' <http://www.mbc.com/ds_sum.html>.

26 United Nations Commission on International Trade Law.

27 See UNCITRAL *Model Law On Electronic Commerce*, General Assembly Resolution 51/162 (16 December 1996) < http://www .un.or.at/uncitral/english/texts/electcom/ml-ec.htm>.

28 < http://www.mmv.vic.gov.au > (select Publications from Java menu, then download the Draft Bill as at January 1999).

29 < http://www.commerce.state. ut.us/web/commerce/digsig/act.htm>. A highly prescriptive approach has also been taken by the State of Washington in the USA, in *The Washington Electronic Authentication Act 1998* < http://www.wa.gov/sec/ea/dsrcw.htm>.

30 Incorporating all legislation, regulations, rules, practices, policies, etc.

31 < http://www.commerce.state.ut.us /web/commerce/digsig/act.htm>.

32 < http://www.commerce.state.ut.us/web/commerce/digsig/rule.htm>.

33 < http://www.commerce.state.ut.us /web/commerce/digsig/commact. htm>.

34 < http://www.commerce.state.ut.us/web/commerce/digsig/illus.htm>.

35 <http://www.ogit.gov.au/gatekeeper/index.html>.

36 <http://www.ogit.gov.au/gatekeeper/pub/contents.html> (Table of Contents).

37 <http://www.law.gov.au/aghome/advisory/eceg/ecegreport.html>.

38 The Electronics Transactions Bill 1999, produced by the Commonwealth Attorney-General's Department in January 1999 for presentation to the Parliament of the Commonwealth of Australia in March 1999.

39 Note — this legal situation is as it stands in the USA (in Federal jurisdictions) and differs in Australia. The original reference has been retained to maintain the flow of the quotation.

40 See *Lewy v Remington Arms Co* 836 F.2d 1104 (8th Cir 1988). Once again, this reference is to a precedent from the USA. As such, it does not directly apply in precisely the same manner in Australia.

41 Merrill, above n 24.

42 Peter S Graham, 'Intellectual Preservation: Electronic Preservation of the Third Kind' (1994) <http://aultnis.rutgers.edu/texts/cpaintpres.html>, as submitted to the Commission on Preservation and Access..

43 For work on this area in the USA, see Report of The Commission on Preservation and Access and The Research Libraries Group < http://www.oclc.org/~weibel/archtf.html>.

44 <http://www.nla.gov.au/padi/>.

45 Draft (February 1998) < http://www.nla.gov.au/policy/physform .html>.

46 Already some vintage computer records are effectively inaccessible.

47 *Dietrich v The Queen* (1992) 177 CLR 292.

48 *Bounds v Lewis* 430 US 817 (1977).

49 Library and Information Services of WA, *Public Library Resources Review Report* (June 1998).

50 Electronic Kiosks are specialised personal computers that have been implemented in courts as an alternative method of delivering court services to the public without using staff resources. A Sutherland, *Courts and Technology Course* (1997), prepared for Edith Cowan University.

51 Disintermediation can be defined as: 'Removing the middleman. The term is a popular buzzword used to describe many Internet-based businesses that use the World Wide Web to sell products directly to customers rather than going through traditional retail channels. By eliminating the middlemen, companies can sell their products cheaper and faster. Many people believe that the Internet will revolutionise the way products are bought and sold, and disinter-mediation is the driving force behind this revolution' Source: <http://webopedia.internet.com/TERM/d/disintermediation.html>.

52 This concept raises what some commentators are now referring to as 'cyber-mediation', a new form of intermediation. The following quote highlights this issue: 'Many new organizations are being created to perform mediating tasks in the world of electronic commerce. In Sarkar, Butler, and Steinfield's paper (JCMC-electronic commerce Vol 1(3) <http://www.ascusc.org/jcmc/vol1/issue3/arkar.html>), the authors argue that the future development of e-commerce will bring more intermediaries rather than eliminate the number of existing intermediaries because intermediaries benefit both customers and producers in many ways. Customers need assistance in search and evaluation. They need intermediaries to reduce the risk and deliver products. Producers need

intermediaries to create product awareness, influence consumer purchases, and provide customer information. There will be no large-scale of elimination of intermediaries. Besides, traditional intermediaries in some industries will stay because they provide customers other values like social interaction and entertainment. The current development of the Internet will increase the product's variability and thus gives more space for creating new intermediaries' by Chi-Tuan Peng <http://150.108.63.4/ec/organization/disinter/disinter.htm>.

53 Gross, above n 10.

54 Evan Predavec, 'Legal Publishing in 2001' *Australian Law Librarian* (1997) 5(1).

55 WA Information Policy Committee, 'Managing the Information Resource' (Government of Western Australia, 1992).

56 T De La Fosse and B Finlay, 'The Council of Chief Justices Electronic Appeals Book Projects' (Paper presented at the first AustLII Conference on 'Computerisation of Law via the Internet', Sydney, 25-27 June 1997).

57 World Wide Web Consortium <http://www.w3.org>.

58 <http://www.standards.com.au>.

59 High Court of Australia, 'The introduction of paragraph numbers in court judgments and the use of medium neutral citation system' <http://www.hcourt.gov.au>.

60 Ludwig von Bertalanffy, in George Braziller (ed) *General System Theory: Foundations, Development, Applications* (revised ed, 1976).

61 PB Checkland, *Systems Thinking, Systems Practice* (1981).

62 B Wilson, *Systems: Concepts, Methodologies, and Applications* (1984) 22 as quoted on the adaptation of the Soft Systems Methodology at Lancaster University by Checkland.

63 The system must have some reason for existence or ongoing purpose.

64 The system must have components inside it which must connect to each other.

65 One must be able to determine how well the system is performing (ie gauge its 'health').

66 The system must have the ability to monitor its activities and performance, and institute activity to control its components to improve performance, or bring its activities back into 'balance'.

67 The system must have the ability to make (or take) decisions, including change activity etc based on its monitoring and feedback.

68 The system must have a readily identifiable boundary between itself and its environment (everything outside the system). One must be able to readily tell what is inside the system and what is outside the system.

69 The system must have resources available to it in order to achieve its objectives or purpose.

70 The system fits within a hierarchy of other systems, as well as having a hierarchy of sub-systems within it

71 Wilson, above n 62, 27.

72 Quoted by F Gout, Ministry of Justice, in an interview with A Sutherland.

73 It can be argued that there are a number of biological identifiers, such as fingerprints, DNA etc. They are becoming more commonly available as identifiers in the criminal justice system, but could not be classified as *readily* identifiable primary keys to most ordinary persons (we do not normally refer to our acquaintances by their DNA strand sequences — even if we knew them!).

74 See <http://www.abs.gov.au>.

75 Products such as the Surety Digital Notary Service provide such facilities. See details at <http://www.surety.com, www.surety.com/whatis.html, www.surety.com/patent_overview.html >.

76 *Evidence Act 1995* (Cth) ss 47, 71, 146, 147.

77 Fedric I Lederer, 'Courtroom 21: The Legal and Practical Implications' (1994) *NCSC Court Technology Bulletin* Vol 6, No 2.

78 J Soon, 'Courting Technology for the 21st Century' (Paper presented at the Technology for Justice Conference, AIJA, Melbourne, March 1998) 9-10.

79 By scanning an image of paper based evidence, taking photographs of physical evidence, taking video tape (moving images) of physical evidence, or even producing a virtual reality model of a piece of physical evidence.

80 A rendition being another copy of the object, but in a different form. For instance, a photograph of a knife is not a copy of the knife (the copy would also be physical and three dimensional) but rather a rendition of the object in a photographic form – being a copy in a different format.

81 Such a facility could even be outsourced, subject to strict service level agreements and penalties.

82 Lederer, above n 77.

83 <http://www.fxpal.xerox.com/oa/>.

84 Ibid.

85 <http://www.extempo.com>.

86 Ibid.

87 Ibid.

88 Wherein resides most of the specialised expertise in business, such as legal expertise, in WA.

89 Adapted from a list documented in T Bickmore, L Cook, E Churchill and J Sullivan, 'Animated Autonomous Personal Representatives' in *Proceedings of the Second International Conference on Autonomous Agents* (1998) 8-15.

90 Closed circuit television.

91 Central Business District.

92 Parliamentary Counsel has advised that courts already have the power to make an order for any proceeding or portion of a proceeding to be conducted by video or audio link unless there is a legislative impediment to do so. The new Act does not enable persons to be sentenced by audio links.

93 Some examples include the following:

(1) The State Bank of Mauritius is a leading commercial bank in Mauritius, an island in the Indian Ocean. In addition to providing world class financial services and products, the State Bank of Mauritius commands 27 per cent of the domestic market share.The State Bank of Mauritius found that video-conferencing was a means to help with communications between its managers and department heads, in addition to doing overseas business <http://www.picturetel. com/ industry/default.htm > Industries and Applications frame.

(2) Lawyers for ITT Hartford (USA) say that projects close faster and decisions are made immediately, saving thousands of dollars. Meeting at a distance is a transparent technology; attendees quickly forget that they are not all in the same room. Taking depositions via video saves up to three travel days per lawyer and can result in a savings of over $10 000 for a single meeting. Ibid, Industries and Applications frame.

(3) Katrina Turnbull controls European video-conferencing deployment to support 'co-location' within the Ford Motor Company and is based at Dunton, Essex, UK, which together with Merkenich, Cologne, Germany, forms the global small and medium vehicle centre. Other design facilities are located in Italy, the US and Coventry, UK. 'We design all the small and medium cars,' explained Ms Turnbull. 'We are a distributed team: that is to say we are responsible for one product line but are based on multiple sites. Videoconferencing is seen as a critical business tool by which we communicate.' 'The engineers are commanded to work together between countries: in the end they need to come up with one car and one engine,' said Klaus Schroeder, Ms Turnbull's counterpart in Cologne, Germany: see Fiona Perrin, 'A Vehicle for Competitive Advantage: Video and Data Conferencing in the European Automotive Sector' (1998), a PictureTel White Paper. Ibid, Industries and Applications frame.

94 Chantel Crews, 'Forecast for the Future: The Effect of Technology and the Internet on the Court System', section B on Video-conferencing <http://www. law.ttu.edu/cyberspc/jour6.htm>.

95 The *Acts Amendment (Video and Audio) Links Act* has attempted to overcome this issue by establishing legislative safeguards to enable the court, through a reciprocal arrangement with other states and any other courts with similar legislation, to enforce orders made and to deal with contempt committed during video proceedings.

96 ALRC, IP23 <http://www. alrc.gov.au/publications/issues/23/ALRCIP23.html>.

97 Ibid, para 5.30.

98 US Bureau of Justice Assistance, 'Differentiated Case Management Program Brief (February 1993) <http://www.ojp.usdoj.gov/BJA/html/bjasrch.htm>.

99 Ibid.

100 Ibid.

101 In current times, government agencies are constantly under pressure to reduce expenditure and do more for less

102 American Bar Association Section of Science and Technology Information Security Committee *Digital Signature Guidelines Tutorial* <http://www.abanet.org/scitech/ec/isc/dsg-tutorial.html> (last accessed October 1997).

103 Ibid.

104 See <www.netscape.com>.

105 Soon, above n 78, 5-6.

106 Administrative Office of the US Courts, Office of Information Technology, *Interim Technical Standards and Guidelines For Electronic Filing In The US Courts* (Draft, 23 February 1998) <http://www.uscourts.gov/casefiles/toc.htm>.

107 See <http://www.adobe.com>.

108 Administrative Office of the US Courts, above n 106.

109 February 1998.

110 Also known as W3C.

111 See <http://www.w3.org/TR/REC-xml>.

112 Basically being all of SGML without the very small percentage of extremely complicated aspects of SGML.

113 HyperText Markup Language.

114 HTML and XML both are defined by W3C.

115 The Turing test is defined as 'a behavioural approach to determining whether or not a system is intelligent. It was originally proposed by mathematician Alan Turing, one of the founding figures in computing. Turing argued in a 1950 paper that conversation was the key to judging intelligence. In the Turing test, a judge has conversations (via teletype) with two systems, one human, the other a machine. The conversations can be about anything, and proceed for a set period of time (eg, an hour). If, at the end of this time, the judge cannot distinguish the machine from the human on the basis of the conversation, then Turing argued that we would have to say that the machine was intelligent.' – as defined at <http://sandcastle .cosc.brocku.ca/Offerings/4P70/Turing.html>.

116 See <http://www.chess.ibm.com/home/html/b.html>.

117 Mark Humphrys, 'How My Program Passed the Turing Test' at <http://www.compapp.dcu. ie/~humphrys/eliza.html>.

118 Uwe Franke, Dariu Gavrilla, Steffen Gorzig, Frank Lindner, Frank Paetzold and Christian Wohler, 'Autonomous Driving Goes Downtown', (1998) 13(6) *IEEE Intelligent Systems* 40-48. Also see <http://computer. organisation/intelligent/ex1998/x6toc.htm>.

119 The Foundation for Legal Knowledge Systems (last accessed October 1997). 'Proceedings Contents', *Jurix'95*, <http://jurix. bsk.utwente.nl/html/j96.html>, <http://jurix.bsk.utwente.nl/html/j95.html>, <http:// jurix.bsk. utwente.nl/html/j94.html>, <http://jurix.bsk.utwente.nl/html/j93. html>, <http://jurix.bsk.utwente. nl/html/j92.html>, <http://jurix.bsk. utwente.nl/html/j91.htm>, <http://jurix.bsk.utwente.nl/html/ phd.html>.

120 Cary G Debessonet and Geroge R Cross 'An Artificial Intelligence Application in the Law: CCLIPS, A Computer Program That Processes Legal Information' (1986) 1(2) *Berkeley Technology Law Journal* < http:/server.berkeley. edu/BTLJ/abstract/12debess.html> (last accessed October 1997).

121 Curtis E Karnow 'Liability for Distributed Artificial Intelligences' (1996) 11(1) *Berkeley Technology Law Journal* <http://server.berkeley. edu/BTLJ/abstract/111karno.html > (last accessed October 1997).

122 Richard Gruner, 'Thinking Like a Lawyer: Expert Systems for Legal Analysis' (1986) 1(2) *Berkeley Technology Law Journal* <http://server.berkeley.edu/BTLJ/abstract/12gruner.html> (last accessed Ocober 1997).

123 Soon, above n 77, 10

124 Adapted from 'Call for Papers – Special Issue on Judicial Applications of Artificial Intelligence' (1996) *Artificial Intelligence and Law Journal*.

125 R McInnes, 'Bordertown and the Globalisation of Justice: Using Computers in an Australian Magistrates Court' – Commentary (1998) 2 *Journal of Information, Law and Technology (JILT)* <http://elj. warwick.ac.uk/jilt/itpract/98_2mcin>.

126 Such as the current debate in Western Australian on crime and sentencing.

127 Regardless of the financial capacity to afford and install such equipment, there will be many situations where attempting to participate in a 'court hearing' from one's home living room will not be feasible. For instance, holding a court hearing while young children need attending in the same living room may be very difficult. Thus, community based facilities for participating in virtual court hearings would be provided, for members of the community to use if they could not afford such facilities, or needed to use such facilities for other reasons.

128 The term 'investigation' is used very loosely in this context. It simply refers to any subject that is of interest to participants that is further discussed using the facilities described.

129 Because the mechanism described is based on Internet technologies (amongst others), another by-product and benefit of the technologies is that participants also do not need to be physically co-located. Participants in such groups can be anywhere in the world (and frequently are).

130 While other participants may or may not be on-line.

131 Loosely, 'controlled' or 'guided'.

132 That is, in terms currently understood, the judicial officer.

133 Rules, practice and procedure would no doubt evolve, in a similar manner to the current types of hearings in physical court rooms. It is interesting to note that participation in such groups over the Internet, as well as participation in other on-line mechanisms such as 'chat rooms' have been subject to 'netiquette'. This is the loose set of rules, practices, procedures and sensibilities that members of the on-line communities observe with each other, to ensure that participation in an on-line community is productive to all involved.

134 Alternatively, the adjudicating person had decided for the parties (in a more case managed version of the process).

135 Depending on the requirements of the parties, and other rules.

136 For instance, one from Norway, one from Argentina and one from the Philippines.

137 Cairncross, above n 12, <http://www.economist. com/tfs/archive_tframeset.html> (search through archive)

138 Technical and social feasibility alone do not necessarily make an initiative a desirable occurrence for a society, or for individuals.

139 By the time Joe is performing this work, the World Wide Web operates at lightning speed!

140 This is a fictional (future) Act.

141 Formerly known as the Legal Aid Commission.

142 An on-line repository of all justice decisions and related issues ever heard in, or related to, Western Australia.

143 Tthe objectives of the justice system may (and arguably, should) remain the same regardless of technological changes. The objectives relate to what the community desires for its justice.

144 By this, principally one is referring to the agencies and parties operating in the justice system.

145 Effectiveness, efficiency and efficacy.

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5.4

The Role of the Legal Profession in Civil and Criminal Proceedings

> An essential pillar in the structure of the adversarial justice system is the legal profession. The system has worked effectively in the past because of the power of several ethical conventions, particularly those relating to lawyers' duties to the court. That power and the conventions themselves have eroded.[1]

INTRODUCTION

There is a relationship between the adversarial system of justice and the role and behaviour of the legal profession. In important respects, stemming from the very premises of the system, courts rely heavily upon an ethical and competent legal profession. At the same time, the extent to which the adversarial system precisely determines the behaviour of lawyers can be over-stated. There is some scope for changing the behaviour required of lawyers without violating the core features of the system. In any event, we need to make changes both to the system and to the legal profession as part of a co-ordinated strategy. In sub-sectionection 1.2,[2] a vision of future civil courts has been described which has as one element a change in lawyers' behaviour. This essay expands the discussion of that element and adds some comments relating to criminal proceedings.

An emerging theme in much of the recent literature about lawyers is that the legal profession has lost its way in modern society. This is epitomised by a highly influential book in the United States by an eminent Dean of Law, Anthony Kronman. In *The Lost Lawyer*[3] Kronman argues that the American legal profession is in crisis and in danger of losing its soul. Kronman's analysis may be unduly gloomy and may not be wholly applicable to Australia. There is also a danger, as Justice Michael Kirby has pointed out, of nostalgic hankering for the 'good old days', which may not have been so good, after all, for the consumer.[4]

It seems clear that if one now posed the question 'What is a good lawyer?' one would receive widely differing responses from different sections of the community, and even within the worlds of the legal profession and legal education. To some, a good lawyer is technically proficient (one who 'knows his law' and its processes). To others, a good lawyer is one who wins battles, or who at least puts clients' interests first.[5] To others, the good lawyer is a peace-maker, regardless of where the legal merits lie.[6] To the ethicist, the good lawyer is virtuous, albeit within the confines of a role morality,[7] and has been variously modelled as a Gentleman,[8] Portia from *The Merchant of Venice*,[9] a Friend,[10] a Statesman[11] or a Hired Gun.[12] To the practice management guru, especially one immersed in the discourse of quality assurance, the good lawyer is one who is equipped for the changing nature of legal practice and can control her or his destiny.[13] To the regulator, the good lawyer runs an efficient practice, communicates well with clients, handles their complaints properly and is scrupulous with their money. To the judge, the good lawyer helps the court whilst putting her or his best foot forward on behalf of the client.[14]

One partial explanation for this lack of consensus over the qualities of the good lawyer today may lie in the increasing diversity in the way that legal services are delivered. Lawyers now practice through a wide range of business forms, from the solo practice (whether as barrister or solicitor) to the mega-firm. They may work outside a law firm altogether (perhaps in an accountancy firm, a community legal centre or a government department). They may specialise in a narrow technical area or they may have a general practice. They may not formally be admitted as a legal practitioner, or they may not need a current practising certificate.[15]

This sub-section cannot aspire to deal with, let alone reconcile, all these issues. The diversity and complexity of views about the legal profession must, however, be constantly borne in mind when approaching particular topics such as, for present purposes, the role of the legal profession in court proceedings. The author pointed out seven years ago that the centre of gravity of a typical lawyer's world has moved from the court to the office.[16] The pressures of the office must now be seen, for better or worse, as having significant influence inside the court.

THE ORTHODOX ACCOUNT

An orthodox account of the role of lawyers in court proceedings is as follows. Lawyers operate within an adversarial system of justice. (See sub-section 1.2 for a stereotypical account of the adversarial system.) Their behaviour is appropriately guided by a role morality that has developed over time to fit the part they play in the system. Subject to certain constraints, lawyers are presumptively partisan and zealous; they do all they can to help their client prevail. The constraints are that they must behave lawfully, and 'ethically', in the sense that they must not breach their duties to the court and the canons

of professional responsibility. Provided they keep within these constraints, they are not morally or legally accountable for the projects of their clients nor the consequences of their clients winning.

This account, told in different ways, has been the lawyer's ultimate defence against public criticism of certain kinds of behaviour. It provides the basis for a common belief within the profession that the public fails to understand the role of lawyers in court proceedings and that, rather than attack the legal profession, the public should decide whether it wants to change the system.

It will be seen that the orthodox accounts of lawyers and of the nature of the adversarial system are closely entwined. Some scholarly and populist critiques of lawyers' behaviour have focused precisely on the adversarial system because the authors have taken the view that that is where discussion of lawyers must begin.[17] Only if the adversarial system can be justified, can lawyers' behaviour also be justified. Thus, for example, before criticising lawyers for keeping confidential the damaging communications of their clients or for exposing others to loss, penalty or ridicule in the pursuit of their clients' interests, the public must come to a view about the system of justice kept in place, after all, by democratically elected governments.

To some extent, the orthodox view that legal ethics and the adversarial system are closely inter-linked must be true. The adversarial system is classicly characterised by *partisan behaviour*, *party autonomy,* and *judicial passivity* (see sub-section 1.2). It follows that it must be lawyers, acting on their clients' instructions, who shape the issues to be tried, choose the evidence to be adduced and put forward particular interpretations of the law that favour their clients.

Courts have to rely heavily on lawyers.[18] They are not funded on anything like the scale that would enable them to take on these responsibilities themselves. Courts rely on lawyers not actively to conceal relevant material. They assume that competent legal representatives will expose the failure of the other party to proffer damaging information. Judges assume that advocates will bring to their attention legal authorities directly in point and will not in any other respect mislead the court. They assume that lawyers will conduct fairly those parts of the procedure where co-operation is mandated. For example, at the stage of discovery of documents in civil matters (where each side must make available for inspection by the other side relevant, unprivileged documents, whether or not those documents harm that side's case) the court assumes that the lawyers will not knowingly conceal or hide them. They assume that lawyers will not make allegations against third parties unless they have reasonable grounds, based on more than the client's instructions, to believe that the allegations are true and that they intend to produce evidence in support of the allegations in due course. They assume that cases will not

be commenced by lawyers in the knowledge that the claim is without legal merit, but for some collateral advantage of the client. In addition, they assume that at a trial the lawyers' forensic skills, particularly in cross-examination, will enable each side's case to be probed for all its weaknesses and thus allow the passive umpire (judge or jury) to make an informed decision whether to believe the prosecution or the defence, the plaintiff or the defendant.

The 'architecture' of legal ethics has been designed to fit with the vision of the adversarial system. Leaving aside some professional canons that are primarily about restrictive trade practices or appropriate business forms, lawyers' ethical duties are divided into two sets. The first, which has lexical priority, are duties to the court (or, as it is sometimes said, to the administration of justice). The second, are duties to the client.[19] Where the two sets of duties conflict (for example, where the client wants the lawyer to commence a hopeless case, to conceal a damaging document or to make groundless allegations against another) then the lawyer's duty to the court comes into operation and prohibits her or him from complying with the request.

The design-fit works as well for criminal cases as for civil ones. Where the client has confessed guilt to the lawyer of the actual crime for which he or she is charged, the lawyer cannot positively assert the client's innocence, for that would be attempting to mislead the court, but the lawyer may put the prosecution to proof. Because the task of the judicial officer or jury in an adversarial system is to decide whether the prosecution case has been made out beyond a reasonable doubt, there is nothing inappropriate in the defence lawyer probing that case to see whether it will stand up on its own.

PROBLEMS WITH THE ORTHODOXY

When the level of generality is reduced, and when information is brought in about the *actual operation* of legal proceedings, the orthodox arguments start to weaken and the orthodox claims about lawyers' behaviour begin to seem thinner. The following sub-headings deal with matters, either factual or conceptual, that suggest we should be cautious about assuming too readily that the adversarial system directly determines in all respects what should be expected of lawyers. It is important to have a more qualified picture because it suggests there is greater scope for experimentation and change.

Diversity within and across adversarial systems

Considerable differences have opened up between the procedures used by different courts in Australia; in particular between the Federal Court and some Supreme Courts. Furthermore, procedures today differ markedly from those of an earlier time. If the relationship between the form of procedure and the requirements of legal ethics was so immediate and direct, why have the latter remained largely unchanged?

On a similar point, it is probable that more legal matters are practically resolved within tribunals in Australia than in courts. Almost all tribunals have fewer

adversarial procedures than almost all courts and lawyers' behaviour has had to adapt. Our legal system is less monochrome than might be assumed by those who tend to practice only in the superior courts.[20]

Indeterminacy and incompleteness of ethical rules

Codes of professional responsibility are expressed in general terms, leaving a considerable amount to the professional judgement of practitioners as to whether they apply in the circumstances of the case. This amount of discretion is sometimes said to be a defining feature of a profession, but it suggests that there is scope for various approaches or styles of practising law. Some elements of legal ethics are provided by the general law and the *sui generis* power of the court to discipline lawyers. Yet, as the relatively recent Federal Court decision in *White Industries v Flower & Hart*[21] shows, there is still uncertainty over what behaviour will amount to an abuse of process and what level of prospects will justify the commencement of an action.

Ethical codes do not usually purport to deal directly with questions of game-playing and styles of advocacy, although certain tactical habits may be an ingrained and unnecessary part of the adversarial system in practice.[22]

Failure to require proportionality

The standard requirement to do everything lawful and ethical on behalf of a client, provided it is within the client's instructions, fails to take into account proportionality, either between the amount at stake and the steps necessary to achieve it, or between the amount at stake and the consequences of achieving it. This can seemingly justify excessive interlocutory activity and behaviour designed to wear down the opponent financially rather than to vindicate a legal right.

Failure to consider the public subsidy of the court system

Whilst there are some general obligations not to waste the time of the court or to cause unnecessary expenditure, so little attention is given to the meaning of these obligations and the circumstances of their application that lawyers acting for well-resourced litigants can often, in practice, pursue every avenue for tactical purposes without regard to the cost to the taxpayer.

Most legal ethics are not 'ethics' at all

Most of the duties owed by lawyers to the administration of justice and to their clients are co-extensively *legal* duties as well as ethical ones. Duties to the administration of justice can be found in the rulings of superior courts in cases involving 'professional misconduct', in cases about whether to order costs to be paid personally by a lawyer, in the law on collateral abuse of process or contempt of court, and in the reasoning of judges in particular decisions on advocates' immunities and procedural matters. Duties to the client are based in contract law (particularly in relation to implied terms in the contract of retainer) and equity (particularly in relation to the lawyer's capacity as a fiduciary). Some lawyers argue that professional responsibility cannot be reduced to norms such as rules and principles but lies in the conscience and judgement of individual practitioners. The point of this sub-

heading is to suggest that in fact the area is already made up of legal norms, albeit imperfectly analysed and expressed as a corpus of law.

The enforcement regime

The enforcement system of legal ethics is spread between regulatory bodies and the courts and lacks a clear policy to guide their respective roles. The penalties are not clearly understood and there is little in the way of a 'penology' of legal ethics which attempts to lay down the principles of punishment.

Evidence of different and changing legal cultures

Although not an area that has been well researched, there are claims that legal culture is localised and can change over time. For example, it is said that lawyers have become more partisan and zealous on behalf of their clients' interests in recent times and that some parts of the country are more litigious than others. To the extent that this is true, it suggests that change in practical ethics is possible without necessarily violating core principles on which the legal system rests.

Conflation of criminal and civil proceedings

The role of zealous, partisan advocate on behalf of a client is taken from the model of a criminal lawyer as it emerged in 18th century England. Justifications for this stance rely in part on the power of the state to deprive a citizen of liberty and the need for protections. In civil matters, where the distribution of risk and resources is usually at stake, the arguments for this role are weaker and some practitioners are now calling for a wholly different approach to the resolution of these matters. One prominent Queens Counsel has recently done so in contraversion of the views of his own Chief Justice.[23]

Prosecutors are subject to different duties

It is well-known that the responsibilities of prosecutors are different from those of other advocates.[24] Their role is often described as 'ministers of justice' and their primary function should be the attainment of justice rather than in securing a conviction.[25] Although in a loose sense the same could be said of all advocates, it is made clear in specific professional rules and in the conventions of courts in the Anglo-Australian tradition that prosecutors should behave in a less partisan fashion than defence lawyers.

Depending on how one categorises advocacy, when lawyers act as prosecutors in criminal cases they constitute the single largest subset of advocates, given that many criminal defendants in the magistrates' courts are unrepresented. Our image of the partisan lawyer may therefore not encompass what is numerically the largest single form of advocate activity in Australia. It is not possible to argue that requiring lawyers to see themselves more centrally as agents of the justice system would cut across their traditions, training and conditioned reflexes, because some of them are required to do so frequently.

Self-represented litigants

The stereotype of legal responsibility in an adversarial system rests on assumptions of checks and balances. Each side will be represented by roughly equally competent lawyers who will look after their clients' interests. The

growth in the numbers of self-represented litigants raises unresolved ethical issues for lawyers representing the opposing parties.[26] This is particularly the case in negotiations to settle civil matters, where it is highly unlikely that there will be any subsequent independent scrutiny of the actions of the practitioner. The apparent rise of unrepresented parties presents a major challenge to the limited versions of lawyers' responsibilities.

OPTIONS FOR REFORM

Replace the adversarial system

A wholesale replacement of the adversarial system with an inquisitorial system is impractical and lacking in justification. As argued in sub-section 1.2, inquisitorial systems differ one from another. We have no more basis for choosing one of them than Belgium has for selecting between the English and the American approaches.

Adversarial systems in operation are integrated with various arrangements concerning legal education, professional structure, the selection and training of judges, and the mode of legal reasoning. The cost and uncertainty involved in simultaneous revolution on all these fronts would seem to outweigh the perceived disadvantages of the present system. Nor is there any evidence that any of the existing alternatives, if imported wholesale, would be a better end product. Furthermore, public budgets have been set on the basis of certain assumptions about the relatively low cost of the justice system. Few governments would relish explaining to their electorate that taxes must rise to pay for an inquisitorial system with more judges so that the voters can be better off through lower legal fees and an undemonstrated rise in the standard of justice. Finally, the behaviour of lawyers in civil law countries has not been described or analysed comprehensively. Whilst there is reason to believe that zealous partisan behaviour is reduced under the inquisitorial system, we have no basis for assessing the size of the reduction nor the net benefits that would flow.

Improve the system

A more fruitful strategy is to abandon habits of comparison with inquisitorial systems and concentrate on the vision of courts and litigation that we wish to work towards. In sub-section 1.2, the vision includes as one element, a changed legal profession. The purpose of the remainder of this essay is to outline an approach whereby that change might come about.

Step 1: Locate the problems accurately

The problems are not to be found in widespread, obvious unethical conduct. Unless evidence is available to the contrary, which it is not, we must assume that the Australian legal profession is generally virtuous and conscientious. The problems lie, it is suggested, in the combination of at least the following factors:

- The demands of certain clients: It may be that some kinds of clients have become more insistent that their lawyers do everything they can to secure victory. It may also be that disappointed clients are more likely today to

complain about, or proceed against, lawyers who have not delivered victory. These observations are commonly made by legal practitioners, although the empirical evidence is sparse. They are plausible to some extent because more and more commercial activity is regulated by law and there are more occasions where lawyers are likely to be on the receiving end of their clients' pressures. It must be added, however, that some corporate clients do *not* see excessive adversarialism as in their long-term interests. Increasingly trust is seen as important for economic efficiency, and more conciliatory ways of resolving problems deliver better outcomes. Nevertheless, lawyers cannot be expected to know at the outset how their clients will react to their reluctance, on professional grounds, to engage in the ruthless pursuit of the clients' interests.

- Commercial pressures on lawyers: The system of time-costing billable hours, where in practical terms the time spent on a matter is the major component of the final bill in many cases, has until recently been a 'taboo subject'[27] although it is now receiving attention, at least from judges speaking extra-curially.[28] The obvious concern about it is the incentive it provides to undertake unnecessary work (over-servicing) and to maintain inefficient ways of doing necessary work. The apparent shift in the self-image of law firms from that of a professional partnership to a commercial entity interacts with the time-costing system and can place everyone in a vicious circle. Partners compete with other partners to demonstrate their worth to the firm. Junior solicitors aim to reach budget targets so as to increase their partnership prospects.[29] Given the indeterminacy of ethical duties (see below) it would not be surprising if many legal matters contain at least a modicum of superfluous activity.

- The indeterminate nature of legal ethics or professional responsibility: The practical indeterminacy of legal ethics stems from a failure to arrive at a national code; the use of some unnecessarily general language; a failure to analyse the law and canons of professional responsibility with the same rigour as other areas of law; and perhaps the absence of an academic community of legal ethicists who can keep debates moving forward.

- The relatively minor place of legal ethics in the initial and continuing education of lawyers: The situation is changing but some law schools still contain no legal ethics topics in their undergraduate curriculum if an alternative provider exists that will allow their graduates to meet Admission Rules requirements. Where legal ethics is taught at undergraduate level, in some cases it is a perfunctory unit at the tail-end of the degree, perhaps delivered by a practitioner brought in for the purpose. When taught as part of a Practical Legal Training course, it may be taught uncritically and learnt by rote. It is rarely provided in Continuing Legal Education programs,

possibly because of a belief that there is greater demand for refresher lectures on substantive law topics.

- The cumulative effect of multiple minor choices that are made daily on behalf of clients: It was suggested above that time-costing contributes to a situation where many matters contain a modicum of superfluous work. Add to this the under-analysed nature of ethical duties, a general lack of debate about the purpose of legal proceedings and the absence of any concerted approach to instilling ethical sensitivities into practitioners. The consequence is *not* widespread, obvious scandals. It is pervasive minor slack in many cases, manifested in sub-optimal methods and borderline non-compliance with procedural requirements.

  This may not be alarming when each matter is viewed individually. From a systematic perspective, however, the cumulative effect of multiple small instances of behaviour which is arguably, but not clearly, just on the wrong side of the line is a social and economic problem. An analogy is with antibiotics. The widespread use of antibiotics for the purpose of appeasing patients and erring on the side of caution is apparently leading to a collective problem of immunity by bacteria. Medical science is devoting more and more money to finding new antibiotics, rather like governments setting up successive expensive inquiries into the cost of justice, when the answer lies in the prescribing practices of the professions.[30]

  One response to these observations might be that they contradict the claim above that lawyers are subject to increasing commercial pressures. Surely, it might be argued, competition between lawyers will prevent the behaviour in question. If, however, the market leaders adopt similar charging practices, and if the scale and complexity of modern commercial work is such that large clients gravitate to large law firms, we seem to have a situation of market failure where particular forms of competitive behaviour do not promote efficiency.

Step 2: Establish with members of the legal profession the benefits for them individually and collectively in change

This can only be done in discussion amongst the profession and between the profession, the judiciary and law reform bodies. Facilitators will be necessary, in the form of respected practitioners, judges or academics. The need for change must be argued against a declining public regard for the profession and diminishing access to justice.

Practitioners have collective and personal interests in doing something about the present situation but it may take wise and far-sighted leaders to demonstrate this. From a collective point of view, legal services markets are still to some extent protected from the competition of outsiders. The details differ across jurisdictions and some of the protective mechanisms have more than one justification (for example, legal professional privilege) but the protection still exists. The profession may have lost sight of the social trade-

off that historically was transacted in most common law jurisdictions where protection of status and markets was in exchange for a dedication to public service. Fairly or otherwise, there is a perception that the profession has not delivered its part of the bargain and there is a pressing need to correct this perception, by words and actions.

Individually, there is some evidence that job satisfaction amongst lawyers is lower because the public respect for lawyers is lower,[31] although it is difficult to disentangle all the factors, particularly the pressures from commercial considerations.[32] Further research is needed on attrition rates, particularly amongst women lawyers, but it may be that professional leaders have under-estimated the idealism that exists amongst many young lawyers: an idealism that could be re-captured if it were made easier for them to demonstrate their commitment to the public good amongst the fog of competitive legal work.

Step 3: Identify a vision of a justice system and principles upon which it rests

In sub-section 1.2, one such vision of a civil justice system is proffered. Criminal justice is considered below under a separate heading.

Step 4: Harness the energies and creativity of the profession to bring the behaviour of lawyers into alignment with the principles of the system in a way that will work towards the vision

Components of this step include the following:

- Further effort to clarify the desirable principles of legal ethics so that there is less uncertainty over what is *not* permitted: Analysis of the kind and calibre in Justice David Ipp's article on 'Lawyers' Duties to the Court'[33] is required, but expanded to deal with the myriad issues that arise in daily legal practice. Professional bodies have made some real progress in this regard in recent years but it is clear that there are further ideas waiting to be debated.[34]

- Statements of best practice in particular kinds of matter: An ideal pupil master or principal not only instructs the beginner in what is unethical, he or she also gives instruction in what is the *best* thing to do in particular situations. The job of professional bodies should be to identify and share a *collective* sense of best practice. Some jurisdictions have begun to develop protocols of best practice for particular kinds of matters and there is considerable scope for more.

- Integration of ethical instruction and the sharing of best practice into the undergraduate law degree and compulsory continuing education programs. Legal education in England and Australia has begun to realise the importance of introducing material on professional ethics into the curriculum. This is evidenced by a new collection of essays on the subject, entitled *Ethical Challenges to Legal Education and Conduct*.[35] Since the Watergate scandal in the 1970s, where most of the main participants were lawyers, American

> legal education has taken legal ethics more seriously, spurred on in part by the accreditation requirements of the American Bar Association. A movement which seems to be gaining support is for teaching ethics by the 'pervasive method', whereby ethical issues are built into the main subjects in the curriculum.[36] The Australian Law Reform Commission quotes a leading American legal ethicist, Professor Carrie Menkel-Meadow, who has argued that law schools cannot *avoid* teaching legal ethics. By the very act of teaching law they are conveying images of law and 'lawyering'.[37] The issue is whether the subject is separately identified and reflected upon.

In 1992 the present author argued that legal ethics should be taught at both the academic and practical stages of legal education:[38]

> In the undergraduate degree, the attention could be on the theory of legal ethics (how they relate to the adversary system, how they fit together, why each duty is thought to be necessary) and also on critical perspectives (the alternatives and their relative merits). At the vocational or practical legal training stage, the emphasis would be on learning the detail of the rules and their application in the practice of law.
>
> An argument for dealing with legal ethics in two stages is that the subject should not be seen as comprising just another set of rules to be learned alongside court procedure, land law and so on. Legal ethics have a wider purpose in orienting the future conduct of lawyers. To be effective and long-lasting they need to be rooted in an understanding of why they are there and what their justifications are. Such an approach is more suitable in the undergraduate degree where the emphasis tends to be on general principle.
>
> On the other hand, lawyers also need to have a grasp of the fine detail of legal ethics and this is best pushed home in a practical context at the end of their training. It seems, therefore, that all law schools should consider the adequacy of their treatment of legal ethics in the undergraduate degree and attempt to devise curricula which complement those in practical legal training courses.

One major issue facing Western Australia and some other jurisdictions is whether to introduce programs of mandatory continuing legal education (MCLE). The background to this issue, with comparative information from other countries, can be found in the Australian Law Reform Commission's Issues Paper No 21.[39] Many practitioners voluntarily attend CLE lectures and sessions. Some of the larger firms have in-house programs. A significant advantage of *mandatory* schemes is that a systematic view can be taken of the issue as a whole. It is possible to work out where certain topics are being dealt with, and where the gaps are. Flexibility need not be sacrificed. In-house programs, accredited specialist programs and postgraduate courses can all receive recognition within a mandatory scheme. Current topics in professional responsibility is an obvious component in any mandatory program.

- The development of defences for lawyers who act in accordance with the principles of the justice system: In sub-section 1.2, the recommendation is made that objects clauses be introduced into all relevant legislation and the Rules of Court so that the principles on which the civil justice system rests are clearly set out. If this recommendation is accepted it is important that other parts of the substantive law and rules of professional responsibility do not run counter to them. In particular, it is important that practitioners who are not disposed to conduct their professional lives in line with the principles can find no refuge in some other part of the law.
- The new rule 19 of the New South Wales *Barristers' Rules* provides an illustration of what is possible. It is provided there that the barrister will not have breached her or his duty to the client in exercising certain kinds of forensic judgements, contrary to the desires of the client, if the purpose is to '(a) confine any hearing to those issues which the barrister believes to be the real issue; (b) present the client's case as quickly and simply as may be consistent with its robust advancement; or (c) inform the court of any persuasive authority [as distinct from binding authority] against the client's case.'
- It might be thought a bold step to provide by legislation for a general rule that exempts a practitioner from liability under the general law where he or she has been genuinely, after reasonable communication with the client, attempting to pursue the matter in accordance with the principles on which the civil justice system is based. There might be political difficulties in 'selling' such an idea to the public. Other professions that may not in any event be generally well-disposed to the legal profession, may wonder why an equivalent blanket protection is not applied to them.
- Nevertheless, such a general rule might only involve bringing together, and possibly extending in some circumstances, defences and exceptions that already exist in relation to the causes of action. This is a matter for careful examination by experts in the relevant areas.

Step 5: Consider systematically the enforcement mechanisms

The respective roles of regulatory bodies and the court should be re-visited. The relevant penalties should be identified (from striking off powers through to powers to order costs personally against the practitioner) and then a rational and fair system constructed that can be explained simply to the uninitiated. A new penalty should be provided for, which allows the enforcing body to require a practitioner to undertake a specific number of hours of *pro bono* work, perhaps in specified areas of law. This would parallel the modern penalty of community service orders. There should be nothing shocking about requiring, for example, an experienced commercial solicitor who has erred to provide assistance at a community legal centre.

It is vital that this process of cultural and regulatory change is driven by the legal profession itself, albeit with facilitation from those whose experiences

and perspectives have led them to some useful insights, and perhaps stiffened by knowledge of a political resolve that change of some kind will be imposed if improvements cannot be achieved in any other way.

THE PROBLEM WITH CRIME

Although this view is no longer universally shared,[40] there are in the author's opinion reasons to regard criminal proceedings differently. The immediate purpose of commencing criminal proceedings is to inflict punishment rather than to call for an adjustment of rights or redistribution of resources.

Since the emergence of liberalism as a political philosophy in common law societies (and in advance of the establishment of modern democracies) it has been thought that the prosecution must make out the case against the defendant to a certain standard and that there is no requirement that the defendant should assist in the process. This is manifested in the concepts of burden of proof, standard of proof, the right to silence and the privilege against self-incrimination. It is unlikely that any change in these concepts will be accepted by the community, following a reasoned debate, other than perhaps some encroachment into the right to silence involving advance disclosure of each side's case.

Even if one tried to place further obligations on the defendant, it is unlikely that a court would be willing to allow a conviction to be entered against someone who might be innocent of the charge simply as a penalty for failing to meet procedural obligations. This differs from self-executing and default orders in civil proceedings.

This leaves open the possibility that heightened obligations might be imposed upon *defence lawyers*, in relation to compliance with time limits, disclosure of material that must be disclosed, and strict compliance with required standards at trial. Although this is an empirical obligation that is unsupported by research, it may be that the latitude given to criminal defendants because of the priority we accord to the preservation of liberty has, in practice, been extended to their lawyers also. There is no obvious justification for this. A slight improvement in compliance with procedural requirements and expeditiousness, when multiplied across the number of criminal cases in the system, could have a significant aggregate effect. It would seem important that the judiciary and the magistracy are consulted on this matter. If they publicly renewed a resolve to ensure strict compliance by defence counsel, this would reinforce moves from within the legal profession. There is no shortage of judicial dicta in support of this. Note, for example, the following remarks, underscored by comments by the Commonwealth Attorney-General in 1998,[40] by the Court of Criminal Appeal in Victoria in 1995:

> Let it be understood, henceforth, without qualification, that part of the responsibility of all counsel in any trial, criminal or civil, is to co-operate with the court and each other so far as is necessary to ensure that the system of justice is not betrayed: if the present system of litigation is to

> survive, it demands no less. … Whether the cost of legal representation be privately or publicly borne, counsel are to understand that they are exercising a privilege as well as fulfilling a duty in appearing in a court of law; and neither privilege nor duty will survive the system of justice of which the court is part.[42]

PROPOSALS

1. The Law Society of Western Australia, in consultation with those responsible in the courts for the taxation of legal costs, should be invited to inquire into appropriate methods of billing, with a view to reducing the prominence of time-costing as a methodology for calculating professional fees.

2. A task force should be established, comprising representatives of professional bodies, the judiciary, the law schools and the Attorney-General's Department to examine:

- The adequacy of the present rules of professional conduct;
- The production of protocols of best practice;
- The formulation of a general legal immunity from suit where the practitioner genuinely, and after reasonable communication with the client, has acted to promote the principles enshrined in legislation on which the justice system is said to rest;
- The mechanisms whereby ethical obligations are enforced in Western Australia, the range of penalties and the principles on which penalties are to be imposed; and
- The manner in which legal ethics is taught at the undergraduate, postgraduate and continuing stages.

3. A program of Mandatory Continuing Legal Education should be established in Western Australia forthwith. Accredited providers should be obliged to include in their program components on legal ethics and legal procedures.

4. Representatives of the judiciary, the magistracy, prosecutors and criminal defence lawyers should hold a summit meeting with a view to:

(a) identifying areas in which there are difficulties in complying with procedural and other obligations;

(b) resolving those difficulties; and

(c) making a fresh commitment to compliance.

5. Drawing on the talent that is clearly available in the State, and with a view to promoting Western Australia as a leader in the field, approaches should be made to legal publishers with a view to establishing an *Australian Journal of Professional Legal Ethics*. The journal would be a focus for discussion about best practice, current topics in legal ethics and reflective critiques of

the subject. It is essential that the journal is seen as primarily for the benefit of practitioners. An alternative is for a syndicated article to feature, by agreement, in each issue of the journals that emanate from professional bodies around Australia. In that way, those jurisdictions with smaller professions can benefit from the best writing in the field, including from within their own membership. A further alternative is to approach the *Australian Law Journal* with a view to the regular inclusion of a column or section devoted to the subject.

ENDNOTES

1 D Ipp 'Reforms to the Adversarial Process in Civil Litigation – Part II' (1995) 69 *Australian Law Journal* 790, 820.
2 'The Advantages and Disadvantages of the Adversarial System in Civil Proceedings'.
3 Anthony Kronman *The Lost Lawyer* (1993).
4 M Kirby 'Legal Professional Ethics in Times of Change' (1998) 72 *Reform* 5.
5 Glendon notes a US survey showing that the trait most admired by the American public is that lawyers put their clients' interests first, see MA Glendon, *A Nation Under Lawyers* (1994) 38.
6 This is the classic Abraham Lincoln position: 'Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be enough business.' See 'Notes for a Law Lecture' in TH Williams (ed), *Selected Speeches, Messages and Letters* (1957) 33. This position has similarities with the Confucian ethic that the need for formal dispute resolution is a sign that people are being unreasonable. As Australian legal practice mixes more with Asian legal practice, this influence will be increasingly felt.
7 Leaving aside a small literature on ethical discretion or ethical independence; see in particular D Luban, *Lawyers and Justice* (1988).
8 TL and MM Shaffer, *Lawyers and their Communities* (1991) ch 2. The development of the concept of 'professionalism' was implicitly (sometimes explicitly) based around certain 'ascribed characteristics'— especially class (middle/upper) and gender (male). This began to break down somewhat in the latter part of the 20th century, with university training and the preference for 'meritocracy'. See RL Abel, 'The Decline of Professionalism?' (1986) 49 *Modern Law Review* 1, 13; D Weisbrot, *Australian Lawyers* (1990) chh 3-4.
9 See, C. Menkel-Meadow, 'Portia in a Difference Voice: Speculations on a Women's Lawyering Process', (1985) 39 *Berkeley Women's Law Journal* 39; and 'Portia Redux: Another Look at Gender, Feminism and Legal Ethics' in S Parker and C Sampford (eds), *Legal Ethics and Legal Practice* (1995) 25.
10 C Fried, 'The Lawyer as Friend' (1976) 86 *Yale Law Journal* 1060.
11 Kronman, above n 3.
12 See eg, Monroe Freedman, 'Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions' (1966) 64 *Michigan Law Review* 1469.
13 D and C Stein, *Legal Practice in the 90s* (1994).
14 See eg, GL Davies and SA Sheldon, 'Some Proposed Changes in Civil Procedure: Their Practical Benefits and Ethical Rationale' in Parker and Sampford, above n 9, 127.
15 Traditionally, a large amount of legal work has been carried out by legal clerks, or the equivalent. Conveyancing in many states of Australia can be carried out by conveyancers or land agents. In the United Kingdom, since the *Courts and Legal Services Act 1990*, groups of 'non-lawyers' can be accredited to provide certain kinds of legal services. A functional definition of 'lawyer' focuses on the tasks they perform, not the qualifications they possess.
16 S Parker, *Legal Ethics* (1992).
17 For an example of a scholarly critique see Luban, above n 7. For an example of a populist critique see E Whitton, *The Cartel: Lawyers and Their Nine Magic Tricks* (1998).
18 See generally D Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63. There is much judicial dicta to this effect, particularly in cases involving the question of advocates' immunity from suit for negligence; see, for example, Mason CJ in *Giannarelli v Wraith* (1988) 165 CLR 543, 555.
19 See generally Parker above n 16, ch 3.
20 See in particular the Australian Law Reform Commission's Issues Paper No 24 on Tribunals (1998) ch 2.
21 (1998) 156 ALR 169.

22 See The Victorian Bar, *Equality of Opportunity for Women at the Victorian Bar* (1998) 6.5 et seq.
23 See remarks of Peter Hayes QC reported in *The Australian Financial Review* 11 September 1998, 24.
24 See S Ross, *Ethics in Law* (2nd edn, 1998) 444-462; and K Crispin, 'Prosecutorial Ethics' in Parker and Sampford, above n 9, ch 8.
25 See generally *Whitehorn v The Queen* (1983) 152 CLR 657.
26 See Justice JW Perry, 'The Unrepresented Litigant' (Paper presented to the Australian Institute of Judicial Administration Sixteenth Annual Conference, Melbourne, September 1998).
27 This comment was made by WG Ross in *The Honest Hour: The Ethics of Time-Based Billing By Attorneys* (1996) 1 in an American context but it is equally applicable in Australia.
28 See Kirby, above n 4, reporting remarks of Chief Justice Murray Gleeson.
29 See generally the discussion in E Nosworthy, 'Ethics and Large Law Firms' in Parker and Sampford, above n 9, ch 3.
30 This is argued at greater length in S Parker, 'Islands of Civic Virtue? Lawyers and Civil Justice Reform' (1997) 6 *Griffith Law Review* 1.
31 See some of the comments in Vox Pop, 'Change in the Legal Profession' (March, 1998) *Law Institute Journal* 7.
32 See Sir Daryl Dawson, 'The Legal Services Market' (1995) 5 *Journal of Judicial Administration* 147 and the sources cited there.
33 Above n 18.
34 See the interesting suggestions in B Walker, 'Test of Loyalty – Procedural Reform and Advocates' Ethics' (1998) 72 *Reform* 11, eg, his proposed r 36A for the NSW Barristers' Rules which would make clearer the duty not to allege a matter of fact without a proper basis for doing so.
35 Kim Economides (ed) *Ethical Challenges to Legal Education and Conduct* (1998).
36 See in particular D Rhode, *Professional Responsibility: Ethics by the Pervasive Method* (1996).
37 Australian Law Reform Commission, *Rethinking Legal Education and Training*, Issues Paper 21 (1997) para 5.18.
38 Parker, above n 16, paras 6.100 – 6.102.
39 Ibid, para 7.6 et seq.
40 See generally the issues discussed in Ross, above n 24, ch 15.
41 D Williams, 'Reforming Court Process for Law Enforcement – New Directions' (Opening address at the Australian Institute of Judicial Administration Conference, Brisbane, July 1998).
42 *R v Wilson and Grimwade* [1995] 1 VR 163, 180.

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