Foreword

Review of the criminal and civil justice system

In September 1997 the Law Reform Commission of Western Australia (LRCWA) received the largest reference in its 30-year history: to review the criminal and civil justice system. In order to accomplish this important task within a relatively short period it was necessary to transform the Commission's approach to its work. We commenced this project while simultaneously restructuring our staffing arrangements and relocating our office.

The most exciting change in the Commission's approach to law reform involves a major out-reach to the public for submissions. The Commission felt strongly that ideas for change should come particularly from those with first hand experience as users of the justice system. The out-reach commenced with an advertisement in *The West Australian* in December 1997. At the same time the Commission launched an Internet web-site.

New technology facilitates the public outreach

During the web-site's first six months of operation, until the public outreach phase of the Criminal and Civil Justice System Review began, the site averaged 300 hits or visits per month. However, once news of the project spread, an average of 4000 visitors a month opened the Commission's home page, with visits peaking in March 1999 with a total of 7087 hits to the site. More than 50,000 visitors examined the LRCWA web pages during the course of the Review.

The web-site initially featured the Terms of Reference (which precede this Foreword) and the Commission's plain English Issues Paper on *Reform of the Civil and Criminal Justice System.* This simple descriptive document is being used by high school and university classes in Western Australia. The Commission distributed 17,000 hard copies of the Issues Paper and, perhaps,

thousands more through the web-site. Information about our Review on the Internet expanded progressively as 30 papers on different aspects of the justice system were published on our web-site.

The public meetings

During the Review of the Criminal and Civil Justice System, the Commission held or participated in 10 'Have Your Say' public meetings throughout the State. The Commission also hosted an hour-long television broadcast concerning law reform. The program on the Westlink Satellite Network offered viewers a toll-free number which they could call in order to speak to the three members of the LRCWA. Our objective was to give Western Australians living in remote parts of the State an opportunity to express their views.

Members of the Commission and our Administrative Officer spoke to ABC Regional Radio and the ABC's Stateline television program as well as numerous local newspapers. Public meetings held in Karratha, Kalgoorlie, Bunbury, Geraldton, Albany and Perth brought the Commissioners face to face with a wide range of Western Australians, many of whom were eager to speak out concerning their experiences with the justice system.

The public submissions

More than 650 people and stakeholder organisations made submissions concerning the Review of the Civil and Criminal Justice System with some individuals and groups, including the Australian Law Reform Commission, making numerous submissions. The focus of many of the public submissions was law and order. These voluminous submissions are summarised briefly in a separate report. The Public Submissions Report synthesises thousands of pages of material provided to the Commission by members of the public and includes suggestions received on a wide variety of topics including issues outside the current project's Terms of Reference, such as sentencing of offenders.

Resourcing our recommendations

Making resourcing recommendations is also outside the scope of our work. The Law Reform Commission's task was to come up with suggestions to make the justice system work better. In our view that means we are to develop ideas for making the system faster, simpler, and easier to understand while delivering fair and just results. What improvements to the justice system may cost is beyond our capacity to evaluate. We can only make recommendations; we can not implement them nor do we consider how they can be resourced.

However, we have been cognisant of the futility of making recommendations likely to consume significant public resources at a time when finances are already stretched in health, education and other important areas of State responsibility. Therefore we have focussed our attention upon reforms likely to involve no, or limited, public expenditure.

The stakeholders' survey and consultation process

To ensure that our recommendations would be workable and have some support, the Commission surveyed stakeholders. At the conclusion of the survey process it was apparent we should circulate proposals set in the context of an analysis of the existing system and available alternatives before coming out with final recommendations.

The Commission produced 30 Consultation Drafts and Background Information Papers in connection with the Review which we circulated in hardcopy to the media and stakeholders and, as noted above, made freely available through the Internet web-site. The Background Information Papers describe the present system and set the stage for the Consultation Drafts. The Consultation Drafts propose more than 400 reforms for reducing delay and making the justice system simpler, fairer and less expensive. Some of the proposals are controversial. We received more than 150 detailed submissions from individuals and organisations in response to the Consultation Drafts.

Our Final Report

In keeping with our efforts to reform law reform, this Final Report is unlike any report previously produced by this Commission. Lawyers and legal scholars may question our style. There are no footnotes and very few citations to cases and other legal authorities. We use few abbreviations. Our method of citation to material outside this report is simple. It is not the formal style of legal citation with which lawyers are familiar.

Our sources are, for the most part, detailed in the collected Consultation Drafts. There is also a short bibliography of materials directly referred to in this Final Report as well as source materials we used which are not cited in the Consultation Drafts. The Consultation Drafts and the work of the Australian Law Reform Commission (ALRC) which we have considered canvas the law and legal literature on the wide variety of subjects covered in this Review. We should note that the ALRC released Discussion Paper 62: *Review of the federal civil justice system* in late August 1999. While we have reviewed Discussion Paper 62, our substantive work had been completed by the time we received this document.

This Final Report is our attempt to communicate clearly, directly and succinctly. We have tried to eliminate Latin and archaic terminology and to avoid 'legalese'. Our objective has been to express our ideas for reform in plain English. We hope that some day all rules, statutes and communications concerning legal proceedings will be capable of being understood by the average person. When we have not been able to simplify our terminology, we have put the word in the glossary at the back of this Report.

Special thanks

My fellow Commissioners and I are indebted to the authors of the Consultation Drafts, the hundreds of people who wrote submissions or spoke out at public meetings, and our own staff of temporary employees and consultants.

However, we wish to particularly thank three people who devoted most of the past year to this project: Dr Jeannine Purdy, Cheryl MacFarlane, and our Administrative Officer, Marion Brewer.

The thoughtful effort of so many talented individuals made this an exciting project with which to be associated. We hope we included everyone who did not wish to remain anonymous in the Acknowledgments section at the back of this Report. We are particularly pleased to have been able to offer the people of Western Australia the opportunity to contribute to the law reform process. By publishing this Final Report together with the companion papers and distributing the collection widely, we hope to encourage greater public involvement in the Commission's future projects.

Wayne Martin QC
Chairman
Law Reform Commission of Western Australia

September 1999

1

Touchstones

The legal system on trial

1.1 'Justice: Our Legal System on Trial' — so read the headline of *The Australian* on 25 November 1998. Public submissions to us during the course of this review suggest the justice system is guilty of expense, delay and a lack of regard for the lay person who is both consumer and patron of the legal system. Faced with the accusation that the present justice system offers a 'Rolls Royce' system how do we determine what would be better? The marked dissatisfaction evident in the public submissions indicates reform is necessary. The success of Alternative Dispute Resolution (ADR) reveals that something potentially faster, cheaper, simpler and less adversarial appeals to the public. But what criteria — or touchstones — should guide efforts to reform the justice system?

Touchstones

1.2 The objectives of reform put forward by Lord Woolf in his review of the civil justice system in England and Wales (1996) suggest some 'touchstones' against which the genuineness or validity of recommendations can be judged. A publicly funded dispute resolution system should be 'just, fair, comprehensible, certain and reasonably expeditious'. While no one could quarrel with the need for a justice system to have these characteristics, the Australian Law Reform Commission (ALRC) in its Discussion Paper, *Review of the federal civil justice system* (1999h) identifies some of the practical difficulties associated with their implementation. There also are special considerations which apply to criminal matters: that those who offend against public order must be punished.

Criminal justice touchstones

1.3 Balancing the need to protect the innocent — not only from crime but also wrongful conviction — at the same time as securing the conviction of the guilty is one of the most difficult demands placed on the criminal

justice system and remains paramount in proposing reform of that system. While the values identified by Lord Woolf have clear application to a system of criminal justice, a further requirement, as stated in the Runciman Report (1993) on criminal justice in England and Wales, is that 'the risks of the innocent being convicted and the guilty being acquitted are as low as human fallibility allows'.

Tensions within the justice system

Across gender, age, household income group and type of dispute, an overwhelming proportion of [survey] 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'…

Australian Institute of Judicial Administration, *Courts and the Public* (1998)

1.4 The English common law tradition that all people are equal before the law gives rise to the idea that courts should be equally accessible to all. However, there always has been tension between access to justice and legal costs. People in a free and democratic society regard justice not as a privilege but as a right. Accordingly, there is something inherently inconsistent in the notion that justice is a right which must be paid for in order to gain access to it. Chief Justice Murray Gleeson (1999) of the High Court of Australia recently highlighted that, contrary to the received wisdom that it is only the very rich or very poor who can access the justice system, research conducted in New South Wales indicates that the financial profile of civil plaintiffs closely matches that of the ordinary citizen. He goes on to note, however, that litigation is far too expensive and that serious injustice is the result for many people. If the public submissions we received are any indication of the level of satisfaction with the justice system, the system is not meeting public expectations. Many of the recommendations in this Report seek not only to improve access to the justice system, but also to facilitate access to justice through that system for all litigants, irrespective of their financial standing.

Justice and access

1.5 The tensions between existing limitations on access and the abstract right to justice result in dispute over the use of the term 'the justice system' when referring to 'the legal system'. But what does 'justice' mean? Some features are essential if a 'legal system' is to qualify as a 'justice system'. One is access. The system must also provide just results, however difficult that may be to define. Results must be 'just' as between the parties to litigation, civil and criminal, and socially 'just' in terms of community values. While access is essential, there is little point in having an accessible system if determinations are unjust. In a sense, the failings of the existing justice system are evident. The difficulty lies in reforming the system so that we do not lose sight of all the various and competing touchstones of a justice system.

Justice according to the law

1.6 There are various kinds of justice — social, political, economic, moral or legal — of which legal justice is only one. Arguably there can be justice without law. Under the system with which we are familiar, however, if justice is to be had, it is justice according to law: pre-determined and publicly known principles and rules. But it also is important to remember that however precisely these rules or principles may be defined, their application will depend on the facts of the particular case and involve an exercise of discretion by a decision-maker.

Procedure

1.7 The principles, rules and discretions make the justice system as we know it a system of law. These principles, rules and discretions attach to substantive matters defining in theory and determining in practice what is a cause of action in a civil dispute or what is a crime. Principles, rules and discretions also attach to the procedure and processes of the legal system. They direct how the 'system' goes about addressing wrongs and resolving disputes. It is the procedure of the legal system which is the focus of this review and our recommendations for reform.

Expense and delay

1.8 The efficient disposition of litigation is unquestionably a desirable end of the justice system. Public submissions complained of expense and delay. There is no point having a system which is efficient in terms of time and cost but which fails to deliver a just result. For example, removal of rights of appeal may make the system more 'efficient' in a limited sense, but if litigants are denied justice, the saving of money and time is meaningless. Reform of the system of appeals in order to reduce expense and delay without sacrificing justice is discussed in Chapters 32 and 33.

Cost and timeliness

1.9 A system cannot be described as 'just' if it is too expensive, but a system which is not properly resourced cannot be satisfactory. In theory a system might cost parties very little and provide a hearing at short notice. Apart from massive economic implications for the public who would be required to subsidise such a system, there would be no disincentive to litigation, and no incentive to compromise. Thus there are proper limits to the disputes a publicly funded court system should entertain. Some matters are best dealt with independently by the parties. However, it is important that limits are drawn so that the wealth of the parties does not determine access to the courts. Nor should limitations be so broad that too many disputes come into the system and are delayed so long that court adjudication is not a realistic option at all.

The 'litigation explosion'

1.10 The 'litigation explosion' is a derisive term for what is seen as excessive use of the courts in order to resolve disputes which could be better resolved in other ways. To some extent that derision is justified. However, that is not the whole picture; other quite proper considerations play their part in the growth of litigation, if indeed there has been any. (See, for example, ALRC discussion paper 62 (1999h). The ALRC concluded that there was no litigation explosion on the basis of the number of lodgments of civil proceedings in the Federal Court and State and Territory Supreme Courts over the past five years.) The growth in statute law has led to many new causes of action. Class actions have become a significant factor in litigation. Human rights have assumed greater importance. Cases involving the environment are more common than in the past. And, whether viewed as good or ill, the increasing criminalisation of behaviour, through expanding government regulation of conduct, also has implications for the amount of litigation. Some of these are

positive developments which have contributed to litigation. As the law has become more pervasive citizens and government resort to it for redress over a broader range of disputes.

The role of lawyers

1.11 The fact that an individual often requires the assistance of a lawyer to achieve successful results in court proceedings inevitably gives rise to additional costs which may impede or deny access. A related tension lies in the fact that lawyers still regard themselves as practising a 'profession'. As a profession, lawyers have developed certain 'legal professional ethics' to regulate standards of conduct towards each other, the courts and clients. However, some people regard lawyers as service providers; indeed, service providers whose obligations to the community go above and beyond what they are paid to do by their clients or required to do by professional ethics. The legal profession and the setting of legal fees are discussed at Chapter 36.

Informing the public

1.12 There are other touchstones which should be used to assess the justice system. One is informing the public. This review is itself an important step in that regard. Any reforms must accept the need to educate all those who play a part in the system, not just the lawyers, but the entire community. (See in particular Chapter 34.) The Supreme Court of Western Australia recently implemented an important initiative. For the first time in Australia, judges of the Supreme Court will provide summaries of their sentencing decisions to the media. The Chief Justice, David Malcolm AC, (1999) characterised this initiative as recognising the need to improve 'the ability of the judiciary to communicate information to the public about what the courts do and why they do it'. The Supreme Court is taking a more active role in public education by explaining sentencing decisions. This is an excellent precedent.

The justice system in Western Australia

1.13 The justice system in Western Australia is not the result of some logical, well ordered plan. It is the product of centuries of development, inherited from England but modified over the years in light of local conditions. It is the result of legislative initiative, administrative direction and judicial decision. Even the label 'justice system' suggests a more tightly organised structure than is the case. The 'system' comprises courts and tribunals, other forms of dispute resolution, the legal profession, public and private, and investigative bodies, principally the police service, but also the Ombudsman and others.

Reforming the adversarial system

1.14 The present system is not written in stone. It can be changed. What has come to be known as the adversarial system — with passivity on the part of judges, the heightened role of lawyers, the use of oral testimony and cross-examination — is of relatively recent origin, dating from the late 18th century. The adversarial system, said to characterise the legal system of Western Australia and other common law jurisdictions, is part of an evolving process. Despite the unusual breadth of the present review of the civil and

criminal justice systems in Western Australia, it is premised on reforming the system, not dismantling it. To reform the system it is first essential to understand something of the system.

Judicial intervention

1.15 A legitimate cause of complaint is that, in the past, litigants have been left too much to themselves as an action progresses, resulting in undue expenditure of time and money on interlocutory matters, that is, matters incidental to the final resolution of the action. Settlement is only explored in depth once a trial date draws near. This situation is one which rules of court can do much to counter, giving judges and others a more active managerial role once an action begins. Greater participation by court officials in the management of litigation is inevitable; the real question is how far this can be done without undermining the neutral approach expected of judges and the courts. This question is explored in various chapters of this Report.

Treatment of witnesses

1.16 The way in which witnesses have been dealt with over the years is an illustration of how the adversarial emphasis on the rights of the parties to civil litigation or the rights of the defendant in criminal trials have dominated the justice system. The provisions made for the convenience of witnesses giving evidence and the facilities provided for witnesses waiting to appear in court have been shameful. Fortunately the issue has been recognised and much has changed for the better in many courts, although much still needs to be done — as noted in our recommendations in Chapter 34 on the court environment.

1.17 More importantly, the special position of witnesses, particularly victims of crime, has not been sufficiently recognised. Too often witnesses have received insufficient protection from judges and magistrates against hectoring and sometimes bullying cross-examination. (See Chapter 21 for a discussion of the limits of examination and cross-examination.) The absurd insistence on a 'yes' or 'no' answer to a question has left many witnesses with a jaundiced view of the judicial process. The use of victim impact statements in the sentencing process in criminal matters has helped redress the frustration victims and their families feel with a system which denies witnesses an opportunity to articulate the emotional, psychological and financial consequences of criminal conduct. We make recommendations to recognise the particular rights of victims of crime in the pre-trial negotiation process in Chapter 25.

Limits to reform

1.18 There are limits to how far we should go in reforming the adversarial process, particularly in the context of criminal matters. All relevant material should be before a magistrate, judge or jury, provided the defendant's basic rights are not prejudiced. The protection of defendants' rights raises a fundamental concern: what is, or should be, the role of the courts and the justice system in our society? In particular, what disputes should be resolved in court and when are alternative methods of resolving disputes a better option?

Court determination or alternative dispute resolution

1.19 Is ADR what the community wants or is it what those who would reform the system think will make the system more efficient? ADR is not necessarily more cost effective. However ADR may satisfy a deeper aim by resolving the parties' disputes in a non-hostile atmosphere. This very proper aim should not shut parties out of courts or make the courts virtually inaccessible. While ADR, or at least some forms of it, seeks to reach consensus between the parties, the courts play a unique role in the vindication of the rights of the citizen. Court resolutions also may lay down principles which go well beyond the case at hand. It is the task of the courts to preserve the rule of law and, particularly in criminal matters, to provide some balance to the power of the State as prosecutor. For this reason alternative dispute resolution currently has little place in criminal law, as Chapter 11 of this Report indicates.

The structure of the system

1.20 The justice system in Western Australia operates essentially through the courts and to a lesser extent, tribunals. It is structured on the notion of the separation of powers: a legislature, an executive and a judiciary known as the Westminster system. At the heart of this relationship is judicial independence, the principle that courts must be allowed to exercise judicial power and decide cases according to the rule of law and without pressure from the legislature, the executive, or the public. The rationale for judicial independence is the protection of the citizen not only from private retribution but also from the overbearing power of the State. Ordinarily the power of the State is seen most clearly in criminal prosecutions. But it should not be forgotten that the State is a frequent litigant in civil matters, either directly or through statutory bodies.

A criminal/civil dichotomy

1.21 There is nonetheless an important difference between the role of the courts in civil and criminal systems. Civil disputes do not come to the attention of the courts until parties commence proceedings. In criminal matters, while the attention of the courts is not engaged until a charge is laid, the entire investigative process into an alleged crime has an impact, often critical, on the criminal justice system. This can be seen in decisions to exclude improperly obtained confessions and other evidence. Considerations of fairness intrude at an earlier stage in criminal matters than in civil disputes. This relates to the role of the courts in protecting the citizen from misconduct by the State and the nature of penalties attached to conviction. Perhaps the considerations of fairness and justice in these contexts are best met by making more specific the circumstances in which evidence may be excluded. We consider some of these issues in this Report, and particularly in Chapter 20.

Judicial review

1.22 A similar role underlies the judicial review functions of the courts over administrative decisions by government. While judicial review increases tension between the judiciary and the legislature, there is no doubt that judicial review of administrative agencies empowers the ordinary citizen to seek relief against the actions of government agencies which have affected

him or her adversely. We recommend in Chapter 33 that administrative review be entrusted to a tribunal while the courts maintain a limited supervisory role particularly to ensure the correct application of law in administrative processes. The issue is one of the critical questions we examine in this Report — what is the proper role of the courts?

Criminal trials and the right to silence

1.23 Even more than the courts, trial by jury historically has been regarded as a protection for those accused of an offence by the State. It is so ingrained in our criminal justice system that it is unrealistic to consider its elimination even if that were desirable. We discuss the importance of jury trials in Chapters 7 and 30. Another fundamental right in criminal matters is what is known as 'the right to silence'. The right to silence has fostered the principle that pre-trial disclosure of the defence cannot be required. Strong cases can be made for the reform of these traditional practices, but reforms must be measured against the touchstones of a justice system, in this context, effectiveness and fairness. In Chapter 24 we consider these issues as well.

The significance of trials

1.24 Trials and the legal culture, particularly in civil disputes, are often about winning and losing. These values are embedded in the civil system and in summary criminal matters through the awarding of costs to the successful party and against the unsuccessful party. The principles for awarding costs sometimes fail to recognise the wider community issues at stake in litigation. Reform of the awarding of costs is recommended in Chapters 16 and 31.

1.25 Due in part to the 'winner takes all' or 'loser pays' presumption, the majority of civil disputes do not go to trial; they are settled. It is also important to note that the majority of criminal cases, particularly summary matters, are disposed of by guilty pleas. The defendant often is only before the court for the purposes of entering a plea and sentencing. While the focus of much concern over the justice system is on trials, in reality pre-trial proceedings are already highly significant, and possibly not the subject of sufficient scrutiny or accountability. We examine these issues in Chapters 11 and 25.

Settlement or trial

1.26 Not all actions, either criminal or civil, are capable of settlement. Often the parties are too far apart. This is a particular issue in criminal matters. The State prosecutes with all its might and its resources. Defendants rarely are in a comparable position and are entitled to protections which play no part in civil litigation. Criminal disputes also involve matters of public interest and policy — which is why prosecution is by the State and not the victim. However, even in civil matters many more people than the actual parties to the dispute may be involved, as is the case, for example, with environmental disputes.

1.27 Not all actions should be settled. The traditional role of the courts should continue. What is important is that in those actions the courts

ultimately provide an open and public means for resolving disputes between individuals and for dealing with offences against public order. It is this openness to public scrutiny which ensures that justice will be, and be seen to be, done.

An ongoing process

1.28 The justice system exists to serve the needs of society. The identification of these needs is no easy task, but it must be done in an ongoing way if the justice system is to be responsive to those needs. We hope this review and our recommendations go some way to making the justice system more responsive to the expectations and needs of Western Australians.

2

The Justice System

The existing system

2.1 In this Section of our Report we discuss the existing justice system of Western Australia and explore how to measure its effectiveness. Chapter 3 describes the present civil justice system and Chapter 4 outlines the present criminal justice system. Those already familiar with the justice system of Western Australia may wish to skim these chapters as they are purely descriptive and do not contain recommendations for reform.

2.2 Chapter 5 addresses the problem of measuring the effectiveness of the justice system *as a whole* and not just its component parts. We deal with an area about which there is little available literature. The unique opportunity afforded by the breadth of this review permits us to examine this topic in some detail. The task of how we can measure or assess the justice system so that it will be better able to meet the expectations and demands of the community it is supposed to serve is an enormous one. In our view it is also a task which requires us to go beyond traditional notions of whose opinions of the legal system are worthy of attention.

Public consultation

2.3 Consistent with our views on the importance of broad consultation in relation to reform of the justice system, we have sought extensive public input into this review. We conducted public meetings throughout the State and allowed some 18 months for public submissions in relation to our issues paper and various Consultation Drafts. As a result we would expect our recommendations go some way to closing the gap between the legal system 'as it is' and community expectations of what a justice system should be.

The justice system: as it could be

2.4 The justice system encompasses legal proceedings, whether civil or criminal, or whether falling within the jurisdiction of judicial or that of quasi-judicial boards and tribunals. We begin this Chapter by defining the nature of civil and criminal disputes, a difficult distinction but one which governs much legal thinking and shapes the existing court system and, indeed, much of this Report. We examine the various jurisdictions which constitute the court system of Western Australia before describing the cost and structure of the court system and making recommendations for its improvement. The functions of the existing (and multiple) tribunals and boards within the justice system are examined in Chapter 33 where significant reform is also recommended.

The nature of civil disputes

2.5 Many familiar problems fall within the category of 'civil disputes'. These involve claims for:

- recovery of debts;
- contractual disagreements;
- consumers' injuries related to defective products;
- workers' compensation;
- motor vehicle accidents;
- medical malpractice;
- disputes over deceaseds' estates;
- compensation claims for breaches of statutory obligations imposed by State and Commonwealth law; and
- applications for injunctive relief, most usually to prevent someone from doing something.

The nature of criminal disputes

2.6 On the face of it, criminal disputes are easily recognisable. There is a public interest in the maintenance of law and order which sees State agencies prosecuting criminal charges. Although criminal prosecutions are typically thought of as cases prosecuted in the courts by the police or the Director of Public Prosecutions (DPP), a substantial number of criminal matters in fact are prosecuted in the Court of Petty Sessions by others, such as local government and health and safety authorities. (The DPP is a State government funded agency, a fundamental objective of which is to bring to justice those who commit offences.) As indicated in Chapter 1, government authorities also frequently litigate in civil matters.

2.7 The line between criminal and civil disputes is not always clear. For example, some may think matters are 'criminal' because of the damage or potential damage certain acts inflict on the broader community and that this results in prosecution of these acts by the State. However, breaches of corporations law or environmental standards are not always treated as criminal

acts even though these have serious economic and health consequences for significant numbers of people. Ultimately, it is only how the law treats a dispute which determines what is recognised as a criminal dispute. If a dispute falls within the 'jurisdiction' or province of the criminal courts it is a 'crime' in the legal sense; otherwise it is not. The problematic distinction between criminal and civil law is discussed further in Chapter 5.

Jurisdiction

2.8 The expression 'jurisdiction' refers to the authority conferred on a particular court to 'adjudicate' or decide a dispute. The jurisdiction of the court will normally be defined by the legislation creating the particular court. Presently courts exercising jurisdiction in Western Australia derive jurisdiction from State (Western Australian), Federal (Commonwealth) and Imperial (English) legislation.

2.9 The jurisdiction of a court may be defined by:

- reference to the amount or value of the claim in dispute between the parties;
- the subject matter of the dispute, such as criminal matters;
- the nature of the remedies which the court can order; and/or
- district or geographical limits within which the court's judgments can be enforced or orders executed.

Often court jurisdiction will be defined by reference to a number of these criteria, as indicated below.

2.10 A court is said to have 'original' jurisdiction in a particular matter if proceedings can be initiated in that court. If there is more than one court where proceedings can be initiated there is 'concurrent' jurisdiction. If there is only one court where proceedings can issue that court has 'exclusive' jurisdiction. A court has 'appellate' jurisdiction if it deals with a dispute on appeal from a decision of a lower court or tribunal.

The cost of the courts

2.11 The cost of court services to the Ministry of Justice in Western Australia in 1997/98 was $71,102,000. (Ministry of Justice 1998) These costs related to the operations of five levels of court presently in existence within Western Australia — the Supreme Court, District Court, Local Court or Court of Petty Sessions, Children's Court and Coroner's Court. Our Report focuses principally on the first three levels of court.

The court system

2.12 Magistrates in the Local Courts deal with simpler civil cases involving money claims of not more than $25,000. Magistrates or justices of the peace in the Courts of Petty Sessions deal with criminal matters that can be decided summarily without a jury. The District Court is the intermediate level of

court and judges deal with civil disputes involving up to $250,000 and have unlimited jurisdiction for personal injury claims. The District Court also handles most indictable criminal offences, other than the very serious, through trial by judge and jury. The highest level of court in the State system is the Supreme Court which has unlimited civil jurisdiction, and Supreme Court judges, usually with juries, handle the most serious criminal matters which carry life imprisonment.

2.13 Appeals from each level are to the next highest court although, in the criminal area, appeals from the Courts of Petty Sessions go straight to the Supreme Court. Appeals from the Full Court of the Supreme Court, which sits as the Court of Criminal Appeal in some criminal matters, go to the High Court of Australia but first require a grant of special leave from the High Court. (See Chapter 32.)

Proposed Magistrates Court

2.14 The Attorney General currently is considering a limited change to the existing court structure in Western Australia: the establishment of a Magistrates Court along the lines proposed in a Western Australian Law Reform Commission Report of 1988. The structure of the new court suggested in that report was a single court which combined the civil jurisdiction of the Local Courts and the criminal jurisdiction of the Courts of Petty Sessions. It also was recommended that the proposed Magistrates Court have five divisions:

- an Offences Division dealing with offences currently dealt with by the Courts of Petty Sessions;
- a Civil Minor Division replacing the Small Disputes Division and including Residential Tenancies and small claims up to $10,000;
- a Civil General Division dealing with civil claims that are above the 'Minor' division limit and up to $50,000;
- an Administrative Division dealing with the statutory reviews and appeals that magistrates currently hear; and
- a Family Law Division dealing with those family law matters currently dealt with in Petty Sessions.

However, if our recommendations in Chapter 33 are adopted and a Western Australian Civil and Administrative Tribunal is established, the Administrative and Civil Minor Divisions of the proposed Magistrates Court would be incorporated into the Tribunal.

2.15 A Magistrates Court Bill and Magistrates Court (Consequential Provisions) Bill are currently being drafted. If passed after being placed before Parliament these will establish the Magistrates Court, amend or repeal

various Acts and provide transitional provisions for justices, magistrates, clerks and other court staff. The *Local Courts Act 1904* (WA) will be renamed the *Magistrates Courts (Civil Jurisdiction) Act 1904* (WA) and the *Justices Act 1902* (WA), which currently defines the criminal jurisdiction of the Courts of Petty Sessions, will be renamed the *Criminal Procedure (Summary Proceedings) Act 1902*.

1. The proposed Magistrates Court Acts should be enacted, taking into account our recommendations for the establishment of a Western Australian Civil and Administrative Tribunal. (See Recommendations 371 and 372.)

Uniform procedures in plain English

2.16 Although the distinction between civil and criminal matters is not always clear, substantially different procedures attach to processing criminal and civil matters through the courts. In our view, this procedural distinction should be retained because of the significant additional considerations which apply in criminal matters, as identified in Chapter 1. In other respects, however, the range of different procedures used by the various tiers of courts across the country is largely the result of historical developments. We believe the system would be simplified and costs reduced by greater uniformity of procedures throughout the various courts and laws, and by rules and procedures being expressed in plain English. Given that self-represented litigants now make up a significant proportion of court-users, we feel these reforms would be particularly helpful.

2. While maintaining the distinction between civil and criminal matters and in so far as possible, uniformity of rules for different courts and plain English should be implemented when revising or drafting new legislative and procedural provisions in response to recommendations in this Report and generally.

3

The Civil System

The origins of our civil justice system

But it is undoubtedly the general responsibility of a superior court of unlimited jurisdiction for the administration of justice which gives rise to its inherent power. In the discharge of that responsibility it exercises the full plenitude of judicial power. It is in that way that the Supreme Court… exercises an inherent jurisdiction. Although conferred by statute, its powers are identified by reference to the unlimited powers of the courts at Westminster.

Dawson J,
Grassby v The Queen
(1989) 168 CLR 1, 16

3.1 In 1832, the Swan River colonists established courts similar to those which administered the common law in England, including a Court of Civil Judicature. In 1861 the Court of Civil Judicature was abolished along with the criminal Court of Quarter Sessions and a new Supreme Court was established. This Supreme Court is the one which presently exists in Western Australia. It received the entire jurisdiction of the old Court of Civil Judicature as well as the common law jurisdiction of the English Courts of Common Law, a number of other English courts and the equitable jurisdiction of the English Chancellor.

3.2 The most significant of the British *Judicature Acts*' (Imp) reforms of 1873 and 1875, discussed further in Chapter 8, was the fusion of common law and equity so that the one court could administer both. Eventually the *Judicature Acts*' reforms were adopted in Western Australia through the *Supreme Court Act 1880* (WA). That Act was amended on many occasions and consolidated in the *Supreme Court Act 1935* (WA). Although there has been ongoing amendment of the legislation governing the Supreme Court, its basic jurisdiction is still defined with reference to English courts of 1861.

The development of the civil courts

3.3 Following the establishment of the Supreme Court of Western Australia, other courts were created which now form part of the civil justice system. The two most important are the Local Court which was established in 1904 and the District Court which was established in 1970. While we focus on these three courts in relation to the civil justice system, there also are many judicial and quasi-judicial boards and tribunals which exercise significant powers in relation to civil disputes. The civil courts often supervise

these bodies through review and appeal processes. Boards and tribunals are discussed in Chapter 33.

Choice of jurisdiction

3.4 The choice of court is one of the most important decisions to be made by someone wishing to litigate a civil dispute. That choice is based on the jurisdiction of the court. The question is: 'does the particular court have the jurisdiction to resolve this particular type of dispute?' Unfortunately, at times, this can prove to be a complex issue.

Supreme Court jurisdiction

3.5 In Western Australia our Supreme Court has unlimited general jurisdiction in relation to State laws, subject only to statutes which confer exclusive jurisdiction upon other tribunals. The Supreme Court also exercises extensive concurrent jurisdiction with the Federal Court of Australia over matters arising under Commonwealth legislation as well as under the law of Western Australia. However, the legislation which allowed this, known as 'cross-vesting legislation', was recently ruled unconstitutional by the High Court so far as the Federal Court's State law jurisdiction is concerned. (*Re Wakim; Ex parte McNally* (1999) 163 ALR 270) There is also a variety of Imperial statutes which were adopted by the State as conferring jurisdiction on the Supreme Court in 1861.

District Court jurisdiction

3.6 The District Court has jurisdiction in relation to actions up to the amount or value of not more than $250,000. It also has unlimited jurisdiction in relation to all personal actions for claims in relation to death or bodily injury. Within the limits of the District Court's jurisdiction, it may exercise all the powers and authority of the Supreme Court except in relation to remedies. Since 1981 the District Court has been able to grant specified equitable remedies. Previously it had no equitable jurisdiction. Although this increased jurisdiction permits the District Court to grant equitable remedies, these are only allowed as ancillary relief; that is, the equitable remedy is not the main relief sought in the proceedings. The District Court also exercises some appellate jurisdiction over Local Court decisions and a number of tribunals and statutory bodies.

Local Court jurisdiction

3.7 The *Local Courts Act* confers jurisdiction upon the Local Courts for personal actions involving up to $25,000. However, subject matter and locality also limit this jurisdiction. The Local Court does not have jurisdiction to hear actions:

- in ejectment from land (although actions for eviction under the *Residential Tenancies Act 1987* (WA) can be heard);
- in which the title to land is at issue;

- in which a dispute relating to a will is at issue;
- for libel or slander; or
- for a personal injury arising out of the use of a motor vehicle.

3.8 With respect to locality, a person can commence an action in any Local Court and, in the absence of objection, that person will be allowed to proceed in the court of his or her choice. However a defendant can object and may request the action be transferred to a court nearest to where the defendant resides. If the person who brought the action, currently known as the plaintiff, takes steps to justify the choice of court, the court will determine in which locality the action should be heard. For small debts of less than $3,000, a party can elect to have the matter heard in the Small Disputes Division of the Local Court. Legal representation of parties in this Division is not usually allowed and there is no appeal from decisions. Local Court procedure is discussed in Chapter 17.

Remittals and transfers

3.9 It is apparent that in some cases a litigant may in fact choose to commence an action in any of the civil courts. As the Supreme Court has general unlimited jurisdiction and the District Court has jurisdiction up to $250,000, a person wishing to recover a debt of less than $25,000 could choose to commence the action in the Local Court, the District Court or the Supreme Court. Sending a matter from a higher to a lower court in these circumstances is known as 'remittal'. The court can remit a matter without any application being made by either party.

3.10 'Transfer' generally refers to sending an action from one place in which the court sits to another place in which the same court sits. It also refers to sending an action from one court to another of equal status where there is shared jurisdiction. The remittal or transfer of actions can add to costs and delays in having disputes heard and resolved and so the plaintiff's choice of court is an important one.

The Rules of Court

3.11 Once a decision has been made about the court in which to commence proceedings, the stages relating to the resolution of a civil dispute are well established, defined and regulated by procedures set out in the various Rules of Court. The most comprehensive set of rules is that utilised in the Supreme Court of Western Australia which, except in the limited instances where the District Court has made its own rules, also applies to the District Court. The Local Court has its own extensive set of rules which, in broad terms, cover the same stages in the resolution of a dispute as those of the Supreme Court and, indeed, in some situations applies those rules.

Stages of a civil action

3.12 Generally the stages of a civil action can be identified as follows:

- commencement of proceedings;
- service or delivery of documents;
- appearance;
- pleadings, including counterclaim and third party proceedings;
- procedures governing applications for injunctive relief;
- procedures regulating disposition of a dispute before trial;
- procedures protecting against bad or improper claims and defences;
- discovery and disclosure between the parties;
- settlement of disputes;
- trials;
- costs;
- enforcement of judgments; and
- appeals.

Not all of these stages apply to each civil action. The vast majority of civil disputes are settled without proceeding to trial.

How to commence a civil action

3.13 After determining the court in which to commence proceedings, the next decision is how to validly commence proceedings. Unlike the Local Court, which has only one form known as the 'Plaint', there are a variety of forms which can be used to commence an action in the District and Supreme Courts. The most important methods of commencing an action, which are the same in the Supreme and District courts, are the 'Writ of Summons', the 'Originating Summons' and the 'Originating Motion'. (The means of commencing civil proceedings are discussed in Chapter 9.) Whichever method is used to commence a civil action, it must be presented to the relevant office (the registry) of the particular court where it will be given a number and the appropriate filing fee is paid to the court or an exemption allowed. (Filing fees are discussed in Chapter 16.) The 'originating process' is embossed with the court's seal and is returned to the plaintiff to deliver or 'serve' on the defendant.

Defending a civil action

3.14 Once the originating process has been validly delivered to a defendant, the defendant must take the next step in the proceedings. In the Supreme and District Courts, the formal step taken by the defendant is known as 'entering an appearance'. The entry of an appearance is effected by filing at the court, within the specified time period, a memorandum prescribed by the Rules of Court. The purpose of entering an appearance is to notify the plaintiff that the defendant intends to contest the plaintiff's claim. If the action is commenced in the Local Court the defendant is required to file a document known as a 'notice of intention to defend'.

Pleadings as formal documents

3.15 The expression 'pleadings' has two meanings in the context of a civil action. It can be a generic term referring to the documents which contain the formal allegations which pass between the parties. Pleadings, in this sense, include:

- the plaintiff's formulation of the claim, known as the **statement of claim**. This document sets out the relevant or 'material' facts and the conclusions of law on which the plaintiff relies to establish his or her claim;
- the defendant's formulation of the defence, known as a **defence**. In this document the defendant admits or denies the facts alleged by the plaintiff and also sets out further facts relevant to the defence;
- the plaintiff's response to the defence, known as a **reply**, which gives the plaintiff the opportunity to raise further facts after receiving a copy of the defence;
- when a defendant wishes not only to defend a claim but also to cross-claim against the plaintiff, a document known as a **counterclaim** is filed;
- the defendant may not only wish to defend a claim but may also have a claim against another party arising out of the action. If the defendant wishes to involve another party, the defendant must file what is called a **third party notice**.

No further pleadings are permitted except with the permission of the court. Either the plaintiff or defendant may apply to the court for what are known as 'further particulars' if they are not satisfied with the level of clarity or precision of the pleadings. Further, the court may permit a pleading to be amended in certain circumstances.

Pleadings as an art form?

3.16 The expression 'pleading' also can refer to the process or method used to draft the respective formulations of the parties' cases. Pleadings must comply with certain technical rules and have been regarded as something of an art form. Pleadings are only relevant to actions commenced by a writ of summons. This is because this is the originating process used when it is anticipated that there will be substantial issues of fact between the parties. As the writ of summons is not available in the Local Court, it is popularly said that the Local Court is not a 'court of pleading'. However the *Local Court Rules 1961* (WA) provide for 'particulars' to be given after the commencement of an action. Where lawyers conduct Local Court actions they often exchange 'pleadings'.

3.17 Chapters 10 and 17 contain a discussion of our recommendations on pleadings. These include replacing much of the existing system of pleadings

with case statements, principally Applications and Responses, and referring to parties in civil litigation as applicants and respondents rather than plaintiffs and defendants.

Injunctive relief

3.18 A litigant may require some form of urgent action following the commencement of an action or, in some cases, even before an action has commenced. It might be important to preserve the *status quo*, the present position, pending the outcome of the litigation and there is a wide range of court orders available to achieve this, including injunctions. Injunctions are court orders directing a party to do something or to refrain from doing something. These may be made on an interlocutory basis, that is, temporarily, until the matter is determined, and/or permanently as part of the final resolution of the dispute. (Interlocutory injunctions are discussed further at Chapter 14.)

Disposition without trial

3.19 Although the trial process is often thought of as the principal method by which civil disputes are resolved, only a relatively small number of disputes are actually brought to trial. The rules of procedure in the various courts and tribunals exercising civil jurisdiction recognise this aspect of the system by facilitating and encouraging the pre-trial disposition of civil disputes. Indeed, civil disputes may be resolved without proceedings being commenced at all, and many are. Alternative methods of resolving disputes can be conducted both within and outside the courts. The various Rules of Court contain a number of procedures, including the mediation of disputes, which enable a dispute to be resolved without trial. (See Chapter 11.)

Procedures for resolving disputes without trial

3.20 The procedures by which a dispute can be resolved without trial include:

- discontinuance and withdrawal of an action or parts of a claim — by the plaintiff;
- stay of action — by court order (often on the failure of a plaintiff to comply with a court order);
- striking out pleadings — on application by the opposing party if the pleading: discloses no reasonable cause of action or defence; is scandalous, frivolous or vexatious; may prejudice, embarrass or delay a fair trial; or is otherwise an abuse of process;
- dismissal of action — if the plaintiff does not prosecute the claim and causes inexcusable delay or prejudice to the opposing party then the action can be struck out for 'want of prosecution' on application by the defendant;

- settlement and compromise of an action — refers to a process whereby one party concedes benefits in return for an immunity from further action on the same subject by the other party. The rules provide for parties to make an offer of settlement; if the offer is unreasonably rejected the court may impose costs sanctions after trial. The settlement of claims often arises out of pre-trial conferences which are available to parties. Such conferences are compulsory in the District and Local Courts and in practical terms in the Supreme Court can be made compulsory (discussed further in Chapter 11);

- judgment on admissions — rarely occurs in practice but arises where the defendant makes admissions so that the plaintiff can apply to have judgment entered against the defendant without going to trial;

- default judgment — refers to a judgment being entered against one of the parties, generally the defendant, for failing to comply with the Rules of Court, sometimes intentionally, for example where the defendant believes there is no merit in defending a claim. This is very common in the Local Court (Chapter 17);

- summary judgment for the plaintiff — the plaintiff can apply for a summary judgment against the defendant if the plaintiff is of the view that the defendant has no defence but has entered an appearance purely for the purposes of delay. The Local Court only allows such an application for a claim of 'debt or liquidated demand', whereas in the higher courts it is more generally available. It is a discretionary remedy and a court will only give summary judgment if it is clear there is no 'triable' issue (Chapters 14 and 17); and

- summary judgment for the defendant — applies a similarly high standard as that attaching to plaintiffs in an application for summary judgment (Chapter 14 and 17).

Discovery and disclosure

3.21 The term 'discovery' refers to various procedures available to a party in a civil dispute to require opposing parties to provide information. Discovery involves both the disclosure of the existence of documents and, subject to certain restrictions, making those documents available for inspection. The term also can encompass a process which enables a party to ask the other party a series of written questions known as 'interrogatories' which the other party is obliged to answer upon oath. The process of discovery is regulated by the Rules of Court. Discovery is discussed in Chapters 13 and 17 where we recommend substantial reform of the system. Highlighting the changes

recommended, we propose that the process be referred to as 'disclosure' rather than discovery.

Entry for trial

3.22 Prior to a civil dispute being submitted for adjudication by the court, known as 'entering a matter for trial', the court must be satisfied that all aspects of trial preparation have been completed satisfactorily. A party wishing to 'enter a matter for trial' must certify to the court that the dispute is in a fit state to be adjudicated.

Trial

3.23 For centuries civil trials in the common law system took place before juries. In Western Australia civil actions which can be tried before a jury have been significantly curtailed. In practice, jurors are now used only for trials involving allegations of slander or libel. Contemporary civil juries consist of four members although additional jurors may be empanelled to act as substitutes if jurors are unable to complete jury duty. The vast majority of civil trials now are heard before judges or magistrates.

Trial procedure

3.24 Civil trials are divided into the following stages:

- the plaintiff's opening address;
- examination-in-chief of the plaintiff's witnesses;
- cross-examination of the plaintiff's witnesses by the defendant;
- re-examination of the plaintiff's witnesses by the plaintiff;
- the defendant's opening address;
- examination-in-chief of the defendant's witnesses;
- cross-examination of the defendant's witnesses by the plaintiff;
- re-examination of the defendant's witnesses by the defendant;
- the defendant's closing address;
- the plaintiff's closing address; and
- judgment.

Costs

3.25 Costs of legal proceedings broadly include:

- the charges which a solicitor is entitled to make and recover from a client as remuneration for professional services, known as solicitor/client costs; and
- the expenses a successful party is entitled to recover from the unsuccessful party in a dispute, known as party/party costs.

The general rule in civil disputes in Western Australia is that 'costs follow the event' — this means the unsuccessful party not only has to pay his or her

own costs but also has to pay the costs of the successful opposing party. More often than not, however, the charges of a solicitor, including the costs of counsel, will be in excess of the costs which can be recovered from the unsuccessful party. The successful party will be liable for the balance of any costs owed to his or her own solicitor. Costs in civil matters are discussed in Chapter 16.

Appeals

3.26 As with other aspects of the dispute resolution system in Western Australia, the right of appeal originally developed in England. It is not, however, a common law right – it is purely a statutory creation. As a result, the nature of a right of appeal depends on the statutory provision which creates that right. The determination of the rights of parties to appeal requires an examination of the various statutes which constitute the courts and which create the right of appeal.

3.27 Rights of appeal may come in a range of forms — from appeals on only narrow jurisdictional errors or the denial of natural justice to appeals *de novo* (anew), a right to a completely fresh hearing before the appeal court. Appeals in Western Australia are generally by way of rehearing. Appeals by way of rehearing permit the appellate court to try the case again on the evidence used at first instance together with (exceptionally) any further evidence the court allows. In some instances appeal is allowed 'as of right', in others appeals can only proceed with the 'leave' or permission of the court. Rights of appeal depend on factors such as:

- the nature of the decision, for example, whether it is 'final' or 'interlocutory'; and
- the status of the decision-maker in the court hierarchy.

3.28 Generally, appeals may be brought on points of law or on mixed questions of law and fact. Appeals on questions of law, as a rule, have a greater chance of success than appeals on questions of fact. If a matter of fact is involved appeal judges are reluctant to overturn the decision of the judge at first instance who saw and heard witnesses and had the opportunity to assess their credibility. Courts of appeal are even more reluctant to interfere with a trial judge's decision if it involves an exercise of discretion. The appellant will need to show that the judge was clearly wrong, for example, by giving weight to irrelevant considerations. Appeals are discussed in more detail at Chapters 32 and 33.

The civil justice system

3.29 A fair assessment of the present system recognises that for the most part it presents a carefully structured and integrated approach to the definition, presentation and adjudication of civil disputes. Of course, many improvements

can and should be made. However, any proposed reforms must recognise and respect the considerable strengths of a system which has evolved and been carefully refined over a considerable period of time.

4

The Criminal System

The criminal justice system

4.1 After the colonisation in 1829 and the establishment of courts in Western Australia in 1832, judge-made 'common law' inherited from England formed the basis of the State's criminal law. Following the development of a *Criminal Code* in Queensland by Sir Samuel Griffiths in 1899, a *Criminal Code* was enacted in Western Australia in 1902 to provide a legislative basis for the criminal law. The *Code* of 1902 and subsequent amendments were compiled in the *Criminal Code Act 1913* (WA) and, although amended many times since, that Act continues to define and codify many criminal offences in Western Australia today.

4.2 Nevertheless, the procedure of the criminal justice system is not fully set out in the *Code* alone and nor does the *Code* contain all offences dealt with by the courts. Other significant legislation in the Western Australian criminal justice system includes the *Justices Act,* the *Evidence Act 1906* (WA) (which does not codify the law of evidence), the *Police Act 1892* (WA), the *Road Traffic Act 1974* (WA) and the *Misuse of Drugs Act 1974* (WA). There are also *Criminal Practice Rules* (WA) which set out court procedure for trying charges, but only in the higher courts. These rules have been under review since some time before 1994, although the current draft remains concerned only with higher court processes. So, in spite of having a 'code' for the criminal law of Western Australia, in reality the system as a whole is somewhat piecemeal.

An offence is committed

4.3 The criminal justice system first begins to operate when a crime comes to the attention of police or other authorities. A crime may be reported or detected through other means. Many crimes go undetected and unreported. These incidents remain outside the realm of the criminal

justice system even though they are crimes. The reluctance of people to report crimes often represents a lack of confidence in the criminal justice system's ability to do something about the offence. Other redress may be open to the victim, however, through the civil courts or criminal injuries compensation, although in the latter case the offence must first be reported to the police. There also are many offences that do not have a clear victim. These are known as 'discovery offences' and possession of drugs and most driving related offences are among the more common. Other offences may have a victim, although the victim may be unaware that he or she has been victimised. These include environmental crimes, offences against food manufacturing requirements, and criminally unsafe work environments.

The criminal process begins

4.4 Should a victim decide to report an offence, a complaint is made to the police or other authorities and, after investigation, a charge may be laid. Alternatively, the police or other governmental authorities may initiate an investigation themselves. The involvement of the victim, if any, in the decision as to whether to prosecute the charge in either case is minimal. After deciding to proceed with a prosecution and apprehending a suspect, the suspect may be released, charged and granted bail, or retained in custody while the authorities make further enquiries or prepare for trial. Alternatively a suspect may simply be summonsed to attend court on a given date. Once charges are laid the suspect becomes a 'defendant'. Even if the victim is unwilling to give evidence, most criminal charges do not go to trial but are dealt with by guilty plea. Issues of arrest and bail are outside the scope of this Report.

Appearing in court

4.5 The defendant's first appearance is usually before the Court of Petty Sessions, or, if the defendant is under 18, before the Children's Court. The charge is read and a plea entered. Currently police prosecute many offences in Petty Sessions and the Children's Court, although this is expected to change in the next few years as the State DPP assumes this role. Other courts, such as the Family Court and Industrial Magistrates Court, also exercise limited criminal jurisdiction. Although we do not specifically examine the criminal procedure of these courts or the Children's Court, some of our recommendations may be considered applicable.

Alternative criminal charge resolution

4.6 For juvenile offenders and, increasingly, for some groups of adults, procedures exist to keep offenders out of court. The most common are formal cautions or referral to a Juvenile Justice Team (JJT). In the case of a caution, the consent of the victim (if any) is not required. However, the victim's consent is required to any proposed outcome arising from referral of an offender to a JJT. Some alternatives to formal adjudication in the courts and/or sentencing are discussed in Chapter 25.

Types of offences

4.7 If a charge involves a simple offence a magistrate (or justices of the peace) will deal with it summarily, that is, without a jury in the Court of Petty

Sessions. If a charge is a crime or misdemeanour, it is what is known as an indictable offence, that is, an offence which is triable — but not necessarily tried — before a judge and jury. Sometimes legislation permits indictable offences to be dealt with summarily in the Court of Petty Sessions, generally at the election of the defendant and with the consent of the prosecution and court. The remainder of indictable offences must be heard in the higher courts — either the District or Supreme Court. A lawyer employed by the DPP usually prosecutes in the higher courts. Private prosecutions of indictable crimes, although possible, are very rare.

4.8 Indictable offences which may be dealt with summarily allow for a 'summary conviction penalty'. If the offence is tried summarily the maximum penalty provided for is lower than if the offence is determined in a superior court, and conviction is deemed to be of a simple offence only. These are incentives to a defendant to have his or her matter dealt with summarily and reduce the expense to the State and delay in hearings associated with a trial in the higher court.

The Court of Petty Sessions

4.9 The Court of Petty Sessions deals with most matters which may be dealt with summarily. A magistrate generally hears charges, although two justices of the peace sitting together may exercise the same jurisdiction. In remote locations a justice of the peace sitting alone may exercise the same criminal jurisdiction as a magistrate. When a defendant appears in court, he or she may plead guilty to the charge(s), or go to a hearing of the evidence where magistrates or justices of the peace will determine whether the defendant is guilty. If there is a finding of guilt the magistrate or justices convict and sentence the person. The procedure in the Court of Petty Sessions is discussed more fully in Chapter 27.

Preliminary hearings

4.10 Although people charged with indictable offences are entitled to be tried in the higher courts, their first appearance is in the Court of Petty Sessions. If no election for summary trial is available or made and the defendant pleads not guilty, the defendant will be given a 'hand-up brief' of relevant material from the prosecution. The defendant then can elect to have a preliminary hearing. At the preliminary hearing the Court of Petty Sessions will determine whether the prosecution has enough evidence to put the defendant on trial on indictment. The defendant will either be discharged or, if the prosecution can show that there is a case to answer, the defendant will be committed for trial in the higher courts. The discharge of the defendant by the court, however, does not preclude the DPP from later indicting the defendant on the same charges, just as the decision to commit for trial does not preclude the DPP from dropping the charges. Preliminary hearings are discussed further at Chapter 28. If the defendant has not pleaded guilty and does not elect to have a preliminary hearing, he or she is committed for trial in the higher courts.

The higher courts

4.11 If the defendant is committed for trial on indictment or has pleaded guilty to charges not tried summarily, the matter is sent to the District or Supreme Court. The District Court has jurisdiction to deal with indictable matters other than those for which a penalty of life imprisonment may be imposed. This was the result of a significant expansion of the District Court's jurisdiction in 1996. It was part of a broader program of legislative reform designed to address issues of access to justice and, in particular, to reduce the backlog of cases in the Supreme Court. (See Chapter 5.) Criminal matters may be determined in the District Court by a judge and jury, although in some cases the defendant may be tried by judge alone, a relatively recent legislative innovation discussed at Chapter 30. The Supreme Court has jurisdiction over all indictable offences, but usually hears only the most serious offences. A judge and jury try all matters unless the defendant elects to be tried by judge alone and the prosecution consents. The procedures of the higher courts are discussed at Chapter 29.

Legal representation

4.12 People accused of crimes may engage a private solicitor or barrister to represent them in court and will incur legal costs. Legal costs in criminal matters are discussed in Chapter 31. Alternatively, legal representation may be provided by Legal Aid, the Youth Legal Service, the Aboriginal Legal Service or by a duty solicitor from one of these organisations. Legal Aid is means tested and generally only people with very little income or few assets qualify for assistance. The other forms of representation referred to are generally provided free of charge or for a nominal fee. Many people also appear in court without legal representation.

4.13 *Dietrich v The Queen*, (1992) 177 CLR 292, highlighted the importance of the defendant's legal representation in serious criminal cases. In that case, the High Court held that on serious charges the unavailability of legal representation might mean that the defendant is denied the possibility of a fair trial. However, in Australia there is no general right to legal representation. Chapter 34 recommends changes to assist self-represented litigants, including those charged with criminal charges, and in Chapter 35 we discuss, amongst other things, how technology may assist litigants who are not legally represented.

Evidence

4.14 The criminal justice system must strike a balance between ensuring the conviction of guilty persons and protecting defendants from wrongful conviction. A right to a fair trial includes examination of the admissibility of evidence and scrutiny of how evidence was obtained. Rules of fairness, voluntariness and public policy apply to the admissibility at trial of responses to all police questioning regardless of the form of the evidence. However, past concerns surrounding the contents of confessional statements made to police have largely been resolved through the use of video-taping procedures where available. Recommendations to reform the rules of evidence affecting criminal trials are made in Section V and Chapters 27 and 29.

Jury or judge alone?

4.15 If a matter proceeds to trial by jury, 12 men and women are empanelled, frequently with a reserve juror in case one of the 12 is unable to complete his or her duties. Both the prosecution and the defence are entitled to 'challenge' the selection of jurors — with eight peremptory challenges (challenges as of right) each and an additional right of challenge for cause. A challenge for cause requires the party objecting to a potential juror to provide to the court satisfactory reasons for the objection. The Attorney General currently is considering reducing the number of peremptory challenges available to parties at criminal trial.

Conduct of the trial

4.16 A criminal trial commences with a plea by the defendant. If the defendant pleads guilty he or she will be sentenced in the normal manner. If the defendant pleads not guilty, the prosecution opens its case by outlining the facts on which it relies and calls prosecution witnesses. Each witness gives 'evidence-in-chief' for the prosecution and then may be cross-examined by the defence and re-examined by the prosecution. Once the prosecution has presented its case, the defence may argue that there is no case to answer. If the trial judge agrees he or she will direct the jury to enter a verdict of not guilty. If this argument is not raised or accepted by the judge, the defence can call evidence.

4.17 The defendant is not required to call any evidence or give evidence. This is because the prosecution bears the burden of proving its case beyond reasonable doubt. A defendant need not prove innocence. If a defendant elects to give evidence in his or her own defence, the evidence must be on oath and will be subject to cross-examination.

4.18 Both prosecution and defence are entitled to make a closing address consisting of a version or interpretation of the facts most favourable to their respective cases. If the defence calls no evidence it is entitled to make the address after the prosecutor, otherwise the defence must make its address first.

The role of judge and jury

4.19 In jury trials the judge decides questions of law only, while the jury decides the facts. The judge will 'sum up' each side's evidence and instruct the jury on the law. The judge also is required to warn the jury if there is any aspect of the trial suggesting that the evidence of a witness may be unreliable. After the judge's instructions the jury retires to consider its verdict. If, after three hours, the jury is unable to reach a unanimous verdict it may be sufficient if a decision can be reached by not less than 10 jurors. If the jury cannot reach a verdict it will be discharged, and the matter may be tried again later. If the jury reaches a verdict, the defendant will be acquitted or convicted. The jury will then be discharged. If the judge hears matters without a jury, the judge determines both questions of fact and law. A matter tried by judge

alone must end with a verdict. If either judge or jury convicts a defendant, the judge determines sentence.

4.20 Recommendations to reform trial procedure are discussed in Chapter 29, on 'Criminal Process in Indictable Matters'. If a matter goes to trial in the Courts of Petty Sessions, a trial process similar to that outlined above applies although, as there is no jury, the magistrate or justices of the peace are always the arbiters of law and fact.

Sentencing

4.21 Public attention tends to focus on sentencing of criminals. Only a very small proportion of those convicted of offences are sentenced to serve prison terms. A slightly larger proportion of offenders receives some type of order for supervision in the community. Most offenders sentenced to custody will be released early with some form of supervision on the recommendation of the Parole or Supervised Release Boards. The management of offenders in prison and in the community is an important and high profile function of the criminal justice system.

4.22 Far greater numbers of offenders are sentenced to pay a fine or to an order for restitution or reparation. Fines are generally the most common sentence, particularly if account is taken of 'infringement notices' (for example, for traffic offences). Fines help the State recoup the cost of prosecuting. Nevertheless, a significant proportion of the prison population is made up of men and women who default on paying fines or breach a community supervision order.

4.23 Orders for compensation and restitution may represent the only opportunity to offset some of the injury suffered by the victim of crime, whether financial, physical or emotional. Sentencing orders for compensation or restitution also may be supplemented by Criminal Injuries Compensation or by the pursuit of a civil case against the offender. Sentencing issues are outside the scope of this Report.

Appeals

4.24 If the defendant has been convicted and sentenced, he or she may appeal against conviction and/or sentence. The prosecution has more limited rights of appeal and generally is unable to appeal against the acquittal of a defendant. Different procedures apply according to the jurisdiction of the court from which the appeal is taken. The grounds upon which appeals may be based also vary widely. Usually it is asserted that the trial judge made an error interpreting or applying the law. In some cases it may be argued that there was an error of law and fact. An appeal can set aside the conviction obtained in the trial court, but only if the error resulted in a miscarriage of justice. If the appeal court accepts the merits of an appeal, it may acquit, substitute a conviction for a lesser offence, order a new trial or alter the sentence. Appeals are discussed further in Chapter 32.

5

Measuring the Justice System

The task

5.1 The task of determining whether our justice system is effective is an enormous one. What is encompassed in 'the justice system'? How could you measure its effectiveness? Perhaps the enormity of the task explains why there is so little literature available which deals with measuring the effectiveness of justice systems, particularly examining them *as a whole* and not just their component parts.

The justice system as a whole

5.2 In Western Australia, there is no clear division between the various parts of the justice system. For example, in the criminal justice system, police currently prosecute the majority of cases; prisons hold and are responsible for the transport of most remand prisoners; community corrections provide pre-sentence reports for the courts; and so on.

5.3 The civil and criminal justice systems are not independent of each other — the volume, and other aspects, of civil cases have repercussions for criminal matters. This is because, although there are differences between the functions of civil and criminal justice, they overlap substantially in the facilities they use and the organisations and people who 'act' or are employed within them.

Divisions in the justice system

5.4 The existing division between civil and criminal justice has been subject to recurring criticism, particularly in terms of responsibility for matters which do not fit easily in either category. For example, restoration and restitution for victims of property crime may require proceedings in both jurisdictions. It may be that the existing structural divisions in the justice system fail to meet either community expectations or the requirements of efficiency and should be re-examined.

5.5 Given the reality that officials, staff buildings and courts are shared between the civil and criminal justice systems, it is difficult to consider them separately. Moreover, Western Australia seems relatively unique in having most of its governmental justice functions located within just two departments, the Western Australia Police Service and the Ministry of Justice. Thus it is both practical and pragmatic to approach the task of measuring the effectiveness of the justice system as a whole, while differentiating between criminal and civil justice where functions or practices diverge.

Existing measures of civil and criminal justice

5.6 There has been a significant effort to measure performance in the civil justice system with an emphasis on satisfaction with the administration of the courts. There also have been high profile attempts to measure general performance in the criminal justice system. Significantly, however, these have been driven by the desire for comparative measurement of Western Australia against other Australian jurisdictions, in effect benchmarking our criminal justice system against others. As a result there is considerable data on the criminal justice system including valuable measures of the true level of crime. Additionally, there have been some attempts to measure the performance of and public satisfaction with the service provided by the police. But, in other aspects, there has been little emphasis on the needs, convenience and opinions of the 'customers' of the criminal justice system.

5.7 Though perhaps evolved from developments in civil justice, the measures of customer satisfaction can and do include measures applicable to courts' performance in criminal as well as civil cases. Some of these existing measures, discussed in more detail below, provide the basis for our recommendations on how to measure the justice system as a whole.

Courts and the Public

5.8 The Australian Institute of Judicial Administration (AIJA) report, *Courts and the Public* (Parker 1998), adopted a qualitative approach to assessing the functioning of the courts. Detailed interviews, some of them group interviews, were held with individuals working in and for the courts as well as others representing interest groups. There were no interviews with the public or lay users of the courts. The study is a laudable attempt to form views on the degree to which Australian courts are in tune with the needs and wishes of the public. It also illustrates how seriously the issues of performance measurement and customer focus have been taken in the field of court administration. However, if the attitudes expressed in public submissions about inadequate lay input into the legal system are any indication, the failure to include members of the public in the survey may reduce its credibility to some extent.

Western Australian Courts' customer satisfaction survey

5.9 The Ministry of Justice's Court Services Directorate has recently carried out a partly quantitative and partly qualitative survey of its 'customers'. These included judicial officers, legal practitioners, jurors and litigants — being

civil and criminal defendants and civil plaintiffs. The survey's focus was on staff and buildings and not on the legal and justice system. Its findings are useful to the administration of the courts, and add quantitative, relatively objective data to studies such as the AIJA report. However, there were distortions in the Ministry survey, including those resulting from the over-representation of the views of judicial officers and civil plaintiffs and defendants as a proportion of users of the courts. It is also of note that witnesses were not included in the survey. As a result the survey excluded the views of the victims of crime.

A lay user's view of the justice system

5.10 What we are attempting to do in this review is to examine the justice system from many perspectives. We believe it is essential that a lay user's view of the justice system is included in any effort to measure its effectiveness. By formulating our task in this way we acknowledge that the justice system does not exist to serve those employed in it, but to serve the community as a whole. By seeking to incorporate the views of all members of the community who utilise the justice system we significantly depart from previous attempts to measure the effectiveness of the justice system.

Western Australian Ministry of Justice's performance criteria

5.11 The Ministry of Justice dominates the justice system of Western Australia not only in size but also in the breadth of its responsibilities. No other agency operating in Western Australia has an interest and a role in the same range of areas in the justice system, both civil and criminal. In our attempt to find a locally valid set of criteria within which to discuss local measurement, we have adopted those used internally by the Ministry of Justice. The criteria are:

- quantity;
- quality;
- timeliness; and
- costs.

5.12 Ultimately these criteria are merely labels; it is the content that is important. The four criteria may overlap and, occasionally, conflict: refer to our comments in 'Touchstones', Chapter 1, for example, about cost and timeliness. Most significant, in light of our undertaking to include a lay-user's perspective of the justice system and of the measurement of its effectiveness, is the issue of who gives content to the label. For example, while no-one could dispute that the quality of criminal justice outcomes is a significant performance measure, there is likely to be less consensus over what constitutes a 'quality' outcome.

Quantity

Limitations

5.13 There is almost no publicly available quantitative information on the operation of the civil justice system. However, statistics on the criminal justice system proliferate. Although it could be argued that 'quantity' is the least

relevant of the four criteria of the effectiveness of the justice system, quantity often will give clues to other aspects of the performance of the system, and certainly gives substantial context to that performance.

5.14 It is important to be aware that there are problems with quantitative data even in that limited context because different agencies use different 'counting rules' in recording statistics. Thus information is not always comparable. For example, police do not record certain categories of offences. The courts also handle a range of offences not prosecuted by police and, therefore, these do not appear in police statistics either. As illustrated below, quantitative information can be powerful but a cautious approach should be taken in interpreting the numbers.

Increasing crime?

5.15 Subject to those comments, it appears that crime in Western Australia is increasing. The most recent recorded increase in crime (1997/98) is largely in line with the growth of population, but prior to that there were more substantial increases. It is important, however, to distinguish between actual crime and recorded crime. In Western Australia in 1995 about 40 per cent of victims of household or personal crime did not report the offence to police. An important factor which may affect reported, as opposed to actual, crime is public perception of the effectiveness of the justice system. The police also have a discretion about whether to record reported offences or not. There are no estimates available in Australia of the extent of non-recording by police, but in 1997 in England and Wales, police recorded only 54 per cent of household and personal crime reported to them.

5.16 Increased recorded crime does not necessarily mean that actual crime has increased. Similarly, increased prison numbers do not necessarily indicate increased actual crime. The number of people in prison rose dramatically in the latter half of 1998. However, it was those remanded in custody awaiting trial (generally, those who have not been found guilty) who caused a disproportionate amount of the increase. Therefore the increasing prison population cannot simply be explained as a result of increasing criminal activity but may instead reflect policy changes.

5.17 Furthermore, increased recorded crime (and funding to police and court services) has not been matched by criminal justice outcomes. Police recorded around 250 000 offences in 1997/98 — but cleared less than 80,000 offences. In spite of the increase in recorded crime, the number of police charges prosecuted through the courts appears to have declined slightly since 1991 (Crime Research Centre (CRC) 1998).

Other aspects of the criminal justice system

5.18 In certain other areas the quantity of business of various criminal justice agencies reportedly has increased in recent years. For example, there has been a large increase in the number of cases dealt with by the District Court. However, this was the result of legislative changes in 1996 which

increased the jurisdiction of — and waiting times for trial in — the District Court. The number of matters tried in the Supreme Court declined in response to the change. At the same time the number of cases going to the Children's Court decreased, presumably as a result of cautioning and the use of JJTs, discussed in at 4.6 and Chapter 25. In relation to the high profile of juvenile offending in the community, it is worth noting that in 1996/97 there were only some 20,000 charges in the Children's Court compared with about 140,000 in the adult lower courts.

Quality

Equality of treatment

5.19 The criterion of the 'quality' of the justice system is necessarily bound to notions of justice and fairness, as discussed in Chapter 1. If fairness and justice are understood in terms of equality of treatment of people then the effectiveness of the justice system can be measured through statistics on whether the justice system responds to people equally, regardless of race, gender, sexual orientation, wealth and so on.

Treatment of Aboriginal people

5.20 Although much information is available on the treatment of Aboriginal people by the justice system, there remain substantial gaps in publicly available data. What we do know is that between 1984 to 1994 Aboriginal people made up six per cent of people arrested and summonsed for the first time. This is twice their representation in the population of Western Australia but is probably close to their representation in terms of the age group which comes into contact with police most. Yet more than 30 per cent of Western Australia's prison population is drawn from the Aboriginal population. It also seems that Aboriginal offenders are over-represented amongst those serving short prison sentences and among fine defaulters who are imprisoned. Aboriginal people are also much more likely than non-Aboriginal people to be victims of crime, both violent and non-violent.

Treatment of women

5.21 Statistics from across Australia indicate that:

- 9 out of 10 homicide offenders are male but only 6 out of 10 victims are male; and
- 60 per cent of female homicides are victims of intimate partners while only 11 per cent of male homicide victims are killed by intimate partners;
- 80 per cent of reported sexual assault victims are female and almost half of all victims of sexual assaults are acquainted with the perpetrators. (Australian Institute of Criminology (AIC) 1998 and 1999).

However, it is not possible to conclude that female victims, particularly of sexual and violent crimes by perpetrators known to them, do not see the outcomes they might expect from the justice system, although anecdotal evidence indicates that this is the case. It could be argued that the growth in the use of Violence Restraining Orders has resulted from a failure of the justice system to treat violence seriously. Similarly, in the absence of adequate

information, particularly on sentencing, it is not possible to judge whether female defendants are treated differently from males.

Timeliness

5.22 Some information on the timeliness of the justice system is available from various sources. The Australian Bureau of Statistics (ABS) figures on 90-day clear-up rates are an attempt to combine timeliness and a quality measure. The Ministry of Justice tables annual reports in Parliament which cover lodgments and listing intervals for the civil and criminal jurisdictions of the Supreme, District and metropolitan Local Courts and Courts of Petty Sessions. The Chief Justice also reports on timeliness in the higher courts in his annual address at the closing of the legal year. We use these and other statistics throughout this Report.

Cost

5.23 Statistics for 1996/97 indicate that total government expenditure on justice throughout Australia was $5.4 billion, with 67 per cent being spent on police services, 20 per cent on corrective services and 13 per cent on courts administration (AIC 1998). These statistics are based on information on the monetary cost of operations published by the agencies of the justice system. Although heavily qualified, the Western Australian Ministry of Justice's Annual Report (1998) details:

- the cost of each prison place (in 1997/98, $169.21 per day for an adult and $433.60 per day for juvenile detention);
- the cost of community orders (in 1997/98, $10.41 per day for adult offenders and $29.32 for juvenile offenders);
- the cost of court services (as referred to in Chapter 2, $71,102,000 for 1997/98); and
- the cost of boards and tribunals ($2,594,000 for 1997/98).

The Western Australia Police Service Annual Report also includes performance cost data information, as do most government agencies involved in the justice system and other public services.

Deficiencies in the existing measures of the justice system

5.24 There is a large and diverse range of government and non-government agencies which comprise and interact with the justice system. To adequately assess how effectively the system is operating, information would be required from each agency. Many, but not all, are funded at least in part by the State government. Even if data could be collected and collated from these State agencies, significant gaps would remain. With the growth of privatisation of justice services, there are likely to be growing gaps in the information. Other deficiencies are:

- the absence of any independent measure of crime levels. This is a major concern, as public reporting practices and police recording practices and 'counting rules' may cause artificial fluctuations in the crime rate;

- the lack of data on the effectiveness of the civil system;
- the scant number of agencies gathering any data from their contact with the public (whom the justice system exists to serve), except for demographics and administrative data such as outcomes; and
- the relative absence of information on public attitudes to, and satisfaction with, the justice system. The 'public' encompasses, in this context, victims, witnesses, defendants, plaintiffs, relatives of all of these, and employees of the justice system agencies.

A strategy

5.25 Despite these problems, a clear strategy emerges. Although important and increasingly feasible, as discussed in Chapter 35 on information technology, the full picture cannot be provided by more and compatible statistics from agencies within the justice system alone. Justice agencies cannot provide the qualitative information required, and in particular the agencies alone cannot and should not determine what 'quality' in the justice system means. On a positive note, it is clear that some agencies already have accepted this and a number of surveys are being conducted to supplement administrative statistics. Large-scale public surveys would significantly complement available data on issues such as actual crime rates, data on the civil justice system, attitudinal studies of victims, defendants and other 'users' of the justice system.

5.26 It is important to note that while a standard written survey form may provide an adequate means of communication for many court users, it is not sufficient for those who may be unfamiliar with English, illiterate or suffer from mental or physical disabilities. To ensure that the views of these court users are not excluded, special needs groups should be actively sought out for their input on the court system.

3. Large-scale and anonymous public surveys should be conducted on an annual basis on justice-related issues including:

1) victimisation;
2) self-reporting of offences;
3) attitudes towards and satisfaction with the criminal justice system on the basis of identification as victim/witness/defendant/relative in criminal matters etc;
4) attitudes towards and satisfaction with the civil justice system;
5) quantitative information on dealings and outcomes in the civil justice system; and
6) other matters identified through preliminary research with the public and professionals involved in the justice system.

4. In devising public surveys, arrangements should be made to actively seek the views of special needs groups who may otherwise be excluded.

6

The Adversarial System of Civil Litigation

What is the adversarial system?

A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies of the case on either side.

Dawson J, *The Queen v Whithorn* (1983) 152 CLR 657, 682

6.1 The 'adversarial system' describes the dispute resolution process of adversaries who advance differing propositions of fact and law in the common law courts established in the British Commonwealth and the United States. Typically the parties identify the issues in dispute and the evidence to be brought before the court. The parties set the pace of pre-trial procedure and departures from timetables laid down in the Rules of Court. Sometimes procedural steps can be agreed privately. The parties can settle the case at any time without any adverse comment or sanction by the court. The trial judge rules on disputed points of procedure and evidence, and may ask questions to clarify the evidence of a witness, but otherwise does not take an active part. At the conclusion of the trial, the judge or (rarely in civil cases in Western Australia) the jury delivers a decision.

The adversarial / inquisitorial debate

6.2 Often the advantages and disadvantages of the adversarial system are compared with the 'inquisitorial' justice system which operates in many mainland European countries. As the name implies those courts conduct inquiries and are not confined to deciding between the submissions of the opposing parties. When compared to the inquisitorial system, the adversarial system is often characterised by a high degree of partisan behaviour, party autonomy, judicial passivity and dependence on lawyers. Many of the public submissions we received characterise the focus of the adversarial system as being on winning cases rather than truth or justice. However, in its recent discussion paper on the adversarial system of federal civil litigation, the ALRC (1999h) found the adversarial/non-adversarial construct too elusive a basis to formulate changes to the civil justice system. We agree. At the same time, though, we believe that the complaints and concerns about the existing adversarial system need to be taken seriously. We believe the changes we

recommend will alleviate part of the frustration expressed by some who made submissions asking us to abandon the adversarial system.

The adversarial system in practice

6.3 In practice the adversarial system functions in ways which are not always consistent with the theory. For example, although the English, American and Australian justice systems are all adversarial there exist significant procedural and professional organisational differences. In the same way, the inquisitorial systems of France and Germany vary.

6.4 Even within adversarial jurisdictions there are differences in how the adversarial model operates. Historically the judiciary played a far more active role in the courts of equity than in common law courts. Judicial powers may have existed but been under-utilised, or utilised by some courts more than others. Tribunals rather than courts now handle a significant number of cases. Tribunals generally rely on inquisitorial rather than adversarial procedures. (See Chapter 33.) There also is increasing use in the courts of pre-litigation ADR. (See Chapter 11.) The impact of the growing number of self-represented litigants is also having a significant impact on the adversarial system (discussed in Chapter 18).

The role of lawyers

6.5 The partisan ethic of lawyers is one characteristic of the adversarial system which is fairly constant. Subject to some fairly unobtrusive duties to the court, the civil lawyer's goal has always been to win the case. (The legal profession is discussed in Chapter 36.) This partisan ethic continues to dominate perceptions of the adversarial system at work in the civil justice system of Western Australia.

The objects of the civil justice system

6.6 In his final report on *Access to Justice* (1996), Lord Woolf recommended that the civil justice system should include a single foundational principle, a *grundnorm*, that courts deal with cases justly. The *Civil Procedure Rules 1999* (UK), recently enacted in the United Kingdom to implement Lord Woolf's recommended reforms, provide that the overriding objective of case management should be to enable the court to deal with cases justly. A number of specific considerations are stipulated, including ensuring that the parties are on an equal footing, saving expense and dealing with the cases in ways which are proportionate to their value, importance and complexity and the financial position of the parties. As indicated in Chapter 1, the ALRC (1999h) highlighted the difficulties associated with the practical implementation of Lord Woolf's recommendations. These reforms have been criticised for permitting a broad and largely unguided discretion in the judiciary and for lacking practical means for ascertaining, for example, the importance of a case or the financial position of the parties. The ALRC pointed to the potential inconsistency between these principles and a lawyer's obligation to be a partisan advocate for the client, and concludes that it does not support the requirement of 'proportionate' litigation practice.

Should the civil justice system have objectives?

6.7 Other reform reports suggest that there should be a range of objectives, and rather than implementing these objectives as practice rules, recommend that they be used as a guide to the interpretation of legislation and rules in order to provide standards against which lawyers' and others' conduct can be assessed. In our view, on that limited basis, the objectives of the civil justice system could usefully be identified and incorporated into civil justice legislation. Any objectives should encompass:

- the fair application or development of law by impartial decision-makers;
- active management of cases to ensure proportionality and timeliness;
- proportionality between the complexity and value (monetary and non-monetary) of a dispute and the time and procedure involved; and
- an efficient pace for cases, because justice delayed is justice denied.

In particular, we believe that a 'proportionality principle' can provide a helpful guide for case managers to assess, in consultation with the parties, the extent and expense of interlocutory procedure appropriate to the claim. It also can be a useful guide to lawyers to undertake work proportionate to the claim, particularly in light of the legal defence which we propose should be available to lawyers who act to promote the civil justice system objectives, at Recommendation 439.

5. The civil justice system should be managed in order to be expeditious, proportionate, and both procedurally and substantively just.

6. Legislation should be enacted applying the objects clause (at Recommendation 5) to all legislation impacting upon civil justice, including Rules of Court, so that the principles on which the civil justice system rests are clearly set out.

6.8 If our Recommendations 5 and 6 are not accepted, the principles currently in Order 1 rules 4A–4B of the *Rules of the Supreme Court 1971* (WA) may serve as an appropriate basis for the incorporation of an objects clause into civil justice legislation. These principles include the elimination of delay, the fair and just determination of issues, the promotion of just determination of litigation, efficiency and affordability.

Information technology

6.9 Information technology offers the prospect of continuing efficiency gains in Australian courts that can free resources for improving other services and communicating with the public. Information technology should be adopted in so far as it is compatible with the objects of the civil justice system identified at Recommendation 5. However, heavy or exclusive reliance upon new

technologies only will be efficient if the public has effective access to computerised information and services. Court officials must remember that some sections of the community already find the courts to be alien and intimidating places. When embracing the possibilities of new information technologies, groups who are already disadvantaged must not be left further behind. (Chapter 35, 'Technology and Justice'.)

Accountability and the adversarial system

6.10 Our civil justice system sees many civil disputes resolved by settlement rather than litigation. Settlements occur without comment or sanction by the court, regardless of the amount of time and court resources expended on the case prior to settlement. Out of frustration with the existing system we had proposed to make lawyers accountable for the late settlement of disputes where litigation was commenced but settled at some point prior to judgment after a contested trial. In these cases we proposed that lawyers might have to produce their files and other information, similar to the current procedure for assessment of costs by the courts. This would allow an audit of whether the litigation was conducted appropriately. (See Consultation Draft 1.2.)

6.11 The ALRC (1999a) supported our proposal to the extent that it could address the present lack of useful data on the settlement of claims. An audit of settled cases could provide details of the kinds of cases settled, data on costs, the reasons for settlement and the types of dispute resolution options used. However the ALRC questioned the cost of such audits, the data sought to be obtained, the utility of the data, and the appropriate auditing bodies. There was strong opposition from others to the proposal that the courts be responsible for conducting the audit.

6.12 The investigation of the settlement of cases to the degree originally proposed is unnecessary given the closer scrutiny of cases which would result from the implementation of recommended ADR (Chapter 11), case management (Chapter 12) and our summary judgment reforms (Chapter 14). The issues raised by the ALRC (see above) could be addressed, in part, if the court had a discretion to order that solicitors and self-represented litigants report details of settlements, in confidence, to court case managers. Rather than an audit, the process should be in the nature of data collection to assist in the development of effective ADR processes and techniques, and to assess cost effectiveness.

7. Rules and procedures should be amended to allow courts to require legal representatives and self-represented litigants to report to case managers (in confidence) where a matter has settled so that surveys can be carried out.

Cost implications of changing the civil adversarial system

6.13 The adversarial system assumes that courts do not play an active role in the conduct of cases. While there is reason to question the extent to which the adversarial model applies in practice to the civil justice system in Western Australia, it is true that the courts currently are not funded to take an active role in the direction and pace of litigation. Because civil justice is not considered as important as criminal justice, more active civil courts may need to be funded by those seeking to use those courts.

The State's obligations

6.14 While we recognise that it is the obligation of the State to provide courts to enable citizens to enforce their rights and protect their liberties, private disputes are often of only limited public interest. Frequently there is an element of personal gain associated with civil disputes not found in the prosecution of criminal matters. Should our Recommendations 371 and 372 to establish a Western Australian Civil and Administrative Appeals Tribunal be adopted there would be even less 'public law' litigated in civil courts than is currently the case. Our recommendations to establish private civil courts is one response to the limited public interest in civil litigation. (See Chapter 37.)

Access to the courts

6.15 We also acknowledge that the principle of access by all to the courts must be upheld. The principle is, however, too simplistic. Inadequately resourced litigants may be unable to present arguments competently and as a result may be denied justice, even if they can access the courts. In Chapter 18 we note one means of addressing this imbalance is a more active or inquisitorial role for court staff and judges. Reforms based on an inquisitorial model have significant cost implications. The issue is: who should pay?

Who should pay?

6.16 Concerns over access to the civil courts by indigent litigants and those acting in the public interest should not be the criteria upon which access to the courts by others — who are neither indigent nor acting in the public interest — are determined. These concerns are best addressed through our recommendations in relation to costs, in particular waiving court filing fees in appropriate cases and allowing a 'public interest' exemption. (See Recommendations 116 and 117.) The principle of fairness which should underlie access to the courts may mean that those who can afford to should be required to contribute more towards the operation of the civil court system.

6.17 Consideration should be given to whether the existing fee structure strikes an appropriate balance between public and private funding. It is time to calculate the average level of court fees paid by litigants as a proportion of the average cost per civil case to the public purse. Subject to exemptions based on hardship and public interest, contributions proportional to the value of the case and based on a limited 'user pays' principle should apply.

8. Where litigants are able to make a greater contribution to the cost of accessing the civil justice system they should do so and it should be proportional to the cost to the public of conducting the case.

Balancing private and public contributions

6.18 Issues involving the Commonwealth taxation system are beyond the scope of this review. The tax deductibility of legal costs for businesses, however, is an issue arising from a re-examination of the division between public and private funding for the civil justice system. Effectively, businesses pay a smaller contribution towards the publicly funded legal system than do other litigants, because of the tax deductibility of legal expenses incurred by businesses.

9. As new court fee scales are scheduled, the costs for businesses to access the public civil justice system should be higher than the fees charged to other users, to balance the tax deductibility of legal expenses for businesses.

7

The Adversarial System of Criminal Litigation

Adversarial and inquisitorial criminal justice: common ground

7.1 In both adversarial and inquisitorial criminal justice systems, the State monopolises the determination of whether or not an act is a criminal offence and the sentencing of offenders. The primary purpose is to prevent private justice by retribution. Both systems share the same goal for criminal process and procedure: to ensure procedural fairness by balancing the rights of the individual against the rights and interests of society as a whole. Although there are significant differences between the adversarial and inquisitorial systems, the inquisitorial system, like the adversarial system, allows the defendant some scope to oppose prosecution by introducing evidence to prove innocence. It is the structure and organisation of the forensic process or investigative method, in particular prior to trial, which essentially distinguish the criminal jurisdiction of the two systems.

Our system of justice is indeed adversarial in character, but it has long progressed from the basic classical adversarial system where judges are entirely passive. By an ad hoc development of rules we now have a hybrid system based on adversarial elements. It should be recognised that our system has never been immutable…

Justice David Ipp,
Supreme Court of
Western Australia (1997)

7.2 In terms of protecting rights and ensuring reliable outcomes both the adversarial and inquisitorial criminal justice systems have inherent structural shortcomings in providing acceptable standards for the prosecution of cases. Each type of system also faces resource limitations. Adding to the seriousness of these limitations are the increasing criminalisation of conduct and heightened public concerns about criminality and victimisation. Interestingly, responses to these pressures in both adversarial and inquisitorial jurisdictions follow broadly similar lines and have already resulted in a degree of convergence. For example, in Italy in 1988 a largely adversarial system replaced a longstanding inquisitorial one. However, that system has now been subject to reform and criminal justice in Italy, at least in part, has reverted to its old inquisitorial ways.

Adversarial criminal justice and the role of the jury

7.3 The linchpin of adversarial systems of criminal justice, at least traditionally, has been the jury. Although judges in adversarial systems have assumed a more active role in the conduct of trials in recent times, juries continue to have a purely passive role. It is the parties who determine the scope of the dispute prior to trial and who decide, largely autonomously and in a selective manner, on the evidence to be presented in court. The truth is said to emerge from the presentation by the prosecution and defence of alternative versions of the facts, based on the evidence each side presents.

7.4 Because the focus is on jury trials in the adversarial system, all criminal matters are conducted as if a jury will be the ultimate arbiter of fact. The emphasis on oral evidence is underpinned by the assumption that jurors will have no investigative role and so will be reliant on in-court presentations to assess the credibility of witnesses. Continuity of presentation at trial is essential because those doing jury duty should not be subjected to ongoing involvement in the determination of a matter. To assist in the presentation of reliable evidence, particularly for juries who do not have professional training, exclusionary rules of evidence have developed. The result is that the arbiter of fact, whether in reality a jury, judge alone or magistrate, comes to a conclusion based upon selected evidence.

The significance of jury trials

7.5 The inquisitorial system retains jury trials but only for the gravest offences. The retention of jury trials, to an extent, recognises that juries serve important functions. Juries ensure democratic accountability and act as a possible restraint on the growth of alienation and distrust between the system of criminal justice and the broader community. Juries are used to try a wider range of offences in the adversarial system and their importance is acknowledged by the legal requirement that a judge can never direct a jury to convict, no matter how strong the evidence. However, even in the adversarial system jury trials are available only for charges on indictment — a minority of all criminal charges laid. As a result, juries try only a very small percentage of the total number of criminal charges prosecuted in Western Australia.

The jury and rules of evidence

7.6 While the jury trial may not in practice play the central role in the adversarial system that it does in theory, it nevertheless does determine the content of evidentiary rules for *all* criminal proceedings. In some inquisitorial systems one set of evidentiary rules applies to jury trials and another to trials by judge alone. However, we have reconsidered our original proposal (in Consultation Draft 1.3) to establish a dual system of rules and procedure as this may create further complexity in the already highly complex laws of evidence and undermine public confidence in jury trials.

The cost of jury trials

7.7 Adversarial system trials are expensive because of the reliance on oral evidence and the contested nature of the restrictions on evidence. In

inquisitorial (non-jury) trials, the assumption is that a professional judge will not be swayed by unfair, unreliable evidence nor would the judge convict merely on the basis of the 'bad character' of the defendant. As a result, evidence of this nature need not be excluded. Moreover with the more active role of the inquisitorial judge, oral testimony is not a standard requirement in order for evidence to be admissible.

7.8 However, as discussed more fully in the Chapter 30 on 'Trial by Judge Alone', the existing procedures which attach to trials by judge alone in Western Australia may mean that these are not more cost-effective than jury trials. The bases for appeal from verdicts by judges acting alone are far more extensive than the appellate opportunities from jury verdicts. This makes it difficult to assess the costs of jury relative to judge alone trials within the adversarial system. Further, as also indicated in Chapter 30, the public is unlikely to assume that, unlike jurors, all judges are always free of bias or prejudice or that they can always exclude such matters from their deliberations. When considering whether to further reduce the availability of jury trials, it should not be forgotten that presently only some six per cent of charges laid by police are heard in the higher courts of this State and, therefore, potentially before a jury in any event (CRC 1998).

The problems of jury trials

7.9 Although we originally had proposed to further restrict jury trials in the Consultation Draft 'Advantages and Disadvantages of the Adversarial System in Criminal Proceedings', we now believe that other recommendations better address the problems of jury trials. In general, jury (and other) trials would be improved by the implementation of our recommendations to:

- relax some of the more technical rules of evidence (Chapter 20);
- encourage the greater use of witness statements (Chapters 24, 25, 27 and 29); and
- make greater use of case management to narrow the issues in dispute and accelerate the trial process (below and Chapters 25, 27 and 29).

Truth and justice

Under our law a criminal trial … is 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.

Barwick CJ,
Ratten v The Queen
(1974) 131 CLR 510, 517

7.10 The adversarial system, typified by party control of proceedings and (to a limited extent) outcomes, is often criticised — and was subject to strong condemnation in the public submissions we received — because it is not sufficiently concerned with finding the truth. The defendant and State prosecutorial agencies control and circumscribe the investigative process. Judges and juries do not participate actively in the search for truth. Although the excessive vigour of the prosecution and the manipulation of investigative processes by police often come under attack in common law systems, at the same time, the system is accused of being skewed in favour of the defendant.

7.11 This criticism of bias in favour of the defendant takes two forms. The traditional principle that 'ten guilty persons escaping punishment is better

than one innocent party being convicted' presently seems to be regarded as too high a price to pay for safeguards from oppressive State practices. Furthermore, the parties' control of proceedings, the rules of evidence, and judicial and jury passivity all combine to make the system open to manipulation by smart, wealthy and determined criminals. These criticisms highlight serious deficiencies in the existing system. It also should be remembered, however, that in every case the ultimate aim of the justice system must be to deliver *justice*, which is not always the same as delivering truth. Investigative effectiveness needs to be balanced against limited public resources and respect for the rights of the individual. It also has much to do with the kind of society in which we want to live.

Truth and evidence

7.12 Nonetheless, the importance of finding and presenting relevant facts in evidence should not be underestimated. Nor should it be ignored that the adversarial system is not optimal in this regard. The insistence on oral evidence by first-hand witnesses at trial, party control over the pre-trial stage and limited judicial intervention create a potential for missing 'the truth' at trial. This occurs because:

- evidence gathered before trial is rejected in favour of evidence at trial;
- delay affects witness recall; and
- the obligation is on defendants to find and adduce evidence in their favour when they may not have sufficient resources. This problem becomes even more significant as legal aid resources diminish.

The treatment of witnesses

7.13 The adversarial trial itself is highly confrontational. Both the prosecution and the defence cross-examine witnesses to undermine the opposing case and discover information the other side has not brought out. The primacy given to witnesses' evidence at trial is unfortunate because cross-examination may have the effect of painting a witness in a far less favourable light than is fair. Much of the apparent effectiveness of cross-examination in breaking down a case is arguably more a result of exposing the normal psychological processes that affect recall over time, than a truly effective means of getting at the truth. (Refer to Chapter 21 for further discussion of the limits of examination and cross-examination.) The defendant, whose lot becomes dependent on unnecessarily unreliable processes, may find the whole trial illogical and pointless, as may many honest witnesses. Insistence that evidence gathered before trial (that is, immediately after the events) should largely be rejected in favour of evidence given at trial risks the trial itself being a flawed forensic process with the potential for missing 'the truth'.

Lack of equality and the adversarial process

7.14 The usual imbalance of resources between the prosecution and the defendant is to the detriment of the defendant. This can add to the perception of a failing of the adversarial system. The most fundamental reason for the impact of unequal resources in the adversarial system of criminal procedure

is the major role ascribed to the defendant's legal representative. Because parties control the investigative process in an adversarial system, the responsibility for uncovering evidence of the defendant's innocence lies with his or her lawyer. By contrast, in inquisitorial systems, justice system officials have this responsibility. If a defendant is not represented or is under-represented in an adversarial system it is unlikely that the system can operate fairly.

Addressing inequality

7.15 The solution is not simply to impose a greater moral or professional obligation on lawyers to represent defendants for a reduced fee or no fee. The system should not be systematically dependent on professional altruism, even if it may be dependent substantially on professional ethics (as discussed in Chapter 36). Nor does the solution lie with inquisitorial systems. The defendant is not directly a party to inquisitorial proceedings at all and can be denied the right to put his or her side of the case. In particular, the defendant in inquisitorial systems cannot effectively cross-examine witnesses or test evidence, nor independently introduce evidence at trial. In the absence of increased funding for legal aid, increased judicial intervention to ensure fairness (as we recommend throughout this Report) may be the most effective, albeit partial, remedy to the problem of inequality in the adversarial system.

Case management

7.16 Because the pre-trial stage is secret in inquisitorial systems, the defendant does not have any great role to play at that stage. Balancing this is greater judicial supervision of the pre-trial stage than is found in adversarial procedures. The inquisitorial pre-trial process is designed to result in a non-partisan dossier which is handed to the trial court to determine the truth of the matter. As a result, inquisitorial judicial officers carefully supervise the pre-trial process.

7.17 Given the adversarial character of the criminal justice system of Western Australia, case management may be more appropriate than supervision in most aspects of the pre-trial process. Instead of conducting or overseeing the investigation, it may be more appropriate for a court official in the adversarial context to manage various vital steps in the process — as we recommend in Chapters 25 to 30.

Guilty pleas

7.18 One other distinguishing characteristic of many inquisitorial systems is that there can be no guilty plea by a defendant. This has arisen as a result of the emphasis in inquisitorial systems on the public interest in finding the truth which overrides an individual's right to give up procedural rights recognised in an adversarial system. In terms of seeking a system which is less expensive, it should be noted that the majority of criminal charges in this State are determined without formal proof of the allegations by the prosecution. In 1997, 68 per cent of charges in the higher courts were

determined by a plea of guilty. In 1996/97, 90 per cent of police charges in the Courts of Petty Sessions were determined by pleas of guilty (CRC 1998).

Plea bargaining

7.19 Where a guilty plea is open to the defendant, informal negotiations with the prosecution can be entered into to obtain a lessening of charges in return for a guilty plea. This is known as 'plea bargaining' in the United States. Although Australian courts are not actively involved in pre-trial negotiations and do not endorse them, negotiations between the prosecution and defence do occur in Western Australia and include agreement by the prosecution not to oppose a sentence proposal put to the court by the defence on a plea of guilty. The 'negotiated pleas' process can lead to an excessive emphasis on confessions. As a consequence, police may use unacceptable methods to put pressure on the defendant to confess which can lead to miscarriages of justice. (The 'right to silence' is discussed at Chapter 24.) Negotiated pleas also may result in a lack of public confidence in the system. Justice may be seen to be 'for sale' (by bargaining) and offenders seen to get off too lightly, particularly if negotiations are not formally acknowledged or regulated.

7.20 Despite the drawbacks, a number of European jurisdictions are investigating the introduction of guilty pleas in order to simplify and reduce the cost of the criminal justice system. This would be a significant move towards the adversarial approach, as it would entail precedence being given to the defendant's wishes over any official inquiry into 'the truth'.

Management of cases prior to trial

7.21 One means of preventing some of the drawbacks associated with guilty pleas in adversarial systems is for pre-trial negotiations between the prosecution and the defence to be formally acknowledged and regulated. This is discussed further in Chapter 25, 'Alternative Criminal Charge Resolution' (ACCR).

7.22 There also should be greater pre-trial management of cases. In the Consultation Draft on this topic we proposed the establishment of a new 'pre-trial court'. However, we believe the option explained below achieves the same outcomes without the duplication of court bureaucracies necessitated in establishing a separate court. Instead we recommend drawing on magistrates appointed to the Court of Petty Sessions to oversee the pre-trial process. On the filing of charges, responsibility for the conduct of pre-trial matters relating to the defendant's progression through the criminal justice system should be allocated to a 'pre-trial magistrate' of the Court of Petty Sessions.

Pre-trial process in the Court of Petty Sessions

7.23 Criminal complaints, whether charging summary or indictable offences, are initially filed in the Court of Petty Sessions. It is therefore in the Court of Petty Sessions that many of the pre-trial issues concerning the processing of

criminal charges arise. In our view, the pre-trial process would best be managed by the appointment of a magistrate to deal with all pre-trial matters affecting the defendant, the object being to manage the person and not the individual charge. The rule requiring separation of charges in the interests of not prejudicing the trial of a defendant on multiple but independent charges is intended to protect the interests of the defendant. (Refer to Chapter 26.) However this consideration does not apply to pre-trial matters.

7.24 The pre-trial magistrate should be responsible for managing all charges against a defendant and assume responsibility for granting investigative or forensic powers, such as issuing warrants for search and seizure upon application by the police or prosecution. The pre-trial magistrate also should have extensive powers to deal with issues arising from the progression of a defendant through the criminal justice system until such time as it becomes clear that a charge will need to proceed to trial or is otherwise resolved.

10. The court registry 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.

11. Each file relating to an individual defendant in the Courts of Petty Sessions should be allocated to a magistrate other than the trial magistrate to exercise jurisdiction over pre-trial matters concerning the defendant.

12. The pre-trial magistrate should have powers to:

(1) grant investigative or forensic powers, such as issuing warrants for search and seizure upon application by the police or prosecution;

(2) impose time limits on the parties;

(3) oversee the exchange of information between the prosecution and defence — subject to the defendant's right not to disclose his or her defence; and

(4) assist in the identification of issues.

Accelerated trial processes

7.25 Greater curial management at the pre-trial stage could:

- prevent delaying tactics;
- clarify issues;
- allow the early identification of the most appropriate way to proceed; and
- speed up trials.

The acceleration of the trial process may solve other shortcomings of the adversarial system. The oral presentation of evidence, with its advantages of directness and testability through cross-examination, is less subject to the vagaries of memory and external influences on witnesses the closer it takes place to the actual events. Speedy trials also benefit the defendant (particularly if he or she is remanded to custody), the victim, witnesses and society as a whole.

Trial 'on the papers'

7.26 An abbreviated documentary procedure, known as a trial 'on the papers' and similar to that outlined in Chapter 32 on appeals, could be extended to summary proceedings for appropriate charges. The use of a documentary procedure would reduce the necessity for oral evidence and could be of considerable benefit to many victims and other witnesses for whom testifying in court is an ordeal. The procedure should be at the election of the defendant and with a limited right of appeal to have a court re-hear the case.

13. An abbreviated documentary procedure for trial of certain summary offences should be introduced and available at the election of the defendant.

Rationalising criminal law

7.27 Currently Western Australia has a code of criminal law — the *Criminal Code,* discussed in Chapter 4. While it includes many indictable offences and some aspects of criminal procedure, it does not codify summary offences (many of which are included in the *Police Act*) or aspects of criminal procedure. This Commission (1992) previously reviewed the *Police Act* and recommended that a new Summary Offences Act be enacted. This has not yet occurred. The existing *Criminal Code* should be reformed to become, as far as possible, a code of all indictable offences. A Summary Offences Act should be enacted which codifies, as far as possible, all summary offences. In Chapter 27 we recommend a new basis for classification of offences. Currently, too, a range of anomalous and inconsistent provisions and Acts regulates the awarding of costs in criminal matters, and we discuss criminal costs separately, in Chapter 31.

Rationalising criminal procedure

7.28 Many aspects of criminal procedure are either shaped by the common law, particularly the law of evidence, or by different pieces of legislation. We recommend the development of a new Western Australian Evidence Act in Chapter 20. The *Rules of Criminal Practice* are designed to deal with procedure in criminal matters, but both the existing rules and draft revised rules only

Bentham viewed with disfavour 'the dark Chaos of Common Law', favouring the prescription of rules of conduct by statute. This, Bentham said, would 'mark out the line on the subject's conduct by visible directions, instead of turning him loose into the wilds of perpetual conjecture.'

Gaudron, McHugh, Gummow & Callinan JJ, *Byrnes v The Queen* [1999] HCA, para 11

apply to higher court proceedings. The enactment of a comprehensive code concerning criminal pre-trial and trial procedure, while having the potential to result in rigidity, also could generate greater certainty and clarity. Work currently being undertaken by the Western Australia Police Service on formally documenting criminal investigation practices may be valuable in developing a code of criminal practice and procedure applicable to all offences and to all stages of proceedings.

7.29 In undertaking to rationalise criminal law and procedure, the relevant recommendations of this Commission (1994) in its report on legislation of the United Kingdom also should be taken into consideration. The report identifies British Imperial legislation which continues to apply in Western Australia to this day, including criminal matters.

14. The *Criminal Code 1913* (WA) should be amended to include, as far as possible, all indictable offences. All matters relating to criminal procedure should be removed.

15. A Summary Offences Act, as recommended by this Commission in 1992, should be enacted to include, as far as possible, all summary offences.

16. A comprehensive code of criminal practice procedure should be developed.

17. In rationalising criminal law and procedure in Western Australia consideration should be given to the recommendations of this Commission (1994) in its report on the British Imperial legislation which continues to apply in Western Australia.

8

Civil System — Overview

Alternatives

8.1 Courts are now open to all who want a judge to determine the outcome of a civil dispute. At the same time, courts are the most formal and expensive means of resolving disputes. While open access to all is upheld in principle, in practice the formality of the process makes courts incomprehensible to many. The expense of court proceedings further limits the reality of access for all. The delays associated with an overloaded system and time-consuming procedures have created marked dissatisfaction.

8.2 We are examining two approaches to address the problems associated with the existing civil dispute resolution system. One approach is to reform the system so that some civil matters bypass the formal and expensive court process. This can be achieved by keeping cases out of court. Civil disputes can be diverted to specialised tribunals, to ADR outside the court system, or, at least, away from formal litigation to ADR within the courts. (See Chapters 11 and 33.) Another approach is to reform the existing civil justice system by making litigation itself less expensive, less formal and more accessible for those who need lawyers and courts to help them resolve their disputes. Both alternatives are examined in this Report. Before dealing with our specific recommendations, however, we provide a brief overview of the background and previous reforms of the civil justice system.

Reforming the civil justice system

8.3 The basic and essential features of the present system of civil justice in Western Australia came from England with the passage of reforms to the British civil justice system through the *Judicature Acts* (Imp) in 1873 and 1875. (Refer also to Chapter 3.) The most important changes resulting from these Acts were the fusion of the administration of common law and equity and the abolition of the Courts of Common Law and Chancery. The Acts also

…a fathomless and boundless chaos, made up of fiction, tautology, technicality and inconsistency, and the administrative part of it a system of exquisitely contrived chicanery which maximises delay and the denial of justice.

Jeremy Bentham quoted in Dillon (1907) 494

abolished the common law system of pleading and introduced a system with essential features which still operate in the Supreme and District Courts of Western Australia today. The reforms of the *Judicature Acts* originated in the rapidly changing social and economic conditions in England during the 19th century associated with the industrial revolution. Parliament acknowledged a significant and sustained public attack on the legal system articulated in the newspapers and in the intellectual critique of Jeremy Bentham and his followers.

More recent reforms — case management

8.4 Most but not all aspects of the civil justice system in Western Australia have remained unchanged since the local adoption of the reforms of the *Judicature Acts* more than a century ago. Significant reforms in recent years have seen the courts take a more active role in monitoring and managing civil litigation. These changes often conflict with the traditional notion of the adversarial character of the civil justice system.

8.5 In 1990 the Supreme Court introduced an 'Expedited List' to provide a procedure for bringing urgent commercial and other civil disputes to trial more quickly. The next important phase of reform commenced with the introduction in 1993 of a delay elimination goal in the *Supreme Court Rules*. Further revisions commencing in November 1996 brought into operation a full system of controlling the various stages of a civil action through 'case flow management'.

Case management in the higher courts

8.6 Although amendment of the *Supreme Court Rules* in 1993 improved the efficiency of the litigation process, the amendments did not bring about as much change as had been hoped. Further changes made in 1996 evolved out of consultation with members of the Supreme Court and legal profession. The procedure was meant to secure efficient and timely disposal of matters through continuous supervision by the court. The amendments allowed for:

- **status conferences** — to bring all parties before a court officer at the earliest possible point in time. Options for settlement and a timetable for the case can be reviewed. Long and complex matters are transferred to a 'Long Causes List' for a judge to manage;
- **case evaluation conferences** — which are held within seven months after the summons to the status conference. These enable parties to review progress in the matter with the court; and
- **listing conferences** — which are held shortly after a matter is entered for trial or application is made for a hearing date. The listing conference is held before a judge in chambers. The judge may review documents, enquire about settlement, establish which documents can be admitted into evidence by consent, the number and availability of witnesses, the time their evidence will take and so on. The judge may also determine any question of law or procedure.

8.7 The Supreme Court created a case management registrar with extensive and significant power to make 'case management directions' at the status and evaluation conferences. These directions can limit or dispense with pleadings and other interlocutory steps, direct any or all parties or experts to attend 'without prejudice' settlement conferences and require solicitors to give clients memoranda of costs. We review the case management procedures of the higher courts in Chapter 9. In Chapter 17 we examine the case management and other legal procedures of the Local Courts.

Case management in the Local Court

8.8 As a result of amendments introduced in 1987, the *Local Courts Act* requires that within 14 days of the time for filing the defence, a pre-trial conference should be scheduled. Amongst other things, the pre-trial conference examines the likelihood of settlement, delineates issues in dispute, and considers the state of preparation of the parties' cases and other procedural matters.

8.9 The bulk of matters commenced in the Local Court, however, are debt recovery matters. These are often resolved by default or summary judgment soon after the Plaint is issued. Therefore, many cases at this level of court are not subject to case management processes. Of matters not resolved through default or summary judgment, however, many are settled at the pre-trial conference.

8.10 The introduction of case management principles has had an effect on the efficiency of the civil justice system, although it is not without its critics. Some argue that judges have been over-zealous in the application of its principles. Even the much-heralded reforms of the civil system of England and Wales resulting (in April 1999) from Lord Woolf's (1996) review have been subject to trenchant criticism. Furthermore, any changes may take many years and considerable litigation to settle their meaning.

Other 'reforms'

8.11 At the same time as the implementation of case management procedures by the courts, there have been reductions in legal aid and an increasing number of self-represented litigants. The increase in self-represented litigants before the courts has significant implications for all aspects of the civil justice system as access to the legal system and justice between the parties have become increasingly difficult to sustain in this context. Many of our recommendations for reform have been drafted with a view as to how the civil justice system can best manage this phenomenon. We consider this problem particularly in Chapter 18.

Reforming civil justice

8.12 The system for resolution of civil disputes in Western Australia has evolved over several centuries. However, its principal features can be traced back to the significant English reforms from the latter part of the 19th century. While important changes have occurred since reforms arising from the

Judicature Acts, fundamental reform has not been effected in the Western Australian civil justice system.

8.13 The current call for reform has at its core the objectives to reduce cost and delay. However, eagerness to attain these goals must not be at the expense of justice. Too often reform can be an end in itself, its goal only to appease ill-considered notions of justice. Reform must be a means to an end. The end for reforming the civil justice system must be to preserve a rational, coherent system of dispute resolution with its principal goal the achievement of justice between the parties involved.

9

Means of Commencing Civil Proceedings

Originating process

9.1 Generally a Writ of Summons, Originating Summons or Originating Motion is used to commence civil proceedings in the District and Supreme Courts, although there also are other forms in use. The document used to commence proceedings largely determines the interlocutory processes and the costs which can be recovered by the successful party. Usually the nature of the dispute determines the choice of initiating document.

9.2 When there are likely to be disputed questions of fact requiring pleadings and discovery, a Writ of Summons is used. The Writ of Summons allows for 10 times higher the award of costs than that for an Originating Summons, to reflect the additional costs involved in preparing the case. In the Local Court, there is only one originating process — the Plaint.

Reforming originating process

9.3 The Federal Court has adopted a single form of originating process. Public submissions reveal strong support for the adoption of a simplified originating process. While the adoption of a single form is an important reform, of itself it may not achieve a great deal in practice. Subsequent case management procedures must also be sufficiently flexible to allow the most appropriate form of pre-trial procedure to be adopted to suit the particular case.

Current content of originating process

9.4 The *Supreme Court Rules* currently provide that a writ may contain either a general endorsement (a concise notice of the grounds and nature of the claim and relief sought), or a statement of claim. A general endorsement is used where the writ contains a claim of fraud, defamation, malicious prosecution or false imprisonment. A writ and any statement of claim indorsed on it can be inspected by any person, as a court document, on the payment

of the prescribed fee. For this reason the existing rules do not allow a statement of claim to be included in a writ where the writ contains certain types of claims, such as defamation. The apparent purpose of this rule is to prevent the re-publication of unproven allegations.

9.5 The policy rationale for the retention of this distinction is open to question. It is a restriction on the fundamental rule that all proceedings in our courts be open to public scrutiny. At trial there will be no restrictions on publication of the allegations made, so why should earlier publication be restricted? Further, it is an ineffective rule because reputations can be seriously affected by allegations in a commercial case asserting, for instance, breach of contract or oppression of minority shareholders — cases which would not fall within the rule. This distinction should be removed and the same form of originating process used in all cases. The usual remedies available for abuse of process can handle abuse.

Limitation periods and general endorsements

9.6 Parties responding to originating process are entitled to reasonable details of the claims made against them at the earliest possible opportunity. General endorsements of the claim on the originating document are inadequate. In some instances, however, such as the looming expiry of a limitation period, there may be limited capacity to file the full case details with the originating document. (Recommendation 26 sets out the details required.) This difficulty would be ameliorated by our Recommendation 41 relating to the extension of the limitation periods in specified circumstances, noted in Chapter 10 and in a previous report of this Commission (1997). Other recommendations we make to reduce the technicality of pleadings also should assist. The present two-part process, where a general endorsement on the writ is followed by the full statement of claim, adds an unnecessary step to the process and causes delay. There may still remain circumstances where it is appropriate for case details to be provided separately. This should remain an option, but only with leave of the court.

Other jurisdictions

9.7 An examination of the means of commencing civil proceedings in other Australian states reveals a significant common feature. Broadly speaking there are two 'streams'. One involves cases in which there commonly will be significant contested issues of fact and the plaintiff anticipates substantial pre-trial activity. The other is for classes of cases in which significant tested issues of fact are less common and the dispute can be dealt with in a more summary fashion. One common defect in this division, however, is that it usually occurs by reference to classes of cases and not the circumstances of the individual case.

A single form?

9.8 In our view, case management obviates the need for artificial distinctions between different types or classes of cases. The pre-trial procedures appropriate to the individual case can, and should, be fashioned

by the particular circumstances of that case and not by a process of artificial classification. The information contained in the originating process should be adequate to identify the general nature of the case and the likely extent of factual dispute. (See Chapter 10.) In any event, the extent of factual dispute will be disclosed when parties being sued file details of their case in response.

Complaints, Writs or Applications?

9.9 One of the more contentious proposals in this area was the name of the new initiating document. The term 'application' is in current use in the Federal Court and in common usage by lawyers and the community: as in 'making an application to the court'. In the interests of standardisation we recommend that the originating process for civil proceedings in Western Australia be known as an 'Application'.

18. The sole form of originating process in Western Australia should be known as an 'Application'.

19. In the usual case, the Application should be endorsed with details of the applicant's case. (See Recommendation 26.) In exceptional circumstances leave of the court may be obtained to provide details of the case separately.

Prerogative writs

9.10 Currently there is no equivalent in Western Australia to the Commonwealth's *Administrative Decisions (Judicial Review) Act 1977* (Cth) and the *Administrative Appeals Tribunal Act 1975* (Cth). (Although see our recommendations in Chapter 33.) The only means of seeking judicial review of administrative decisions at law is through commencing civil actions through prerogative writs. Prerogative writs are writs issued out of the superior courts for the purpose of requiring the proper administration of justice by those individuals and bodies having the power to administer it. The most important prerogative writs today are writs of prohibition, *mandamus* and *certiorari*. *Prohibition* is a writ used to prevent an authority exceeding jurisdiction. *Mandamus* — 'We command' — is a writ used to compel an authority to perform its duty. *Certiorari* is a writ used to review the official record of a decision of a lower court or tribunal. For a writ of *certiorari* to be issued the official record of proceedings of the court or tribunal must show that it acted without jurisdiction or determined an issue of law wrongly. This is known as 'an error of law on the face of the record'.

9.11 Prerogative writs are normally used to initiate judicial review of the administrative arm of government and involve public officers and agencies. As discussed in Chapter 16, these writs normally have special costs rules as the court will not usually award costs against a public official or agency

successfully challenged in the courts. In our view, prerogative writs are an archaic anomaly in the civil justice system. Actions against public officers and agencies should be commenced by Application like any other civil action.

9.12 Actions involving judicial review of the administrative arm of government should be heard by a single judge, as is the case in the Federal Court. To initiate such an action it should not be necessary to prove error of law on the face of the record. This restriction on actions against public officers and agencies should be abolished. Reform of the costs rules associated with judicial review of administrative decisions is discussed at Chapter 16.

20. Prerogative writs should be abolished and actions for judicial review of public agencies and officers should be commenced by Application like other civil actions.

21. There should be no requirement to establish an 'error of law on the face of the record' in an Application to review actions of public agencies and officers.

9.13 It is undoubtedly true that initiating documents will need to be tailored to the particular facts and cause of action. The change of form of initiating process will only be effective if adopted in tandem with other recommendations in this Report

Case management and initiating process

9.14 Particularly relevant in this context are our recommendations in Chapter 12 which would see all cases that are not resolved through ADR processes listed for a compulsory status conference. Pre-trial procedures such as the extent of discovery, amendments to documentation and time frames would be determined at the status conference. These can and must be tailored to suit the circumstances of the individual case, and, in particular, to achieve a just resolution in the quickest and least expensive manner. We accept that real gains in terms of simplification and efficiency will not be achieved by the change of initiating documents alone. The recommended reform of the means of commencing civil proceedings can only be effective if implemented as part of a broader reform of the civil justice system.

10

Pleadings

What are pleadings?

10.1 Pleadings are the formal documents exchanged by parties in civil actions commenced by writ. These are supposed to define precisely the matters in dispute and the material facts on which reliance is placed to support the claim and the defence. Statements of Claim (including those indorsed on Writs of Summons), Defences, Replies, Rejoinders, Surrejoinders, Rebutters, Surrebutters, Counterclaims and Defences to Counterclaim are all 'pleadings', although some are rarely used in practice.

Are pleadings sacrosanct?

This case reminds me of a saying of the late Mr Jacob, that the importance of questions was in this ratio: first, costs; second, pleading; and third, very far behind, the merits of the case.

James LJ, *Hall v Eve* (1877) 4 Ch D 341, 344-345

10.2 For more than five centuries the production of formal written pleadings has been perceived as integral to the procedure by which civil disputes between parties are determined in common law courts. The rules of pleadings under which Western Australian courts currently operate are based on the same concepts as those introduced in the United Kingdom between 1873 and 1875 under the *Judicature Acts*, and revised in 1883. While there have been many initiatives from the judiciary and legal profession to change the system, until now change has been slow. The need for substantial reform of pleadings is regarded by many as long overdue.

Reform of pleadings

10.3 In South Australia two attempts to reform pleadings resulted only in the new pleadings rules being used as tactical weapons and as a means to oppress opponents. Costs increased without any consequent benefit to litigants. To be effective, changing the system of pleadings needs to be considered carefully. The system of formal written pleadings is not itself of cardinal importance to the efficient administration of civil justice. But the function of pleadings — to define issues and provide due notice 'at the earliest possible stage' — is essential. It is equally essential that the delay and expense incurred through the pleading process be proportionate to the issues in dispute between the parties and the contribution pleadings can make to the prompt and efficient disposal of those issues.

What are pleadings supposed to achieve?

10.4 Civil pleadings contain the particulars of a claim or defence and help to narrow the issues in dispute and reveal the case each party is making. Pleadings are supposed to:

- disclose whether there is a reasonable cause of action or defence;
- define the scope of discovery and interrogatories;
- determine the range of admissible evidence;
- identify the relief sought from the court;
- give parties notice of the case to be met and a reasonable opportunity to respond and prepare their case on the basis of issues disclosed and thus satisfy some of the requirements of procedural fairness.

If there are subsequent proceedings, pleadings in the earlier case identify the scope of the defence, known as *res judicata,* that the previous case or certain issues in it had already been decided.

10.5 To the extent that the parties, and not the court, define the issues which are in dispute, pleadings are integrally related to the adversarial nature of the common law justice system. Even with moves towards greater court management of cases, if the system of pleadings is retained in its current form, the parties will continue to 'set the court's agenda'.

Do pleadings achieve their goals?

10.6 The goal of pleadings is the efficient administration of the modern civil justice system. But do pleadings achieve this end? Currently pleadings are often standardised and reproduced with only minor changes. Phrases and sometimes entire paragraphs are reproduced as a kind of mantra, often in obscure or antiquated language and often without specific consideration being given to the relevance or aptness of the words being used. With word processing and other technological advances, documents have become longer and more complex. Preparing, filing and exchanging pleadings is expensive and time-consuming. Lawyers fear professional negligence claims if they limit the issues pleaded. Thus there is tension between a lawyer's professional duty to advance a client's interest to the fullest extent and the goal of pleadings as defining the issues in genuine dispute. (But see our Recommendation 439.)

Strike-out applications

10.7 Applications to strike out pleadings have become common place, despite judicial discouragement, and very often result in delay and expense which is entirely disproportionate to the role of a pleading in the prompt and efficient resolution of a dispute. Rarely do these applications result in summary termination of a case. The issues in a case are better addressed directly rather than through the guise of an application relating to a pleading.

The abolition of pleadings

10.8 In our view, in the overwhelming majority of civil cases, the time and expense consumed by the modern pleading process are wholly disproportionate to its utility in the ultimate resolution of the dispute.

Accordingly, we recommend the introduction of fundamental reform measures rather than minor refinement to improve the present regime. These measures are part of an overall scheme for the institution, progress and management of all civil proceedings in Western Australia. In our view the system of formal written pleadings and the procedural code of rules by which it is governed should be removed from all but exceptional cases to be identified by the judicial case manager and defined in Recommendations 36 and 37. This specific exception would continue to be referred to as 'pleadings' but in other instances, under our proposed new regime, the formal documents outlining the cases exchanged by parties in civil actions would be referred to as 'case statements'.

22. The system of formal written pleadings and the procedural code of rules by which it is governed should only apply in exceptional cases, to be identified by a case manager. (And see Recommendations 36 and 37.)

23. The term 'pleadings' only should be used to refer to the exception referred to in Recommendations 36 and 37. Generally 'case statements' should be used to describe Applications, Responses and other documents which parties exchange in civil actions to outline their cases.

A modern approach

10.9 Pleading has been described as an elaborate minuet in which the participants follow pre-ordained ritualistic rules gliding around and around each other without ever coming into direct contact. The traditional role of pleadings as notification to other parties of the case which is to be presented at trial is much more effectively performed by modern practices requiring parties to:

- exchange witness statements;
- agree the documents to be tendered; and
- exchange written submissions.

These procedures are in current use, but could, and in our view should, be expanded to require the parties to confer and then file a document recording the facts that have been agreed between them. This should generally occur sooner rather than later in the process of preparing the case for trial. In some more complex cases it may be appropriate to repeat the process closer to trial. Agreement should be encouraged by penalising a failure to agree a fact which turns out to be non-controversial at trial with an adverse costs order. When these procedures of exchange and conferral are applied, a party cannot credibly claim to be surprised or ambushed at trial, irrespective of the pleaded case.

24. Case managers should have the power to order parties to confer and file a statement of agreed facts.

25. The failure to agree facts not in contention should result in costs orders as appropriate.

Pleadings and the fact/law distinction

10.10 Under the present rules, pleadings are required to contain the material facts on which a claim or defence rests and not to include any statement of the legal nature of the claim or defence or the contentions of law on which parties rely. (In spite of this, there is a convention in Western Australia that plaintiffs may plead conclusions of law where these are supported by the material facts pleaded.) The distinction between fact and law in any event is often blurred and is of dubious utility in helping parties to identify the real issues in a case and resolve them sooner rather than later. Failure to identify, analyse and assert the legal issues at the early stage of proceedings reduces the likelihood of early compromise and eliminates any savings in expense and resources. It leads to applications to amend pleadings once legal issues are identified, again adding to costs and delays. It also reduces the capacity to identify preliminary issues which might be tried quickly and cheaply, perhaps with the consequence that the entire case is resolved. (See Chapter 14.)

26. In a concise narrative and non-legalistic form, case statements should state:

(1) in chronological order the facts which are material to the claim or defence;

(2) the legal nature of the claim or defence;

(3) the contentions of law on which parties intend to rely, including any statutory provisions; and

(4) in an Application, or Cross-Application, the relief sought.

Pleadings and the fact/evidence distinction

10.11 Under the present rules, pleadings are not supposed to include details of the evidence by which the material facts are to be proved. The distinction between fact and evidence is like the distinction between fact and law, often blurred. Maintaining the distinction is of dubious utility in helping parties understand the case that is to be put against them. Moreover, the notion that there need be no disclosure of oral evidence prior to trial is illogical when contrasted to the disclosure of documentary evidence through discovery and the practice of many courts to require pre-trial exchange of witness statements. Discovery, as discussed in Chapter 13, has resulted in over-disclosure of written evidence at unacceptable cost.

What should case statements contain?

10.12 We have considered whether case statements should:

- state how each allegation of fact will be proved;
- state the names, addresses, occupations and qualifications of the witnesses who will be called to give oral evidence;
- annex an outline of the evidence of the witnesses;
- identify the principal documents on which reliance will be placed; and
- annex copies of the principal documents on which reliance will be placed.

In our view these requirements would create a potentially costly barrier to litigation, with a significant 'front-loading' of costs. We agree with many commentators' views that such a proposal would require the 'getting up' of the case for trial before proceedings had even been issued. If ADR was successful, for example, significant wasted costs may result. Moreover the high cost of initiating an action could deter parties from settlement.

10.13 The proposals for what should be included in case statements can be divided into two components — proposals dealing with documentary evidence and those dealing with other evidence. In light of the submissions received, we have decided against recommendations concerning disclosure of non-documentary evidence at the outset of proceedings. However, the requirement to append principal documents which are in the possession of the relevant party should not be an excessive burden for prospective litigants. No doubt those documents will be assembled and considered at the time the case statement is prepared. (Note that, as discussed further in Chapter 35 on information technology, the concept of what constitutes a document is expanding. We use the term to refer not only to paper documents but also to documents in electronic form.)

27. All case statements should:

(1) identify the principal documents on which reliance will be placed; and

(2) annex copies of the principal documents on which reliance will be placed.

28. For the purposes of Recommendation 27, 'principal' documents are those documents which make the case statement intelligible and will usually be referred to in the case statement.

The Response

10.14 Consistent with the spirit of modern case management in civil actions, we consider it essential to allow the respondent an appropriate period of time to decide whether to defend an Application and, if so, to respond with the same degree of particularity as the applicant. The respondent should not be required to formally admit or deny claims made in the Application, but,

like the applicant, to provide a case statement which concisely outlines the respondent's case in a narrative and non-legalistic form.

29. The respondent should be required to file and serve a Notice of Intention to Respond within 14 days of delivery of the Application.

30. Within a maximum of 28 days from the delivery of the Application, the respondent should file and deliver a Response providing information comparable to that required to be provided in the Application.

Subsequent case statements

10.15 If the respondent wishes to seek some form of remedy against the applicant (other than costs) the case statement in response should contain a 'Cross-Application' providing information comparable to that in an Application. The Cross-Application should be answered by the original applicant by a 'Cross-Response' containing the same level of information. Further case statements should be discouraged as they are seldom helpful or illuminating. They should be permitted when some new fact or legal issue is to be asserted, being a fact or legal issue the discovery or relevance of which could not reasonably have been anticipated at the time the party prepared its Application or Response (as the case may be). Any potential harshness in this rule will be ameliorated by the relatively liberal regime for amendment of case statements which we propose. (See Recommendations 39 and 40.)

Delivery of case statements

10.16 Another important issue in relation to case statements, quite apart from the contents, is delivery or 'service' of these documents on opposing parties for higher court proceedings. In our view, the same process should satisfy the requirements for delivery in both the higher and lower civil courts.

31. Delivery of case statements for higher civil court proceedings should comply with the same requirements as set out in relation to Local Court process at Recommendations 169 and 170.

Truth in pleadings

10.17 In Western Australia, as in the rest of the common law world (outside the United States) there is no requirement for pleadings to be verified. Thus nothing contained in pleadings amounts to an assertion that the party or the lawyer believes that any facts pleaded are true. Neither the parties nor their solicitors are required to be frank about what they allege. The suggestion has been made that reform of the current system requires parties and their solicitors to be more accountable for inaccurate or unsupportable claims. Many of the contributors to the public review process we conducted were

highly critical of the current justice system for not being sufficiently focussed on establishing the truth of a matter in dispute. We agree. We also believe that the legal profession has a responsibility to ensure that only issues which are reasonably arguable are brought before the court.

32. The parties should be required to verify Applications, Responses and other case statements on oath or affirmation so as to assert:

(1) the truth of allegations of fact; and/or

(2) the falsity of facts which are denied; and/or

(3) inability to ascertain the truth of facts not admitted despite having made all proper inquiries.

33. When filing an Application, Response or other case statement, every legal practitioner responsible for the substantive preparation of the document must certify:

(1) the document is correct according to instructions provided by the Applicant or Respondent;

(2) the document is not presented for any improper purpose;

(3) the practitioner has reasonable grounds to believe that evidence will be available to sustain the factual allegations made; and

(4) all the issues raised in the document are, in the view of that practitioner, reasonably arguable.

34. If a party verifies a case statement in the knowledge it is false, the party may be punished as a contempt of court. If a legal practitioner certifies a case statement without any reasonable basis, the practitioner should be dealt with for professional misconduct.

Case management

10.18 In keeping with recommendations made throughout this Report to expand the role of case management by the courts, we suggest the task of court-managed scrutiny of case statements and identification of issues should be incorporated into the status hearing. As discussed in Chapter 12, the status hearing will follow either an initial assessment of unsuitability for ADR, or the unsuccessful attempted resolution of the dispute. We note that the ALRC (1999b) endorsed an enlarged role for the court at compulsory pre-trial conferences. At the status hearing the case manager also could rule on any application pursuant to Recommendations 36 and 37 that pleadings be allowed. The party making the application should be required to satisfy the case manager on the basis of stringent criteria that the case is an appropriate one for pleadings to be allowed.

35. At the status hearing the case manager shall:
(1) assess the adequacy of the documentation filed; and
(2) ensure that the true nature and scope of the dispute has been identified.

36. Upon application by any party, the case manager should be empowered to determine:
(1) whether pleadings are appropriate to the case at issue; and
(2) the extent and nature of such pleadings.

37. Before the case manager allows a pleadings process for a particular case the party making the application must show that pleadings:
(1) are likely to save time;
(2) are likely to save costs; and
(3) the cost associated with pleadings would be proportional to the value of the dispute and the cost of litigation.

Pre-trial disclosure of non-documentary evidence

10.19 The ALRC (1999b) raised concerns over requiring parties to provide extensive material at the early stages of the litigation process. It also highlighted the practical consideration that cases develop as further pleadings are filed and more evidence is located. Thus there may be a need for pleadings to be amended during the course of the case. However, should a dispute be listed for a status hearing after being assessed as unsuitable for ADR or unsuccessfully referred, it does not impose too onerous a burden to require parties to disclose detail of the evidence to be relied upon at trial. Disclosure of expert witness evidence is discussed in more detail in Chapter 22. Because of the limited use that may be made of expert evidence until the facts in dispute are clearly identified, it is not proposed to require the exchange of expert witness statements at this stage of the proceedings.

38. Where ADR is unsuitable or not successful, 14 days prior to the status hearing and unless the case manager orders otherwise, the applicant must file and serve a supplement to the Application (Application Part II: Pre-Trial Procedure Memorandum) and the respondent must file and serve a supplement to its Response (Response Part II: Pre-Trial Procedure Memorandum) seven days prior to the status hearing.

The Pre-Trial Procedure Memoranda should:
(1) state how each allegation of fact will be proved;
(2) state the names, addresses, occupations and qualifications of the witnesses who will be called to give oral evidence; and
(3) annex outlines or statements of the evidence of each non-expert witness.

Amending case statements and memoranda

10.20 Amendments to case statements, including pre-trial memoranda, should be permitted at any time provided they are accompanied by a certificate from the legal practitioner responsible for preparing the amended statement (or, if no legal practitioner is acting, the party) to the effect that the amendments raise issues or facts that were either:

- unknown to the party at the time of the original case statement; or
- not foreseen at that time as being relevant to an issue in the case.

The case manager should have a discretion to disallow amendment if it could prejudice any other party which prejudice could not be adequately compensated for by an appropriate costs order, or if it would be contrary to the public interest in the efficient administration of justice.

39. Amendments to case statements, including pre-trial memoranda, must be certified by the legal representative or self-represented litigant as raising issues or facts that were either:

(1) unknown to the party at the time of the original case statement; or

(2) not foreseen at that time as being relevant to an issue in the case.

40. The case manager should have a discretion to disallow amendment to case statements, including memoranda, on the basis that the amendment:

(1) could prejudice any other party and the prejudice could not be adequately compensated by an appropriate costs order; or

(2) if it would be contrary to the public interest in the efficient administration of justice.

Reforming pleadings and the adversary system

10.21 Some advocates argue that if parties are required to disclose legal arguments and oral evidence, opponents will benefit. However, this view is based on the adversarial culture of legal thinking. Disclosure may equalise the contest between litigants with unequal access to resources. Nuisance suits also may be reduced by the requirement that significant economic resources, thought and preparation be put into cases at an earlier stage.

Pleadings and time limits

10.22 Will reform requiring the disclosure of evidence delay the lodging of applications? Particular hardship may arise where lawyers receive instructions shortly before the expiration of limitation periods. This hardship could be alleviated by implementing the previous recommendations of this Commission (1997) to amend the outdated *Limitation Act 1934* (WA). In our view this

reform is justified by reference to the grounds on which any such extension would be allowed — that is, in the interests of justice. The key recommendation from the 1997 *Limitation Report* is as follows:

> The court should be able to order that either the discovery period or the ultimate period may be extended in the interests of justice, but should only be able to make such an order in exceptional circumstances, where the prejudice to the defendant in having to defend an action after the normal limitation period has expired, and the general public interest in finality of litigation, are outweighed by other factors. The court should be able to take all the circumstances into account, including the following:
>
> (a) The length of and reasons for delay on the part of the plaintiff;
> (b) The extent to which, having regard to the delay, there is or is likely to be any prejudice to the defendant;
> (c) The nature of the plaintiff's injury;
> (d) The position of the defendant, including the extent, if any to which the defendant had taken steps to make available to the plaintiff means of ascertaining facts which were or might be relevant to the cause of action of the plaintiff against the defendant;
> (e) The conduct of the defendant;
> (f) The duration of any disability of the plaintiff arising on or after the date on which the injury became discoverable;
> (g) The extent to which the plaintiff acted properly and reasonably once the injury became discoverable;
> (h) The steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice received.

41. The previous recommendations of this Law Reform Commission (1997) to amend the outdated *Limitation Act 1935* (WA) should be implemented so that in the interests of justice there is a judicial discretion to extend the limitation period from the date the Applicant knew of the claim or from the date the claim arose.

Respondents' extension of time

10.23 Respondents also should be able to apply to the court for an extension of time to file and serve a case statement.

42. Extension of the period within which the Response must be filed and delivered should be permitted only by court order.

43. A respondent seeking extension of the period within which to file and serve a Response should be required to provide the court with a verified statement setting out:

(1) the documentation for appending to the Response which he or she has been able to assemble;

(2) a detailed outline of the additional documentation necessary to properly defend the Application;

(3) an explanation of the basis upon which the extension is sought; and

(4) an indication of the length of the extension required.

Self-represented litigants

10.24 It is important that increased demands on parties to state the legal nature of the claims in Applications or Responses and the contentions of law relied upon do not exclude self-represented litigants from the civil justice system. The early judicial supervision of proceedings and scrutiny of documentation filed should ensure that self-represented litigants are not in a worse position as a result of these reforms. Our recommendation to establish a dedicated self-represented litigants case management track in the higher courts should be of particular assistance. (See Recommendation 202.) Early access to opponents' legal arguments also should help. The ALRC's submission (1999b) notes that case-conferencing at the early stages has worked successfully in the Commonwealth Administrative Appeals Tribunal where there is a high percentage of litigants who are not legally represented.

Case statements, timeliness and sanctions

10.25 We accept that the reforms we propose place greater demands on practitioners to prepare fully in less time. In order to clarify the obligations and responsibilities of legal practitioners we recommend the following additions to the Professional Conduct Rules. See also Chapter 36 where we recommend amendments to the *Legal Practitioners Act 1893* (WA) providing immunity from liability for professional negligence for practitioners acting in good faith pursuant to the obligations to narrow the issues in a case and only advance arguable issues.

44. The Professional Conduct Rules recognise that:

(1) it is appropriate professional conduct for a practitioner to decline an instruction to prepare and file an Application or a Response when the demands of the practitioner's practice do not allow sufficient time and attention to be devoted to prepare that document properly and in a timely manner. No professional sanction should be levied against a practitioner who declines an instruction on this basis;

(2) if a practitioner accepts an instruction to prepare and file an Application or a Response he or she undertakes that the demands of his or her practice are such that sufficient time and attention can be devoted to prepare that document properly and in a timely manner; and

(3) if, having accepted an instruction to prepare and file an Application or Response, a practitioner fails to prepare that document fully and in a timely manner professional sanctions may be levied against that practitioner for professional misconduct.

Departure from a case statement

10.26 We have endeavoured to emphasise that case statements should be non-technical, non-legalistic documents taking a narrative form. They will provide a platform for pre-trial preparation but should not be regarded as prescriptive, in the same sense as a pleading prescribes the case. Prescription in that sense is unnecessary because of the recommendations we make for:

- the utilisation of other mechanisms for pre-trial disclosure — exchange of witness statements (Chapter 21), written submissions (Chapter 15), agreement as to facts (this Chapter) and documents to be tendered (Chapter 13); and
- the allowance of discovery by reference to specific issues (Chapter 13).

It follows that a party normally should be permitted to go beyond his or her case statement at trial.

45. A party should be allowed to go beyond his or her case statement at trial unless the trial judge decides that:

(1) the facts or legal propositions relied upon are substantially different from those disclosed in the course of the pre-trial procedures; and

(2) another party will be substantially prejudiced in the presentation of its case at trial.

11

Alternative Dispute Resolution

What is Alternative Dispute Resolution?

11.1 Dispute resolution processes which avoid formal litigation in the courts are often called Alternative Dispute Resolution ('ADR'). In litigation, the dispute is understood only in terms of the evidence presented by the parties to the court. The judge or magistrate determines what evidence is relevant and what the law is before making a ruling on which party is 'right'. This is known as 'rights-based' dispute resolution. The court's ruling becomes an enforceable order. In almost all civil cases the losing party is required to pay the legal costs of the winning party. The key distinguishing characteristic of ADR is that, in theory at least, after the parties meet together with a neutral third party (the 'neutral') to discuss the case, they come to a resolution upon which the parties agree. Because the parties agree, there is less likely to be a 'winner' and a 'loser'. Moreover, costs can be agreed upon as well, with parties often deciding to bear their own costs. Another significant characteristic of ADR is that the issues need not be as narrowly confined as they are in litigation. This may give greater satisfaction to the parties as it allows the resolution to address underlying issues which may be excluded in litigation. This is known as 'interest-based' dispute resolution.

11.2 ADR includes a range of processes alternative to litigation. These may be court-based as well as community-based and include mediation, conciliation, facilitation, early neutral evaluation, expert appraisal and arbitration. Court officials need not necessarily conduct court-ordered ADR, although at present as a general rule they do. ADR processes do not normally result in enforceable outcomes and are effective only because the parties agree to them. However, the parties' resolution can become enforceable as a court order if the ADR process is related to court proceedings and the resolution is entered as a judgment by consent.

ADR or litigation

11.3 Many public submissions supported the extension of ADR prior to civil litigation. The response from our stakeholders' survey also was overwhelmingly supportive of this idea. The potential for non-adversarial, cost-effective, efficient and prompt resolution of disputes through ADR undoubtedly is attractive. However, the attraction of ADR does not outweigh the need to maintain a civil justice system which is accessible, fair and equitable. As we observed in Chapter 1, 'Touchstones of the Justice System', the courts play a unique role in the vindication of the rights of the citizen. Court resolutions — unlike those achieved by ADR — also may lay down principles which go well beyond the case at hand. In these respects ADR and litigation should be seen as complementary rather than competing dispute resolution processes.

Recent developments

11.4 ADR has been used increasingly during the past decade and already plays a significant role in the justice system. Litigants often prefer settlements achieved through ADR because it is faster and less expensive than waiting for a decision from a judge. In Western Australia, all courts presently consider a form of ADR for parties involved in a civil dispute before the matter proceeds to trial. An officer of the court usually acts as the neutral in the ADR process. The dispute between the parties is normally confined to the subject matter before the court. There is also a range of community options for mediating disputes ranging from 'user-pay' schemes to publicly funded community mediation services.

ADR in the higher courts

11.5 In 1993, the Supreme Court introduced mediation in an attempt to reduce the backlog of matters in the civil list awaiting trial: Order 29, *Supreme Court Rules*. The procedure is now used throughout the civil list, and the court and case management registrar have discretionary power to order parties into mediation. There are some 1,300 civil proceedings filed in the Supreme Court of Western Australia each year. In 1997, the Supreme Court conducted 283 mediations, of which 25 actions proceeded to trial after mediation failed and 184 matters were resolved prior to trial.

11.6 Only two to five per cent of the 7,000 civil actions initiated in the District Court each year complete trial. All parties involved in civil litigation in that court must attend a pre-trial conference after the filing of a request for entry for trial. Parties resolve half of all actions filed without assistance from the court. Another 30 per cent of civil actions resolve with the assistance of a registrar trained in ADR.

ADR in the Local Court

11.7 Of the 46,925 plaints filed in the Local Court in 1995/96, only 12 per cent proceeded to trial. A large proportion of Plaints filed in the Local Court are undefended and resolve by default or summary judgment. In 1996, 38 per cent of all defended matters resolved at the pre-trial conference, a further 19 per cent settled shortly thereafter and 7 per cent at the court room door

or within a short time of commencement of the trial. Although the introduction of compulsory pre-trial conferences in the Local Courts has reduced the number of matters which settle on the day of the hearing, there continues to be a significant number of matters which settle at the last moment.

Community-based ADR schemes

11.8 There is a wide range of schemes available to enable disputes to be resolved in the community rather than in the court. Publicly funded community mediation services, private mediators, conciliators and arbitrators provide ADR. Specialist ADR providers include LEADR (Lawyers Engaged in Alternative Dispute Resolution), the Institute of Arbitrators and Mediators Australia, Relationships Australia and Centrecare.

Commercial and technical disputes

11.9 Private mediators or arbitrators often provide ADR for commercial disputes. One of the major reasons why commercial interests choose mediators and arbitrators as ADR methods is that, unlike court processes, ADR is private. As a result there is little information available about the cost of private ADR, although it can be assumed that such a process is likely to be cheaper than litigation. Parties often prefer private mediators and arbitrators for commercial and technical disputes because they also can bring specialised knowledge to the dispute resolution process, which may not be available in the courts.

Publicly funded ADR in the community

11.10 In Western Australia the Ministry of Justice funds the Gosnells and Bunbury Community Mediation Services and a mediation service operated by the Citizens Advice Bureau. (The Aboriginal Alternative Dispute Resolution Group was suspended in April 1998 but has received funding for 1999/2000.) Other than disputes over dividing fences and neighbourhood restraining order matters, court registries in Western Australia refer few matters to community mediation services. In some other Australian jurisdictions considerable resources are devoted to community mediation centres. In previous years, for example, New South Wales allocated 18 times the Western Australia budget to community based mediation, although the population differential is only approximately four times as large.

46. There should be an appropriate level of community mediation services in Western Australia. Infrastructure, coordination, operation, information support services, mediators, the training of staff and volunteers, and promotion of the services will need to be provided for if community mediation services are to be successful.

The limits of ADR

11.11 Methods of dispute resolution vary according to the degree of control that remains with the parties. In contrast to court procedure which is fixed

and where individual parties have little influence upon court process, mediation allows the parties to retain not only control over the determination reached but also control of the process. While this is one of the strengths of ADR, it also means that when there is a significant power imbalance between the parties, it may be that less control in the hands of the parties will afford a greater potential for fairness in the outcome. The type of dispute and the nature of the relationship between the parties dictate that different processes be used. There is no single model that is suitable for all types of dispute. In some cases ADR will not be appropriate at all.

47. A system should be implemented in the various courts to determine after each case is filed whether ADR is suitable, and, if so, which method of dispute resolution is best suited to the case.

48. Guidelines should be developed to assist in evaluating the suitability of each dispute for ADR with regard to the following:

The Dispute

- whether the dispute arose due to a misunderstanding between the parties;
- the subject matter of the dispute;
- how the dispute arose;
- whether the dispute concerns the interpretation of a statute;
- whether the matter is a 'test case'; and
- whether the claim is to recover a debt.

The Parties

- the degree of privacy desirable;
- the relationship between the parties;
- whether there is an ongoing relationship between the parties;
- the nature of the parties (individuals, organisations, government entities or businesses);
- the views of the parties;
- the views of the parties' legal representatives, if any; and
- the potential for, or degree of, power imbalance between the parties, if any.

Disclosure Issues

- whether the dispute is the result of failure to disclose information; and
- whether there is a need for further information of a technical nature in order to resolve the dispute.

49. The information to assess a case for ADR will usually not be apparent from the initial court process. A questionnaire and a confidential case management conference will generally be required.

Access to justice

11.12 Currently, court filing fees may be waived for various reasons. If litigants are unable to afford legal representation they may be assisted by Legal Aid or similar organisations, discussed in Chapter 18. If not eligible for assistance, litigants are entitled to represent themselves. It is important that the suggested reform of the legal system to more fully integrate ADR does not act as a practical barrier to access to the justice system. Although in the longer term we hope to see a reduction in demands for publicly funded legal assistance through a reduction in litigation expenses, in the short term this is unlikely to balance rising demands for assistance against an already over-stretched system. We recommend that in determining the appropriate ADR processes and neutrals, not only should the matters listed in Recommendation 48 be considered, but also the cost of ADR.

50. When determining appropriate ADR processes and neutrals, consideration should be given to any associated costs to the parties with reference to:

(1) the value (monetary and non-monetary) of the dispute;
(2) the financial positions of the parties; and
(3) the merits of the competing claims.

Classifying disputes

11.13 Currently there is little information available on the nature of the disputes before the courts. For example, while courts can provide the actual number of proceedings commenced, the only means of categorising the number of cases by subject matter is by reviewing each file individually to determine the various types of cases and the number of each. Without information, it is difficult for courts to plan a system for dealing with disputes in a manner alternative to litigation. The ALRC (1999c) stresses the need for data to assist courts in the identification of appropriate characteristics of cases amenable to ADR and those which should proceed directly to adjudication by a judge. Our recommendations in Chapter 5, 'Measuring the Justice System', and Chapter 35, 'Technology and Justice', should assist in the development of data collection processes which enable court services to be responsive to users' needs.

Compulsory ADR?

11.14 In the purest sense of dispute mediation there can be no compulsion involved. On a practical level the ALRC (1999c) notes that there are no clear data on the effectiveness of mandatory ADR processes or whether ADR promotes settlement of cases or limits the overall costs of litigation. There also is a danger that ADR would become simply a step in the process of litigation if it is mandatory. Matching appropriate dispute resolution techniques to the variety of cases, as we have recommended, is one means of enhancing the success of ADR.

11.15 When parties use public resources to assist in the resolution of private disputes, is the State entitled to insist that parties attempt to resolve matters quickly and without trial? We believe that unless a particular case is assessed as unsuitable for ADR or falls within a number of specified exceptions, the parties should be expected to seek to resolve the dispute in good faith without resorting to litigation.

11.16 In expecting potential litigants to attempt to resolve the dispute in good faith, we are not expecting them to capitulate on their principles or go beyond or below the sound elements of their case. What we recommend is that parties reconsider those parts of their case which they accept, or after discussion realise, are not clear or strong. It is important not to regard the usefulness of ADR as limited to settling actions; it also can serve an important function by narrowing the issues for trial.

51. There should be a presumption in favour of ADR unless the case manager to whom the matter is referred has reason to decide otherwise. Unless the case manager certifies that a dispute either could not or should not be resolved other than by adjudication, the parties should be expected to make a good faith effort to resolve the dispute by an appropriate method of ADR.

52. The expectation that parties make a good faith effort to resolve the dispute by an appropriate method of ADR means only that parties are expected to reconsider those parts of their case which they accept, or after discussion realise, are not clear or strong.

Sanctions and ADR

11.17 To ensure that ADR is effective, a form of sanction should be imposed if parties refuse to resolve the dispute through good faith mediation. One of our most contentious Consultation Draft proposals was to deny access to litigation in the courts if parties refuse to engage in ADR. (See Consultation Draft 2.3.) Commentators saw this proposal as inconsistent with the democratic right of access to the courts as well as inappropriate for some types of disputes. In our view if parties to a matter which has been assessed as suitable for ADR refuse to negotiate in good faith, according to the standard set out in Recommendation 52, they should be subject to sanction, but access to the publicly funded court system should not be barred.

53. Failure by parties genuinely to attempt to resolve a dispute during ADR after commencing litigation should be considered by the court in assessing costs. The matter should be brought before the court, after adjudication, by means of certification by the neutral. Matters

to be considered by the court in imposing cost disincentives should include:

(1) the principles of natural justice; and

(2) the inequity to parties who may be in differing financial circumstances.

54. The current practice of recording on the court file that an ADR process was concluded without settlement being attained is appropriate and should continue. Matters relating to the imposition of cost disincentives should be raised only after adjudication of the dispute.

The role of the neutral

11.18 We recommend that the neutral should make the assessment of parties' refusal to negotiate in good faith. Some suggest that this approach is inconsistent with the proper role of ADR and requires a person who is supposed to be in a neutral role to adopt a judgmental attitude. To some extent this is a valid criticism. However, we believe that the combination of our recommendations should mitigate any inconsistency. A broad range of matters will fall outside the guidelines for referral to ADR. Further, parties' wishes, amongst other things, must be considered in the assessment of suitability for ADR. Parties will have the opportunity to personally put their views at the initial meeting with the case manager. Finally, as set out in Recommendation 52, what is expected of parties in order to genuinely attempt to resolve a dispute through ADR is only an openness to considering those parts of their case which they accept or, after discussion, realise are not clear or strong. Given these safeguards we do not believe the standard is onerous or that the neutral would be compromised in making an assessment.

Lack of cooperation

11.19 Certification by a neutral that a party had entered into good faith negotiations would not prevent the case manager from later making an adverse costs order under *Supreme Court Rules* Order 29A rule 11(2). The court may determine that a party generated unnecessary costs by not cooperating during mediation.

When should matters be referred to ADR?

11.20 Another issue raised in relation to the effectiveness of ADR relates to limitations arising if it is required at an early stage of the usual litigation process. Currently in the Supreme Court mediation may be attempted at various stages of the litigation process. There are no statistics or anecdotal evidence to suggest whether early or late mediation brings better results. On one hand, the earlier a matter is referred to ADR the better, as parties avoid becoming entrenched in their positions. On the other hand, in some cases discovery may be needed before the parties can try to resolve disputes. Our Recommendation 27, requiring the appending of documents to case

statements, and Recommendation 48, requiring consideration of issues of disclosure in assessing the appropriateness of ADR should help address the latter concern.

55. Disputes assessed as suitable for ADR should be referred to ADR prior to the commencement of any other procedure associated with litigation, with the exception in limited circumstances of disclosure and/or interrogatory procedure as determined by the case manager.

56. If resolution cannot be achieved initially through ADR, the case manager should retain a discretion to refer the parties again to ADR at any later appropriate time.

Who should conduct ADR?

11.21 We have already indicated that the case manager should have guidelines upon which to assess the most appropriate method for conducting ADR. The effectiveness of ADR is dependent not only on the kind of ADR utilised (whether interest- or rights-based, mediation, conciliation, arbitration) but also the status of the neutral. The neutral's expertise in a particular area of ADR, law, commerce or other technical field also may be relevant and the status and technical expertise in particular fields may not necessarily be available through court-based ADR.

Court-based ADR

11.22 There has been significant debate about whether court officials can appropriately carry out ADR. The ALRC (1999c) commented that studies have shown court-based mediators have a clear interventionist approach, in part motivated by their knowledge of likely court orders in the dispute at hand. The ALRC refers to a mixed response to such mediations — with some arguing that it is an appropriate and practical approach and others concerned that it interferes with the mediator's neutrality. An interventionist approach may be useful in some cases where the neutral can advise parties of the likely outcome of a dispute if ADR fails such as the details of the costs, dates and the estimated length of trial. Another objection to ADR by court officials relates to a perceived lack of appropriate qualifications and/or qualities. Currently in Western Australia all court officials who conduct mediation have training in ADR but may not have substantial forensic experience or seniority in a professional sense.

11.23 Any court-based neutral undertaking ADR should be of sufficient stature in the court system to:

- obtain the respect of the parties; and
- have knowledge of the likely outcome should the matter proceed to adjudication.

It would be difficult for any court-based neutral to meet these requirements who is not a judge or retired judge, or senior court officer. To this end, it would be useful if it were made clear that conducting mediation or arbitration is not equivalent to legal practice and so should not affect the pension entitlements of retired judicial and court officers.

57. Court officials who undertake ADR should have successfully completed training in ADR in a course of an appropriate level.

58. Appointed or retired judges and senior court officers should conduct court-based mediation.

ADR and legal representation

11.24 One important factor in assessing the balance of power between the parties to a dispute is access to legal representation. Should ADR be considered when only one party has legal representation? One means of addressing this imbalance would be to appoint a skilled neutral who is familiar with the law on the subject matter of the dispute. When assessing the most appropriate form of ADR for such a dispute, court-based ADR may have much to commend it. A legally qualified neutral could ensure that appropriate questions are asked of the self-represented party so that the dispute is more likely to be resolved fairly. While this may not completely redress the imbalance, the lack of representation also would affect a person involved in formal litigation.

11.25 If both parties are self-represented then the power balance is more equal, although the neutral may need to take a more active role to ensure that all relevant information is elicited to enable the dispute to be resolved. When parties do not have legal representation, they should be able to interrupt the ADR process to obtain further information, including legal advice.

59. Where one or more parties to a dispute are not legally represented:

(1) the neutral should have experience in the area of law relating to the subject matter of the dispute; and/or

(2) the process may be interrupted to allow for the parties to obtain further information including legal advice.

Other objections to court-based ADR

11.26 Another objection to court-based ADR rests on the mediation process itself. Mediation permits *private* access by individual parties involved in the dispute to the court neutral, contrary to litigation where private access by parties to the court is not permitted. Other objections to court-based ADR include the imposing status of court officials, inflexible processes, and

the lack of time available for court officials to conduct mediation. To some extent, these considerations are balanced by the status of the court official impressing upon the parties the seriousness of the negotiation and the court procedure providing a structure and rules which are binding on the parties and obvious for all to see.

Community-based ADR

11.27 While currently there is reason to continue to maintain an option of court-based ADR, must ADR be court-based? One difficulty is that the requisite skills, status and expertise for effective ADR may not necessarily be available in court employed neutrals. We recommend that the case manager have a discretion to refer the parties to ADR conducted by someone other than a court official.

11.28 Given the significant role of court-ordered ADR in our revamped civil justice system, in general it should only be undertaken by approved neutrals and court officials. The case manager should consider the parties' wishes if they elect to use someone other than a court-approved neutral.

60. The case manager should have an option to refer parties to ADR using an approved list of neutrals.

61. Should the parties elect to have a neutral who is not court-approved, the case manager should take into consideration the views of the parties as to the appropriate neutral to conduct ADR.

62. The Mediation Act (at Recommendation 69) should establish a process for regulating ADR including registration of approved neutrals for the purposes of court-ordered ADR. The Act also should provide a means for parties and others to apply to have a neutral registered.

Community mediation services

11.29 There appears to be no reason why better resourced community mediation services could not play a significant role in court-ordered ADR. There is debate about whether community-based mediators should be legally qualified. Although it is useful for mediators to have an understanding of court proceedings and the possible outcomes, this does not require mediators to have legal qualifications. If ADR is interest-based rather than rights-based, mediators need only have skills to assist the ADR process. Because community-based mediations are currently interest- rather than rights-based, and the majority of disputes mediated are neighbourhood disputes, mediators need not be legally trained. However, provision should be made for parties to obtain information about their legal rights.

63. The recommended Mediation Act should impose an obligation on anyone conducting court-ordered ADR to ensure that parties undertaking ADR are acquainted with their legal rights.

64. The recommended Mediation Act should enshrine the desirability of parties who undertake ADR being aware of their legal rights.

Who should pay for ADR?

11.30 The issue of who should pay for court-ordered pre-litigation ADR is a complex one. The court system provides the present system of court-based ADR because ADR can avoid the more expensive and time-consuming costs of litigation in the publicly funded court system. If parties choose an external, court-approved mediator they share the cost equally.

11.31 There is a legitimate expectation amongst potential litigants involved in technical, commercial or highly specialised disputes and others, that they should not be expected to use a process which does not meet their special needs. This would require court-ordered ADR to include neutrals outside the court system. If this were to be publicly funded, it would result in government assuming a considerable liability for dispute resolution which currently, in many instances, is paid for by potential litigants themselves. We therefore recommend that ADR processes utilised prior to litigation should be privately funded.

11.32 Once a matter goes to a status conference the judicial case manager may determine that it is appropriate for the matter to be referred, either for the first time or again, to ADR. In our view, should court-based neutrals conduct ADR at this stage the process should be publicly funded. If parties elect to have ADR conducted by non-court based neutrals after the status conference, the cost should be borne privately, as is currently the practice. While the option of publicly funded ADR after the status conference may be seen to act as a disincentive to early resolution of the dispute, this ignores the reality that early resolution can achieve significant savings in time and money for the parties. In particular, the significant costs associated with preparing Pre-Trial Memoranda, which must be filed prior to the status conference and include outlines of witness evidence (Recommendation 38), should be a sufficient deterrent to those seeking to improperly take advantage of publicly funded ADR after the status conference. There is also the possibility that adverse costs orders could be made against an uncooperative party under *Supreme Court Rules* Order 29A rule 11(2) and Recommendation 53.

65. The parties should bear the cost of ADR prior to litigation.

66. ADR after the status conference should be conducted by a court-based, publicly funded neutral; otherwise the parties should pay the cost of ADR.

Effectiveness of ADR

11.33 ADR is not necessarily effective and, in some circumstances, can be of doubtful value, particularly where it is part of a standard pre-trial process. If ADR is merely a step in the process of litigation rather than an important opportunity to resolve the matter, ADR may become part of a more protracted and expensive litigation process. The profile of ADR must be improved so that ADR carries significant weight within the justice system. As long as ADR is viewed as merely a perfunctory step in the litigation process only junior legal staff members will attend ADR conferences. Juniors often will not be sufficiently in control of the litigation to be able to resolve the dispute. It is also important for parties to take an active personal part in ADR if it is to be effective.

11.34 The litigants' handbook, recommended in Chapter 16, is one means not only of providing information on ADR processes to potential litigants, but also of discouraging any perception of court-ordered ADR as merely another step in the litigation process.

67. Court-ordered ADR should have greater status by ensuring:

(1) legal representatives attending must either have conduct of the file or authority to settle the matter; and

(2) the parties, and not just their representatives, must attend ADR conference(s).

68. The civil litigants' handbook (see Recommendations 123 and 124) should include a substantial discussion of ADR, explaining the processes and emphasising its significance, once ADR is assessed as appropriate, as a means for resolving disputes in a non-adversarial, efficient, cost-effective and prompt manner.

'Without prejudice' ADR

11.35 Currently, court-based mediation is 'without prejudice' while community-based mediation normally requires parties not to divulge information obtained in the mediation in subsequent legal proceedings, nor to call the neutral as a witness. For ADR to be effective it is essential that there be full and frank discussion between the parties. Therefore confidentiality is important. No party should be permitted to use information gleaned from the ADR process against the other party if the matter proceeds to trial. It also is essential that the neutral be entitled to claim privilege; that is, not be required to give evidence of what was said during the ADR process. In response to the ALRC (1998) Issues Paper (No. 25) there was strong support for the absolute confidentiality of ADR processes, although there were some reservations in relation to admissions concerning violence against children.

11.36 Amendments to the *Supreme Court Act* will be presented to Parliament in 1999, providing for confidentiality and privilege, amongst other things, relating

to mediations. However, these issues extend beyond the courts to community-based mediations. Legislative reform needs to be of general application.

69. A Mediation Act should be enacted which encourages mediation and includes provisions based on the *Evidence Act 1995* (Cth) which:

(1) ensure the confidentiality of mediation conferences; and

(2) provide ADR neutrals privilege from being required to give evidence of what transpires during the course of ADR.

70. If there are to be exceptions to the provisions conferring confidentiality on ADR conferences and privilege to neutrals, these should be clearly identified in the recommended Mediation Act.

Litigation as a last resort

11.37 One problem with the practical implementation of ADR is that often, when a party seeks assistance over a dispute, lawyers launch into litigation without attempting to resolve the dispute by any other means. Litigation is the focus of legal training. Further, until litigation is commenced, there is little opportunity for lawyers to claim costs from the other party for work done on behalf of a client should negotiation be successful. A change in attitude is required. Litigation should be seen as the last resort rather than the first. (See also our recommendations on continuing education for legal practitioners in Chapter 36.)

71. The litigation cost scales should be amended to allow for solicitors' reasonable costs incurred prior to litigation.

72. The *Legal Practitioners Act 1893* (WA) should be amended to impose an obligation on all legal practitioners instructed in a civil matter to:

(1) consider the possibility of ADR;
(2) apprise clients of the possibility of ADR;
(3) give clients specific advice about the availability of ADR resources; and
(4) discuss with clients the costs implications of ADR.

Costs disclosure and ADR

11.38 Case management registrars already have power under the *Supreme Court Rules* to order solicitors to provide clients with:

- a written statement of fees incurred to date;
- an estimate of likely future costs;

- the likely amount recoverable if the case is won; and
- the likely amount owed to the other side if the case is lost.

The orders are typically made before the pre-trial mediation conference and after the close of pleadings. At Recommendation 121 we recommend that solicitors be required to advise their clients of the likely costs to resolve a dispute. However, we also believe that costs disclosure could be useful in the ADR process.

73. Cost disclosure orders should be made as part of an order for referral to ADR in all courts. The solicitors for the parties should be directed to bring a copy of the cost statement to the ADR process and the neutral should be permitted to inspect the statement upon request if the neutral thinks it appropriate to do so.

74. The neutral conducting the ADR, as well as the officer making case management directions, should also be permitted to require the solicitors for the parties to provide updated cost statements from time to time.

Appeals and ADR

11.39 The ALRC (1999c) pointed out a development in the United States involving the use of ADR in appellate courts. Parties can agree to 'vacate' or overturn court judgments. This feature of the appeal system provoked concern in the United States, as litigants are perceived to be overturning the authoritative rulings of lower courts. The Supreme Court of Western Australia, under Order 65B of the *Rules of the Supreme Court*, has power to order the mediation of appeals. The ALRC expressed concern about the courts requiring appellate parties to utilise ADR.

75. The power to order parties to an appeal to enter into ADR under Order 65B of the *Supreme Court Rules* should be limited to:
(1) exceptional cases; or
(2) narrowing or defining the issues on appeal.

11.40 Another issue is whether there should be appeal rights relating to the ADR process. In our view, the orders made by the registrar and subsequently by the case manager are case management directions designed to reduce the expense and time taken in litigation. It would be counter-productive to allow appeals in relation to these directions, particularly as parties retain the option of proceeding to litigation in any event.

12

Case Management

Case management

12.1 In recent years in Australia there has been a significant move away from wholly, or largely, lawyer/client driven litigation towards case management by the courts. The traditional non-interventionist role of the courts — consistent with the philosophy of an adversarial system — is progressively being replaced by a system where courts play an active role in the management and progression of civil proceedings. The object is to achieve a better result for litigants and a more effective use of publicly funded resources in the court system. The critical question, however, is how can case management itself be best structured to achieve this? There is growing evidence that in some cases judicial intervention in litigation does not significantly reduce delay and may actually increase costs. Recently, Lord Browne-Wilkinson (1999) sounded a note of caution over the potential costs associated with case management reforms implemented in the United Kingdom as a result of the Woolf Report (1996). Extensive research in the United States (covering 20 districts and involving 12,000 cases over four years) also casts doubt upon the cost effectiveness, at least in that country, of individualised case management systems. The research by the Rand Corporation also showed that case management had little impact on litigants' perceptions of the fairness of the legal system (Kakalik, Dunworth, Hill, McCaffrey, Oshiro, Pace & Vaiana 1996).

Models of case-flow management

12.2 There are many forms of case-flow management. However the two basic models are:

- management involving continuous control by a judge, who personally monitors each case on a flexible basis (individual list model); and

- management where control is exercised by requiring the parties to report to the court at fixed milestones and where the court exercises routine and structured control (master list model).

12.3 The first model is expensive and requires frequent appearances by the parties. It is normally suited only to complex cases. The second is effective and relatively inexpensive and reduces the number of interlocutory appearances. A differential case management concept — which recognises that different types of cases require different types and levels of judicial management — is becoming increasingly popular.

Case management: efficiency or cost

Case management is, I think, a good example of the need to match the extensiveness of the procedure with the magnitude of the dispute. Small and medium-sized cases cannot afford extensive judicial management

Justice GL Davies, Supreme Court of Queensland (1997)

12.4 There seems little doubt that the current trend towards increased judicial involvement has the potential to absorb more court resources and to increase the costs of the parties by subjecting the pre-trial stage of litigation to constant intervention. It also appears that the most expensive case management schemes are those which involve multiple conferences. The regime recommended by us seeks, so far as possible, to minimise the number of interlocutory conferences. In our view those conferences largely should follow the form of the current case management structure — with an initial case management conference (to assess ADR options), a status conference and a listing conference.

76. In the usual case there should be only three mandatory pre-trial conferences. Judicial intervention beyond that should be restricted to large or complex matters or on the basis of demonstrable need, including the involvement of self-represented litigants. (See Recommendation 202.) A special list should be established for cases requiring extensive case management.

77. If assessed as not suitable for ADR at a case management conference, a status conference should be held within four weeks of that assessment. If assessed as suitable, but not resolved through ADR, a status conference should be held within four weeks of the determination. The status conference would follow the form of the current status conference in the Supreme Court. At that hearing the court would consider what level of continuing management is appropriate and give such case management directions as the court thinks fit based on:

(1) an examination of issues related to disclosure, case statements and expert evidence; and

(2) consideration of the potential for summary judgment or trial of preliminary issues, and an agreed statement of facts.

78. A listing conference should be held once a case has been entered for trial. That conference would follow the procedure of the current listing conference in the Supreme Court. A party would not be entitled to enter a case for trial where any previous case management directions had not been complied with, except with the leave of the court.

Who should manage cases?

12.5 At present a case management registrar conducts status and case evaluation conferences, with extensive powers to make 'case management directions' under Order 29A rule 3 of the *Supreme Court Rules*. The listing conference is held before a judge in chambers. The ALRC (1999c) has identified a lack of continuity between pre-trial hearings and trial as an obstacle to efficient case management. The transition from a court official who oversees the pre-trial hearings to the trial judge inevitably results in a lack of continuity in the treatment of issues raised and the requirement that two court officials rather than one become familiar with the issues in dispute.

12.6 In reviewing the civil system in England and Wales, Lord Woolf (1996) was of the view that the functions involved in the 'active management of litigation' are judicial. These functions include:

- identifying the issues to be resolved;
- summarily disposing of some issues;
- deciding on the order in which remaining issues are to be resolved;
- fixing timetables for parties to take particular steps; and
- limiting disclosure and expert evidence.

The character of case management

12.7 Under our recommended reform of the civil case management regime in Western Australia, the difficult question arises of which court official is appropriate to conduct pre-trial conferences. In spite of some concerns about the resource implications and fears of apparent bias, it is our view that the trial judge should take the conduct of the status and listing conferences. However, someone other than the trial judge should conduct the preliminary assessment at case management conferences of cases' suitability for ADR and the appropriate form of ADR (discussed in Chapter 11). The kinds of issues to be assessed may not be regarded by the parties as appropriate to be raised before the trial judge. In our view registrars would be most appropriate to conduct case management conferences, unless the parties consent to the conference being conducted by the supervising judge.

79. A registrar should conduct the case management conference, unless the parties consent to it being conducted by the supervising judge. In the usual case, the proposed trial judge should conduct the status and listing conferences.

Failure to comply with case management directions

12.8 The frequent failure by parties to comply with case management directions is cited as one of the reasons for opposition to judicial involvement in case management. The failure of parties to comply with directions has resulted in far more conferences being required in practice than the original three-conference model contemplated in the 1996 reforms. (Refer to Chapter 8). In our view, it is not appropriate for the case manager to assume the role of ensuring compliance with case management directions. If additional court resources are to be expended on case management this should be at the instigation of the parties. A case manager should not repeatedly adjourn conferences to ensure parties' compliance with directions. Instead, as we recommend at No. 78, entry for trial should not normally be permitted until all directions are complied with.

Inactive cases

12.9 While courts should not be responsible to ensure compliance with case management directions, the courts do have an obligation to ensure the proper utilisation of publicly funded court resources. Cases should be automatically transferred to an 'inactive case' list if no step is taken for six months, except where authorised by order of the court. After another six months, the matter should be struck out administratively for want of prosecution.

12.10 Whether struck out administratively or judicially for want of prosecution, it is our view that the leave of the court should be obtained before the proceedings are re-issued. Leave should be granted on the same basis as we have previously recommended should apply to parties seeking to issue proceedings outside the limitation period. (See Chapter 10 and this Commission's 1997 *Report on Limitations and Notice of Actions — No 36*, Part II recommendations at 15-17.)

80. An Inactive Cases List should be established. Any case in which no party has taken any steps for a period of six months should be transferred to the Inactive Cases List. No step in the proceeding could be taken while a case is on the Inactive Cases List without leave of the court. Legal representatives should be required to notify their clients and, in particular, advise that no action has been taken on the case for six months when the matter is entered on the Inactive Cases List. An inactive case may be removed from the List only by order of the court. After six months on the List a proceeding should be administratively dismissed for want of prosecution. A party should require leave of the court to re-issue proceedings.

81. Any case dismissed for want of prosecution, whether judicially or administratively, should require leave of the court to re-issue proceedings. Leave to re-issue should be determined on the same criteria as ought to apply to leave to issue proceedings outside the limitation period as recommended previously by this Commission in our 1997 Report, No 36, Part II, and only should be given in the interests of justice.

The diligent prosecution of litigation

12.11 The court should not be responsible for chasing up recalcitrant litigants, nor should it be required to ensure solicitors comply with their professional duties to prosecute litigation diligently. To the extent that professional advisers rather than clients cause unreasonable delay, it is a matter which can be best dealt with through professional disciplinary bodies or by civil remedies through the legal system. At the very least, the matter of costs should be considered in accordance with our Recommendations 149 to 151 in relation to 'wasted costs'. To the extent that a party is responsible for delay, the procedures of the court must enable sufficient sanctions to be attached, primarily in the form of adverse costs orders or, ultimately, by means of judgment.

Case management and sanctions

12.12 If parties are to benefit from case management the courts must have a wide range of sanctions available, including indemnity costs (payable forthwith), the power to strike out a party's case statement or to enter judgment summarily. Given the large number of cases that are eventually settled (many without taking into account interlocutory costs orders) the immediate payment of costs awarded for any default is a particularly powerful sanction which should be more readily utilised. Moreover, we can see no reason why the non-defaulting party should have to bear the costs of the application until the proceedings are resolved. (Refer to Recommendation 146.)

Uniform procedures

12.13 It is generally our view that uniformity of procedures is desirable, and it seems many of the ALRC (1999h) proposed reforms of the federal civil jurisdiction are similar to our recommended reforms of the Western Australian civil justice system. However, one area of significant divergence is between the case management model we recommend and the model endorsed by the ALRC and currently implemented in the Federal Courts. Both the recommended differential case management model we recommend and the Federal Court 'Individual Docket System' accept the benefits of having a single judge who manages cases from commencement to disposition, although we recommend that a registrar is more appropriate to conduct an initial assessment of cases for ADR.

12.14 The major divergence arises from our view that individually tailored directions, procedures and listings in many cases is unnecessary and may in fact increase the overall cost of litigation. In our view, requiring parties to report to the case manager at fixed milestones for routine and structured supervision should be sufficient to manage many cases in an efficient, inexpensive and timely manner. It also reduces one of the disadvantages identified by the ALRC in its discussion paper, that the individualised system has led to significant differentiation in practice between various judges.

12.15 Our recommendations concerning case management generally rely upon a more sparse supervision, subject to party-initiated sanction and administrative provision for striking-out cases for want of prosecution. We recognise, however, that some cases will require more extensive case management. We differentiate between the extent to which case management should be used on the criteria of the length and complexity of the case and allowing for more intensive case management in matters involving self-represented litigants. (See Chapter 18.)

12.16 While we therefore depart from our Recommendation 2, that there should be uniform civil procedures, by advocating a different civil case management system to that implemented in the Federal Courts, our recommendations are suitable for both the District and Supreme Courts. A similar case management regime also is recommended for use in the Local Courts. However, reflecting the principle of proportionality between procedure and the value of Local Court disputes, and as discussed in Chapter 17, it will often be the case that very limited pre-trial procedures will be appropriate.

13

Disclosure

What is discovery?

Unnecessary intrusions into the privacy of individuals, high costs to the litigants and correspondingly unfair use of the discovery process have come to be a ready part of some lawyers' strategy. When winning a case may turn on a party's ability to endure discovery, rather than the merits of the claim or defence, costly and time-consuming discovery activities including evasive answers become tactical weapons with which to delay and harass. Sanctions have little effect on delay and evasiveness. Economic pressures give economic incentives to delay.

Justice David Ipp,
Supreme Court of Western Australia
(1995) 69 ALJ 790, 793-4

13.1 At present, discovery is the legal process used to disclose evidence relevant to any matter at issue in a civil dispute. Each party has the right to call on others to provide discovery of relevant documents. If discovery is called for, the formal procedure begins with opposing parties creating a list of all relevant documents which are or have been in their possession, custody or power. The list must be verified by affidavit. Another means of obtaining disclosure is through interrogatories. These are written questions one party may ask another, usually only with the leave of the court, and which have to be answered in writing on oath before trial. With word processing, interrogatories have become inexpensive to formulate — but remain time-consuming and expensive to respond to.

13.2 The right to discover an opponent's documents and the potential to interrogate are both part of the existing process to obtain disclosure of an opposing party's case. In some cases the existing processes of discovery have caused delay and expense; however, disclosure often is essential to achieve a just result in litigation. Can discovery be abolished or is it necessary for a fair and equitable justice system?

What does discovery achieve?

13.3 Discovery is supposed to provide the parties with relevant documents before trial. It can assist parties in preparing their cases or determining whether to settle before trial. It also should save court time and expense through:

- narrowing the issues in dispute;
- preventing parties being taken by surprise at trial; and
- enabling a dispute to be settled or determined at trial on its merits and not tactics.

Discovery in practice

13.4 Amendments to the *Supreme Court Rules* enable the court to limit the ambit of discovery and to order discovery at any time, in accordance with principles of positive case-flow management. However, both powers appear to have had little impact in practice: discovery is rarely limited by court order and it still normally occurs at the close of pleadings. It is unclear whether this is because practitioners are unaware of the provisions or there is a general reluctance to use them.

Discovery and the adversarial system

13.5 There is no discovery process in inquisitorial legal systems. All major documents relevant to the case are appended to the claim and response. (However a broader range of professions can claim privilege against disclosure than is permitted in adversarial systems.) Furthermore, unlike the system in Western Australia, inquisitorial judges play an active role in 'digging' for the facts. In our system judges do not play an investigative role and the parties are required to do their own 'digging'. Although many of our recommendations would see judges take a more active role in case management, none go so far as to suggest that judges and magistrates adopt an investigative approach. Apart from anything else such a reform would have enormous resourcing implications.

13.6 Our recommendations to restrict the existing system of pleadings (Chapter 10) do not go so far as to mirror the position in inquisitorial systems. Parties only need append to case statements copies of relevant documents going to make out their *own* case. Documents damaging to one's own case or useful to an opponent need not be appended. Further, we are not recommending that judges have the power to investigate the existence of documents. It follows that, in Western Australia, disclosure will remain important and should not be abolished. However, the benefits of disclosure through the existing discovery processes often have been obtained at too high a cost.

The Peruvian Guano test

13.7 The cost of disclosure is related almost directly to the number of documents discovered. The *Peruvian Guano* test (from *Compagnie Financière du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55) established the existing test for discovery. Under that test, the range of potentially relevant and therefore discoverable documents is virtually unlimited: a document is discoverable if it may 'fairly lead [the party] to a train of inquiry which may have either of … two consequences' — directly or indirectly to advance the party's own case or to damage the case of the adversary. Although there are well-documented instances of problems with discovery in large commercial and banking cases, there is no recent empirical data on the costs and benefits of discovery in relation to other cases. Although the extent of the problem is unclear, in Queensland, the discovery procedure has been reformed so that the obligation to disclose documents now is limited to material which is

directly relevant to a matter in issue. The *Federal Court Rules* (Cth) also have been amended to remove any presumption in favour of general discovery.

From discovery to disclosure — stopping the train of inquiry

13.8 Discovery was based on a test of indirect relevance. We recommend a new name, 'disclosure', and a new test for this process: disclosure should be limited to documents that are directly relevant to a matter in issue. To be disclosed, documents should not be merely tangentially relevant, leading to a train of inquiry, or relevant only to credibility or similar fact. Rather, documents must bear directly on an issue joined in the exchange of case statements. (See Chapter 10.) Further, there should be no disclosure as of right. Any categories of document sought to be disclosed should be put by a party to the case manager and should be allowed only if the case manager is satisfied that disclosure would contribute to the just resolution of the dispute.

82. The case manager should have a discretion, usually exercised at the status conference, to order disclosure of documents that are directly relevant to the issues in dispute. The party who is seeking the documents should apply for disclosure. Leave should only be granted where the case manager has identified a category of documents which bears directly on an issue arising out of the exchange of case statements. The case manager must be satisfied the disclosure would contribute to the just resolution of the case so that the time and cost involved are proportional to the significance of the dispute.

83. The court should retain a discretion to order disclosure in phases, particularly for, but not limited to, drawing a distinction between documents relating to issues of liability, and documents relating to issues of damages.

84. Strict time limits for complying with orders for disclosure should be imposed and not be departed from unless there exists very good cause.

Subpoenas

13.9 *Subpoenas* — literally 'under penalty' — are documents issued to ensure that witnesses attend court proceedings and can require witnesses to bring any material documents in their possession. No *subpoena* against a party should be allowed to undermine the recommended limits on disclosure. In our view, any *subpoena* that seeks to have a party disclose documents which would not be subject to disclosure under the recommended test should be set aside as an abuse of process.

85. No *subpoena* against a party to compel production of documents in relation to a civil action should be allowed.

Inadequate disclosure

13.10 Currently, when a party is concerned that discovery has been inadequate, the possibility of obtaining a court order for the discovery of a specific document is limited by the practical difficulty of satisfying the legal test. The party seeking the document must be able to swear an oath that the other party has or had the particular document. In practice this test may be exceedingly difficult and we suggest a more relaxed test should apply for an application for further and better disclosure.

86. Applications for further and better disclosure ought to be allowed where there exist reasonable grounds for belief that a document exists which has not been disclosed and which falls within a category identified by the case manager as bearing directly on an issue arising out of the exchange of case statements.

Parties' and solicitors' obligations to disclose

13.11 Currently discovery commences with the verification by affidavit of a list of relevant documents. A party's solicitors also verify that they have explained the obligations of discovery to their client. By limiting the range of documents to be disclosed, it is clear that there must be greater reliance on the integrity of the parties to a dispute and also on the integrity of their solicitors. We recommend parties verify that they have made reasonable inquiries and there are no other directly relevant documents. Solicitors should also verify, in addition to the above, that they are unaware of any documents which are directly relevant to the identified categories and which have not been disclosed.

13.12 Where it is clear that inadequate disclosure has been made, the case manager should have a discretion to permit cross-examination on an affidavit of disclosure prior to trial.

87. Disclosure by verification on oath of a list of documents should be retained. In the affidavit of disclosure a party should depose that reasonable enquiries have been made and there exist no documents other than those specified in the list that are directly relevant to any of the categories of documents identified by the case manager.

88. In every case in which disclosure is provided, the solicitor, if any, shall certify that:

(1) the obligations of disclosure have been fully explained to the client; and

(2) the solicitor is not aware of any documents that are directly relevant to any of the categories of documents identified by the case manager which have not already been disclosed.

89. When it is clear that a party providing disclosure appears to be misinterpreting the test of direct relevance, or shielding behind that test, the case manager should have a discretion to permit cross-examination on an affidavit of disclosure prior to trial.

What are interrogatories?

13.13 Interrogatories are another aspect of the existing process for discovery in civil cases. Unlike discovery of documents, in Western Australia interrogatories usually can only be put to opposing parties with court permission. Interrogatories are supposed to assist in determining the extent of the dispute by narrowing the necessary proof of the matters raised in the pleadings at an early stage. They also may reveal potential problems of proof at trial. Interrogatories are of particular importance where applicants must prove their case out of material held by the respondent or through the respondent's servants and agents. In other circumstances, interrogatories may be useful in obtaining admissions prior to trial and thereby narrowing the issues in dispute. They may be a critical step in ensuring the admissibility of documents.

Interrogatories in practice

13.14 Leave to interrogate is required in all matters in the Supreme Court and District Court, except in specified categories involving personal injury claims. Nevertheless, the benefit obtained through interrogatories in some cases is far outweighed by the time and cost involved in the process. In other cases the nature of the litigation suggests interrogatories are useless and are being used for mere tactical reasons to harass the other party or delay the proceedings. There currently is no limit to the number of interrogatories which may be administered. In spite of the problems, it is generally conceded that, when used properly, interrogatories can be a useful tool.

90. Leave to interrogate must be obtained from the case manager in any matter, usually at the status conference.

91. Leave to deliver interrogatories should only be granted if a case manager is satisfied that there is not likely to be available any other reasonably simple and inexpensive way of proving the matter at trial. Leave also should be granted if the party seeking to deliver interrogatories can demonstrate an unfair disadvantage if leave is not granted. The application should be accompanied by a draft of intended interrogatories.

92. The number of interrogatories should be as few as is practicable and generally not more than 30 unless the case manager otherwise directs. The number of interrogatories is to be determined by treating each distinct question as one interrogatory.

Interrogatories and admissibility of documents

13.15 Currently, not all documents discovered are automatically admissible as evidence before the court. There are a number of requirements which must be satisfied before documents can be admitted. These are set out in section 79C of the Western Australian *Evidence Act 1906*. For example, currently a document only may be admissible as evidence if its author is called as a witness to authenticate it. (Discussed further at Chapter 20.) Interrogatories can be useful in obtaining an admission of the authenticity of the document from the opposing party so avoiding the need to call the witness. However, if disclosed documents, including those appended to case statements, were automatically capable of being tendered as evidence, unless the other party disputed their authenticity, the interrogatory could be avoided.

93. All disclosed documents, including those appended to case statements, should be automatically capable of being admitted into evidence without reference to a witness, unless the authenticity of the document is disputed. The weight to be given to any disclosed documents will be a matter for the court.

Objections to interrogatories

13.16 In Western Australia the grounds for objection to answering interrogatories are numerous. Therefore great care needs to be taken in drafting interrogatories to prevent objections being taken on technical grounds. If the use of interrogatories is significantly curtailed, it will become even more important that parties properly answer interrogatories.

94. The only opportunity to query or object to an interrogatory should be at the time the case manager's approval of the draft list of interrogatories is being sought.

95. An answer to an interrogatory should be given directly and without evasion or resort to technicality.

96. If parties fail to properly answer interrogatories, case managers should have a discretion to require them to attend for oral examination prior to trial.

14

Summary Judgment, Interlocutory Injunctions & Trials of Preliminary Issues

Summary judgment

14.1 Summary judgment allows a litigant to obtain judgment without going to trial. In Western Australia, summary judgment in the Supreme and District Courts is governed by Orders 14 and 16 of the *Rules of the Supreme Court*. Similar procedures exist in the Local Court: section 47A *Local Courts Act*. The rules were amended in 1996 to expand and rationalise summary judgment procedures. In the higher courts the plaintiff or the defendant can request summary judgment, although different rules apply depending on who applies. Proceedings also may be determined in a summary manner where the parties consent. Summary judgment in the Local Courts is discussed further in Chapter 17.

Summary judgment by the plaintiff

14.2 A plaintiff can apply for summary judgment in relation to the whole or part of the claim, normally within 21 days of the date the defendant enters an appearance. This reflects the policy that as summary judgment applications are designed to save costs, the application should be brought before significant expense is incurred. The application must be supported by an affidavit verifying the facts upon which the claim is based and stating the belief that there is no defence to the claim. If the court is of the view that the plaintiff had reasonable grounds to believe that the defendant would be given unconditional leave to appeal against a decision in the plaintiff's favour, the court may dismiss the application with costs under Order 14 rule 8 of the *Supreme Court Rules*. However, normally the order in an unsuccessful application for summary judgment is that costs go to the eventual winner.

Summary judgment by the defendant

14.3 A defendant may apply for summary judgment, normally within 21 days after the defendant enters an appearance, on the grounds that the

action is frivolous or vexatious or that there is a good defence on the merits. The application must be supported by an affidavit verifying the facts upon which the application is based. The defendant may simply wish to argue that the plaintiff's Statement of Claim cannot succeed as a matter of law, an argument which requires no evidence at all.

Striking out

14.4 The existing rule for striking out pleadings applies to pleadings that disclose either no reasonable cause of action or no defence. Given the similarity of the tests to be applied, parties' applications for summary judgment may be made as an alternative to, or in conjunction with, applications to strike out. Different legal principles apply to each application. Lord Woolf (1996), in his review of the civil justice system of the England and Wales, recommended a single procedure which would combine both summary judgment and strike out procedures. We see merit in the simplicity of this approach.

97. A single procedure for summary judgment should replace the existing procedures and enable applicants and respondents to bring an application for summary judgment or to strike out case statements disclosing no reasonable cause of action or defence.

The test for summary judgment

14.5 The existing test in an application for summary judgment whether by a plaintiff or defendant, while often expressed in different legal terms, is essentially the same. Applicants for summary judgment must demonstrate that their right to judgment is so clear that there is no real question to be tried. The courts have regarded summary determination of civil disputes as both exceptional and not to be encouraged. The exceptional right to summary judgment has been emphasised where the facts are in dispute, and particularly where there is a conflict in evidence presented in affidavits. This does not mean that disputed questions of law are more likely to be determined by a summary judgment. The courts are concerned that a party's case may not be fully or adequately presented in an application for summary judgment. There is also a concern that the development of law may be stifled. However, these concerns tend to be self-fulfilling prophecies or illusory. The concerns are self-fulfilling in that the approach of litigants and their advisers will be influenced by the expectations of the court and illusory in that few summary judgment applications are reducible to questions of law.

A new test

14.6 As most summary judgment applications involve a combination of disputed fact and law, the courts are cautious about allowing summary judgment. This tends to discourage applications for summary judgment by litigants who have a real likelihood of being successful at trial. A reformulation

of the test for summary judgment which takes into account the relative strengths of parties' cases would see the court order summary judgment unless it was satisfied that a party's case has a 'reasonable prospect of success' or is 'reasonably likely to succeed'.

98. The test for summary judgment should be reformulated so that summary judgment should be entered unless the opposing party demonstrates his or her case has a reasonable prospect of success.

14.7 If our Recommendations 26, 27, 32 and 33 are adopted, at the outset of all civil legal proceedings the case statements would:

- verify all facts material to the claim;
- outline the legal nature of the claim;
- state the contentions of law on which parties intend to rely; and
- attach copies of relevant documents.

This should greatly assist parties in making informed assessments of the prospect of success at an early stage of proceedings.

Applying the new test

14.8 The new test we propose will offer a broader scope for entry of summary judgment. There is a need to safeguard against applications for summary judgment being used tactically or oppressively to force the opposing party to show his or her claim is 'reasonably likely to succeed', while the applicant's own case is not subject to similar scrutiny. It is our view that the court should have power to enter judgment for any party irrespective of which party brought the summary judgment application. This will mean that by applying for summary judgment a litigant also is opening the strength of his or her own case to scrutiny by the court.

99. Upon review of an application for summary judgment the court should have the power to enter judgment for any party, regardless of which party brought the application.

Summary judgment on disputed facts

14.9 The new test would, and indeed is, designed to deprive more litigants of the right to have the merits of cases determined at trial. It is also true that, while summary judgment is intended to reduce delay and expense, it may have the opposite effect where summary judgment is allowed, but subsequently appealed successfully. After extensive litigation the parties may still not have the substance of the dispute addressed. Where there is an application for summary judgment and the success of a party's case comes

down to one disputed area of fact, a trial of the separate issue generally on affidavit evidence but with a discretion to allow cross-examination, should be allowed which will finally determine the factual issue.

100. On a summary judgment application the court should have the power to order that a disputed fact or question of law be determined finally as part of the application. This power may be exercised on application by a party or on the court's own motion at any point before the determination of the application.

Summary judgment on questions of law

14.10 Where summary judgment applications involve questions of law, there is the potential for the legal question to be argued twice — once in the context of the application for summary judgment, and subsequently at trial, if the application is unsuccessful. We consider this to be extremely inefficient. Where the dispute between the parties in a summary judgment application can be reduced to a question of law, even a complex question, the court hearing the application should make a final determination of the question of law.

101. Where a question of law is the only issue arising between the parties, the court hearing a summary judgment application should make a final determination of the question of law and enter judgment accordingly.

Questions of law in interlocutory injunctions

14.11 The same inefficiency arises where interlocutory injunction applications involve questions of law. Interlocutory injunctions are court orders directing a party to do something or to refrain from doing something. These may be made on an interlocutory basis, that is, temporarily until the matter is finally determined. Where the interlocutory injunction application involves only a question of law, the court should have the power to make a final determination of that question. Where any application for an interlocutory injunction is before the court, it should consider whether the substantive case can be determined and not merely whether the injunction should be allowed.

102. Where a question of law is the only issue arising between the parties in an interlocutory injunction application, the court should make a final determination of the question of law and enter judgment accordingly.

103. The court should be required to consider whether, on any application for an interlocutory injunction, the substantive case can be disposed of rather than just the injunction application, and have power to make orders to that effect.

Partial summary judgment

14.12 Even if it cannot be held that there is 'no reasonable prospect of success' on every dispute of fact and/or law, there may be scope to deliver summary judgment on at least some issues. Only the remainder of the issues would need to proceed to trial. The judicial case manager should be in a position to assess the possibility of partial summary judgment at the status conference.

104. Order 14 of the *Supreme Court Rules* should be amended to encourage greater use of partial summary judgment.

An overriding public interest discretion?

14.13 The potential for an expanded summary judgment procedure to be open to abuse raises the issue of a general discretion to refuse summary judgment, notwithstanding an apparent entitlement to judgment. The Woolf Report (1996) proposed an exceptional discretion in the court to allow a case to continue if there is a public interest in the matter being tried. However, we disagree. If the test for summary judgment is that summary judgment should be entered unless a party demonstrates his or her case has a reasonable prospect of success, we can see no merit in letting the matter proceed to trial.

Multiple applications

14.14 There remains a potential for summary judgment to be another mechanism whereby more powerful litigants are able to delay or impose unreasonable burdens on other parties. In particular, the proposed changes to the summary judgment procedures, while intended to make the procedures speedier and more cost effective than trial, could increase the cost and time involved in summary judgment applications. This potential problem can be addressed by the courts, particularly through costs orders for frivolous or groundless summary judgment applications. An additional mechanism to alleviate the problem could be to limit each party to one application for summary judgment without leave of the court.

105. Following an unsuccessful summary judgment application, a party may only bring a further application with the leave of the court. Leave should only be granted on the basis that the applicant demonstrates that there is fresh evidence which is:

(1) material to the application;

(2) likely to dispose of the case; and

(3) could not by reasonable diligence have been discovered at the time of the party's original summary judgment application.

Time limits

14.15 The current time limit of 21 days for applying for summary judgment is only suitable where the test is one of no real issue to be tried. The new test we recommend of no reasonable possibility of success may only be clear at a later stage of proceedings. It may, for example, only become apparent after disclosure of additional categories of documents and/or interrogatories, where these are allowed by the case manager.

106. Either party should be entitled to apply for summary judgment at any time until 60 days after the completion of disclosure or the holding of the status conference if no disclosure of additional documents or interrogatories is ordered, or at any later time by leave of the court.

The role of legal representatives

14.16 The parties' advisers should be required to properly consider the possibility of obtaining summary judgment. We had originally proposed in the Consultation Draft on summary judgment (2.7) that solicitors be required to file a certificate stating that summary judgment had been considered and was not appropriate, outlining the grounds on which that view was formed. However, we have reconsidered this proposal, as it is inconsistent with reducing costs of litigation. We believe that a better approach would be to amend the *Legal Practitioners Act* to require legal practitioners to consider summary judgment. The need for on-going education for legal practitioners, which could raise awareness of the changing responsibilities of practitioners, is discussed in Chapter 36.

107. The *Legal Practitioners Act* should be amended to require legal practitioners to consider summary judgment in any civil proceedings.

Costs

14.17 The current costs provisions under Order 14 rule 8 of the *Supreme Court Rules,* referred to previously at 14.2, should be re-examined. These provisions are based on a view of summary judgment as a procedure to be

encouraged only in the clearest of cases. This special costs rule in relation to summary judgments should be removed.

108. Order 14 rule 8 of the *Supreme Court Rules* should be repealed and the costs of summary judgment applications should be generally in the discretion of the court.

Preliminary issues

14.18 There are various mechanisms in the *Supreme Court Rules* to enable a question of law or fact in proceedings to be finally determined separately from the balance of proceedings. Traditionally the trial of a preliminary issue has been ordered only where the court considers the preliminary issue will necessarily determine the outcome of the litigation between the parties (although in practice this is not necessarily the result). Unlike summary judgment, the trial of a preliminary issue employs the usual trial process to determine the disputed issue.

The changing role of the courts

14.19 Traditionally the test for allowing a trial of preliminary issues was difficult to meet. In recent times, however, it has been considered more broadly: it now may be available when there is a possibility of *settlement* after a determination of the preliminary issue and not just where the preliminary issue will necessarily determine the litigation. This change has occurred in conjunction with an increased role of court-based mediations and case management in litigation. Case management has greatly increased the ability of the courts to identify issues between the parties the resolution of which may promote settlement or early disposition of the proceedings.

109. The court should have the power on its own motion to order the trial of a preliminary issue at any stage in proceedings.

The test for trials of preliminary issues

14.20 With an increasing role of ADR prior to litigation, the existing test for allowing a trial of preliminary issues should be amended to specifically indicate that resolution of the proceedings between the parties is not always, and perhaps not usually, brought about by a judgment of the court.

110. The test for whether a question or issue of law or fact be tried as a preliminary issue should be whether the trial of the issue will substantially promote the resolution of the dispute between the parties, including resolution by settlement of the whole or part of the proceedings.

Existing procedures for trials of preliminary issues

14.21 Order 31 of the *Supreme Court Rules* enables the court to separately determine questions of law. Where the facts between the parties are already agreed or determined, parties may state a question of law arising from the facts as a special case for determination by the court (Order 31 rule 1(1)). Alternatively, the parties may seek to have a point of law decided in the absence of any findings of fact (Order 31 rule 2(1)). Order 32 rule 4 allows parties to seek to have a preliminary issue determined which raises questions of fact or mixed fact and law. The provisions in the various rules unnecessarily duplicate what could be a simple system for determining issues in civil proceedings at different times. Any difference which may arise, given the different subject matter of the preliminary trial, could be resolved by a sufficiently flexible procedure.

111. A single procedure for the trial of preliminary issues should replace the existing procedures under Order 31 rule 1, Order 31 rule 2 and Order 32 rule 4 of the *Supreme Court Rules*.

15

Written and Oral Submissions

Written and oral submissions

15.1 The correct balance of written and oral submissions in civil proceedings is relevant as we search for ways to reduce delay and cost in civil litigation. The use of written outlines of submissions and even full written submissions has increased in recent years. Written submissions can assist in the identification of the issues between the parties. However these have the drawback that the courts may become overburdened with paper without gaining any appreciable benefit. If written submissions simply add to, rather than complement, oral submissions, the only result may be to increase the cost of litigation.

Existing procedures for written and oral submissions

15.2 In Western Australia, Practice Directions rather than the Rules of Court largely regulate the use of written submissions. In the Supreme Court, Practice Direction No 5 of 1997 provides for the plaintiff to lodge a written outline of submissions by the fourth working day prior to the day fixed for hearing. The defendant must lodge a written outline of submissions by the second working day prior to the date fixed for hearing. The outline should not normally exceed three to five pages in length. Similarly, in the District Court, the Consolidated Practice Direction dated 16 December 1996 requires that in various circumstances each party must lodge a written outline of submissions not exceeding five pages not less than seven working days before the date fixed for hearing.

15.3 There have been recent amendments to the *Supreme Court Rules* which specifically address the question of oral submissions. Order 34 rule 5A provides that a judge may at any time by direction limit 'the time to be taken in oral submission'. Thus there is currently scope in trials in the Supreme and District Courts for limits on oral submissions and a greater emphasis on

written submissions. However, the imposition of time limits on oral submissions is not compulsory and is rarely done in practice.

The use of oral argument

15.4 Oral argument is, in many ways, a dominant feature of our legal system. Its benefits should not be underestimated. The opportunity for a party to present argument orally contributes greatly to justice being conducted publicly. Exchange with the bench and other parties can refine the issues. The reform of oral submissions therefore should be directed at making submissions more effective rather than replacing them. Time limits are one way of achieving focus in an oral submission — although, given the variety and complexity of cases, it may not be useful to prescribe fixed time limits without regard to the nature of the case and the issues involved.

112. For the purposes of trials of civil actions, the court should give consideration in every case to whether time limits on oral submissions should be imposed. If imposed, time limits should be determined at the listing conference and based on the parties' estimates. Time limits may only be exceeded with the leave of the court at the hearing.

The use of written submissions

15.5 At present the limits imposed on the length of written submissions are often overlooked or ignored. This can result in written submissions having the opposite effect to that intended. It would be useful to consider the appropriate limits for written submissions at the time of setting limits for oral argument.

113. For the purposes of trials of civil actions, the court should give consideration in every case to imposing limits on the length of written submissions. If imposed, limits on written submissions should be determined at the listing conference and based on the parties' estimates. In the absence of a particular order, the limit should be five pages. Written submissions in excess of that limit or as ordered may only be filed with leave of the court.

Interlocutory proceedings

15.6 There are a number of procedures in which the need for oral argument is minimal. One such procedure is the application for leave to appeal which is discussed further in Chapter 32 on appeals. Interlocutory proceedings can usually be determined based on the orders sought and the papers in support of the application. In most interlocutory matters, the parties

should have the option of presenting limited argument in writing, subject to the judicial officer requiring oral argument.

114. Except for applications for leave to appeal, which are dealt with at Recommendation 350, in any civil interlocutory proceeding the parties should file a written outline of submissions stating whether the party intends to present oral argument. The applicant must file the outline with the application and the respondent must then reply within seven days. The applicant may file any additional submissions in reply within a further seven days. Where neither party intends to present oral argument the application may be determined based on the papers and written submissions in support without the need for appearance, subject to any requirement by the judicial officer that there be oral argument. (And see Recommendation 366.)

115. The court should retain a discretion to limit oral argument, conduct interlocutory hearings by telephone conference, or even decline to take oral submissions when written submissions have been filed.

16

Civil System — Costs

Civil costs

16.1 As discussed in Chapter 1, there is something inherently inconsistent in the notion that justice is a right which must be paid for in order to gain access to it. And yet justice comes at a cost. Moreover, it seems that the cost of justice is growing. While steps have been taken in recent years to reduce the delays in the justice system, the cost of litigation is beyond the means of many members of the community. Reductions in legal aid funding have made the situation worse. From court filing fees, fees owed by a litigant to his or her lawyer (solicitor/client costs), fees owed to the other side if a case is lost (party/party costs), court assessment of costs (known as 'taxation' of costs), and the use of costs as a sanction, costs raise multiple issues for access to justice. In this Chapter we discuss reforming the many and varied components of costs in the civil justice system.

Court filing fees

16.2 All courts and most tribunals in Western Australia charge filing fees for lodging various documents — most particularly documents which initiate an action. In the Supreme Court the judges make the rules of court setting out the filing fees. Most initiating documents are subject to a fee of $265, but a notice of appeal is subject to a $500 fee. These fees are extremely modest by comparison to fees charged in other jurisdictions. Whether they accurately reflect an acceptable balance between private and public contribution to the cost of the civil justice system is discussed further in Chapter 6, on the civil adversarial system, and Chapter 37, on 'private courts'. Unlike filing fees in the Federal Court, the fees charged in Western Australian courts do not distinguish between corporations and natural persons. Given the prevalence of small companies, through which natural persons trade these days, the absence of distinction should be maintained. Any distinction should be based

upon whether the litigation concerns a business conducted by the applicant, that distinction corresponding with the tax deductibility of the fee. (See Recommendation 9.)

Expedited treatment

16.3 The Supreme Court has an Expedited List where matters are dealt with on an expedited basis with special rules and practice directions in force designed to make proceedings as quick as possible. Although a great proportion of work on the Expedited List is commercial in nature, not all of it is. Acceptance on to the List is dependent upon an assessment of the urgency of the matter and not the subject matter of the dispute or the capacity of the litigants to pay. A Commercial List, as exists in Victoria, identifies a class of litigant who is demanding special treatment (that is, expedition) and who is probably litigating over large amounts of money. We had originally proposed the establishment of a Commercial List that would see commercial litigants have the option to pay a higher filing fee in return for an expedited service. (See Consultation Draft 2.9.)

16.4 The proposal's underlying principle was that commercial interests, which often already had the advantage of the Expedited List and the potential for large monetary gains accruing as a result of litigation, should contribute more for the level of service provided by the publicly funded system. While it is a reality that litigants are often able to purchase a higher standard of legal representation according to their means, this proposal raises the issue of whether a litigant's means also should determine the level of service provided by the courts.

16.5 On further consideration, we now are of the view that other recommendations more satisfactorily give effect to what we had wanted to achieve. We have recommended that, as a result of the tax-deductibility of all business related legal expenses, there should be higher filing fees for any business related litigation. (Recommendation 9.) Moreover, should commercial interests want to purchase more expeditious litigation, this would appear to be a more appropriate service for a private court to provide. (See Chapter 37.)

Waiving court filing fees

16.6 One important means for ensuring access to the courts would be to waive or defer payment of filing fees in appropriate cases. Order 83A rule 5 of the *Supreme Court Rules* gives the court or a registrar a discretion to waive or defer the payment of all or part of the fees. This is a very open ended discretion, whereas the Federal Court provisions relating to the payment of fees establish a clear outline of relevant considerations and a process of application and review. We believe issues of access to the courts would be best addressed by a regime for determining fees payable based on the Federal Court provisions together with a discretion to waive filing fees in matters being litigated in the public interest.

116. Order 83A of the *Supreme Court Rules* should be amended to follow the *Federal Court Regulations* (Cth) so that when considering the waiver or deferment of filing fees:

(1) there is a list of specific factors to be considered;
(2) there are categories of litigant entitled to exemption;
(3) there is a detailed application form; and
(4) there is a right of review.

117. Order 83A of the *Supreme Court Rules* also should be amended to allow for a waiver of filing fees on the grounds that the litigation is in the public interest.

Costs agreements and scale of costs

16.7 In terms of the potential costs which may be incurred as a result of litigating, court filing fees are very modest. One of the most significant liabilities may arise between a client and his or her solicitor. Costs agreements may be entered into by a solicitor and client and are usually based on the solicitor charging for the time spent on a case. Although some of our recommendations in this Chapter apply to costs agreements, particularly Recommendation 121 requiring practitioners to advise clients of the likely costs of litigation, costs agreements are discussed more fully in Chapter 36 on the legal profession. If there is no valid costs agreement between solicitor and client, the solicitor is only entitled to charge the client in accordance with the scale of costs, that is, the fixed rates which can be charged by practitioners for litigation.

16.8 There also is the potential liability for party/party costs should a litigant be unsuccessful. In relation to court orders for costs made between party and party it makes no difference if the successful party has a valid costs agreement with his or her solicitor or not — the costs the unsuccessful party has to pay are normally based on the scale of costs. This explains why a party may still be liable to his or her solicitor for a large proportion of the costs even after winning the case.

16.9 The Legal Costs Committee determines current 'scales of costs'. The Committee was established in 1987 and consists of one judge or senior practitioner, two practitioners, an accountant and two lay members. Previously the judges of a particular court had determined the scale of costs for that court.

Scales for the Supreme Court and the District Court

16.10 With few exceptions, one scale of costs applies to Supreme and District Court litigation. It is based generally on time charging for discrete steps in the process but with the important safeguard of a recommended/estimated amount of time that each step should take. The scale also establishes a maximum charge-out rate for practitioners at different levels of seniority.

For certain tasks the maximum rate is based on the assumption that a more junior practitioner will do the task, and therefore will take longer to complete the task although the hourly charge-out rate will be lower. Other tasks are scaled on the basis that a senior practitioner will undertake them.

16.11 This does not mean that a practitioner of the particular seniority used to calculate the maximum will necessarily do the task, nor that solicitors are always entitled to charge the maximum allowed under the scale. When the courts assess costs, the court officer will need to assess the complexity of the specific work undertaken, the seniority of the particular person who did the task and how long the task took. But even if it is virtually impossible to predict exactly what will be awarded on assessment, where the scales apply at least the maximum for any particular task is known.

16.12 District Court appeals have a separate scale of costs, calculated on the basis of fixed maximum amounts. These tend to be extremely modest. There also are few steps involved. This means that clients should be able to be told with a great degree of accuracy the potential costs involved, should that party be ordered to pay the other party's costs in District Court appeals.

Scales for the Local Court

16.13 The Local Court scales consist of four categories — claims below $3000 (Division 1) and over $3000 (Division 2), with each of those divisions being further divided into routine or complex cases. The costs for routine matters are nearly always fixed for all items. The same applies to complex cases below $3000, although the rates are slightly higher. Division 2 complex cases basically follow the same approach as litigation in the District and Supreme Court, although the rates are lower.

Improving the scales of costs:

Supreme Court

16.14 The Supreme Court scale of costs distinguishes between different types of cases — but only by reference to the way the case is commenced. There are at least six different initiating documents including a writ of summons (generally commercial disputes), an originating summons (used for probate or trusts related matters) or applications (used for companies matters). If an originating summons or application commences a matter, the general rule is that the maximum order for party/party costs is $6,900. The reason for this is that if there are likely to be disputed questions of fact, making the case more expensive to run, a writ of summons rather than an originating summons should be used as it allows for higher costs awards. The rationale however does not apply to companies applications. Such applications may involve questions of fact. If our recommendations are adopted to have all actions in the superior courts commenced by the one species of originating process (an Application), these divisions would not apply. (Refer to Chapter 9.)

16.15 This reform does not address the difficulty faced by those who are required to commence an action in the Supreme Court, not because of the

quantum involved, but because one form of relief sought is equitable. Currently the District Court has jurisdiction to grant equitable remedies as ancillary relief only and the Local Court has no equitable jurisdiction. The relatively generous Supreme Court scale of costs applies, even though the value of the amount in issue would otherwise have brought it within the jurisdiction of a lower court.

16.16 Although the problem presently does not arise in relation to matters which would otherwise be heard in the District Court because the Supreme Court scale of costs applies in any event, we recommend at No. 120 that the District Court have a separate scale. There is in any event a substantial costs increase for matters which would otherwise fall within the Local Court jurisdiction. We recommend that the Local Court have jurisdiction to grant equitable remedies as both primary and ancillary relief within its monetary limit at Recommendation 156. It follows that, in our view, the present limit on District Court jurisdiction to grant only ancillary equitable relief also should be removed. Whether these recommendations are adopted or not, where an action is brought in the Supreme Court only because some equitable or other relief is not available in a lower court the lower court scale should apply.

118. The District Court should have jurisdiction to grant both primary and ancillary equitable relief within its monetary jurisdiction.

119. Order 66 Rule 17 of the *Supreme Court Rules* should be amended to provide for lower court scales of costs to apply where the only reason the action is brought in the Supreme Court is because some equitable or other relief is sought which the lower court is not able to grant.

District Court

16.17 Although the amounts in dispute in the District and Supreme Courts vary widely there is only one scale of costs for cases argued in those courts. The nature of the cases dealt with by each court is also often quite different. The only exception is for appeals in the District Court, which has a separate scale: see this Chapter at 16.12. Even within the District Court itself there can be significant variations in the monetary value of matters in dispute from $25,000 to $250,000. One means of implementing some proportionality between the scale of costs and the amount in dispute would be to enlarge the jurisdiction of the Local Court, thereby removing smaller scale disputes from the District Court jurisdiction. The Government should consider doing so. Also, in terms of the complexity of the litigation in the District Court, personal injuries cases readily divide between those where liability and quantum are at issue and those where only quantum is at issue.

120. The District Court should be given its own scale of costs. Within that scale there should be a special scale tailored to the steps peculiar to personal injuries actions. The special personal injuries scale should make provision for cases in which quantum is the only issue.

Estimating costs

16.18 Aside from litigation costing too much there is also a problem of the extreme difficulty in trying to estimate precisely how much a litigation venture will actually cost. Litigation is uncertain enough to start with and so it is necessary to work out what the client will have to pay to take the case to its conclusion. This includes the costs which may be owed to the client's own lawyers as well as the costs the client may have to pay the other side. These two categories of costs — solicitor/client and party/party — reflect the twin liabilities a litigant may confront when embarking on litigation.

Client protection before litigation

16.19 Currently there is no legal obligation on solicitors to provide clients with the costs implications of any proposed litigation, nor to enter into any agreement about costs. Clients who enter into litigation without realising the full costs often face a dilemma. If they withdraw the claim, they may be required to pay the other side's costs in addition to the costs they have already paid their own solicitor. One problem in providing costs estimates prior to litigation, however, is that they are extremely hard to make.

121. The *Legal Practitioners Act* should be amended to impose an obligation on solicitors to advise their clients from time to time, and not less than once every 12 months, of an estimate of the likely cost of resolving the dispute.

122. Should a solicitor fail to comply with the obligation to advise a client of the likely cost of resolving a dispute, the *Legal Practitioners Act* should prohibit the solicitor from recovering fees from the client.

Litigants' handbook of pitfalls

16.20 It also would be useful for the client to be given a standard form booklet or video which refers to the risks and pitfalls of litigation generally — such as the risks of losing on appeal although successful at trial and the possibility of interlocutory skirmishes and their costs implications. Civil litigants booklets and videos would be most useful if tailored to the particular court out of which proceedings issue and would be of particular use to self-represented litigants. Such litigants could be issued a copy of the relevant booklet or granted access to the video either in tape form or through the Internet by court staff. The booklets, videos and information in alternative translations and formats ideally would be produced after consultation.

123. The requirement to provide a standard form civil litigants' booklet or video should be made by amendment to the Professional Conduct Rules and/or as a prerequisite to entering into a valid costs agreement with a client.

124. Court staff should be directed to provide a copy of the civil litigants' booklet or video to self-represented litigants, or provide internet access, immediately upon filing an Application or a Response.

The loser pays principle

16.21 The usual order in civil litigation in Western Australia is that the loser must pay the winner's costs. However, there are a number of exceptions. These include probate, where administration and trust disputes are often paid out of the estate. There are also a number of jurisdictions where the usual rule is that parties must bear their own costs — under the *Industrial Relations Act 1979* (WA) and the *Family Law Act 1975* (Cth) for example, and certain criminal jurisdictions which are discussed in Chapter 31. In any event, most practitioners agree with the estimate that costs recoverable from the other side will only be between 40 to 60 per cent of what the winning client has to pay his or her own lawyers.

Judicial review and costs

16.22 One other area in which the 'loser pays' principle has not applied is in judicial review applications. These are applications to superior courts for prerogative writs and equivalent statutory remedies against public officers and agencies, discussed at Chapter 9. Because of the involvement of public officials and agencies, the courts tend to apply special rules when allocating costs in these matters. In particular the court will not usually award costs against a public official or agency successfully challenged in the courts. The successful applicant may be understandably disgruntled by having to bear all of his or her own costs. While it may be unfair to expect tribunal members who have acted in good faith to bear the costs of litigation, it is no less unfair to expect the successful litigant to pay. The current practice is inconsistent with the principles behind the Suitors' Fund, designed to give an unsuccessful respondent to an appeal a public fund to contribute to the costs. (Discussed further in this Chapter at 16.46 — 16.50.) The theory is that it is neither side's fault that the judge made an error of law. We recommend in Chapter 9 that applications for judicial review in these cases be commenced in the same way as other civil proceedings. The same rules also should apply in relation to costs.

125. The *Supreme Court Act* and/or the *Supreme Court Rules* should be amended to state a general rule that an unsuccessful public respondent to an application for judicial review should pay the costs on the loser pays principle. The applicant may enforce the costs order as a debt owed by the State.

Who pays for litigation?

16.23 In *Costs Shifting — Who Pays for Litigation* the ALRC (1995) recommended that the loser pays rule should remain. However, it also recommended a number of exceptions:

- personal costs orders against legal practitioners;
- special costs orders where case management directions are not complied with;
- appeals succeeding on a point not raised in the court below;
- cases where there is a public interest; and
- cases where, having regard to the financial circumstances of one of the parties, the possibility of loser pays will adversely impact on the ability of that party to present the case or negotiate a fair settlement.

The ALRC rightly points out that parties need to make informed decisions about the costs of litigation and costs orders at an early stage of the proceedings.

126. The recommendation of the ALRC in the 1995 report *Costs Shifting — Who Pays for Litigation*, that the loser pays rule be retained in civil litigation but subject to a number of specific exceptions where parties bear their own costs, should be followed.

127. The loser pays rule should apply in the absence of a declaration that a civil case falls within one of the exceptions. If the court makes a declaration that a particular exception applies, then the rule that each party bear his or her costs becomes the presumptive rule in place of the loser pays rule. The presumptive rule should only be displaced for good reason — for example, the other side makes an offer of settlement which is unreasonably rejected. This presumptive rule should be identified at the start of the proceedings. The applicant should be permitted to discontinue with no order as to costs if the presumptive costs rule on which he or she reasonably hoped to litigate is declared not to apply.

Capping costs

16.24 As part of the reform of the loser pays rule, consideration has been given to the use of capped costs orders being made at early stages of the litigation. Such orders are available in the Federal Court under Order 62A of the *Federal Court Rules* (Cth). That Order allows the court to specify the maximum costs that may be recovered on a party/party basis. It was enacted to give 'persons of ordinary means' access to the civil courts.

128. An Order 66A should be inserted into the *Supreme Court Rules* which corresponds with Order 62A of the *Federal Court Rules* (Cth) allowing the case manager to specify the maximum costs which may be recovered on a party/party basis.

129. *The Supreme Court Rules* should require the case manager in every case to give consideration to whether the specification at Recommendation 128 should be made.

16.25 As capping regulates only party/party costs, the gap between party/party and solicitor/client costs of the winning party may be widened. While a capped costs order will not assist in reducing the gap, our Recommendation 121 requiring solicitors to advise their clients of estimated costs will assist their clients' understanding of the gap between the costs which may be awarded should they win and what they will owe their own solicitor.

The gap in costings

16.26 The existing rules of court entitle a successful party to recover costs except for costs unreasonably or unnecessarily incurred. However, there has always been a gap between what a successful party recovers on court assessment of costs from the unsuccessful party and what a successful party has to pay his or her own solicitors. This is in part a conscious effort to restrict litigation. In a sense it is unfair. If an applicant is successful then by definition the applicant has and always had a right which the respondent should have recognised. But even if a successful party's lawyers have charged at scale rates, there will always be a difference between the amount awarded on a party/party basis and what the client has to pay his or her own lawyer. For example, a statement may be taken from a witness but it is decided not to call that witness at trial. Although such costs would be fairly and reasonably incurred in the preparation of a case and therefore payable by the winning party to his or her solicitor, they would not normally be included in party/party costs. Even where there is an order for indemnity costs the courts have held that this does not oblige the loser to pay whatever the winner's solicitor may have charged.

16.27 We favour allowing the successful party to recover reasonable costs for all steps reasonably and properly incurred in the prosecution or defence of the case with a view to reducing the 'gap'. We recommend that this be formulated as a positive principle to be applied by the courts in determining costs either through amending the existing rules of court or through the introduction of a separate Legal Costs Act. (See Recommendation 152.)

130. Amendments should be made to existing rules of court or a separate Legal Costs Act (see Recommendation 152) should be introduced establishing the principle that when determining costs a party is entitled to recover a fair and reasonable amount for work that was reasonably required for the litigation.

File management work

16.28 More significant in terms of the gap in costs is the failure of the scales to allow for a good deal of file management work. Solicitors often charge people on other than scale rates and, in particular, file management work is invariably billed under time costs agreements. As a result the cost of file management work is paid by a party but cannot be recovered should the party win the case. The 'paper trail' is important to protect solicitors from claims of professional negligence and also to comply with the requirements of a Law Society Approved Quality Practice, but the amount allowed on a court assessment of party/party costs varies from court officer to court officer. File management work also creates problems for the assessment of solicitor/client costs, but generally charges for some file management work are allowed. A simple process for calculating recoverable costs for file management work would allow parties to litigation to know potential costs at a very early stage. The process we recommend for calculating costs for file management work is unlikely to act as a full indemnity for these costs. However the existence of some gap between actual costs and recoverable costs might help deter litigation that is not absolutely necessary.

131. To reduce the gap between party/party and solicitor/client costs, the scales should be amended to recognise the fact that as between solicitor and client file management work is done and properly charged for.

132. For the purposes of a court assessment of party/party costs this solicitor/client file management work should be expressed as a flat percentage of the amount at which the party/party bill would otherwise be allowed. The percentage should be determined after consultation with the Law Society, consumer groups, the Legal Costs Committee and the officers of the Supreme Court involved in assessing costs.

133. A flat hourly rate for file management should be identified in the scale for the purpose of a court assessment of solicitor/client costs where the solicitor does not have an enforceable cost agreement and the scale must be applied. The flat hourly rate for file management work should also be used by the court in making an indemnity costs order.

Assessment of solicitor/client costs

16.29 Western Australia does not have a statutory requirement for fee disclosures and agreements as exists in other States. (But refer to our Recommendation 121 on the disclosure of a costs estimate.) However, solicitors presently cannot sue for their fees until a bill of costs has been served on the client which contains the advice that the client has the right to have the costs assessed or 'taxed' by the courts. If it is a lump sum bill, the client has 30 days to ask for itemisation of the account. Another 30 days are allowed in which to request the solicitor to present the bill to the Supreme Court for assessment. The bills are assessed either on the basis of the costs agreement or, if there is none, on the applicable scale. Often significant amounts are 'taxed off' the practitioner's bill. Once the assessment is complete it takes effect as a judgment of the Supreme Court and may be executed accordingly. This means the solicitor will not need to spend time and money suing for recovery of the fees in the District or Local Court, although currently only the client can initiate the court assessment of costs.

134. The *Legal Practitioners Act* should be amended so that the solicitor has the option of referring any bill rendered to a client to the Supreme Court for court assessment on the solicitor's own motion.

Refusal to pay

16.30 A client may choose not to exercise the statutory right to court assessment of costs and simply refuse to pay. When the solicitor takes debt recovery action, the basis of the client's defence may be only that the charge is unreasonably high. In these circumstances the matter proceeds to trial in the Local Court — although in substance it is simply a costs assessment issue.

135. The *Legal Practitioners Act* also should be amended so that in any proceedings before a court by a practitioner against a client seeking the recovery of fees, the court (for example, the District Court or the Local Court) has the power to direct that the question of the amount and reasonableness of the fees charged be determined after the conduct of an assessment of solicitor/client costs before an officer of the Supreme Court.

Assessment of costs

16.31 The court assessment of both party/party and solicitor/client costs can be a drawn out and tedious exercise particularly when the matter involves time based cost agreements. This is because the bill is based on each unit of time expended rather than the categories of work carried out. Generally party/party costs assessments are less time consuming because they are based

on the scales of costs. The assessment of costs should be avoided if at all possible. Order 62 Rule 46 of the *Federal Court Rules* (Cth) provides for an assessment procedure aimed at avoiding full assessment, based on a registrar's estimate of the likely amount to be assessed.

136. Order 66 of the *Supreme Court Rules* should be amended to adopt the estimate and provisional costs assessment procedures of Order 62 rule 46 of the *Federal Court Rules* (Cth).

Costs assessors

16.32 Many complaints made against solicitors to the Legal Practitioners Complaints Committee and the Law Society relate to fees. There are conciliation procedures under the *Legal Practitioners Act* to resolve such disputes; however there is no provision to appoint a costs assessor.

137. The *Legal Practitioners Act* should be amended to allow the use of costs assessors. The Legal Practitioners Board should be given a discretion to certify persons who are 'fit and proper' to be costs assessors.

138. The case file should be referred to the assessor without the necessity for the solicitor to draw a formal bill. The assessor should be entitled to call for and receive written submissions but only if the assessor believes this will assist. Upon issuing a formal assessment the client or the solicitor should have (say) 21 days to refer the matter to an officer of the Supreme Court for assessment. If the matter is not referred to the Supreme Court then the client (if there is a refund due to the client) or the solicitor (if further money is due to the solicitor) should be able to register the assessment in the Local Court and enforce it as a judgment of the Local Court.

Publication of costs assessments

16.33 One means of reducing reliance on costs assessments by the courts is for the amounts awarded on assessment in particular categories of case to be published annually by all courts and tribunals. This should increase consistency amongst court officers and also assist solicitors and costs assessors.

139. Data on costs assessments by all courts and tribunals should be published similar to those published by the Federal Court.

Lump sum costs

16.34 Another means for determining costs, albeit in a very limited class of case, is by calculation of a gross sum which the loser must pay rather than proceeding by way of court assessment of costs, as allowed for under Order 66 Rule 12(3) of the *Supreme Court Rules*. This approach is used frequently in relation to costs in criminal matters and certain civil cases involving an undefended application to wind up a company.

140. Courts should identify procedures and issue practice directions as to the costs which will be awarded by way of lump sum rather than proceeding to a court assessment of costs.

'Up lift fees'

16.35 Contingency fees allow a solicitor to be paid only if a case is won and on the basis of a percentage of the damages awarded. The arrangement received widespread support amongst the public submissions we received, and the ALRC (1999h) noted that speculative fee charging can assist access. However, these fees have not solved the problems of access, delay and the cost of justice in the United States. In particular, percentage fees lead to remuneration of lawyers out of all proportion to their efforts or the risk involved.

16.36 One option for addressing the disproportionate gains to lawyers from the implementation of contingency fees has been to allow contingency fees but to continue the prohibition of remuneration based on a percentage of the 'winnings' should the client be successful. Instead, if the case is won, the successful lawyer would be entitled only to the normal fee plus an added percentage of that fee known as an 'up lift fee'. The Access to Justice Advisory Committee report of 1994 undertook a detailed examination of the issues associated with contingency fees based on 'up lift' remuneration and made many sound recommendations. In July 1998 the Conditional Fee Agreements Order 1998, made under the *Courts and Legal Services Act 1990* (Eng), took effect and limited up lift fee arrangements are now permitted in England.

141. Limited contingency fee agreements should be permitted in all cases (save criminal law and family law matters) where two conditions are satisfied:

(1) all other means of avoiding the use of a contingency fee arrangement have been exhausted; and

(2) the client is financially unable to conduct the litigation without the use of a contingency fee arrangement.

142. The contingency reward to the lawyers should be in the form of an up lift on fees rather than a percentage of the amount recovered. Contingency fee arrangements should be available to both applicants and respondents. The safeguards set out in the 1994 Access to Justice Advisory Committee Report, *Access to Justice: An Action Plan*, should be adopted.

The amount of 'up lift'

16.37 If there were adequate legal aid, contingency fees would not be necessary. Up lift fees are a necessary evil and because they fall outside the scope of scaled fees, they add to the erosion of the compensation awarded by the court. Therefore up lift fees should reflect no more than a limited allowance for the risk undertaken by lawyers nor should they be encouraged.

143. The amount of the up lift should be calculated not on the bill the solicitor renders to his or her own client but on the amount of costs recovered from the other side by court assessment or agreement.

144. An up lift agreement between solicitor and client should only be entered into with leave of the court. In assessing whether the amount of up lift is approved the court should consider the risk and financial burden to the solicitor involved and the conditions specified in Recommendation 141.

Disbursements

16.38 In addition to filing fees, there are a number of up-front costs, known as disbursements, associated with litigation which need to be paid. Unless the solicitor pays these on behalf of the client, and to some extent agrees to bankroll the litigation, such costs could preclude an action being prosecuted even if there are up lift contingency fees. Consideration should be given to utilising presently existing funds to finance a disbursements fund, for example, the Law Society's Litigation Assistance Fund. A disbursements fund could allow many cases to proceed on a speculative basis even under the existing law. We believe a disbursements fund should be established even if it is decided that up lift contingency fees are not in the public interest.

145. A disbursements fund should be established to assist lawyers in representing clients who cannot afford up-front costs of litigation.

Costs to deter interlocutory proceedings

16.39 Under the present system almost every piece of litigation will have a number of interlocutory skirmishes prior to trial. In Chapter 15 we recommend that interlocutory matters usually be determined on the basis of the orders sought and the papers in support of the application. This should reduce the cost of these applications. A common costs order for interlocutory matters is that costs be paid to the successful party 'in any event' — that is, the successful party on the interlocutory matter will be entitled to costs whatever the outcome of the case. Such an order has no great impact on the litigation. The mounting costs of paying his or her solicitor in the meantime for any interlocutory matters may make the continuation of litigation financially unbearable for a litigant even if he or she has won the point. Indeed it is not uncommon in settlement negotiations for an allowance to be made for costs but disregarding costs orders made along the way, such as those made on interlocutory matters.

16.40 An order that such costs be assessed and paid forthwith would address this problem. However, currently the power to make such orders under the *Rules of the Supreme Court* is not clearly stated to apply in these circumstances. The increased use of such orders should discourage unnecessary interlocutory applications. At the same time, however, the court also must be alive to the possibility that interlocutory costs orders could mount and stifle the litigation — irrespective of its merits.

146. Order 66 of the *Rules of the Supreme Court* should be amended to provide for the circumstances in which costs of an interlocutory application should be ordered to be assessed and paid forthwith. The court should be given a discretion to order that costs be assessed and paid forthwith where the application was unreasonably brought or unreasonably opposed unless the making of such costs order would, having regard to the loser's financial circumstances, prejudice the ability of the loser to continue the litigation. The court also should be given a discretion not to make such an order where the winner of the application is in a financially stronger position compared to the loser of the application.

Costs as a sanction

16.41 It sometimes happens that steps are taken in proceedings, or some aspect of the litigation is conducted in such a way, that costs are needlessly and unreasonably incurred. This is not always the fault of the client, although usually the court awards costs against the client. In any event, lawyers have ethical obligations to the court regardless of their instructions from their client.

16.42 In some circumstances it clearly may be the fault of the solicitor that additional costs are incurred, for example a pleading that infringes basic rules. While the solicitor may not charge his or her client, the court is likely also to make an order that the client pay the additional costs incurred as a result by the other party. Order 66 rule 5 of the *Supreme Court Rules* deals with such situations and allows the court to:

- disallow the solicitor from charging his or her client;
- direct the solicitor to reimburse the client; and
- direct the solicitor personally to indemnify any party.

That rule, as currently written, is probably not wide enough to apply to an employed solicitor. Nor does it apply to barristers. In New South Wales, Part 52A rule 43A was inserted into the *Supreme Court Rules 1970* (NSW) to apply similar sanctions to barristers found to be at fault.

147. Order 66 rule 5 of the *Rules of the Supreme Court* should be amended to allow an order to be made against an employed solicitor.

148. An amendment to Order 66 of the *Rules of the Supreme Court* should be made by inserting a rule 5A applying to barristers in the same terms as Part 52A rule 43A of the *Supreme Court Rules* 1970 (NSW).

Costs orders and the solicitor/client relationship

16.43 Often in Order 66 rule 5 applications under the *Supreme Court Rules* counsel for the solicitor opposing the order and counsel for the other party are heard, but the client is not. The court does not and should not know what takes place between a solicitor and client and so this is appropriate. However, it is important that a client be fully informed. The client then would be able to consider whether he or she needs to change solicitors or to discuss with the current solicitor whether certain costs should be deducted.

149. The *Legal Practitioners Act* should be amended to require solicitors to inform their clients of all costs orders made against the client and the reasons for making those orders.

150. Should a solicitor not comply with the obligation to advise a client of a costs order, the solicitor should be personally liable for those costs.

'Wasted costs'

16.44 'Wasted costs' issues have the potential to drive a wedge between a solicitor and client and normally should be determined by the court only at

the end of the trial. However there are some instances where the court should consider ordering that the costs be assessed and paid forthwith. Such situations would arise where the solicitor does not file some document required by an order of the court or a practice direction and this leads to an adjournment.

151. If a practitioner asserts that the reason for a default leading to a costs order to be paid immediately relates to the conduct of the client the practitioner should be required to prove to the court that notice of the assertion was given to the client.

A Legal Costs Act?

16.45 The ALRC (1995) recommended that the matters relating to costs be formulated as rules rather than as principles upon which judicial discretion is exercised. We recommend that the costs rules that apply to all State courts and tribunals should be codified into a separate Legal Costs Act. The Act should cover all relevant courts and tribunals by having a suitable definition of 'court' and 'tribunal'. Part VI of the *Legal Practitioners Act* should be reorganised and inserted into the Legal Costs Act along with any provisions concerning barristers' fees, contingency fees, personal costs orders and the other matters referred to. Scales of costs (that is, determinations of the Legal Costs Committee) should be passed by way of regulations under the Legal Costs Act.

152. A separate Legal Costs Act should be enacted which formulates the principles of legal costs as rules with the scales of costs included as regulations under the Act.

Suitors' Fund

16.46 The existing Suitors' Fund was established in 1964. It has two aims:

- to relieve litigants of the burden of costs they might incur as a result of a judge's error of law; and
- to compensate litigants where proceedings are aborted through no fault of their own, for example, if a judge becomes sick or dies during a trial.

16.47 The first aim is to address the unfairness for litigants who have costs ordered against them on the basis of a successful appeal by an opposing party on the grounds of an error of law. In a sense, this is expecting the litigant to bear the costs for a judge's error of law. For this reason the Suitors' Fund allows the litigant to ask for a certificate to cover the costs the litigant must pay to the successful appellant for costs and his or her own costs in endeavouring to uphold the original judgment.

Suitors' Fund limitations

16.48 In practice the Suitors' Fund does little to achieve this aim. The maximum amount that can be paid to a civil litigant is $2,000. This amount is very low and may bear no relation to the actual costs involved. For example, in unsuccessfully defending an appeal to the Full Court of the Supreme Court the costs payable to the appellant include at least a $265 filling fee, usually $855 assessed costs for settling the appeal book and so on, the fees for drawing the notice of appeal (between $880 to $4,050) and the appellant's counsel fees. This is without even considering the respondent's own costs.

153. The *Suitors' Fund Act 1964* (WA) should be amended so that, subject to judicial discretion, the unsuccessful respondent is entitled to have paid out of the Suitors' Fund an amount equal to the court assessed party/party costs recovered by the appellant.

Suitors' Fund questions of law

16.49 It is also the case that litigants are only entitled to access the Suitors' Fund if the appeal has been upheld on 'a question of law'. This is an uncertain concept and it has been the subject of much judicial debate in the context of many other areas of law. For this reason alone the test should be changed. Further, the fairness of the test is open to doubt. Why should the respondent be any more liable if the original judge made an error of fact rather than an error of law?

154. The reference in section 10(1) of the *Suitors' Fund Act* to 'on a question of law' should be deleted. The sole criterion for invoking the judicial discretion to award a Suitors' Fund certificate should be the fact that the appeal succeeded. The Act should be further amended to provide that the discretion of the court is to be exercised having regard to the conduct of the respondent at the appeal stage and also in the court or courts below.

Paying for the Suitors' Fund

16.50 In order to reform the Suitors' Fund so that it can be useful to litigants in the circumstances recommended, the collection base for the Suitors' Fund will have to be expanded.

155. A component of the increased revenue raised as a result of Recommendations 8 and 9 relating to higher court filing fees should go to the Suitors' Fund.

17

Local Courts

The Local Court

17.1 Of all the courts in Western Australia exercising a civil jurisdiction, the Local Court should be the most user-friendly. The Small Disputes Division of the Local Court reportedly has been successful in enabling parties to resolve disputes or to have them adjudicated quickly, at minimal cost. Because the Small Disputes procedures are a relatively recent innovation, parties apparently understand the process and feel it accords natural justice. However, the Local Court's General Division, in which the majority of matters are commenced, has not been as successful. Although magistrates have done much in recent years to reduce delays and have achieved a great deal, existing Local Court procedure is antiquated, open to abuse and not useful in achieving the same standards as the Small Disputes Division. As the existing Small Disputes Division procedures work well, our recommendations in this Chapter are directed to the reform of what is now the General Division procedure of the Local Court. (In Chapter 33 we recommend that the Small Disputes Division becomes part of a Western Australian Civil and Administrative Tribunal.)

Equitable relief and damages

17.2 The Government is currently considering the jurisdiction of the Local Court in the context of recommendations made by this Law Reform Commission in 1988. (See Chapter 2.) However, it is not clear whether magistrates in the Local Court will be given power, within the limit of the monetary jurisdiction, to grant equitable relief, nor whether the 'Minor Claims Division' will include claims for damages. We recommend in Chapter 16 that if the only reason an action is brought in the Supreme Court is because some equitable or other relief is sought which the lower court is not able to grant, the lower court scales of costs should apply. (Recommendation 119.) We also believe the jurisdiction of the Local Court should be expanded.

156. Magistrates in the Local Court should be given power to grant both primary and ancillary equitable relief within the limit of the monetary jurisdiction of the court.

157. The proposed 'Minor Claims Division' of the court should have jurisdiction to determine claims for damages. However, in accordance with our Recommendation 372, it should be incorporated into the Western Australian Civil and Administrative Tribunal and subject to the appeal procedures of the Tribunal.

Existing Rules of Court

17.3 The procedure in the Local Court is adversarial. The parties progress the matter by applying to the court to obtain leave to take a step in the action or require the other party to do so. Such a system is open to abuse, particularly for those without legal advice or experience with the system. The procedure is based on the *Local Courts Act* and the *Local Court Rules*. The Rules are antiquated, arguably more detailed than they need to be and drafted in an outdated style using archaic language. The Rules are basically incomprehensible and inordinately complicated for use by the increasing number of self-represented litigants in the Local Court. The Government's proposals to allow the Chief Magistrate together with at least three other magistrates to make rules for the procedure of the Local Court should assist in the reform and on-going revision of the rules. It is imperative that simple, workable new procedures and forms be developed.

Delay

The trinity of cost scales that reward activity, fear of being sued for negligence and an adversary based litigation process drive lawyers to leave no stone unturned in litigation at a cost to the parties that is beyond their ability to pay and which often overwhelms the amount of the actual dispute.

Andrew Cannon SM, Civil Division, SA Magistrates' Court (1996)

17.4 It is hardly surprising that delays and many unproductive interlocutory applications dog Local Court proceedings. Parties are able to put off a detailed consideration of the litigation until the trial. One example under the existing rules is the option available to plaintiffs to issue a plaint containing little information followed by a phrase 'particulars whereof have been rendered' and a defendant has the option to avoid providing particulars of the defence until compelled by the plaintiff to do so. In drafting a new procedure we believe the focus should be on the attributes identified by us in Chapter 2.

158. All new Local Court procedures should force the parties to come to terms with and understand the issues and evidence as soon as possible.

159. The rules of the new Civil Division of the Magistrates Court, like other legislation which applies to civil justice (see Recommendations 5 and 6) should state clearly the object of the rules and the context in which proceedings are to be conducted. For example:

The Local Court should be managed in order to be expeditious, proportionate, and both procedurally and substantively just.

Commencing proceedings in the Local Court

17.5 The 1988 report of this Commission, referred to in this Chapter at 17.2, suggested that the procedure for commencing proceedings in the Local Court should be simplified and proposed that the initiating process itself, or an attached explanatory booklet, should explain the rights of litigants in Local Court proceedings. In keeping with our recommendations in Chapter 9 for the simplification of the means of commencing civil proceedings in the higher courts, we recommend that a simple, standard form Application instead of a plaint should be used to commence all actions in the Local Court. To mark the move to a new procedure and consistent with our proposals in relation to the higher courts, we also propose to call the person initiating the action in the Local Court (previously known as the 'plaintiff') an applicant, and the person being sued (previously known as the 'defendant') a respondent.

17.6 The Application should be in plain English and should clearly let the respondent know that an action has been commenced, how to respond, and the deadline for response. As developed in the Victorian Magistrates' Courts, 'precedents' for common classes of action commenced in the court should be available to applicants. Increased use of information technology in the justice system could facilitate access to precedents. (See Chapter 35, 'Technology and Justice'.) As discussed further in Chapter 18, the large number of self-represented litigants in the Local Courts means that special attention should be given to meeting their needs.

160. All Local Court actions should be commenced using a simple standard form Application which is available in a simple booklet that outlines the court's procedure.

161. The standard form Local Court Application should be in plain English and advise respondents:

(1) that legal proceedings have been commenced against them;

(2) how to respond; and

(3) the deadline for responding.

162. The Local Court should develop (perhaps by way of Practice Directions) plain language forms for various types of common causes of action. These standard forms should be capable of being accessed and, perhaps, completed over the internet, on disk, and at terminals in court registries and public libraries.

163. The Local Court should be particularly sensitive to the special needs of self-represented litigants and those with English as a second language or other special needs, by providing multi-lingual and multi-format guides and materials.

Pleadings in the Local Court

17.7 Although the Local Court is not strictly a 'court of pleadings', as discussed in Chapter 3, the *Local Court Rules* provide for 'particulars' to be given after the commencement of an action. Where lawyers conduct Local Court actions they often exchange 'pleadings'. Pleadings and the move towards a system of case statements are discussed more fully in the context of the higher courts where the complexity and technicality of pleadings tend to be more of a problem. (See Chapter 10.) Nevertheless reform of 'pleadings' in the Local Court could considerably assist in the accessibility and simplification of existing procedure.

17.8 One of the most fundamental functions of the case statements we propose is to ensure that parties are aware of the nature of the case they need to counter as soon as possible. All case statements, including Applications and Responses, should be specific and not based on general assertions or denials. Further, if the procedure is to be made simpler and more accessible, the technicalities which need to be satisfied should be kept to a minimum. Case statements at the Local Court level should be restricted to the facts and particular principles of law relied upon. Other measures to streamline the process include attaching copies of all principal documents referred to in the case statement and the requirement that statutory declarations verify that the facts pleaded are true to the best of the signatory's knowledge and belief.

164. Case statements must not contain general assertions or denials.

165. All case statements must contain:
(1) a concise and simply expressed statement of facts and law on which the party relies, with relevant details;
(2) a list and copies of principal documents referred to in the case statement which are to be relied on at trial; and
(3) where applicable, the relief sought.

166. Case statements must contain a statutory declaration by the party that the facts stated are true to the best of the signatory's knowledge and belief.

167. If a party is legally represented, the practitioner must certify the party's case statement:
(1) is correct according to instructions provided;
(2) is not presented for any improper purpose; and
(3) all issues raised are, in the view of that practitioner, reasonably arguable.

168. If a party verifies a case statement in the knowledge it is false, the party may be punished for contempt of court. If a legal practitioner certifies a case statement without any reasonable basis, the practitioner should be dealt with for professional misconduct.

Service in the Local Court

17.9 As indicated in Chapter 3, default judgments in the Local Courts are common, that is, judgments entered against one of the parties, generally the defendant, for failing to comply with the Rules of Court, for example failing to file a defence. However a default judgment will be set aside if it cannot be proved to the satisfaction of the court that there was effective delivery or 'service' of a document initiating court proceedings. The essential test is that the initiating document, which we propose will be simply an Application, is brought to the attention of the defendant who will be called the 'respondent'.

17.10 Currently, leaving a plaint or other initiating document at the defendant's address with 'a person over the apparent age of 16' is sufficient. And yet a large number of applications to set aside default judgment arise because this does not necessarily meet the essential test for service. A better result would be achieved if delivery by post is permitted and the addressee is required to acknowledge receipt of the mail. There also should be clear guidelines as to what constitutes delivery on corporations for these purposes.

169. The court should arrange delivery of the Application, normally by post, and a delivery receipt should be returned to the court.

170. Delivery of Local Court documents should only be effected by:

(1) personal delivery to the recipient; or

(2) any form of mail service which involves delivery to the recipient and an acknowledgment of delivery by the recipient; or

(3) in the case of a corporation in any manner permitted by relevant corporations legislation; or

(4) as specified in an order for substituted delivery.

Notice of Intention to Defend in the Local Court

17.11 At present in Western Australia the defendant must file a short Notice of Intention to Defend. This Commission's 1988 report recommended that a standard period of 14 days from the service of a document commencing proceedings be allowed for the defendant to file a Notice and subsequently file the Defence. The experience in the Local Court, however, has been that

14 days is not sufficient. We recommend an extension of time be allowed, but that a Response, addressing the applicant's claim, be filed instead of the Notice and Defence.

Counterclaims, set-offs and Third Party Notices

17.12 There are a number of additional processes which may accompany the usual claim and defence in a legal action. These are known as the counterclaim, set-off and Third Party Notice. A counterclaim is not simply a defence to a claim. It is formulated as an action which could have been argued independently against the applicant by the respondent but which is brought within the existing matter. At the present time it is possible for a respondent to file a counterclaim in the Local Court even though the amount exceeds the limits of the court's monetary jurisdiction and even though it relates to a matter or circumstance completely unconnected with the applicant's claim. In these circumstances, in effect, two actions are being tried together. We believe the scope to argue another action within the same proceeding should be limited to only those actions arising out of an identical transaction or same set of circumstances.

17.13 Unlike a counterclaim, a set-off is a claim made by the respondent which is formulated as a defence to all or part of the applicant's claim. It is limited to money claims, to extinguish or reduce a debt claimed by a creditor applicant, and is not framed as an action which is capable of being argued independently of the applicant's action.

17.14 A Third Party Notice is a notice issued by a respondent to a person who is not already a party to the proceedings. A Third Party Notice may be used where a respondent claims that the ultimate responsibility for loss or damage lies with another party with whom, for example, the respondent had a contractual arrangement. Issuing Third Party Notices can be a major delaying tactic. There is anecdotal evidence that although the current rules provide a time limit for filing the Notice, it is often ignored.

Filing counterclaims and set-offs in the Local Court

17.15 Actions and claims included in the existing system of counterclaims, Set-offs and Third Party Notices and the defences to counterclaims and set-offs should be filed prior to the commencement of case management procedures and within strictly limited time frames. As we discuss below, we recommend that Local Court matters undergo ADR where appropriate. If ADR is unsuccessful in resolving all aspects of the dispute, we recommend that all interlocutory matters be dealt with at the status conference. (See this Chapter at 17.24.) The early identification of all relevant issues would facilitate the efficiency and speed of Local Court processes and provide finality for the parties.

171. Notice of Intention to Defend should be abolished and respondents be required to file, within 21 days of delivery of the Application, a Response which, in addition to the requirements set out in Recommendation 165, states any fact or matter which:

(1) would mean the Application could not be maintained;

(2) indicates whether the Application is denied in whole or in part;

(3) indicates whether liability is admitted, and, if so, whether the amount is disputed.

The Response also should:

(1) indicate whether an action against the applicant arises out of the identical transaction or same set of circumstances; and/or

(2) the details of any debt the respondent claims he or she is owed by the applicant which is to be included as a defence in the proceedings.

An extension of time to file the Response should be available with leave of the court only if good cause can be shown.

172. A respondent should be able to commence an action against the applicant in the same proceedings, a 'Counter-Application', only if the facts and circumstances on which it is based are identical or directly related to the facts and circumstances on which the Application is based or an identical transaction.

173. A respondent intending to file an action against the applicant or a third party which is to be included in the original proceedings only should be able to do so:

(1) in a form specified in a practice direction (which has the same requirements as to form and content as an Application); and

(2) at the same time as the Response is filed.

174. Unless good cause can be shown any action against the applicant or a third party, or defence of a debt owed, which the respondent intends to be included in the same proceedings as the original action by the applicant, must be filed in the time permitted.

175. Unless good cause can be shown the applicant should be able to file a response to any Response, Counter-Application or claim of debt by the respondent within 14 days after delivery of the action or claim and prior to the case management conference.

Resolution of Local Court disputes

17.16 Presently, the bulk of matters commencing in the Local Court are debt recovery matters. These usually are resolved by default judgment soon after the initiating document is delivered. A significant number of the matters which are not resolved through the default judgment procedure eventually are settled at a pre-trial conference. (See Chapter 11.) However, a significant number go to trial. Unlike the Small Disputes Division, where the procedures involve little formality and there is no undue delay, matters in the General Division can be subject to unreasonable delay.

Default judgment in the Local Court

17.17 The large number of default judgments in the Local Court confirms the usefulness of the default judgment procedure. Under the procedure we propose, once the Application has been served and the time for filing a Response expired, the applicant should be able to apply for a default judgment. The applicant should be required to confirm that the debt claimed in the original Application is continuing with an option to enter judgment for a lesser amount if that is the present liability. We reaffirm this Commission's recommendation of 1988 that the class and amount for damages eligible for default judgments in the Local Court should be liberalised.

176. When applying for default judgment, the applicant should be required to confirm that the debt claimed in the original Application is continuing with an option to enter judgment for a lesser amount if that is the present liability.

177. The class and amounts of claims for damages in respect of which judgment in default may be obtained should be liberalised. In the case of damages for pecuniary loss the applicant should be entitled to enter judgment by default if the damages claim does not exceed a prescribed amount.

ADR in the Local Court

17.18 Within 14 to 21 days of filing the Response, a compulsory case management conference should be held. Like the case management conference in the higher courts discussed in Chapter 12, the purpose of the conference would be to assess the suitability of the dispute for referral to ADR. The guidelines should be the same as those specified at Recommendations 48 and 50, although the smaller value or significance of disputes in the Local Court is likely to result in the convenor considering less expensive forms of ADR. Court officials of the Local Court equivalent to the registrars of the higher courts should convene the case management conference.

178. As soon as practicable after the respondent files a Response a case management conference should be held, attended by the parties personally, which determines whether the matter is appropriate for ADR in accordance with the processes set out in Recommendations 48 and 50.

179. Appropriate court officials of the Local Court should conduct case management conferences.

Status conferences in the Local Court

17.19 Should a dispute be considered unsuitable for ADR, or if ADR fails to resolve all issues in dispute, a compulsory status conference should be convened. The proposed trial magistrate should conduct the status conference. While the purpose of the conference should be precisely stated, the methods of achieving that purpose should be expressed in the widest possible terms in the rules, providing the convenor with broad powers and flexibility. The powers of the convenor also should include those in Recommendation 242 if the parties intend to call expert evidence.

180. If a dispute is assessed as not suitable for ADR or if ADR fails to resolve all issues in dispute, a status conference, conducted by the proposed trial magistrate, should be convened.

181. At the status conference the proposed trial magistrate should:
(1) define and clarify the issues in dispute;
(2) decide the best method of resolving the issues and make orders accordingly (ie. to deal with all interlocutory matters); and
(3) provide a fixed trial date not more than two months ahead.

182. The discretions which may be exercised at a status conference should include:
(1) requiring the parties to give additional details;
(2) granting leave to parties to amend case statements with copies of additional documents to be relied on at trial;
(3) settling, with the cooperation of the parties, a statement of facts and contentions;
(4) that referred to in Recommendation 242, concerning the use of expert evidence;
(5) ordering that a document may be filed in electronic form;
(6) ordering that there be an exchange of written statements of the intended evidence of each witness;
(7) ordering how the statements referred to in (6) can be used;

(8) ordering the preparation and filing of an agreed list of exhibits that are page numbered and indexed (in appropriate order); and
(9) ordering the preparation of written submissions on a question of law raised, and the filing of copies of authorities relied on.

These powers should be exercised in relation to the aims identified in Recommendation 159 and, in particular, proportionality.

Disclosure and interrogatories

17.20 There are real problems with the existing process of discovery at the Local Court level. It can be a time-consuming and expensive process exceeding the value of the subject matter in dispute in the Local Court. At the same time, parties, particularly those not legally represented, often are not able to appreciate the relevance or significance of a document. There is a problem with limited discovery however, in that it can result in relevant documents being excluded.

17.21 We recommend that the status conference convenor have the power to order limited disclosure in addition to the overriding obligation on a party to disclose any document the party *should* have known would be significant to his or her own case. Deficient disclosure should be sanctioned whether that deficiency arises from deliberate non-compliance with the terms ordered at the status conference or due to the failure to disclose documents parties should have been aware were significant. We recommend that the Local Court have specific powers to deal with deficient disclosure.

17.22 There also has been significant debate about the usefulness of interrogatories. In our view, it is sufficient for the court to have discretion to deal with this matter at the status conference.

183. The proposed trial magistrate, at the status conference, should have the power to order additional limited disclosure bearing in mind the aim of proportionality of associated costs with the value or significance of the matter in dispute.

184. The court should have the power to deny a party the right to rely at trial on a document he or she deliberately neglected to disclose. Alternatively, if the document advantages the non-disclosing party, an order should be made that the defaulting party pay part or all of the costs of the action.

185. The question of whether interrogatories are allowed should be left to the discretion of the status conference convenor.

Summary judgment in the Local Court

17.23 Anecdotal evidence suggests that in the Local Court in Perth a large number of applications for summary judgment are made but about three-quarters fail. The result is considerable delay and wasted costs. To some extent this problem may be alleviated if our Recommendations 98 and 99, extending the availability of summary judgment, are accepted and applied in the Local Courts. We also recommend that, in the usual case in the Local Courts, the opportunity to apply for summary judgment should only be available at the status conference. The status conference provides a better opportunity to assess the relative strengths of the Application and Response. Summary judgment should be available on application by either the applicant or respondent, or by consent. (Currently only the plaintiff can apply for summary judgment in the Local Court.) Where a party applies for summary judgment, the convenor should have the same powers to make findings of fact and rulings of law, and to make these final as apply in the higher courts (see Recommendations 100 to 101). The convenor of the status conference also should exercise broad powers to limit the matters for trial.

186. Our Recommendations 98 and 99, to extend the availability of summary judgment, should apply to Local Court proceedings.

187. Where either party applies for summary judgment or an application is made by consent, the convenor of the status conference should have the same powers as recommended for the higher courts to make findings of fact or rulings of law and to make these final. (See Recommendations 100 and 101.) The convenor should have power to enter summary judgment if warranted.

188. The convenor of the status conference should have additional powers to:

(1) order the Application or Response or part of either or both be struck out if there has been a failure to comply with a rule, practice direction or direction given by the court;

(2) direct that a party may not call evidence on a particular issue, or call a particular witness or use a particular document;

(3) order the action proceed to trial as soon as practicable;

(4) fix time limits in respect of any subsequent proceedings;

(5) fix the date for trial of the action; or

(6) order the Application or Response or other case statements be dismissed in whole or in part.

Interlocutory matters

17.24 As a result of the above recommendations the proposed trial magistrate would exercise very wide powers at the status conference. This

is so that the status conference can deal with all interlocutory matters at one time, although in exceptional circumstances, such as where further disclosure or particulars are allowed, it may be necessary to adjourn the conference until the additional information is available. In any event, parties should not retain the right to apply for any order that could be made in the status conference without the leave of the court.

189. A party may not, without leave, subsequently apply for particulars, disclosure, summary judgment or any of the matters that were or could have been dealt with at the status conference. Leave should only be granted if good cause can be shown.

Listing conferences in the Local Court

17.25 All issues which have not been resolved at the recommended case management and status conferences should proceed to trial as soon as possible. The only outstanding matters should be those relating to the conduct of the trial itself. Presently these matters are dealt with at a listings conference. Under the procedures we recommend, the proposed trial magistrate should have additional powers to make orders concerning the conduct of the trial. The pre-trial magistrate should combine status and listings conferences absent exceptional circumstances.

190. A listing conference may be held shortly before the trial to enable the proposed trial magistrate to make orders concerning the conduct of the trial but only in exceptional circumstances.

191. The proposed magistrate may make orders at either a status or listing conference:

(1) referring the parties to a mediation conference;

(2) concerning the order of evidence at trial;

(3) limiting the time to be taken in examination, cross-examination and re-examination of a witness;

(4) limiting the number of witnesses (including expert witnesses) that a party may call on a particular issue;

(5) for the parties to exchange witness statements;

(6) limiting the time to be taken in making any oral submission;

(7) limiting the time to be taken by a party in presenting its case; and

(8) limiting the length of the trial.

Witnesses

17.26 We are not recommending that the procedures in the Local Court be uniform with those of the higher courts. This is principally because of our approach that the proportionality of procedure to the value or significance of a dispute must be considered. In relation to witnesses, we believe a streamlined process is more appropriate to Local Court proceedings than that recommended in Chapter 10 to apply to witnesses' evidence in higher court civil matters.

192. The attendance of a witness at a trial should not be required if:

(1) the party calling the witness serves an affidavit of the witness on all other parties not less than 14 days before the date fixed for trial; and

(2) within seven days after the affidavit is served, another party has not objected to the use of the affidavit at the trial;

(3) an objection, if any, giving reasons is in writing;

(4) the court may receive as evidence an affidavit properly served and to which no objection has been made; and

(5) the court is to order a party whose objection it considers unreasonable to bear relevant costs.

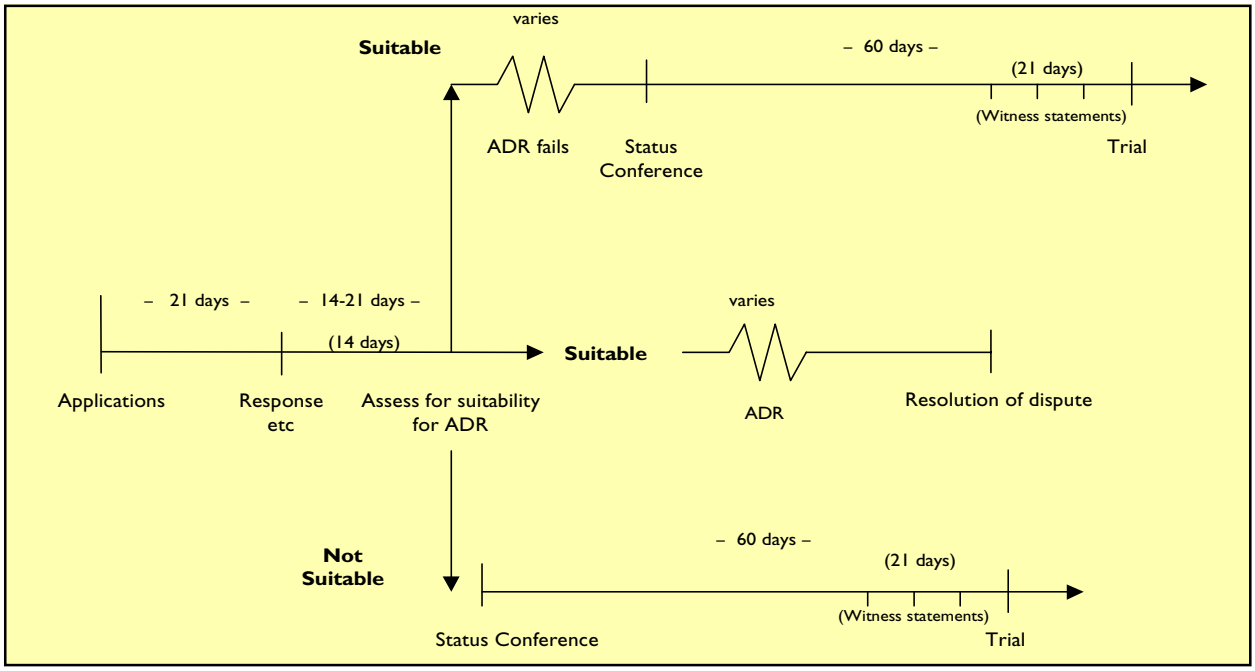


Figure 1 Time line for Local Court actions

17.27 Should our recommendations in relation to Local Court proceedings be adopted, the potential would exist for matters to be resolved in a relatively short timeframe. As indicated by the following time-line even if a matter is not resolved through pre-trial processes, the standard case should be set for hearing in under three months from the filing of a Response.

Non-attendance in the Local Court

17.28 The court should have the power to strike out an action if the applicant or respondent fails to attend pre-trial conferences or the trial. However, judgment entered as a result should be capable of being set aside in appropriate circumstances.

193. The Local Court should have the power to strike out an Application if the applicant fails to attend at the trial or any conference or hearing without:

(1) reasonable excuse; and

(2) advance notice to the court and all parties and witnesses.

Similarly, the Local Court should strike out the Response if the respondent does not attend without reasonable excuse and advance notice.

194. Judgment entered as a result of the failure to attend should be capable of being set aside.

Sanctions in the Local Court

17.29 If attempts to streamline the procedures of the Local Court are not to be undermined by parties seeking to exploit the process for their own ends, it is necessary to have appropriate sanctions for non-compliance with rules and court orders. In keeping with our recommendations in relation to the higher courts (see Chapter 12), only the parties should be able to apply for such orders. Should any penalty include a costs component, this should be payable forthwith and not 'follow the event' at some later date.

195. Parties should be able to apply for an order sanctioning another party for non-compliance with an order made at a conference.

196. The court should have the power to impose a penalty on parties if they have failed, without reasonable excuse either to have complied with an order or caused delay in complying with an order, on the application of another party to the proceedings.

197. Penalty costs orders payable to the court or other party should be payable forthwith and in an amount in the discretion of the court but sufficient to be an effective deterrent.

18

Self-Represented Litigants

Self-represented litigants

18.1 Litigants may be unable to obtain legal representation because they cannot afford a lawyer or because no representative is willing to act on their behalf. Some litigants may choose not to be legally represented even if eligible for legal aid or able to afford legal representation. The apparently increasing presence of self-represented litigants in the civil courts has implications for the effectiveness, efficiency and fairness of the justice system at every level.

Bias

All too frequently, the burden of ensuring that the necessary work of a litigant in person is done falls on the court administration or the court itself.

Mason CJ, Brennan, Deane, Dawson & McHugh JJ, *Cachia v Hanes* (1994) 179 CLR 403, 415

18.2 The justice system of Western Australia operates on the premise that lawyers will represent litigants in court. People representing themselves are less likely to be adequately informed or prepared. They may lack knowledge of court procedures. They may not understand the law and legal terminology. Moreover, they may not have the advocacy skills necessary to prove their cases. (See Chapter 21.) While it is generally the court administration, magistrates and judges who are required to assist the self-represented litigant, this practice renders the system vulnerable to claims of bias.

Costs

18.3 The presence of self-represented litigants in the civil justice system has the potential to increase costs for all court users. These increases may arise from:

- more pre-trial procedures;
- poor issue definition and clarification;
- greater time and expense spent in responding to unclear or irrelevant evidence; and
- excessive time spent in hearings.

18.4 Some believe self-represented litigants have a significant impact on increasing time and costs of other parties, lawyers, court staff and judges. However, the Family Court experience is that, due to unfamiliarity with the system, self-represented parties do not know what to ask for in interim matters. Similarly, Family Court trials are truncated because self-represented litigants have little knowledge about how to present their cases effectively by leading evidence and cross-examination. In some cases it may be that self-represented litigants actually decrease the cost and time of the litigation process, although this may be at the expense of achieving justice in the cases at issue.

How many self-represented litigants are there?

18.5 Representatives of Western Australian courts have noticed an increase in self-represented litigants. The lack of reliable quantitative data causes significant difficulties when attempting to assess the magnitude of the phenomenon and develop solutions. Data bases currently being established and customer surveys being conducted by the courts should help identify and collect information on self-represented litigants. (See Chapter 5.)

198. Data should be collected by the courts to:

(1) profile litigants;

(2) categorise their legal disputes;

(3) determine the cost of resolving matters; and

(4) record the quality, nature and satisfaction of the results.

Judicial intervention

18.6 Self-represented litigants invariably need assistance at trial due to their lack of legal representation. When a matter is being heard, it is generally only the magistrate or judge who is available to assist the self-represented litigant. Judicial activism traditionally has been considered acceptable in two circumstances. The first is where there is potential injustice to the parties and to avoid injustice, the judge assists or advises an unrepresented party. Intervention also may be justified on the basis of larger community interests such as the speedy resolution of trials through limiting the length of trials and using witness statements without endangering a fair trial by creating a perception of bias. But how far can the judge intervene to achieve a fair trial?

The role of the judiciary in an adversarial system

18.7 Self-represented litigants have the capacity to unbalance the adversarial nature of the justice system and undermine efforts at impartiality by judges, magistrates and court staff. Judges and magistrates are forced into an interventionist style, to the extent perceived necessary to address the shortcomings and lack of familiarity of self-represented litigants with pre-trial and trial procedures. The trial judge or magistrate inadvertently becomes more of a manager of the trial while continuing to be the adjudicator. Although we have advocated an increased role for the judiciary throughout this Report,

we are conscious of the dangers inherent in judicial activism, including:

- the absence of norms and rules, making it difficult to review managerial decisions;
- the insidious influence of inappropriate performance standards;
- the loss of neutrality;
- the need to make decisions before all the facts are known;
- the impropriety of involvement in settlement negotiations; and
- the extra financial costs of managerial judging.

Although endorsing an increased role for the judiciary in relation to self-represented litigants in particular, we also have sought to establish proper limits for such activism so that the other ends of the justice system, neutrality and efficiency, are not ignored.

The need for uniformity

18.8 With apparently increasing numbers of self-represented litigants a uniform approach to intervention is necessary. The Supreme Court already has 'in person assistance/legal advice' policy and guidelines for Registry staff. The District Court has a 'Benchbook' for judges which includes guidelines for dealing with self-represented litigants. Customer Service Guidelines assist in dealing evenhandedly with all types of litigants and users of the courts. Some courts also have 'in person kits' available for applicants. These initiatives assist court staff and the judiciary in managing self-represented litigants. However, unless care is taken, judicial intervention can have an adverse effect upon the perceptions of both the legally represented and self-represented litigant as to the even-handedness of the court.

18.9 Adopting the view of Lord Woolf (1996), we recommend that the best means for attaining the difficult compromise between the demands of neutrality and assistance for self-represented litigants required in order to have a fair trial is through the training of all court staff and the setting of benchmarks. Training of staff and the development of more comprehensive benchmarks should complement existing policies and guidelines on self-represented litigants. Achieving a consistency of approach is a safeguard for both individuals using the justice system and those who control, operate and work within it.

199. There should be a manual for court staff, specific guidelines for the judiciary and magistracy, and training for all court personnel, including the judiciary and magistracy, to assist in dealing even-handedly with self-represented litigants and other litigants.

Self-represented litigants in the higher courts

18.10 The legal and evidentiary issues raised before the higher courts are usually more complex than those presented in the Local Courts. Supreme Court procedure, which generally applies in District Court proceedings as well, is often too complex for the average self-represented litigant. Due to the inherent complexity of the procedures the involvement of self-represented litigants at this level may add greatly to the time and financial costs for all concerned. It is better if all parties are legally represented but Legal Aid's Minor Assistance Programme does not generally help people involved in higher court matters. The District Court Registry is now referring potential litigants to community legal centres and Law Access as a consequence of the apparently increasing number of self-represented litigants. Law Access is a free or discounted referral service, including a shopfront lawyer service, for litigants who would otherwise not be able to obtain legal advice,. The pre-trial conference is a crucial aspect of District Court procedure and self-represented litigants may consume more time at these conferences than represented parties.

18.11 A new Federal Court rule creates a '*Pro Bono* Panel' to provide free legal assistance to litigants in the Federal Court who are otherwise unable to obtain assistance: *Federal Court Rules* (Cth) Order 80 rule 1(2). The Supreme Court of Western Australia has recently launched a similar scheme, although it is confined to assistance for criminal matters being taken on appeal and is not formally recognised by the Rules of Court.

200. The *Supreme Court Rules* should be amended to create a panel to provide free legal assistance similar to that instituted by Order 80 of the *Federal Court Rules* (Cth) for litigants who are otherwise unable to obtain legal assistance in higher court proceedings.

Assisting the adjudicators

18.12 In both the civil and criminal areas, Supreme Court Registry resources already have been utilised to assist self-represented appellants in the preparation of appeal books (the collection of documents required to initiate an appeal). This resulted in reduced court sitting time, and, more significantly also removed the requirement for judges to inform appellants of what should and should not be included in appeal books. Previously this had left judges open to criticism for assisting one side. Further information should be obtained about what resources would assist adjudicators dealing with matters involving self-represented litigants.

18.13 In the Consultation Draft on this topic (2.10), we had referred to the practice of staff attorneys being employed to assist the court. In some cases it appears these attorneys assist in the preparation of court documents or

make courtroom presentations on behalf of self-represented litigants where this will assist the court. In reality, such attorneys are more an aid to the court than the litigant, ensuring that a matter goes smoothly and rendering the judges' work easier. However, in our view such a practice results in confusion as to the proper role of the court and creates an unacceptable tension between the attorney's legal professional obligations to the litigant and the court. A better resolution of the difficulties faced by self-represented litigants is to expand the availability of court registry assistance and facilities to present and compile documentation.

201. Court registry resources should be developed to assist self-represented litigants in the presentation and compilation of court documents in order to facilitate adjudication of cases on merit.

Self-represented litigants track

18.14 Together with other recommendations in relation to case management, we suggest there should be a special case management track for self-represented litigants in the higher courts. A self-represented litigant's case manager could have responsibility for keeping the matter on track as well as the usual responsibilities for making all interlocutory decisions including security for costs, summary judgment and trying preliminary issues. (See Chapter 12 for a discussion of the proposed case management system for civil matters.) The purpose of a dedicated self-represented litigants' case management track is not to prejudice or deprecate, but rather to ensure adequate monitoring of matters involving self-represented litigants. We note, however, that difficulties may arise when a litigant moves in and out of legal representation. The case manager should have a discretion to keep matters in the special track in these circumstances.

202. A special 'self-represented litigants track' should be established in the higher courts, the purpose of which is to enhance support for self-represented litigants.

Self-represented litigants in the Local Court

18.15 The Local Court is the civil jurisdiction in which most disputes involving self-represented litigants are heard. The Local Court Registry currently provides user-friendly brochures about various aspects of the court and generally refers people to advice agencies. (But see also the comments in Chapter 34.) It also provides copies of standard forms to litigants and accepts handwritten court forms. These efforts are helpful particularly given the complicated and antiquated rules and forms which presently bind the Local Court. A dedicated case management track for self-represented litigants

need not apply in the Local Court. The Local Court should operate on the presumption that most parties will represent themselves.

18.16 However, it remains true that the increasing lack of legal representation now places a burden, previously borne by lawyers, on registry staff, clerks and magistrates. One way to alleviate the lack of representation is to allow non-lawyers to represent clients in court. The Civil Justice Review (1988) conducted in the United Kingdom, recommended that litigants in small claims, debt and housing cases have a statutory right to be represented by a lay representative of their choice, subject to the discretion of the court. We do not share that view and, in Western Australia, the Local Court does not encourage legal representation for these matters in any event. Fortunately, too, significant reforms in the Local Courts are already under-way and our recommendations in Chapter 17, if adopted, would further assist in the process of improving access to the Local Courts without legal representation.

203. The Local Court should operate on the presumption that most litigants will, and should be able to adequately, represent themselves.

Chamber magistrates' scheme

18.17 The New South Wales court system operates on the basis that a properly informed litigant can be an asset to the justice system. Potential litigants in the Magistrates' Courts must first pass an information officer, before accessing the registry. The information officer attempts to provide relevant information with the aim of assisting and diverting the potential litigant to other agencies, if appropriate, before the potential litigant may proceed further. (Refer to Recommendation 415 concerning a referral service.) If a case is in the registry, staff make an assessment of the complexity of the matter and may make an appointment with a chambers magistrate if necessary. Chambers magistrates provide legal information, not advice.

204. A scheme should be implemented in the Local Courts whereby registry staff may refer potential litigants to a magistrate in chambers for legal information prior to filing a matter, complemented by other information services.

Innovations in delivery of legal services for self-represented litigants

18.18 Limitations on funding and the responsibility to help more people access the legal system without legal representation brought about many innovations in the delivery of legal services.

- **Legal Aid** has developed telephone advice services, self-help kits for common court actions, standard form documents with information on

how to issue proceedings and draft letters of demand. It also provides a duty counsel scheme for criminal matters in the Court of Petty Sessions. Duty counsel lawyers generally provide free legal advice and/or representation for undefended matters for defendants on the day of their court appearance. The Aboriginal Legal Service also provides duty counsel. The Youth Legal Service did so at the time of this Report, but in the future will provide legal information and advice only.

- **Community legal centres** have attempted to deliver a solution-based service encouraging self-help, providing community legal education and information, and publishing helpful resource material as well as telephone advisory services, mediation and financial counselling.
- Other **community-based groups**, including religious organisations, also provide personal support for litigants in court, which may not be appropriately provided by court staff and lawyers.
- The Law Society has developed **Law Access**, referred to previously. The Law Society also operates a **Litigation Assistance Fund** which provides assistance to civil litigants who are assessed as having a meritorious case but do not qualify for legal aid or are unable to afford the full cost of legal representation.
- Another innovation, known as **alternatives to full time representation** has seen lawyers employed to carry out discrete tasks with the litigant remaining responsible for the overall conduct of the matter.

A number of our recommendations, particularly in Chapters 34 and 35 on the court environment and technology, have been made with self-represented litigants in mind. Other innovations should be implemented which could assist the courts to manage self-represented litigants and the problems they pose for the legal system.

205. A duty counsel scheme, providing free legal advice and limited representation to self-represented litigants, should be established for civil matters modelled on Legal Aid's existing criminal duty counsel scheme.

206. Court advice schemes, including referrals for financial or personal counselling, should be established. (See, too, Recommendation 415.)

207. Community-based programs should be extended to provide assistance not appropriately provided by court officers or lawyers.

208. Government employed lawyers should participate as rostered court-based advisers to provide free advice or information to potential litigants.

209. An expanded Law Access or similar type of organisation should increase services available to:

1) coordinate volunteer and low fee advice and representation;
2) provide shopfront advice; and
3) refer potential litigants to alternative diversionary bodies or coordinate legal representation.

210. All public libraries should carry current commonly required legal materials and court forms, perhaps accessible through computer terminals.

211. There should be on-going monitoring of information technology developments in the justice system to ensure self-represented litigants have access to legal information and assistance.

212. As soon as adequate information technology support is available, a 'one stop shop' information service should be introduced on a trial basis at selected courts. (See, too, Recommendation 417.)

19

Unreasonable and Malicious Litigants

Unreasonable litigants

…delay, wasteful use of resources, hardship to litigants and an erosion of confidence in the administration of justice.

Simon Smith, 'Vexatious Litigants and their Judicial Control' (1989) *Monash University Law Review* 15:50

19.1 This Chapter is concerned with litigants who are considered unreasonable or malicious. First, we consider people who litigate in a manner which may abuse opposing parties and other participants in the justice system whom we refer to as 'unreasonable' litigants. These litigants may or may not be legally represented. They often engage in 'solicitor shopping' and excessive interlocutory and pre-trial manoeuvres. They may raise spurious claims or defences, flout time-limits to cause delays, pursue unmeritorious applications, refuse reasonable settlement offers, fail to pay orders for costs and launch frivolous appeals. The conduct of unreasonable litigants impinges on the effectiveness and efficiency of the justice system and makes the process of litigation more expensive and protracted for everyone.

Unreasonable litigants and summary judgment

19.2 In spite of the courts' inherent right to control an unreasonable litigant, there is a reluctance to terminate the right to litigate. Judges are conscious of the possibility that a valid claim might be lost due to the inability or failure to articulate it, particularly where self-represented litigants are involved. But there is also a perceived failure by the courts to recognise the emotional and financial impact of unreasonable litigants on other parties. Presently there is no systematic consideration at an early stage of whether a litigant's claim has any real merit. Innocent parties can be dragged through the courts for a decision made at the end of a long legal road that the claim never had any legal merit in the first place. The vindicated party frequently has no practical opportunity to recoup even court assessed costs, let alone actual out-of-pocket costs. And there is no redress for the loss of time and the aggravation of futile legal proceedings. Our recommendations to increase the availability of summary judgment, in Chapters 14 and 17, should assist in bringing proceedings without reasonable prospect of success to an earlier end.

Unreasonable litigants and case management

19.3 We also believe that with potentially unreasonable litigants, closer management of cases by judges, magistrates and registrars should assist in reducing the opportunities to abuse legal process. (See Chapters 12 and 17.) In particular, the involvement of a judge or magistrate empowered to deal with all interlocutory matters should limit the potential for appeals on interlocutory matters. Only registrars' decisions generally are open to appeal as of right.

Screening of proceedings

19.4 There are various ways to control or monitor parties commencing court proceedings. Order 67 rule 5 of the *Supreme Court Rules* enables a registrar to refuse to file proceedings without leave of the court if the proceedings appear to be an abuse of process or are frivolous or vexatious. The rule could be amended to clarify existing grounds and add other grounds for refusal to file without leave. In place of the archaic language of proceedings which appear 'frivolous or vexatious', the grounds for refusal to file without leave should be changed to 'groundless or malicious'. This would clarify the purpose of the provision: to limit the potential for litigants to annoy or embarrass others by instituting an action without sufficient substance or proper purpose.

19.5 Additional grounds for imposing the requirement to obtain leave should be:

- unreasonable conduct of an action by the potential litigant; or
- that proceedings by the litigant had been issued 'frequently' and without cause in the past.

These grounds would give the registrar the option to consider the conduct of the litigant more broadly and not simply consider the proceedings to be filed.

19.6 An interested party in proceedings also should be able to request screening of applications made by a litigant who has previously regularly issued proceedings without cause in the action, for example interlocutory applications. This could result in all applications being screened by the case manager, in the absence of the litigant, before being filed. The case manager of a specific action also should have power to order that a litigant with a history of issuing proceedings without cause in the action be required to obtain leave prior to initiating any fresh application, such as an appeal.

213. The language of the existing grounds for requiring leave to file under Order 67 rule 65 of the *Supreme Court Rules* should be updated to 'groundless or malicious' in place of 'frivolous or vexatious'.

214. Order 67 rule 65 of the *Supreme Court Rules* should be amended to allow a registrar to require the litigant to obtain leave of the court before filing proceedings on the additional grounds of:

(1) a history of frequent issue of proceedings without cause by a potential litigant; or

(2) 'unreasonable conduct' by a litigant of a particular action.

215. The case manager should have a discretion to order that interlocutory applications or applications to appeal in an ongoing action should not be filed without leave of the case manager on the grounds that a party has made frequent applications in the action without cause.

The case manager's discretion may be exercised either at the request of a party with an interest in the proceedings or at the initiative of the case manager. Leave to file may be made subject to the litigant first paying costs of the matter.

Security for costs

19.7 The ALRC (1995) concluded that the risk of an adverse costs order was insufficient to deter unmeritorious claims and defences. In particular, stronger measures are required to protect innocent parties from unreasonable litigants. Currently, a defendant (respondent) may apply for the plaintiff (applicant) to pay an amount into the court to cover the probable costs the defendant would be entitled to recover if the action is unsuccessful. This practice is known as 'security for costs'. To assist with the identification of unreasonable litigants in a security for costs application there should be a discretion to order disclosure on oath by the party wishing to litigate, of prior litigation, including whether the party has been involved in interlocutory applications, appeals, judgments, costs orders and whether adverse judgments were satisfied. In any event, where the applicant is impecunious, bankrupt or has a record of failing to meet prior adverse costs orders, the merits of the case should be dealt with expeditiously.

19.8 In our Consultation Draft on this topic (2.11), we acknowledged that respondents as much as applicants could abuse the legal process through making groundless or 'unreasonable' defences and behaving unreasonably. However, rather than extend screening to apply to respondents, we believe the expanded summary judgment provisions we recommend in Chapters 14 and 17 are sufficient to deal with unreasonable defences and respondents.

19.9 In some cases, although there is no application for security of costs, one or both parties may be impecunious, bankrupt or may have failed to meet prior adverse costs orders. In these circumstances, legal procedures

can be used tactically. A better-resourced litigant may run-up interlocutory costs and impair the other party's ability to litigate effectively. A litigant without resources may cause the opposing party to incur costs that cannot be recovered. Presently an order for security for costs can only be made against the plaintiff. Whether or not such an order is made should be in the discretion of the case manager. The case manager is also best placed to determine whether to ration, limit or apply proportionality principles to the procedures allowed in any proceeding and should have a discretion to do so.

216. In an application for security for costs, the case manager should have a discretion to order any litigant to provide a sworn statement of disclosure concerning any previous litigation in any jurisdiction including whether, and when, any judgments were satisfied.

217. Factors relevant to the exercise of discretion whether to grant any security for costs application should include:

(1) default in paying any previous judgments or any costs award;

(2) the financial status of the litigant; and

(3) the manner in which the litigant conducts litigation.

218. If a litigant is impecunious, bankrupt or has a record of failing to pay costs, the merits of the case may be dealt with through expanded summary judgment procedures, a trial of preliminary issues or a summary hearing process.

219. If a litigant is impecunious, bankrupt or has a record of failing to pay costs, the case manager may ration, limit or apply proportionality principles to the procedures allowed in any matter.

Vexatious litigants

19.10 Vexatious litigants are those to whom the *Vexatious Proceedings Restriction Act 1930* (WA) applies. They are litigants who habitually, persistently and without reasonable grounds bring legal proceedings. As with unreasonable litigants, vexatious litigants may or may not be legally represented. Also like unreasonable litigants, their conduct has repercussions throughout the justice system.

Vexatious Proceedings Restriction Act 1930 (WA)

19.11 Theoretically, the severest sanction available to control abuse of the legal process is to have a person declared under the *Vexatious Proceedings Restriction Act 1930* (WA). The process involves the Attorney General, usually following a complaint from a member of the public, making an application to the Supreme Court for an order that a person only be permitted to commence litigation after first having obtained leave of the Supreme Court.

19.12 The current Act has proved largely ineffectual. Applications are rarely brought and are almost never successful. The existing procedure is time consuming and cumbersome. Significant problems with the existing legislation are:

- the narrow test of habitual and persistent issuing of originating proceedings as constituting a vexatious litigant;
- the failure to consider the issuing of interlocutory and appellate proceedings;
- the failure to consider proceedings before tribunals and quasi-judicial bodies;
- the failure to consider the manner of conduct of proceedings;
- the exclusive power of the Supreme Court to declare a litigant vexatious;
- the difficulty in locating information about previous litigation by a litigant; and
- the limited categories of parties who can bring an application to have a litigant declared vexatious.

Malicious litigants

19.13 We make recommendations to address these problems below. To mark the move to a broader and hopefully more effective statutory regime for preventing abuse of the legal process we also recommend that the terminology be updated and the Act renamed the Malicious Proceedings Restriction Act.

220. The *Vexatious Proceedings Restriction Act 1930* (WA) should be amended so that:

(1) The Act is renamed the Malicious Proceedings Restriction Act, and references to 'vexatious' conduct or litigants be amended to 'malicious' conduct or litigants.

(2) The test of a malicious litigant includes issuing process that is unreasonable and unmeritorious.

(3) The Act includes, as part of the malicious litigant's behaviour indicative of or relevant to the conduct of any proceedings, actions by the litigant or by a third person or representative acting in concert with the litigant:

i. issuing process or proceedings in tribunals or equivalent bodies including quasi-judicial bodies;

ii. issuing interlocutory proceedings and appeals;

iii. failing to meet deadlines;

iv. failing to cooperate (including with settlement processes);

v. failing to comply with orders and judgments; and

vi. engaging in possible delaying tactics.

(4) A court granting leave to a declared litigant to institute proceedings or to continue should have a discretion to make such leave to issue or proceed conditional.

(5) Available conditions on leave to issue or proceed should include:
   i. security for costs;
   ii. representation by counsel; and
   iii. a limit to the number of interlocutory proceedings initiated by a particular party in a claim or regarding a particular aspect of a claim.

(6) The court's discretion in making a conditional order for leave to issue or proceed should include making an order about particular litigation, a particular aspect of the litigation, a particular class of litigation, all litigation, or the commencement of any specified type of legal proceeding. This may include a particular person or class of persons forever or for a limited period.

(7) Any court, of its own motion, at any stage of proceedings and without the need for an application under the Act (subject to natural justice being provided to the litigant) should have the power to make an order declaring the litigant malicious where it appears to the court there are proper grounds to make such an order.

(8) Any court, tribunal or quasi-judicial body should be able to refer a matter to the Attorney General for consideration of an application being made under the Act where it appears to the court, tribunal or quasi-judicial body that there are proper grounds for such an application.

(9) The litigant the subject of an action under the Act may be ordered to provide, on oath or affirmation, a schedule of all applications, motions, summonses, writs and appeals which the litigant has filed in any court or tribunal. In addition the litigant may be ordered to provide, on oath or affirmation, a schedule of all orders relating to such matters and a history of compliance, including final orders thereof and judgments and subsequent compliance.

(10) Standing to bring an application to have a litigant declared malicious should include, along with the Attorney General, a registrar or equivalent in any court or tribunal covered by legislation, the DPP, or with the leave of the court any other interested or aggrieved person.

20

Evidence

Why is there a law of evidence?

20.1 Traditionally the laws and rules of evidence require a high degree of formal proof. These exacting standards exist so that only reliable evidence is allowed in court. The integrity of the justice system depends on the fact-finder, whether judge or jury, basing decisions on dependable evidence. Hearsay is a prime example of the kind of evidence often excluded by the existing laws. Unless a person who made a particular statement can be questioned during trial, courts generally will not allow another witness to repeat or describe what that person said in an attempt to prove that what was said was true. The same complicated rules exclude written evidence. One of the reasons for these rules is so that the fact-finder can observe witnesses and evaluate their truthfulness.

What is the law of evidence?

20.2 Except where legislated not to apply, the law of evidence governs the reception and use of information in legal proceedings. Evidence law is a collection — even a mish-mash — of principles, rules and discretions, developed over many years and often in response to changing rationales. To further confuse matters, in Western Australia two evidentiary regimes apply. In the Federal courts, the reception of evidence is governed by the *Evidence Act 1995* (Cth). In the State courts, the *Evidence Act 1906* (WA) and the common law govern the reception of evidence. It is open for some cases to be heard in either the State courts of Western Australia or the Federal Court of Australia sitting at Perth. Litigants sometimes have a choice of where to institute proceedings. It is inefficient and unfair that the same case, conducted in the same State, potentially can be prepared and conducted on the basis of two different evidentiary regimes.

The law of evidence in criminal and civil proceedings

20.3 There is, however, a valid distinction between the different approaches taken in criminal and civil proceedings. In criminal matters, as discussed in Chapter 7 on the criminal adversarial system, the law of evidence must be considered in relation to the jury. Demands on jurors, unfamiliar with the technicalities of the law of evidence, are difficult. For example, evidence may be admissible against one defendant but not a co-defendant. There also are concerns that judges, in making decisions on evidentiary matters, do not usurp the function of the jury as the arbiter of fact. Another area of concern is the effectiveness of warnings and directions which are issued to juries about the reliability of evidence rather than the exclusion of the evidence. There is also, of course, a fundamental difference in the standard of proof required in criminal and civil matters — criminal matters being required to be proved 'beyond reasonable doubt' and civil matters to the lesser standard of 'on the balance of probabilities'. While there is ample reason to move towards uniform laws of evidence throughout Australia, the distinction between civil and criminal matters remains important.

Evidence Act 1995 (Cth)

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

Justice Smith, Foreword to Odgers' *Uniform Evidence Law* (1997)

20.4 The ALRC's comprehensive review of the law of evidence in both civil and criminal matters led to an interim report in 1985, a final report in 1987, and culminated in the enactment of the *Evidence Act 1995* (Cth). The Act applies in all Federal courts and New South Wales has already adopted similar laws of evidence in its own courts. The Act has the advantages of codification and greater uniformity. (See Recommendation 2.)

Evidence Act 1906 (WA)

20.5 In contrast, the Western Australian *Evidence Act* came into existence in 1906 and has been the subject of a number of piecemeal amendments. Many evidentiary principles are not covered by the Act, nor has it been the subject of any systematic review since its inception. There are, however, some beneficial local provisions which do not have any counterpart in the Commonwealth Act. In particular, provisions relating to the evidence of children and special witnesses, which were the subject of a report by this Commission (1991), and the specific protection afforded complainants in sexual assault cases, have no equivalent in the *Evidence Act 1995* (Cth).

Advantages of the Commonwealth Evidence Act 1995

20.6 It is not possible in the scope of this Report, nor was it in the Consultation Draft 'Aspects of the Law of Evidence' (3.1), to canvass all the differences between the Western Australian and Commonwealth *Evidence Acts*. While the *Evidence Act 1995* (Cth) may not be preferable to the existing Western Australian laws of evidence in every respect, it has some clear advantages:

- it is far more comprehensive;
- it was drafted in light of an overriding policy framework which focused on reducing delay and cost;

- it contains a number of considerable improvements (only some of which are discussed in this Report);
- it acknowledges and seeks to benefit from advances in technology;
- it seeks to reduce surprise in litigation by providing for the giving of notice to opposing parties in various circumstances; and
- it is in use in all Federal courts including the Family Court of Australia and in all courts in New South Wales.

20.7 Of particular advantage in the Commonwealth *Evidence Act 1995* are two initiatives. The first provides for discretions to exclude or limit the use of evidence on the bases that:

- the evidence is unfairly prejudicial;
- the evidence is misleading or confusing; or
- undue waste in time may result.

The second initiative provides the court with a discretion, in appropriate circumstances, to dispense with rules of evidence altogether.

221. The *Evidence Act 1906* (WA) and related Western Australian legislation should be rewritten to embody the *Evidence Act 1995* (Cth), but also to include the specific advantages of Western Australian legislation, for example:

(1) provisions concerning the evidence of children and special witnesses;

(2) the protection afforded complainants in sexual assault matters; and

(3) specific matters recommended in this Report.

Excluding 'the truth'

20.8 In any evidentiary regime there is often a perception that the law of evidence 'conspires' to exclude 'the truth' from legal proceedings. In criminal matters the fair trial of the defendant is central and requires the exclusion of unduly prejudicial evidence. Thus evidence that members of the public might consider relevant can be excluded from the jury at trial. A classic example is evidence of a defendant's 'bad character', including prior convictions. Other rules of evidence, which apply in both civil and criminal proceedings, often cause the judge to exclude relevant information — in particular, the rules against hearsay and those which attach to the admissibility of documentary evidence.

Evidence of 'bad character'

20.9 Many public submissions expressed concern about the exclusion of evidence from trial, and in particular evidence of the 'bad character' of the

defendant. However, it is a misconception that the law systematically prevents the presentation of evidence of 'bad character', including prior convictions, in all criminal cases. This evidence is potentially admissible in a number of circumstances, including:

- by one co-defendant against another co-defendant;
- when a defendant raises evidence of his or her own good character and therefore makes it an issue;
- when a defendant 'throws away the shield' by attacking the character of a prosecution witness;
- when evidence of a prior violent relationship is necessary to prevent the jury from being misled;
- when the requirements of similar fact evidence are met (that is, evidence of a person's previous conduct which tends to indicate that he or she has a propensity to behave in a particular way); or
- in a variety of circumstances where the probative value of evidence is sufficiently strong.

20.10 The reasoning needs to be examined which underlies the claim that juries are being denied valuable evidence by not, in all instances, being advised of previous convictions. The reasoning is that a person who once committed a criminal offence, of whatever kind, regardless of when the offence was committed and the stage of a person's life, is more likely to have later committed another criminal offence, whether related or not, and regardless of the time between the two. If this reasoning is relied upon, it is clear how evidence of 'bad character', if allowed in all instances, could hinder, even mask, rather than aid, in determining guilt.

20.11 The current rules concerning the admissibility of evidence of prior convictions and 'bad character' generally, in our view, stress relevance to the current proceedings, at the same time involving flexibility and discretion. The existing rules which reject evidence of prior convictions unless fairness dictates that the evidence should be permitted, allow for the reception of material by jurors which can assist them in performing their function and do not require reform.

The rule against hearsay

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

Toohey J,
Pollitt v The Queen (1992)
66 ALJR 613, 635

20.12 In Western Australian courts, the rule against hearsay is governed by the common law, and is subject to a range of highly technical exceptions. There are two key reasons for the rule. The statement brought into evidence by hearsay is not reliable evidence because the person who made it cannot be cross-examined. Because evidence brought in by hearsay also makes it extremely difficult for the validity of the statement to be challenged by the opposing party, it can result in unfairness. It is our view that the rule against hearsay can be reformed so that the improper rejection (or reception) of

evidence is minimised at the same time that the key and sound rationales behind the rule are accommodated. The overwhelming majority of public submissions received on this point also supported reform.

Commonwealth Evidence Act 1995 and the hearsay rule

20.13 The *Evidence Act 1995* (Cth) reformed the common law position relating to hearsay. While hearsay remains excluded generally, the rule is substantially relaxed and the exceptions to it rationalised. Unintended 'implied assertions' are no longer excluded by the hearsay rule. (Take, for example, statements such as 'Hello Mary'. The statement does not assert that Mary was present at the time it was said as would the statement 'Mary was there', but it implies that she was. Implied assertions are regarded as more reliable than other statements.) Under the Commonwealth Act, the hearsay rule also is clearly formulated; third party confessions may be admitted where appropriate; technicality is reduced; and the approach accepts that juries are competent to deal with complex issues. Appropriate distinctions are drawn between first and second hand hearsay and between civil and criminal proceedings, given the higher standard of proof required in the latter. Necessary safeguards also are provided for in the form of discretions and warnings and in provisions requiring notice to be given to the other party. (The matter of the hearsay rule and expert evidence is discussed further in Chapter 22.)

222. In drafting the new Evidence Act, the provisions of the *Evidence Act 1995* (Cth) relating to hearsay should be adopted.

Documentary evidence

20.14 The importance of reforming the law regarding the admissibility of documents cannot be overestimated. A number of provisions of the *Evidence Act 1906* (WA) are designed to facilitate the admission of documents into evidence. However, the Act has failed to keep up with technological changes, including the increasing use of documents in electronic form. This and other evidentiary issues raised by information technology are discussed in Chapter 35. In other respects, and quite apart from judicial development, the provisions as they stand have been the subject of considerable criticism. Significantly, there are no specific provisions in the Western Australian Act relating to business records generally. The provisions made for documentary evidence are far inferior to the provisions in the *Evidence Act 1995* (Cth).

Commonwealth Evidence Act 1995 and documentary evidence

20.15 The *Evidence Act 1995* (Cth) greatly reduces the formal burden of proof in relation to the admission of business records. It abolishes the original evidence rule, so that copies, transcripts and so on are admissible to prove their contents. Photocopies and faxes are presumed to be authentic, unless

there is evidence to raise a doubt otherwise. There is no 'qualified person' requirement in the Act, unlike the *Evidence Act 1906* (WA), so that a statement in a document may be admissible to establish a fact or opinion whether the statement is by a qualified person or not.

20.16 A number of safeguards have been incorporated in the *Evidence Act 1995* (Cth), including a process where a party may request that a person who made representations in business records be called to give evidence. The party also may request that a person 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 document not be admitted. (See too Recommendations 427 to 429.)

20.17 One disadvantage of the existing *Evidence Act 1995* (Cth) is that it did not adopt clause 33 of the original *Evidence Bill 1991* (Cth). Clause 33 proposed that the court should be allowed to order the production of complex evidence in summary form where it would assist in the *comprehension* of the evidence. The clause applied to any complex evidence, and was not limited to documentary evidence. When eventually enacted as section 50 in the existing Act, however, summary form of evidence only was allowed to assist in the *examination* of evidence and was limited to documentary evidence. We recommend that the review of the law of evidence in Western Australia revisit the original proposal contained in clause 33. We also recommend (see Recommendation 93) that disclosed documents, including those appended to case statements, should be presumed admissible in the absence of a dispute as to their authenticity.

223. The law of evidence in Western Australia concerning documentary evidence should be based as substantially as possible on the provisions of the *Evidence Act 1995* (Cth), subject to:

(1) our Recommendation 93, concerning the admissibility of disclosed documents; and

(2) adopting clause 33 of the Evidence Bill 1991 (Cth).

Resolving evidentiary disputes and the use of witness statements

20.18 It is generally accepted that, wherever possible, disputes about evidence should be resolved before trial. This is particularly important in jury trials. So, for example, where there are evidentiary issues in criminal matters not tried summarily, section 611A of the *Criminal Code* already provides for their pre-trial disposition. The ability to identify evidentiary issues prior to trial would be enhanced to the extent that witness statements are exchanged prior to trial and even more so where they are ordered to stand as evidence

in chief. The exchange of witness statements in relation to criminal proceedings is discussed at Chapters 24, 25 and 27 and generally at Chapter 21. See also Chapter 10, 'Pleadings', concerning the exchange of outlines or statements of witness evidence as part of the civil pre-trial process of the higher courts and Chapter 17 on Local Court process.

20.19 In Western Australia, pre-trial hearings to determine the admissibility of disputed evidence have been successfully conducted. In our view, this practice should be encouraged wherever appropriate. It also would complement our recommendations in relation to pre-trial conferences in both civil and criminal proceedings, although the usefulness in this regard in criminal matters will be more limited given the present absence of any comprehensive requirement for the accused to disclose his or her defence. (See Chapter 24.)

224. In conjunction with the drafting of a new Evidence Act recommended at 221, the rules of court, evidence and procedure should be reviewed to ensure that appropriate provision is made for the resolution of disputed evidentiary matters prior to trial if required.

21

The Limits of Examination and Cross-Examination

When examination becomes abuse

Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial.

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

21.1 An essential feature of our legal system is the right of a defendant, whether in criminal or civil proceedings, to challenge the opposing party's case. However, excessive or abusive examination and cross-examination clearly should be prevented wherever possible. It increases the time and expense of litigation without assisting justice to be done in the particular case. It also affects each trial participant, other litigants, and the general interest of the community in having legal proceedings resolved fairly and as inexpensively and expeditiously as possible. The key to curbing abuse is to determine what is excessive and what is appropriate examination and cross-examination.

Reasons for excessive examination

21.2 Incompetent or ill-prepared counsel may conduct unduly protracted examination and cross-examination because they do not know what to ask and do not know how to get to what is important. It has been suggested that the structure of Legal Aid and DPP briefs may contribute to a lack of preparation by counsel because any 'getting up' or preparation charges are included within the first day's fee and that provides little incentive to be well-prepared. It may be, too, that counsel unduly prolong their examination for tactical reasons or because they are afraid of leaving any issue uncovered. Greater judicial intervention appears to us to hold the key to limiting excessive or abusive questioning of witnesses.

Self-represented litigants

21.3 Some contend that self-represented litigants also are likely to be excessive in their questioning of witnesses. They:

- may not appreciate what is considered relevant at law;

- may be unaware of evidentiary rules;
- are less constrained by any duty to the court; and
- may use the opportunity to vent frustrations or engage in personal attacks.

These factors may impact on both examination-in-chief (when evidence is led from a party's own witness) and cross-examination (when a party questions witnesses called for the other side). Justice system procedures are premised on the assumption that lawyers conduct litigation and courts should remain impartial and largely passive. As a result the courts are guarded in the degree of intervention they exercise over the examination of witnesses, even when self-represented litigants conduct cases.

21.4 Self-represented litigants cannot and should not be barred from the court, nor is it possible for any 'on the spot' training to sufficiently address these deficiencies. Again it seems to us that greater judicial and curial intervention is required to ensure a fair trial. In particular, additional processes may be necessary to ensure a fair trial with just results where litigants do not have legal representation. Particular recommendations to assist self-represented litigants in civil matters are discussed in Chapter 18.

Self-represented defendants in criminal proceedings

21.5 Later in this Chapter we discuss the constraints on intervention by judges and court officers. One matter concerning self-represented litigants, however, requires particular reform. Currently, in criminal matters, when alleged offenders are not legally represented they are entitled to personally cross-examine witnesses, including victims. There are a number of professional, ethical and legal obligations on lawyers to protect witnesses who are being questioned by them. There also are evidentiary rules of which lawyers, but not necessarily a self-represented defendant, would be aware. For witnesses who are in fact the victims of crime, the trauma of being cross-examined by the alleged offender may be significant. At the same time, however, persons accused of a crime must be entitled to conduct their defence.

21.6 In our view, the judicial or curial officer managing the case prior to trial should have a discretion to disallow direct cross-examination of witnesses by accused persons in appropriate cases. Existing procedures allowing for the cross-examination of children in sexual assault matters could be extended to others, enabling the use of closed-circuit television or screens for the purposes of cross-examination by the alleged offender. Where the matter is being heard before a jury, the judge will need to direct the jury carefully so the procedure is not seen to reflect adversely on the defendant, but rather as a standard practice arising out of the absence of legal representation. The degree of control exercised by the judge over the content and nature of the questions would be no different to that exercised in relation to examination and cross-examination by other parties.

225. Case managers should have a discretion to order that witnesses, in appropriate criminal cases, are not to be subject to direct cross-examination by the defendant. In those cases, cross-examination should take place through the medium of closed-circuit television or, if that is not available, the use of screens. Particular consideration should be given to the nature of the alleged offence and the wishes of the witness in the exercise of this discretion. Trial judges must provide careful direction to the jury, where relevant, explaining that this is a standard procedure which does not reflect upon the defendant, but rather arises due to the absence of legal representation.

Witness statements

21.7 The clear delineation of issues prior to trial and the pre-trial exchange of witness statements should reduce the time required for examination and cross-examination. Pre-trial procedures assisting in the early delineation of issues are dealt with extensively throughout this Report. Although already utilised to some degree, if implemented generally the exchange of witness statements also should reduce trial time in a variety of ways:

- the statement may be ordered to stand in place of examination-in-chief so that only a small number of questions would be permitted when necessary to meet new and unanticipated issues or in the interests of justice generally;
- objections to the admissibility of evidence-in-chief could be dealt with prior to trial; and
- the exchange of witness statements also could enable better preparation for cross-examination.

Not only would the efficiency of the trial process be increased but also the need to bring unanticipated evidence would be reduced.

21.8 The argument against this disclosure is that the preparation of witness statements increases the costs of litigation. This argument must be considered against the reality that proofs of evidence are already routinely prepared. We believe the pre-trial exchange of witness statements brings advantages in terms of both fairness and efficiency. Furthermore, if our recommendations in relation to pleadings (Chapter 10) are adopted, and in particular, Recommendation 38, Pre-Trial Memoranda will be filed prior to the status hearing in the higher courts. The Memoranda will include either outlines of non-expert witness evidence or the actual non-expert witness statements, at the election of the party. Substantial pre-trial preparatory work will need to be done with witnesses in civil matters in any event. (Expert witness statements are dealt with in Chapter 22.)

Exchanging witness statements and the 'right to silence'

21.9 There are considerations which limit the desirability of exchanging witness statements in criminal cases. The current practice in the Supreme and District Courts is for prosecution witness statements to be made available prior to trial. A pilot scheme to similar effect is being conducted in the Perth Courts of Petty Sessions. We recommend that these practices be formalised and extended throughout the criminal courts. (See Chapters 24 and 27.) However, as we discuss in Chapter 24 on 'the right to silence', disclosure of the defence case in criminal matters remains problematic and prior disclosure of defence witness statements should be limited.

226. The use and exchange of witness statements in all civil proceedings should be strongly encouraged. Subject to Recommendation 192 in relation to Local Court proceedings, witness statements should be available to the other party no later than seven days before the listing conference.

The rule in *Jones v Dunkel*

21.10 The exchange of witness statements in civil matters prior to trial will put parties in a position to make informed decisions about whether to call a witness to give evidence at trial. However, parties need to be cautious of the traditional rule of evidence that the unexplained failure by a party to call a witness or lead evidence may lead to a conclusion that the witness or evidence would not have assisted the party's case. In the case of *Jones v Dunkel*, (1959) 101 CLR 298, the High Court of Australia extended this rule so that potentially the failure of the party calling a witness to ask that witness certain questions in examination-in-chief also could lead to negative inferences being drawn. However, it is unlikely that negative inferences would be appropriate where there is alternative evidence on point or where other witnesses have testified to the same point.

21.11 Given the difficulty in formulating any general principle about when the rule in *Jones v Dunkel* could result in parties engaging in excessive examination, judicial intervention in the particular case would seem the best means to deal with any potential inefficiencies. We believe there should be no change to the rule that the unexplained failure by a party to call a witness or lead evidence may lead to a conclusion that the witness or evidence would not have assisted the party's case, or its extended application to the questioning of witnesses.

227. There should be no change to the traditional rule that the unexplained failure by a party to call a witness or lead evidence, or its extended application to the questioning of witnesses, may lead to a conclusion that the witness, evidence or questioning would not have assisted the party's case.

Judicial discretion to call witnesses

21.12 What if neither party is entirely comfortable calling a witness who may assist the court, particularly where the truthfulness of the witness may be questionable or the witness's evidence may be favourable to the party only in one respect but not in others? If a party calls a witness, that party cannot cross-examine the witness on any aspect of his or her evidence unless the witness is declared 'hostile' — in which case the potential benefit of the evidence is effectively lost. But if the party does not call the witness, the rule in *Jones v Dunkel* might lead to the inference that the witness would not be helpful to that party's case. The dilemma not only affects the parties. Because judges and magistrates cannot call witnesses at common law, the court also may be deprived of relevant evidence.

21.13 We put forward a question in the Consultation Draft 'Curtailing Irrelevant or Unduly Protracted Examination and Cross-Examination' (3.2) asking whether judges should have an exceptional power to call a witness if both parties agree, or if one party can show good cause. The question was answered vehemently in the negative in many of the submissions received. It was said that the suggested reform would fundamentally alter the nature of the legal system and potentially compromise the neutrality of the judge. We accept the concerns raised and on reconsideration believe the problem may be better addressed by our Recommendation 221 in Chapter 20 on evidence. If implemented, that recommendation would result in the existing laws relating to 'hostile' witnesses being amended as part of the adoption of an Evidence Act based on the Commonwealth provisions. The *Evidence Act 1995* (Cth) makes it easier for parties to have their own witness declared (in effect) 'hostile' and to cross-examine the witness on any unfavourable evidence before the opposing party has the opportunity to do so.

Uncooperative witnesses

21.14 The preceding discussion has been based on the assumption that witness statements are available at the request of parties so that informed decisions can be made about whether to call a witness to give evidence at trial or not. However, not all witnesses will cooperate with a party who seeks a statement from them. In civil matters, if a witness declines to provide a witness statement to a party, that party should be allowed to call the witness and subject that witness to cross-examination.

228. Should a witness decline to provide a witness statement to a party involved in a civil dispute, that party should be entitled to call the witness to give evidence at trial and cross-examine him or her, if required.

Cross-examination and the rule in *Browne v Dunn*

21.15 One rule of practice which applies only to cross-examination but imposes requirements which may be seen as lengthening rather than reducing the process is known as the rule in *Browne v Dunn*, (1893) 6 R 67. The rule requires that, if witnesses do not have notice of an opponent's case, the nature of that case must be put to them before they are cross-examined. This allows witnesses an opportunity to respond to any allegations that will be raised against them. In more recent times the rule has been clarified: it is satisfied so long as notice of the disputed aspects of the case has been given to the witness.

21.16 In our view, the rule is satisfied where a party gives the other party notice of the case by way of a case statement or witness statements, and so will not impose additional obligations in the usual civil case. In particular the rule does not require any particular proposition be put to an opposing party's witness so long as notice was previously given to the party calling that witness. As such, its modern operation is both fair and efficient.

229. There should be no change to the rule that if a witness does not have notice of an opponent's case, the nature of that case must be put to him or her during cross-examination. The rule is satisfied so long as notice of the case has previously been given to the party calling the witness.

The lower courts and the rule of *Browne v Dunn*

21.17 There are decisions of the Supreme Court of Western Australia which hold that the rule in *Browne v Dunn* does not apply to proceedings before a magistrate. However, the rule applies in both civil and criminal proceedings in the superior courts. There seems no reason why the same rule should not apply to the treatment of witnesses in both the Local Courts and Courts of Petty Sessions and it seems that in practice the rule is generally met in lower court proceedings. (See, for example, the 1999 decision of the Supreme Court of Western Australia in *Garrett v Nicholson*). It is true there is a greater proportion of self-represented parties in these courts, but that is a matter to be taken into account by the magistrate when applying the rule on a case by case basis.

230. The rule that if a witness does not have notice of an opponent's case, the nature of that case must be put to the witness before cross-examination should be applied in both the Court of Petty Sessions and the Local Court, subject to Recommendation 229. The consequences of a failure to follow the rule should be tailored to meet the individual circumstances of the case, including whether a party is legally represented or not.

Judicial power to intervene in examination and cross-examination

21.18 We have commented in relation to a number of issues that we believe judicial intervention and discretion are the best way to curtail excessive or abusive examination and cross-examination. Traditionally, however, judges have been reluctant to intervene in the examination and cross-examination of witnesses because of legal principles relating to the adversarial nature of legal proceedings and concepts of judicial independence. Both result in the notion that a fair trial is one in which the parties, rather than judges, conduct the litigation. In jury trials there is the additional concern that judges should not be seen to be encroaching upon the role of the jury as the arbiter of fact.

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

Sir Anthony Mason, Chief Justice, High Court (1993) 3 JJA 156, 166

21.19 These considerations quite properly limit the extent of judicial intervention in the examination of witnesses. However, in more recent times there has been a move to greater involvement by the judiciary. This has been part of a paradigm shift away from considering only the parties in a particular case towards recognising the needs and rights of all litigants as well as the community served by the courts. This shift is one factor behind case management regimes now entrenched in this State and elsewhere in Australia. (See Chapter 12.)

Under the Evidence Act 1906 (WA)

21.20 Do Western Australian judges and magistrates have sufficient power to intervene in examination and cross-examination where appropriate? All legal proceedings in Western Australia which are bound by the rules of evidence are subject to the *Evidence Act 1906* (WA). Section 25 of the Act provides for intervention to limit cross-examination:

- to relevant matters;
- to matters that are not indecent or scandalous even if these have some bearing but are not directly at issue; or
- so as to exclude matters which are needlessly offensive.

Section 26 provides a judicial discretion to prohibit questions which are indecent or scandalous, or intended to insult or annoy in certain circumstances. There is also a special regime for the protection of witnesses in sexual offence cases.

Under the Commonwealth Evidence Act 1995

21.21 Given our Recommendation 221 to draft a new Western Australian Evidence Act based on the Commonwealth provisions, it is important also to consider the relevant provisions of the *Evidence Act 1995* (Cth). Section 37 allows leading questions in examination-in-chief in some circumstances while section 38 provides a discretion to the trial judge or magistrate to disallow leading questions in appropriate circumstances. This is particularly useful where there are vulnerable witnesses. Other provisions also limit the form or content of cross-examination. Section 41, which is similar to the existing section 26 of the Western Australian Act, allows for the exclusion of misleading, unduly annoying, harassing, intimidating, offensive, oppressive or repetitive

cross-examination. There also are provisions allowing the limitation of cross-examination as to a witness's credibility. The Commonwealth *Evidence Act 1995* goes further than the existing Western Australian Act by providing the court with a discretion to exclude evidence for reasons including the inefficient use of time.

Under the Supreme Court Rules

21.22 The existing Western Australian *Rules of the Supreme Court* make specific provision for judicial control over the time spent in trial in relation to a number of matters, including the examination and cross-examination of witnesses. In deciding these limits, Order 34 rule 5A requires a judge to consider a number of factors, including:

- reasonableness;
- fairness;
- the degree of complexity of the case;
- the number of witnesses;
- the state of the Court lists; and
- the importance of the issues and case as a whole.

The rule applies to both the Supreme and District Courts. It provides clear power for judicial intervention — although the consideration of 'the state of the Court lists' could be amended to make clear that it is the interests of other litigants and the community as a whole which are important. Determination of what constitutes unduly prolix examination and cross-examination also should be assessed in terms of proportionality.

231. 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.

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

233. Order 34 rule 5A of the *Rules of the Supreme Court* should be amended to include consideration of what constitutes unduly prolix examination and cross-examination in the context of whether the cost and time involved are proportional to the significance of the case and necessary to its just disposition.

234. The court should be encouraged to use Order 34 rule 5A of the *Rules of the Supreme Court* in appropriate cases.

In the Local Court

21.23 There are very limited references in the *Local Courts Act* to the conduct of a trial and no specific provisions dealing with judicial intervention in the examination and cross-examination of witnesses. The *Local Court Rules* are similarly limited. The only specific reference to control of examination, disallowing vexatious and irrelevant questions in cross-examination, is unlikely to add anything to the provisions in the existing Western Australian *Evidence Act 1906*. Although the *Supreme Court Rules* arguably apply to the Local Courts, as a result of section 35 of the *Local Courts Act*, the issue is sufficiently important for the Act to be amended so that magistrates' powers are expressly set out.

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

In the Court of Petty Sessions

21.24 The *Justices Act* applies in relation to proceedings in the Court of Petty Sessions. It contains a number of provisions which relate to the taking of evidence, but only one deals with judicial intervention in examination and cross-examination. Section 141 of the *Justices Act* provides that the practice of examination and cross-examination of witnesses should be in accordance with Supreme Court practice. It would be preferable if there was a clear power to intervene, and the grounds for intervention were clearly stated. In making this recommendation we are conscious of the care which needs to be exercised by judicial officers before intervening to control examination and cross-examination in criminal proceedings.

236. 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 which are clearly stated and subject to the interests of justice and the right of a defendant to a fair trial in criminal matters.

Limits to intervention

21.25 Both the actuality and appearance of impartiality are central to the administration of justice. These concepts impact on the degree to which it is proper for a judge or magistrate to intervene in proceedings. There are clear governing principles and guidance from the cases, such as *ReKeely; Ex parte Ansett Transport Industries (Operations) Pty Ltd* (1990) 64 ALJR 495 and *Jones v National Coal Board* [1957] 2 QB 55. *Re Mr Justice Kealy and Anor* provides helpful comments on the restraints and standards to be adopted by trial judges to prevent the apprehension of bias; *Jones v National Coal Board*

establishes that it is the degree of judicial intervention, rather than the intervention itself, which causes concern. In our view, these cases do not prevent appropriate intervention by the court in the examination and cross-examination of witnesses.

237. There should be no change to the basic principle that it is the degree of judicial intervention, rather than the intervention itself, which causes concern, and no change to the rules relating to reasonable apprehension of bias as they relate to judicial intervention to control excessive examination and cross-examination.

21.26 There are additional concerns about intervention in the context of criminal proceedings. The distinction between the role of the judge and jury is one significant factor. Undue intervention by a judge has the potential to sway a jury. In this context it is important to distinguish between judicial intervention to ask questions of witnesses, which may risk encroaching on the jury's function, and judicial intervention to halt excessive questioning by counsel.

21.27 Provided judicial intervention is handled with care and subject always to the principle of preserving the right to a fair trial, no additional rule should be required to stop intervention by a judge or magistrate to control examination and cross-examination of witnesses.

The role of the jury

21.28 In jury trials there is presently no formal provision for questioning of witnesses by jurors, or for raising of issues by jurors until all the evidence is taken. By then it is too late for the jurors' concerns to be addressed by calling evidence. This may lead to speculation by jurors and disenchantment with the process. When coronial inquests were conducted with juries the practice was different. We understand the coronial jurors' ability to ask questions and indicate matters they wanted addressed worked well and sometimes assisted parties to limit issues and evidence.

21.29 In criminal trials before a jury, however, there are obvious concerns about such a process. For example, jury questions reflecting prejudice could lead a defendant to question whether he or she was receiving a fair trial. Submissions on the suggestion that juries be entitled to question witnesses were invariably negative and we accept these views.

22

Expert Evidence

Expert evidence

22.1 For centuries common law courts have allowed expert witnesses to give evidence at trials. Over the years, the fields of expertise have expanded and expert evidence has proliferated. Opposing experts are now as much a part of the litigation process as opposing parties, solicitors and barristers. The growth in use of expert evidence has reached the point where uncontrolled expert evidence has been described as one of the major costs in civil litigation.

Expert witnesses as 'saxophones'

22.2 The lack of impartiality of expert witnesses is a major problem. The slang term for expert witnesses in the United States is 'saxophones': the lawyer hums the tune and the expert witness plays it like a musical instrument. Unlike other witnesses, experts are paid for their evidence. No matter how honest, experts tend to be aligned with their employer — although there may be a genuine divergence of opinion between experts, regardless of how they are paid. The problem is that the adversarial system discourages a cooperative approach between opposing experts. The existing system does not encourage parties to agree upon a single expert who would act on the instructions of all parties and be cross-examined by all parties. Instead each party engages its own expert.

22.3 Currently Supreme Court judges conducting civil pre-trial directions hearings enquire about the need to call more than one expert witness. We recommend that this practice be applied in all courts in matters where expert witnesses are to be called. In civil matters, the courts should reinforce the shift towards the use of single expert through the allocation of costs. (If our recommendations in Chapter 31 are implemented, there will be no costs awards in criminal cases.)

238. All courts should encourage parties to agree to use a single expert in all matters in which expert opinion is genuinely required.

239. In civil matters, the courts should order costs associated with the use of multiple experts against parties who do not cooperate in the appointment of a single expert witness.

Interrogating an opponent's experts

22.4 One reason opposing parties call different experts on the same issue is because there is only a limited opportunity to interrogate an expert witness who is briefed by another party. For example, the expert witness cannot be asked to express an opinion based on alternative factual assumptions or upon an issue on which the opposition does not propose to lead evidence. If the notion of expert witness as advocate is abandoned there is no reason why these questions would not be allowed so long as the party seeking the answers meets the cost.

240. Experts should be required to prepare for and answer questions from parties upon payment prior to trial of the reasonable costs of answering questions.

Expert evidence and access to justice

22.5 The time and expense involved in preparing, receiving and debating expert evidence may deny some litigants access to justice. Inequality of resources may mean large corporations such as insurance companies can readily access substantial supporting expert evidence while the opposing party has insufficient resources to respond. The proportionality of costs incurred as a result of engaging experts should be relative to the subject matter in dispute. Although already the practice in the Supreme and District Courts, we recommend the requirement for leave to adduce expert evidence be formalised in the rules applicable to all courts. In giving effect to this recommendation, however, care should be taken that the outcome not be merely to shift, or worse, to duplicate the hearing of argument about disputed expert evidence.

22.6 In civil matters, the usefulness of expert evidence could be improved by case managers first assessing whether its value is diminished because the primary facts upon which the expert opinion is sought are controversial. (See Recommendations 24 and 25.) The case manager could require the parties to seek to agree the facts prior to seeking expert opinion if appropriate. In criminal matters such a process is unlikely to be effective given that facts are rarely agreed in criminal trials. The particular issues raised by the use and

exchange of expert witness statements in criminal matters are discussed in Chapters 24 and 27.

22.7 We note that the proposed reform of the civil system could result in there being little to gain in attaching expert witness statements or outlines of evidence in the exchange of Pre-Trial Memoranda discussed in Chapter 10. The facts upon which the expert evidence is provided may be altered and so any costs associated with the report would be 'wasted'. That is why we have exempted expert evidence from the requirements at Recommendation 38.

241. No expert evidence should be adduced without the leave of the court.

242. In civil matters, the case manager at the status conference should consider whether the primary facts should be agreed first and then an agreed expert appointed or expert reports exchanged. (See Recommendations 24 and 25.)

Expert advisers and expert witnesses

22.8 Until now the courts have allowed experts to act as both partisan advisers and independent witnesses in the same dispute. Experts may be engaged to assist in:

- formulating a claim;
- advising a client of the range of opinions held;
- identifying the facts needed in order to express an opinion;
- preparing a case for trial; and
- providing a critical review of the expert evidence of other parties.

All these activities are necessarily partisan and are consistent with the adversarial goal of advancing a party's case as strongly as possible.

22.9 With the best will in the world an expert who has participated in the process of preparing the case on behalf of a party will have difficulty in giving an independent opinion at trial. Yet the current practice is for such an expert to be called to give evidence before the court as an 'independent' expert. If the following Recommendation 245 is accepted, an expert who claimed to be 'independent' would not be entitled to claim that any communication with the parties and/or lawyers was privileged. If an expert is an 'adviser' of one party, the expert would only be entitled to claim privilege if the other party called him or her. In civil matters, the scale of costs also should provide an appropriate fee which can be charged for expert advisers, so that it may be recovered if a party is successful at trial.

243. The practice and procedure of all courts should maintain a clear distinction between expert advisers and expert witnesses. The distinction should be established by requiring expert witnesses to disclose, prior to trial, the nature of their relationship with the parties, which may be subject to cross-examination.

244. The scales of costs should provide for appropriate fees for expert advisers in civil matters, so that a party who is successful at trial may recover these costs.

The existing law on expert evidence

22.10 The existing laws facilitate the transition from partisan adviser to 'independent expert'. There are many examples of laws which establish that a person who has an obligation to represent the interests of one party should not act in another capacity that may conflict with that responsibility. There are also rules which ensure that lawyers do not coach witnesses of fact. Neither principle currently applies to expert witnesses.

Experts and legal professional privilege

22.11 In other respects an expert witness is in the same position as a witness of fact when it comes to facts observed by the expert. This means the expert can be subpoenaed to give evidence of observed facts by the opposing party and can be seen beforehand and given a proof. The things or chattels and documents upon which the expert bases his or her opinion and the opinion itself are not privileged. Communications between solicitor and expert which would otherwise be privileged also must be disclosed if they are necessary to properly understand the expert's evidence. Significantly, however, legal professional privilege generally attaches to confidential communications between solicitor and expert. This encourages solicitors to communicate more fully with experts about the interests of their client and the arguments supporting their client's case. The privilege also attaches to communications between a party and expert if the communication relates to instructing a lawyer. The privilege which keeps such communications confidential sits uneasily with the notion of the expert later being called to give an 'independent' report to the court.

Making expert witnesses independent

22.12 Faced with the prospect that the party's expert may be cross-examined about communications with the party's solicitors, or the prospect that the expert's opinion may be disregarded where the expert provided assistance concerning the preparation of the case, the character of communications with experts can be expected to change. In particular, solicitors could draw a distinction between expert advisers who assist in the preparation of a case and experts who are called as witnesses and whose communications with solicitors would be subject to cross-examination. However, the waiver of legal professional privilege would not apply if the

opposing party subpoenaed a party's expert adviser who would not have been a witness or otherwise participated at trial.

22.13 The desired result is not that solicitors engage two experts — one as adviser and one as witness — but that solicitors ensure that in most cases their communications with the expert will not compromise the expert's independence. This in turn may lead to a culture where agreement between the parties on the appointment of a single expert is more realistic and where the existing adversarial nature of expert evidence is altered so that experts will be more likely to reach agreement.

245. Where a party calls its own expert adviser to give evidence there should be a waiver of legal professional privilege in respect of all communications with the expert, except communications consisting of statements and other communications from other witnesses.

Conflicting expert evidence

22.14 Should the parties be unable to agree on appointing a single expert witness, there is still the possibility that the points of conflict between opposing parties' experts can be narrowed. Currently, experts may be ordered to attend a 'without prejudice' pre-trial conference to investigate narrowing the issues in dispute for trial. This is already a common feature of directions made by courts in Western Australia. A useful preliminary step would be to require experts to consider carefully opposing expert witnesses' statements and clearly identify grounds of agreement and disagreement. This could reduce the costs associated with expert evidence.

246. Where there are opposing expert witness statements filed, each expert should be required to:

(1) certify that he or she has considered the other opinions that have been expressed;

(2) specify the matters with which the expert agrees; and

(3) state those with which the expert does not agree and explain the basis of the disagreement.

Expert reports

22.15 Experts' preparation of comprehensive written reports for court proceedings is an area of enormous cost. In order to reduce the time and cost associated with expert reports we had originally proposed, in Consultation Draft 3.3, to restrict the use of detailed reports by expert witnesses. However,

a number of submissions indicated the importance of opposing parties having access to the expert reports in full. This was not only because of the potential of the proposal to create duplication of work — through writing and then summarising the report — but also in the interests of fair disclosure of the opponent's case and the increased likelihood of settlement prior to trial.

22.16 Accepting the importance of full disclosure, however, leaves the issue of how to encourage shorter reports which provide all relevant detail. Our view is that courts could encourage this, at least in civil cases, by not allowing costs in full where an expert report is excessively long.

247. Civil courts should disallow costs in full for overly long experts' reports.

Expert witnesses' obligations to the courts

22.17 There appears to be a view, especially amongst judges, that experts are not aware of their obligation to provide independent assistance to the court. To address these concerns the Federal Court recently published a practice direction including the requirement that:

> At the end of the report the expert should declare that '[the expert] has made all the inquiry 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 Supreme Court already has implemented a similar practice. In our view, this practice should be universal.

248. All expert witness statements should contain a detailed declaration that all appropriate enquiries had been made in a form required by the courts.

Hearsay and expert evidence

22.18 The common law requires that the basis of an expert opinion must be proved by admissible evidence. 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 hearsay evidence, for example. The *Evidence Act 1995* (Cth) replaced this rule with a discretion for judges to admit expert evidence by balancing the potential prejudice against the probative value of the opinion evidence.

22.19 Recent Commonwealth reforms of hearsay and expert evidence do not require the factual basis of expert evidence to be proved or tested.

Concerns over not requiring the factual basis of the expert opinion to be proved may be countered by parties seeking to have more weight attached to the evidence, where possible, by adducing and proving expert opinion by direct evidence. In any event, it is difficult to see how expert evidence which does not establish its factual basis could meet the requirements of relevance.

The 'ultimate issue', 'common knowledge' and expert evidence

22.20 The courts are cautious of expert witnesses giving evidence on the 'ultimate issue'. The difficulty is that by speaking to the ultimate issue the expert may be seen to be taking the place of the arbiter of fact — the judge or jury. For example, issues concerning the cause of an accident, or what conduct amounts to negligence, may be the subject of expert opinion, but the answer to the question: 'was a party negligent?' is not allowed. Another difficult rule precludes expert witnesses from giving evidence which is not in the 'common knowledge' of the decision-maker. This has been interpreted to mean that the only evidence the expert is allowed to provide is evidence which may assist the decision-maker. Both rules prescribe standards which are uncertain and raise conceptual distinctions which are difficult to apply. General discretions replace these rules in the *Evidence Act 1995* (Cth).

Commonwealth Evidence Act 1995 and expert evidence

22.21 We believe the Commonwealth provisions governing expert evidence and hearsay, the 'ultimate issue' and the 'common knowledge' rules, have much to commend them and should be adopted in Western Australia. The adoption of these provisions and others relating to expert evidence, would not only assist in the uniformity of evidence rules throughout Australia, but could result in cost savings. In particular, allowing a judicial discretion may ensure that substantial costs are not expended in proving matters which are out of proportion to their significance in the dispute between the parties.

249. When drafting a new Evidence Act for Western Australia (Recommendation 221) the provisions of the *Evidence Act 1995* (Cth) relating to expert evidence, as modified by these recommendations, should be adopted.

22.22 The ALRC has recently distributed for comment ALRC (1999d) Background Paper No. 6, *Experts*. The paper sets out the ALRC's (1999e) current thinking on expert evidence in federal courts and tribunals. As part of the drafting of a new Evidence Act recommended in Chapter 20, the matters raised in the ALRC's discussion paper, where relevant, should be considered.

An Expert Evidence Forum

22.23 There is no established channel of communication between judges, lawyers, experts and parties to litigation concerning the process by which experts prepare and present evidence to the courts. Information on the

duties and responsibilities of the various participants in litigation is not readily accessible. There is no agency which provides specific training for lawyers on instructing and cross-examining experts.

250. An Expert Evidence Forum should be established.

22.24 In its Discussion Paper No. 62, the ALRC (1999h) raised issues, similar to our own, relating to the cost, delay and inconvenience associated with expert evidence as part of the 'litigation industry', but pointed out that there is little research in Australia on the use and cost of expert witnesses in litigation. In the absence of such research and in light of strong stakeholder opposition, we have decided not to recommend the more radical reforms discussed in the Consultation Draft on this topic (3.3) allowing the courts to appoint expert witnesses and permitting expert witnesses to make submissions to the court. However, the ALRC does cite research, both American and Australian, which substantiates one particular concern: the partisan nature of expert evidence. We believe our recommendations to clearly differentiate the role of expert advisers and expert witnesses and to highlight expert witnesses' obligations to the court should facilitate court access to expert evidence which is truly independent.

23

Criminal System — Overview

The problem

23.1 Public dissatisfaction with the criminal justice system in this State often focuses on sentencing issues, although these are not within the scope of this Report. Other concerns relating to the treatment of the defendant, witnesses and, in particular, victims of crime, clearly fall within our reference. Issues relating to evidence and the treatment of witnesses generally are discussed in Section V. In this Section we examine issues of criminal pre-trial and trial process, and particular issues of evidence in criminal proceedings.

23.2 We see two approaches to addressing the problems associated with the existing criminal justice system. One is to reform the system so that some criminal matters bypass complicated and lengthy court processes without sacrificing openness and accountability to the public. This can be achieved by keeping cases out of court and entering into formally regulated pre-trial negotiations or diversionary schemes. An alternative approach is to reform the existing criminal justice system by making court processes less complicated, technical and drawn out — an adequate alternative to deal with those matters which demand the full and rigorous scrutiny of the law. Before dealing with our specific recommendations, however, we provide a brief overview of the background and previous reforms of the criminal justice system.

Victims in criminal matters

23.3 Currently the State serves as prosecutor in nearly all criminal matters. The victim's role in the criminal justice system is as a witness only. This is a radical departure from the pre-Norman British origins of our criminal justice system. In those times the major focus of criminal resolution was on:

- the victim of the crime; and
- the community's involvement in ensuring that the defendant made restitution to the victim for the wrong done.

Since then, the notion of the 'king's peace' has been asserted, and it is the Crown (or State) which is nominally the primary 'victim' of any criminal wrongdoing. Although there is some provision for criminal prosecutions to be conducted by private individuals, it is usually the State which prosecutes crime because of what is seen as the 'public interest' in the prosecution and punishment of crime. (See Chapter 7.) This also explains why criminal proceedings now are referred to as *'R'* or *'The Queen' versus (the name of the defendant)*, although this tradition may well change in the near future. 'R' stands for 'Regina' meaning 'queen', in Latin.

23.4 Another consequence of this shift to the State as prosecutor has been the movement away from restitution to the victim and towards fines payable to the State, consistent with the notion of a debt owed to society rather than the individual victim. In recent years the creation of Criminal Injuries Compensation entitlements and the use of victim impact statements have gone some way to re-establishing the rights of, and recognising, the individual victims of crime.

The defendant in criminal matters

23.5 The role of the defendant in the criminal pre-trial and trial process also has undergone significant change. In early 17th century England, defendants were subject to the now legendary compulsory interrogations of the Star Chamber and High Commission. Both the Chamber and Commission were abolished by the middle of that century and the privilege against self-incrimination developed as a result of these legal and constitutional struggles. The privilege against self-incrimination appears to have been the basis of the defendant's right to silence both before and during trial.

23.6 By the end of the 17th century, however, the general prohibition against persons with an interest in the outcome of proceedings giving evidence was extended to exclude the defendant from giving evidence at trial. It was not until 1898 in the United Kingdom and 1906 in Western Australia that defendants became competent witnesses at their own trial, that is, were allowed to give sworn evidence in their own defence. Effectively, for two centuries, the silence of the defendant at trial was obligatory — although in felony trials, where the defendant also was not allowed legal representation, the defendant could give unsworn answers to damaging evidence and conduct the defence. Felony offences including murder and armed robbery, were the most serious and the disqualification of the defendant as witness and denial of legal representation severely restricted the defendant's opportunity to put his or her version of events to the court. These restrictions became the foundations of the pre-trial right to silence and the extremely cautious approach taken by the courts to receiving confessions. The prohibition against legal representation was abolished in the United Kingdom in 1836.

23.7 At trial, the defendant now may give evidence in his or her own defence and may be legally represented. Given that so much of the historical

basis for the 'right to silence' no longer applies, it is important to investigate whether it still serves legitimate functions in the criminal justice system. We do so at Chapter 24.

Guilty pleas

23.8 Until the 19th century, criminal matters usually were disposed of by way of trial. It is a relatively recent innovation for a defendant to be able to enter a plea of guilty. As discussed in Chapter 7, guilty pleas still are not allowed in many inquisitorial systems. In Western Australia the majority of criminal charges are resolved by way of guilty plea.

Trials in criminal matters

23.9 Not only were most criminal matters disposed of by trial, at one time it was trial by jury that was the standard form of trial in common law jurisdictions. Today, however, jury trials in Western Australia only determine a minority of criminal charges. Most charges are dealt with in the Courts of Petty Sessions where even those relatively few matters that are not resolved by a guilty plea will go to trial without a jury. One thesis is that the trial, and in particular jury trial, has become less significant as a safeguard of a defendant's rights in the adversarial system with the emergence of other pre-trial procedures designed to perform that function. It is important, however, that the increasing emphasis on pre-trial procedures does not exclude accountability from the criminal process. We address this issue in Chapter 25.

The Court of Petty Sessions

23.10 Any overview of the background and previous reforms of the criminal justice system will expose a history of piecemeal reform and its consequences. This is evident in one of the most significant pieces of legislation governing criminal process in this State. The *Justices Act* regulates much of the process and procedure of the Courts of Petty Sessions. As stated, the Courts of Petty Sessions determine the majority of criminal charges processed in Western Australia.

23.11 The *Justices Act* of 1902 was the consolidation of a number of Acts which originally had been enacted in Western Australia in 1850. These earlier Acts, in turn, were based on three English statutes of 1848, collectively known as *Jervis's Acts*. The reforms implemented through *Jervis's Acts* were based on the burgeoning criminal business of justices of the peace in 19th century England. The increased volume of criminal work arose from the statutory extensions of summary jurisdiction, an increased population and the enforcement of law by the 'new police' — the organised police forces which originated in metropolitan London in the early 19th century.

23.12 The *Justices Act* has been subject to numerous changes over the years, including the shift from lay justices of the peace towards legally trained magistrates. However, many of the provisions of the Act which operate in Western Australia today are in exactly the same terms as the provisions

which applied in England in 1848. Fifteen years ago this Commission (1984) recommended a thorough review of the *Justices Act*. This is now being undertaken as part of the development of the Magistrates Courts, which will combine the existing criminal jurisdiction of the Courts of Petty Sessions and civil jurisdiction of the Local Courts. (Refer to Chapter 2.)

A history of piecemeal reform

23.13 There have been substantial reforms of some fundamental aspects of the criminal justice system. However, as indicated in Chapter 4, the system as a whole is somewhat piecemeal and, consequently, reform also has been piecemeal. In this Report we have endeavoured to review the whole criminal justice system in Western Australia from a procedural perspective and have made recommendations intended to create a consistent and coherent system.

24

The 'Right to Silence'

What is 'the right to silence'?

24.1 Some people question whether the right to silence should be maintained in the contemporary Australian context. The right to silence may conflict with the community's interest in having all relevant information available to both the investigating authorities and the courts. Is it time to abolish the right to silence or is it a fundamental right and essential to a fair and equitable judicial system? To fully appreciate the debate about the right to silence it is important to understand exactly what that term means from a legal, theoretical and practical perspective. Although it is often regarded as a single fundamental right, it actually refers to a diverse group of immunities. We discuss these under three broad headings:

- a suspect's right to silence in the police station;
- the limits on the pre-trial process of disclosure enjoyed by both the prosecution and the defendant in criminal cases; and
- a defendant's right to silence at trial.

The right to silence as a legal principle

It is fair that a person who has the resources of the State marshalled against them should not have to contribute to their own conviction by being forced to speak. The State has, in the main, all the resources necessary to investigate a matter. There is little need to interfere with the right to silence of the accused. The interest of the State is in convicting the guilty and acquitting the innocent.

John McKechnie QC, Director of Public Prosecutions (1998)

24.2 In legal theory the right to silence is connected to the fundamental presumption of innocence in criminal matters and the adversarial nature of the common law system itself. Indeed criminal trials, in which the defendant is not required to give any notice of 'defence' prior to the trial, have been described as a prime example of adversarial proceedings. The presumption of innocence and the adversarial nature of legal proceedings in turn are tied to legal tenets such as the privilege against self-incrimination. Because the burden of proof, in legal theory, lies with the prosecution, the justification for the right to silence and the privilege against self-incrimination is not the protection of the guilty but the notion that the prosecution must prove its case against the defendant beyond reasonable doubt. The rules of evidence concerning the admissibility of confessions also relate to notions of a right to silence and the privilege against self-incrimination.

Removing the right to silence

24.3 Some of the immunities against self-incrimination granted under common law have already been removed or reduced by legislation. Examples can be seen in relation to bankruptcy proceedings and the requirement to provide one's name and address under various Acts. A 'right to silence' and the privilege against self-incrimination also do not apply to the use of physical (as opposed to verbal) evidence against a defendant. For example, people can be compelled to provide fingerprints or blood samples and this evidence can be used to incriminate them.

24.4 In the United Kingdom recent restrictions on the right to silence have had a mixed reception. Critics claim the particular circumstances in the United Kingdom which led to these reforms have no application in Western Australia. In Ireland the reduction of the right to silence was predicated on paramilitary and terrorist activity. In England, the protections of defendants' rights instituted under the *Police and Criminal Evidence Act 1984* (Eng) appeared to cause something of a backlash which culminated in a reduction of the right to silence. Many of the submissions we received also expressed concern over the complexity and uncertainty associated with the United Kingdom reforms. However, one similarity between the position in the United Kingdom prior to the reforms (Hill 1998) and the position here is that, in practice, it seems few suspects decline to answer police questions in any event.

Exercising the right to silence in practice

24.5 Reasons given in submissions explaining why the majority of suspects do not exercise their right to silence prior to trial vary — from a lack of awareness of legal rights to a willingness to cooperate with police. But, whatever the reasons, the practical reality is that if suspects and others refuse to answer questions, it is not possible to force them in a physical sense to answer short of returning to the techniques of the Star Chamber. Apart from the questions of whether the community would or should endorse such techniques, the issue remains: how reliable is information obtained under duress? This raises what it might mean to abolish the right to silence.

24.6 The real question to be addressed is not whether the so-called right to silence should be abolished. It is whether inferences can be drawn from the exercise of the right to silence by a suspect or defendant and whether the court and/or prosecution can comment on that silence at trial.

The right to silence at the police station

24.7 The basic position in Western Australia is that no inference can be drawn against a defendant for remaining silent when questioned by police. There are two aspects to this rule. First, the fact-finders cannot use silence by the defendant as a basis to infer a consciousness of guilt. Second, if a defence is raised for the first time at trial no inference can be drawn that it is a new invention or suspect.

24.8 Arguments to limit the right to silence ultimately reflect Jeremy Bentham's dictum in his 'Treatise on Evidence': 'Innocence claims the right of

speaking, as guilt invokes the privilege of silence' (Weinberg 1997). This ignores that there may be good reason to refuse to answer police questions:

- suspects may be unclear about both the nature of the offence and the legal definitions of terms;
- silence may reflect fear or a desire to protect friends or family and not necessarily reflect guilt;
- suspects may be bewildered, embarrassed, or waiting for legal advice; or
- because of perceptions of bias stemming from historical and contemporary unsatisfactory relations some minority groups have with police.

24.9 Inferring guilt from silence largely ignores the particular difficulty faced by people from non-English speaking backgrounds. People not fluent in English are vulnerable to misunderstanding, questioning and, in turn, being misunderstood. They also may have different cultural understandings of what is appropriate conduct. For them the right to silence can act as an important protection against being misunderstood or misrepresented. It also may be a demonstration of awareness of the power of the police. In any event, there is no evidence that reliance on the right to silence increases the chance of acquittal.

Removing the right to silence at the police station

24.10 One argument against the right to silence is that, provided sufficient safeguards are in place, there is no need to preserve the right. For example, suspects' guaranteed access to legal advice accompanied the reduction of the right to silence in the United Kingdom. In Western Australia there is no clear right to legal advice for a suspect, nor is there any publicly funded scheme for the provision of such legal advice. In any event access to legal advice is a very real issue for people in remote communities in Western Australia.

24.11 In the same way, any expectation that a suspect should reveal his or her defence to police at the time of questioning would need to be based on proper safeguards, including a clear understanding of the charges and relevant law. Again this would require access to legal advice. Given recent changes to Legal Aid it seems likely that suspects without funds to pay for legal advice generally, but particularly those in remote areas, would be adversely affected by any reduction of the right to silence in police stations.

251. The existing prohibition on any adverse comment at trial concerning a defendant's exercise of the right to silence under police questioning should be maintained.

The prosecution's right to silence on pre-trial disclosure

24.12 The DPP has issued guidelines concerning the extent of a prosecutor's obligations to make disclosure in indictable matters. Generally the prosecution must disclose the case in chief, including any inconsistent statements by witnesses, and make limited disclosure of information or possible witnesses whose evidence may provide a defence. Police must disclose to the DPP all information which may be of assistance to the prosecution or the defence.

24.13 The position is less clear in relation to summary offences. Traditionally prosecution witness statements have not been disclosed. The defendant only has the right to the particulars of the charge and not the evidence by which the charge will be proved. (See further discussion in Chapter 27.) A pilot scheme was introduced in the Perth Court of Petty Sessions allowing records of interview and witness statements generally to be made available to the defendant. Submissions to us have commented very favourably on the impact of the pilot scheme. Disclosure often has led to a change of plea, or facilitated the making of admissions by the defence as well as the preparation of the defence.

24.14 It is unfair for police and prosecutors to withhold information which could result in a miscarriage of justice or wrongful conviction. In all criminal cases the position regarding pre-trial disclosure should be formalised through the statutory requirement for police disclosure to the prosecution and for prosecution disclosure to the defence. This would mean that instead of DPP guidelines (which are not legally binding on police), police would be under a statutory requirement to disclose to the prosecution, and a defendant would have an enforceable right to prosecution disclosure. Wilfully inadequate prosecution disclosure should be subject to an adverse finding by the courts and potential disciplinary proceedings: see Recommendation 254. But whether wilful or not, inadequate police or prosecution disclosure also should be regarded as potentially seriously compromising the proper conduct of the trial. Timely disclosure would enable the defence to make a fully informed decision on whether to plead guilty or, alternatively, would give the defence the ability to prepare properly for trial.

252. The law on pre-trial disclosure should be amended to:

(1) introduce a statutory disclosure requirement for the prosecution, including police, along the lines of the DPP guidelines published on 14 December 1993 (but see Recommendations 286 and 287);

(2) specify potential consequences, in addition to those at Recommendation 254, for failure by the prosecution to provide proper disclosure including rulings that the failure to disclose resulted in:

i. a miscarriage of justice; or

ii. wrongful conviction.

The defendant's right to silence on pre-trial disclosure

24.15 The existing obligations on a defendant to reveal his or her case to the prosecution prior to trial on any charge are very different. Generally, and in keeping with the notion that the prosecution bears the onus of proof of guilt, a defendant 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 defences may be raised, and disprove all such defences beyond reasonable doubt. Currently in Western Australia the only defence disclosure obligation attaches to alibi defences on indictable charges. Section 636A of the *Criminal Code* requires prescribed details relating to an alibi defence be provided to the prosecution at least 10 days before the trial. In practice, however, defence lawyers commonly but informally advise the prosecution of the elements of the prosecution case which will be disputed and which will not. Often the lawyers agree in advance of trial or admissions are made so that prosecution witnesses need not be called. (Pre-trial negotiations between defence and prosecution are discussed in Chapter 25.)

Compulsory defence disclosure?

24.16 Reform of the existing law on pre-trial disclosure by the defence could be directed towards providing all relevant information so the prosecution can investigate matters to be raised by the defence. If the overriding objective of the justice system is truth, as called for in many public submissions, then such a reform may be warranted. While there can be no quarrel with such an objective, the inequality of power and resources between the prosecution and most of those accused of criminal offences makes the implementation of this objective difficult. Compulsory pre-trial disclosure by the defence has significant resource implications. If fairness is to remain an overriding principle of the justice system, this inequality cannot be ignored. Furthermore, it is very doubtful that compulsory disclosure could be fair for a defendant who has no legal representation. In court, the judge may assist a self-represented defendant but prior to the trial no such assistance presently is available. Even if our Recommendation 11 is adopted, and magistrates are appointed to oversee pre-trial matters associated with the processing of charges, the proper role of the court would be circumscribed by the need to remain neutral as between the parties.

Draft Criminal Practice Rules on defence disclosure

24.17 In light of the difficulties of reconciling the legitimate expectations of the public, particularly victims of crime, with the reality of unequal access to legal advice and resources, we recommend a more limited reform. We believe that, as has been adopted in Victoria and is proposed in the draft Criminal Practice Rules of Western Australia, the prosecution should be given access to defence expert witnesses' statements, but not have a right to access other defence witnesses' evidence.

24.18 We also recommend the adoption of the proposed reforms in the draft Criminal Practice Rules removing the inefficiencies of the prosecution anticipating, investigating and disproving matters which are not truly at issue.

The draft Rules propose that when a copy of the indictment and evidence is given to the defendant, the prosecution also must provide a statement which simply summarises the factual elements of the offence and includes any particular proposition of law which the prosecution will rely upon. We discuss the prosecution obligation to outline its case and formulate relevant recommendations in Chapters 27 and 29. We raise this matter here because it has implications for the defence: the draft Rules propose that, once the prosecution case has been outlined, the defence must file a statement in response. The proposed defence statement would reveal the defence attitude to the facts or law set out in the prosecution statement and any records which the prosecution proposes to tender in evidence. It also would identify any particular ground on which it may be contended guilt will not be proved. For example, the statement would indicate if the defence case is that the prosecution will not be able to prove intention, or that it plans to rely on self-defence or provocation.

24.19 We believe the draft Rules on defence disclosure have much to commend them but, as is also our position in relation to the obligations on the prosecution, recommend that these are not limited to indictable offences (however, see Recommendation 288.) We further recommend that any disclosure requirements are made through legislation, such as the recommended criminal procedure code (see Recommendation 16) rather than the Rules so that validity will not be at issue.

Sanctions for failure to disclose by a defendant

24.20 Sanctions should apply to a defendant, as much as to a prosecutor, who wilfully withholds information subject to disclosure requirements. Special regard should be had for the self-represented defendant so that, where the defendant is genuinely unable to obtain or afford legal representation, sanctions for the failure to disclose are imposed with caution. Should inadequate disclosure be the responsibility of the defendant's legal adviser, it would be unfair to penalise the defendant and sanctions for legal representatives are discussed separately. (See Recommendation 254.)

253. Subject to Recommendation 288, the law on pre-trial disclosure should be amended by statute to:

(1) require defence disclosure of statements by expert witnesses, but not other witnesses;

(2) require a statement from the defence specifying:

i. any of the factual elements of the offence or particular proposition of law identified by the prosecution (Recommendation 282) upon which it may be contended that guilt may not be proved;

ii. documents disclosed by the prosecution to which objection will be taken, with grounds; and

iii. any particular ground upon which it may contend guilt will not be proved.

(3) require a notice of alibi, if any, similar to that already in place for trials on indictment;

(4) provide a range of sanctions for wilful failure by the defendant to provide proper disclosure including:

i. adverse comment by the judge and, with leave, by the prosecution, if the defendant personally and deliberately failed to comply with a disclosure requirement; and

ii. a right for the prosecution to re-open its case, if necessary.

Special consideration should be given to the position of a self-represented defendant, where the defendant is genuinely unable to obtain or afford legal representation.

Subsequent prosecution disclosure

24.21 It may be that once defence disclosure is made the prosecution will need to make further disclosure, particularly in light of the prosecution's obligation to disclose information or possible witnesses whose evidence may provide a defence. By identifying the particular grounds upon which it may contend guilt will not be proved, the defence statement will provide a clear basis for the prosecution to assess whether material in its possession is relevant to the defence case.

Wilful failure to disclose by legal representatives

24.22 There should be professional sanctions against both prosecution and defence lawyers who make wilfully inadequate disclosure. Presently because police prosecutors are not required to be legally qualified and often prosecute summary offences, there are difficulties in imposing professional conduct standards on disclosure requirements. This will be alleviated once DPP lawyers or lawyers on brief from the DPP prosecute summary charges. Note, however, the statutory disclosure requirements recommended at No. 252 will apply to police officers in their capacities as investigators and prosecutors.

254. If the legal representative of the prosecution or defence wilfully fails to disclose, the pre-trial magistrate should have power to make a finding of professional misconduct and the legal representative should be subject to appropriate sanctions.

The right to silence at trial

[The] jury cannot, and cannot be required to, shut their eyes to the consequences of exercising the right [to silence].

Weissensteiner v The Queen (1993) 178 CLR 217, 229

24.23 There are important differences between the position of a suspect in a police station and a defendant at trial. At trial a defendant knows the case he or she must answer. The questioning occurs in public and under the control of the judge or magistrate. Nevertheless, it has long been recognised that there are reasons other than guilt to explain why a defendant may not want to be cross-examined — reasons such as timidity, dread of confusion, or even the potential for previous convictions to be raised as noted in Chapter 20. Currently the law on this subject allows for adverse comment by the trial judge on the exercise of the right to silence by a defendant at trial — but only in limited circumstances. The existing *Evidence Act 1906* (WA) prohibits the prosecution from making any adverse comment on the failure of the defendant to give evidence at trial.

24.24 The law as explained in *Weissensteiner v The Queen* (1993) 178 CLR 217 at 288 makes any direction by the judge to the jury on this point extremely complex and the scope of permissible comment is not clear:

> 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 …

In effect the courts have held that the jury ought to be told that they may take into account the defendant's failure to explain at trial when it is reasonable to expect that an innocent person would have provided an explanation of events which have been proved independently. This direction should be clarified and prosecution comment allowed, but confined by the same limits as apply to a judicial direction. Any comment also should be subject to the proviso that the jury is first directed as to the defendant's 'right to silence'.

255. The law on the right to silence at trial should be amended to:

(1) permit the jury to have regard to a defendant's silence as one of the circumstances or part of the evidence but not, in and of itself, permitting an inference of guilt, so long as the jury is first directed as to the defendant's right to be silent; and

(2) permit prosecution comment upon the silence of the defendant within the same limits as those applying to a permissible direction by the judge.

25

Alternative Criminal Charge Resolution

Alternative resolutions to criminal charges

25.1 Alternative resolutions to criminal charges may involve a defendant being given an opportunity to take part in a formal diversionary scheme rather than the usual process of adjudication and/or sentence. Police referral of matters to community-based mediation centres and other restorative justice strategies are being investigated and trialled in other jurisdictions. Resolution of criminal charges also may include a broad range of alternatives to adjudication by a court as informally agreed by the police and a suspect or the prosecution and a defendant. In that sense, alternative resolutions to criminal charges presently are used at all stages of the criminal process in Western Australia. However, the informally negotiated resolutions which concern us in this Report are not the equivalent to the plea-bargaining which is entrenched in the criminal justice system of the United States. In Western Australia plea-bargaining is neither officially acknowledged nor endorsed by the courts.

25.2 Because the process of negotiating charges, sentencing and pleas does not require court approval and is not generally monitored it is difficult to know how extensively parties resolve or refine criminal matters by negotiation. However, statistics give an indication of the potential scope for reaching alternative resolutions of criminal charges before trial. Of approximately 7,000 charges against 1,700 defendants which are sent to the District Court each year only some 1,150 charges proceed to trial. Over a 12-month period from December 1997, the charges against 182 defendants were sent to the Supreme Court but only 77 proceeded to trial.

Pre-charge alternative resolutions

25.3 In the pre-charge stage, there is little formal recognition of police 'negotiations' with suspects. However, two significant and formally

acknowledged alternative resolutions at this stage of proceedings are police discretions:

- whether to charge or not, subject to directives from the Commissioner of Police; and
- whether to divert the alleged offender from the court process, including diversion as allowed under the *Young Offenders Act 1994* (WA).

Post-charge and pre-conviction alternative resolutions

25.4 At the post-charge and pre-conviction stage, there are significant opportunities for issues to be discussed and resolved by defendants, their counsel (if the defendant is legally represented) and prosecutors, including:

- the sufficiency of evidence on each charge;
- whether the matter needs to be sent to a superior court;
- a negotiated withdrawal of some charges on the basis of a guilty plea on others;
- the omission of certain facts alleged in return for a guilty plea; and
- prosecution agreement to not oppose a sentencing option put forward by the defence in exchange for a guilty plea.

Because prosecutors will need to satisfy prosecuting policy and supervisors of the merits of potential resolutions, negotiations often are not finalised until the day of the trial.

25.5 One significant form of pre-conviction diversion, currently available only for certain juvenile offenders, is a type of family group conferencing known as the Juvenile Justice Team. The young person attends together with a supporter and/or members of his or her family, the victim and support person, a police officer and a member of the Ministry of Justice, all of whom must agree to the implementation of a proposed diversionary program. The plan of action may include an apology, reparation, community work and so on. Offenders may be referred directly by police or by the Children's Court provided the offender accepts his or her responsibility for the offence and agrees to make amends. If the agreed plan is carried out the charges are withdrawn. The Children's Court also has a discretion to refer offenders after they have been convicted, although this is rarely used. There does not appear to be any reason why the availability of such a scheme needs to be confined to young offenders. The Ministry of Justice is currently investigating expanding the availability of family group conferencing schemes. A particular benefit of this form of diversion is the greater participation it affords the victim of crime in the resolution.

256. The diversionary scheme based on family group conferencing currently available only to juvenile offenders should be extended to include young adults who are not recidivist and first offenders of any age for appropriate offences.

The role of the DPP prior to conviction

25.6 The DPP is responsible for the prosecution of virtually all criminal matters in the higher courts. It exercises significant discretion in determining who will be indicted. For example, the DPP may prosecute a defendant who has been discharged after a preliminary hearing by filing an '*ex officio* indictment', an indictment filed within the powers of the office of DPP. The DPP also can exercise discretion not to prosecute on the basis of published guidelines under the *Director of Public Prosecutions Act 1991* (WA), even if a defendant has been committed for trial after a preliminary hearing. When a decision is made not to prosecute, a *nolle prosequi* is entered, that is, a notice or bill of no prosecution. The DPP has been criticised recently for late decisions not to proceed to trial with indictments, wasting defence and court resources. There also have been criticisms that there is no mechanism for the DPP to adequately explain its exercise of the discretion. These matters are discussed in detail in Chapters 28 and 29.

Sentencing and alternative resolutions

25.7 'Plea-bargaining' which involves court approval of charging and sentencing deals negotiated between the defence and prosecution is not endorsed in Australia. However, in Western Australia an established sentencing principle is that a defendant who enters a plea of guilty to a charge, rather than pursuing his or her right to trial, will benefit from a discount of between 25 to 35 per cent of the sentence which would otherwise be imposed. The earlier the defendant enters a guilty plea the greater the discount afforded. This is reflected in the sentencing of offenders who opt for the fast-track procedure discussed in Chapter 28 on preliminary hearings. In a sense the trade-off between the right to trial and the guilty plea and reduced sentence is also an alternative form of resolution of a charge.

25.8 Following a plea of guilty or a finding of guilt after trial, the court may remand a convicted person for a pre-sentence report, to be prepared by the Community Based Corrections Officer. The Ministry of Justice provides a Victim-Offender Mediation Unit for adult and juvenile offenders and their victims, if both the offender and victim wish to take part. Mediation can result in an apology, monetary restitution, unpaid work and other reparative outcomes. The court may take the outcome of mediation into account when passing sentence. The pre-sentence report also may recommend that an offender undergoes some kind of rehabilitative course or programme and the court may adjourn the sentence pending the outcome. The success or otherwise of the rehabilitative course will be taken into account when finally determining sentence.

Post-sentence alternative resolutions

25.9 Following sentence an offender still may be offered the opportunity to attend victim-offender mediation. At this stage the main objective would be to reach agreement concerning the future contact between the offender and victim, but it also may be relevant for an offender's release order if sentenced to custody.

Formalising pre-trial negotiations

25.10 Because negotiations between the prosecution and defence are rarely formally recognised there are no good data on how frequently negotiations are entered into to resolve criminal charges. However, submissions to us indicate that in spite of problems associated with their use in the current system, informal alternative resolutions are in use in the criminal process. Such problems include late decisions by the DPP not to prosecute, mentioned previously, which are addressed in Chapter 29. The late withdrawal or change of charges tried summarily is addressed in Chapter 27.

25.11 Other problems arise from the highly discretionary and private nature of much of the alternative resolution currently being undertaken. Particular problems are the fact that determinations can be arbitrary and lacking in accountability. A self-represented defendant poses further difficulties in negotiations. Formalising the negotiation process may ensure a degree of transparency and fairness in negotiations.

Compulsory pre-trial conferences?

25.12 Although compulsory pre-trial conferences overseen by an officer of the court had been our original proposal in the Consultation Draft on this topic (4.3), we now have reconsidered this idea. Under the proposal, negotiations were to be without prejudice and confidential if publicity could prejudice any trial process; a court official was to monitor but not 'judge' negotiations. It is now our view that the original proposal was not sufficient to attain the fairer and more transparent process we had sought. The Runciman report (1993) on criminal justice in the United Kingdom raised further concerns about the cost-effectiveness of pre-trial conferences conducted by court officials.

Alternative Criminal Charge Resolution

25.13 On consideration of matters raised in submissions to us, we recommend the adoption of a formal pre-trial negotiation process — 'Alternative Criminal Charge Resolution' (ACCR). In order to attain transparency and accountability, in place of the court supervision originally proposed we now recommend that victims of crime should have the right to be consulted prior to any negotiations between the prosecution and defence. Where possible all outstanding charges against the defendant should be considered at the same time to afford greater flexibility in negotiations.

257. Pre-trial negotiations between prosecution and defence should be formalised into a process known as Alternative Criminal Charge Resolution (ACCR).

258. If practicable, all outstanding charges against the defendant should be dealt with through the one ACCR process.

259. The purpose of ACCR should be to reach agreement between the parties about:

(1) which charges will continue to hearing and in which jurisdiction;

(2) whether these charges can be heard concurrently;

(3) evidentiary issues, including disclosure of copies of statements of non-expert witnesses whom the defence proposes to call, if the defence wishes to do so;

(4) notice of which prosecution witnesses will be required to be present, if the defence wishes to do so; and

(5) the possibility of other admissions.

260. The victims of crime the subject of charges being negotiated, if any, should have the right to be consulted by the prosecution prior to negotiations between the prosecution and defence.

261. Where agreement is reached involving a change of plea, the matter should be listed in court as soon as possible and the new plea taken.

262. Where agreement cannot be reached and there is a need for directions to be issued prior to the trial, the matter should be listed in court, as soon as possible, for directions.

The role of victims of crime

25.14 It is not suggested that the proposed pre-negotiation consultation could perform the task of a mediation between alleged offenders and victims. However, with increasing recognition of the importance of victim input into the criminal justice system, there is a legitimate role in the pre-trial process for victims of crime. Victims should be informed of the ACCR process and, if they wish, be entitled to submit a statement for consideration at the negotiations, in addition to having the right to be consulted by the prosecution prior to negotiations. They also should have a right to be informed of the outcome of negotiations and the reasons for the outcome.

263. Victims of crime the subject of charges to be negotiated, if any, should be informed of the pre-trial negotiation process and be entitled to provide a written statement for consideration by the parties. Irrespective of whether victims submit a statement or wish to be consulted about the negotiations they should be notified of the outcome and reasons for the outcome.

'Without prejudice' and in confidence

25.15 Information available only as a result of the ACCR process should not be admissible in any court proceeding; that is, it should be 'without prejudice'. This would help parties to enter into full and frank negotiations. Participants in the process also should be under an obligation to maintain confidentiality, at least until all charges are finally resolved. This would mean that the prosecution, the defence and any victims of crime would be under an obligation not to divulge what occurred during, or any information obtained as a result of, the ACCR process. The principal reason for this requirement is to prevent any prejudice arising against the defendant in the event of trial following the ACCR process. In the most extreme case, public disclosure of the contents of ACCR negotiations, outcomes and reasons could result in the impossibility of the defendant receiving a fair trial and so lead to the permanent stay of all charges.

25.16 All parties who participate in ACCR should be made aware of their obligations and the reasons for the restrictions on the use of information obtained as a result of negotiations and the divulging of such information. To limit the possibility of any abuse of the process it should be made clear that the media is subject to an absolute prohibition from publishing information obtained during the negotiations so long as the potential remains for the charges the subject of negotiation to be tried or re-tried.

264. ACCR negotiations and any information available only as a result of the process, including victim statements and advice of outcomes and reasons, should be 'without prejudice'.

265. All parties involved in the ACCR process should be made aware of their obligations to maintain confidentiality and the reasons for those obligations, and be required to sign a undertaking to that effect. Signed undertakings to maintain confidentiality should not have 'without prejudice' status. Confidentiality should be clearly stated to apply so long as the charges subject of negotiation may be tried or re-tried.

266. The media should be prohibited from publishing the contents of any ACCR negotiations or any information available as a result of that process so long as there remains a risk that it may prejudice the trial or re-trial of any of the charges subject to negotiation.

Fairness to the defendant

25.17 One of the reasons we originally had proposed judicial supervision of the pre-trial negotiation process was to ensure fairness to the self-represented defendant. However, given the highly adversarial nature of criminal proceedings and the highly discretionary nature of negotiations, it is unrealistic to expect a court official to assume the role of ensuring fairness to

the defendant. A better means of achieving fairness would be the legal representation at pre-trial negotiations of any defendant charged with an offence for which a prison sentence is a real possibility. The anticipated establishment of a Public Defender's Office, publicly mooted over the last year, should assist in the representation of defendants who are unable to afford legal representation.

267. All persons for whom a prison sentence is a real possibility on conviction who want legal representation should be legally represented in ACCR negotiations.

The effectiveness of ACCR

25.18 A problem with ACCR is that if it is not mandatory, there is a possibility for negotiations simply to bypass the process. This would defeat the purpose of ACCR: to enable victims of crime to have their views considered as part of the negotiating process. In order to avoid this, it is our view that prosecutors should be prohibited by statute from making any agreement with the defendant and/or defence counsel without taking all reasonable steps to consult the victim.

25.19 Defendants also must be in a position to make informed decisions about whether or not to take part in ACCR and about their eligibility for legal representation at these processes if desired. In particular, defendants should be aware that sentencing matters remain at the discretion of the court, irrespective of any agreements made between the defence and prosecution. There should be a requirement imposed on defence lawyers under the *Legal Practitioners Act* to explain the potential advantages and limits of ACCR to clients. For self-represented defendants the court registry should provide effective information explaining the ACCR process and its advantages and limits, as well as criteria for eligibility for legal representation in these negotiations. The information could be developed through consultation and presented in booklet and video form, or via internet access.

268. There should be a statutory obligation on the prosecution which precludes agreement being entered into between the prosecution and the defence in relation to charges without the prosecution taking all reasonable steps to consult the victims.

269. The *Legal Practitioners Act* should be amended to impose an obligation on legal practitioners instructed in a criminal matter to:

(1) give clients specific advice about the availability of ACCR;

(2) discuss with clients the costs implications and other potential benefits and limits of ACCR; and

(3) provide access to information concerning ACCR in a standard form booklet, video, or through the internet and available in translation.

270. Court staff should be directed to provide access to information on ACCR in a standard form booklet, video, or through the internet, in the relevant translation, to defendants who are defending themselves. Court staff should also be required to explain the process to self-represented defendants.

26

Joinder

Fair trials and the issue of joinder

26.1 It is central to the administration of justice that criminal trials take place promptly, at reasonable cost and without unnecessary inroads into judicial resources. However, these aims are not to be attained at the expense of a fair trial — not only fairness to the defendant but also to the State, the victim, and other witnesses. Ultimately the way in which the interests of the defendant and others are balanced and the determination of what constitutes a fair trial is a matter for the courts, the legislature and the electorate. Joinder is one area where the balance between the interests of the defendant and other factors is particularly difficult.

The rules limiting joinder

[Joinder exists] to avoid the technicalities and rigid rules of criminal pleading and procedure, but not to impair the administration of criminal justice.

Brennan J, *Sutton v The Queen* (1984) 152 CLR 528, 542

26.2 'Joinder' is a legal term referring to two procedural matters: combining a number of charges against an individual in a single indictment or bringing a number of defendants together on one indictment. Criminal procedure rules limit joinder of both charges and of defendants. Subject to a number of exceptions, the *Criminal Code* states that an indictment must charge one offence only. The *Code* also only allows for joinder of defendants in limited circumstances. There are similar rules in the *Justices Act* dealing with the joinder of charges and defendants tried summarily.

Rationale for the joinder of charges

26.3 Joinder of multiple charges against the same defendant in one indictment reduces State costs, saves time and conserves judicial resources. It also can work to the advantage of the defendant in terms of reduced cost and time. There is the additional potential benefit of concurrent sentences if the defendant is convicted. Trauma to witnesses may be reduced and decision-makers can be given a more complete picture of the alleged offending. Given

the potential benefits of joinder, it may seem curious that joinder of charges is generally restricted in Western Australia.

Rationale for prohibition

26.4 The restriction upon joinder of charges stems from the fundamental principle that evidence of the commission of offences other than the offence charged is generally inadmissible against the defendant at a criminal trial. Allowing evidence of other offences may unjustly erode the presumption of innocence which underlies all criminal trials. (See too Chapter 20 on evidence of 'bad character'.) Any potential benefit to a defendant from joinder of charges leading to concurrent sentencing is a sentencing and not a trial issue, and we have addressed it as such in Chapter 27.

Joinder of charges

26.5 Section 585 of the *Criminal Code* provides that an indictment must charge one offence only, except in three specified circumstances:

- **Where several distinct indictable offences form or are part of a series of offences of the same or similar character**. Thus, joinder of charges is allowed if there is a sufficient connection between the charges.
- **Where several distinct indictable offences are alleged to be constituted by the same acts or omissions**. Joinder is allowed where the evidence to support the charge of one offence is the same evidence as used to support the charge of a different offence.
- **Where several distinct indictable offences are alleged to have been done or omitted for a single purpose**. The courts have applied this exception widely. For example, a court allowed the joinder of offences of robbery and assault with intent to resist arrest on the basis of the single purpose of committing a robbery and 'getting away'.

Improper joinder of charges will not lead to the setting aside of the conviction unless, as in all criminal appeals against conviction, it can be shown that a miscarriage of justice resulted.

Election or direction for separate trials

26.6 Even if charges are joined, section 585 of the *Criminal Code* also provides that the court should order separate trials if the hearing of all charges at the one trial would result in impermissible prejudice to the defendant. This may occur where evidence admissible on one charge would not be admissible on another. It is possible for judges to direct juries about the pitfalls of such evidence and to indicate which evidence is admissible against which charge, but it is unclear how effective these directions are. The High Court has held that there are occasions where the direction to the jury is insufficient to overcome the prejudice against the defendant arising from joinder of charges at trial.

271. The existing principles of law which hold that a direction by the trial judge to the jury cannot overcome the prejudice to the defendant arising from joinder of charges should be overridden. The law should be amended so that if the judge before whom the issue of joinder is brought concludes that prejudice can be overcome by an appropriate direction by the trial judge joinder of charges at trial should be permitted.

Joinder of sexual offences

26.7 The traditional view is that cases involving multiple offences of a sexual nature are particularly likely to give rise to prejudice to the defendant. The High Court has repeatedly warned of the impermissible risk of prejudice arising in cases involving multiple sexual offences. While our previous recommendation would provide the trial judge with a discretion to allow these offences to be joined at one trial, the traditional reluctance to allow the one trial of multiple offences of a sexual nature because of the potential prejudice to the defendant is likely to remain influential.

26.8 As a result of *Hoch v The Queen*, (1988) 165 CLR 292, there is another factor which must be considered by the court in cases involving sexual offences. Generally charges may be joined where the details of the alleged offences provided by multiple witnesses show that the offences are of a similar character. However, as a result of the High Court decision in *Hoch*, if evidence of sexual offences which would otherwise be admissible could have been the result of 'concoction' by the witnesses the charges should be tried separately. Queensland and Victoria have legislated to abolish the effect of the *Hoch* case. We believe Section 585 of the *Criminal Code* should be amended to include a provision based on the Queensland *Criminal Code 1899* section 579A(1AA) to abolish the rule in *Hoch*.

272. In considering potential prejudice, embarrassment or other reason for ordering separate trials under provisions relating to the joinder of alleged offences of a sexual nature, the court should 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.

Joinder of defendants

26.9 The Western Australian *Criminal Code* provides for more than one person to be charged on the one indictment — known as joinder of defendants — in specific circumstances. Under section 586 more than one person can be charged in the one indictment if the persons are charged:

- with the same offence;
- with procuring or committing the same offence;
- as accessories after the fact;
- with receiving property allegedly stolen by the others charged on the indictment; or
- with offences arising out of substantially the same or closely related facts.

Rationale for joinder of defendants

26.10 The misjoinder of defendants on one indictment is viewed more seriously than the misjoinder of charges. The courts have held that it always results in a miscarriage of justice. Therefore appeals are upheld where there has been a misjoinder of defendants.

26.11 One important consequence of joinder of defendants is that a joint trial should avoid inconsistent verdicts on the same or similar charges. There also are administrative issues of time and cost if more than one trial is conducted. Further, there is the significant matter of victims and other witnesses to be considered: joinder of defendants resulting in a joint trial means that witnesses do not need to give evidence of the same events at a succession of trials. A joint trial gives the decision maker a more complete picture of the alleged criminal activity in question. Joint trial of defendants may also prevent abuses of the criminal justice system. For example, joinder prevents one defendant giving self-incriminating evidence at the trial of a codefendant, and then having the favour returned at his or her own trial.

Separate trials of joined defendants

26.12 Even if the defendants are joined on one indictment, the court may order separate trials under section 624 of the *Criminal Code*. The primary reason a defendant would seek a separate trial is to avoid being prejudiced by evidence about a codefendant. For example evidence may be admissible against one defendant but not another, or the co-defendants may have inconsistent defences. In Western Australia there are no statutory criteria for the exercise of discretion to order separate trials for defendants who have been joined.

26.13 As in instances of joinder of charges courts often view cases involving sexual offences and multiple defendants as giving rise to prejudice to defendants if tried together. The rationale for ordering separate trials for joined defendants is similar to that affecting separate trials of joined offences: that a direction to the jury by a judge could not overcome the prejudice to the co-defendants arising from their matters being heard together. At the same time, however, there may be considerable trauma to victims of sexual and other offences who are required to repeatedly give evidence about the same events at separate trials.

273. The existing principles of law which hold that a direction by the trial judge to the jury cannot overcome the prejudice to co-defendants arising from joinder should be overridden. The law should be amended so that if the judge before whom the issue of joinder is brought concludes that prejudice can be overcome by an appropriate direction by the trial judge joinder of defendants at trial should be permitted.

Multiple defendants, multiple juries

26.14 If a judge before whom the issue of joinder is brought concludes that prejudice cannot be overcome by an appropriate direction by the trial judge and separate trials are ordered, one option, based on experience in the United States, is to have one trial of all defendants before different juries. This would mean that each jury would only hear evidence which is admissible against the relevant defendant. (More flexible and appropriate accommodation for juries, and others involved in the justice system, is discussed in Chapter 34.) In our view the option of multiple juries should be available in cases in exceptional circumstances, for example where victims or other witnesses are highly vulnerable.

274. In exceptional circumstances, such as in cases with highly vulnerable victims or other witnesses, it should be possible to empanel multiple juries in cases of joinder of defendants where the court determines that there should be separate trials, and two or more defendants elect a jury trial.

Appeals against joinder

26.15 Section 611A of the *Criminal Code* deals with applications for separate trials for joined charges or for co-defendants. The Court of Criminal Appeal has held that it has no power to overturn a decision to join prior to conviction or acquittal as it has no jurisdiction to hear any appeals on interlocutory criminal matters. The traditional argument against interlocutory appeals in criminal matters has been that it fragments the criminal process and leads to delays. We believe section 611A of the *Criminal Code* should be amended to specifically allow for appeals in cases where a ruling on separate trials under sections 585 or 624 of the *Code* has been made. In particular, allowing appeal before the conduct of the trial or trials will avoid the possibility of a successful appeal and re-hearing of the matters on these grounds after the initial trial or trials, save for appeal to the High Court in exceptional circumstances. An equivalent provision for appeal against a ruling on a separate summary trial application should be included in the *Justices Act*.

275. When a ruling on a separate trial application on indictment has been made:

(1) the right to appeal should be open to the prosecution as well as the defence;

(2) the right of appeal should be to the Court of Criminal Appeal;

(3) strict time limits should apply to prevent any disruption to the trial process — for example, the appeal should be lodged seven days from the making of the order; and

(4) no right of appeal on the ruling will be available after the trial or trials have been conducted.

276. An equivalent provision to that set out in Recommendation 275 should be included in the *Justices Act* for appeals against a ruling on a separate summary trial application, with a final right of appeal to a judge of the Supreme Court.

27

Criminal Process in the Court of Petty Sessions

The Court of Petty Sessions

27.1 In Western Australia, it is usually magistrates of the Court of Petty Sessions who exercise summary jurisdiction. Summary jurisdiction includes adjudicating and sentencing on summary (or what are supposed to be less serious) offences. It also includes adjudicating and sentencing on those indictable offences which would normally be heard in the higher courts, but for which summary trial is allowed and has been elected. Hearings to assess whether there is sufficient evidence for an indictment to be laid against a defendant, (known as preliminary hearings and discussed in Chapter 28), are also conducted in the Court of Petty Sessions. As a result, initially criminal complaints laid by police, whether charging summary or indictable offences, are filed in the Court of Petty Sessions. (Charges against children are an exception and are filed in the Children's Court). In addition, criminal offences prosecuted by other agencies are generally heard in the Court of Petty Sessions.

27.2 Two justices of the peace sitting as a Court of Petty Sessions also may exercise power to determine summary offences. Where no other justice usually residing in the district can be found at the time within a distance of 16 kilometres, one justice of the peace can exercise summary jurisdiction. The summary jurisdiction of justices of the peace may be particularly important in rural communities.

Classification of offences

27.3 The different categories of offence have significant impact in terms of the ways in which offences are processed through the criminal justice system, as well as implications for the cost and delay in defending charges,

and sometimes the maximum sentence which can be imposed. Yet, there is no coherent basis for the classification either with reference to the seriousness of the offending or the importance of community input through jury trial. Classification of offences as summary, indictable with the option of summary trial, or indictable with the option of trial by judge alone or by jury has evolved in a piecemeal way over many years. In our view, a restructuring of how offences are classified is long overdue.

277. Offences should be classified into the following categories:

(1) **Serious Indictable Offences**
All offences which carry a maximum penalty of a life sentence should be heard by a Supreme Court jury with the option of trial by judge alone subject to 2) below.

Intermediate Indictable Offences
All offences which carry a maximum penalty of less than a life sentence but more than 15 years imprisonment should be heard by a District Court jury with the option of a trial by judge alone subject to 2) below.

Lesser Indictable Offences
All offences which carry a maximum penalty of between five to 15 years should be heard by a District Court jury with the option of trial by magistrate subject to 2) below. Where trial by magistrate is allowed, the summary conviction penalty available shall be no more than five years imprisonment.

Summary Offences
All offences which carry a maximum penalty of less than five years imprisonment must be heard by a magistrate.

Minor Summary Offences
Offences carrying no prison term may be heard by magistrates or justices of the peace.

(2) When Parliament is of the view that the proper adjudication of an offence requires a jury trial in order to establish contemporary community standards, the legislation should stipulate that there is a presumption that the offence should be tried by jury.

(3) Where trial by judge alone or magistrate is available it should be at the election of the defendant, unless opposed by the prosecution, in which case the issue is to be determined by the court.

The role of justices of the peace

27.4 On our recommendations, justices of the peace would exercise a significantly reduced jurisdiction. Instead of sharing concurrent jurisdiction with a magistrate, two justices of the peace, or one in remote locations, would be entitled to exercise summary jurisdiction only over offences where no prison penalty is available. It is important that this reform should not result in the extended detention of defendants on summary offences punishable by a prison term until a magistrate is available.

278. Defendants detained in custody should be transferred to an appropriate court for determination of outstanding charges as a matter of urgency.

Profile of the Court of Petty Sessions

27.5 In 1995/96 there were 80,169 police charges heard in the Court of Petty Sessions resulting in 76,818 convictions against 31,286 individuals. (A large number of criminal charges are prosecuted by other agencies through the Court of Petty Sessions, such as wildlife and fisheries officials and local governments, but detailed statistics are not available.) As at November 1996, the waiting times for trial in the Perth Court of Petty Sessions had increased from five to 17 weeks since 1994. It is of note that the apparently minor increase in the volume of charges heard over this period cannot explain the increased delay. More recent information on delay in the Court of Petty Sessions in Western Australia is not publicly available.

27.6 Statistics are not available in Western Australia, but a Victorian study found approximately 40 per cent of all cases in the Magistrates' Courts (the equivalent of the Court of Petty Sessions) were adjourned at least once. Of these cases 12 per cent were adjourned three times or more. On average each adjournment adds 40 days to the length of the case. In this Chapter we examine and seek to address the apparently increasing delays in the Court of Petty Sessions.

Process in the Court of Petty Sessions

27.7 Proceedings in the Court of Petty Sessions are commenced by 'complaint', a form prescribed by the *Justices Act*. The complaint is lodged or filed at the court, and administrative arrangements are made to place it before a magistrate. If the complaint is combined with a summons to appear, the complaint is placed before a magistrate on the date on which the defendant has been summonsed to appear. Defendants who have been arrested are taken before a magistrate as soon as practicable or released on bail.

27.8 When the defendant first appears in court the complaint is read out. This process constitutes the formal 'charging' of the defendant. Defendants

who are arrested do not receive prior notification of the details of the charge. Defendants may obtain a copy of the complaint from the Court of Petty Sessions, although there apparently is a fee applicable under the *Court of Petty Sessions Fees Regulations* (WA) but not under the *Justices Act Regulations* (WA). Details of each appearance by the defendant are recorded by hand on the complaint form by the magistrate. These handwritten notations are the court's primary record of any proceedings.

Limitations of the existing process

27.9 There are a number of serious limitations under the existing procedure:

- The complaint form, which dates from 1902, is difficult to understand, particularly for a defendant who does not have legal representation. The form is not easily adaptable to electronic dissemination and makes no allowance for joinder of charges and/or defendants.

- Given the lack of prior notice to those arrested of the details of the charge(s), any request to a magistrate for an adjournment is inevitably granted. Even if a defendant wants to plead guilty, any legal advice would be to wait until the precise nature of the charge is known. Because the defendant is charged by the State there seems to be no good reason why the defendant, rather than the State, should be responsible for, or pay for, finding out what the charges are.

279. The initiating document for the Court of Petty Sessions should be redrafted in plain English and should make allowance for joinder of offences and/or defendants where applicable.

280. In all cases of arrest, there should be an obligation imposed on police to read a formal charge and provide copies of the initiating form, free of charge, before the defendant appears in court.

A Justice Information Exchange

27.10 More use could be made of information technology in the criminal process. In Victoria the Department of Justice has proposed an electronic Justice Information Exchange. Agencies of the justice system will be required to transfer information, such as complaints, to the Exchange as soon as these are available. The Exchange will then notify all relevant parties of the availability of the information. Parties who are 'on-line' will not only have immediate notification of the availability of the information but also have immediate access to that information. The establishment of the Exchange could provide an alternative to the requirement for police to provide copies of the charges

to the defendant. The use of information technology in the justice system is discussed further at Chapter 35.

281. There should be a Justice Information Exchange providing facilities for electronic exchange of information in Western Australia.

Late guilty pleas

27.11 In Western Australia, as indicated in Chapter 7, some 90 per cent of charges laid by police in the Courts of Petty Sessions are determined by pleas of guilty. The problem, in terms of efficiency, is the lateness of some of these pleas and the inefficiencies associated with this. These inefficiencies include:

- waste of time in court;
- under-utilisation of court rooms;
- inconvenience to parties and counsel;
- additional costs resulting from over-listing to compensate for the possibility of late cancellations;
- inconvenience to witnesses, particularly victims; and
- costs associated with being absent from other duties or work and travel expenses incurred by publicly funded agencies, such as police, and individuals called as witnesses.

Reasons to delay pleading guilty

Lack of information

27.12 At present defendants who are arrested make their first appearance without sufficient information to enable them to decide whether or not to plead guilty. Prior to appearing in court, a defendant is not provided with a copy of the complaint, the particulars of the complaint (material facts) or a copy of his or her criminal record. The court will consider all of these documents when determining sentence. Furthermore, although persons accused of indictable offences may be entitled to a record of any interview and/or video recording of confessional material, confessional material is not normally provided to those accused of matters tried summarily. (See section 100 of the *Justices Act* and section 570 of the *Criminal Code*.) Unless a matter is adjourned, the defendant often will not have access to relevant materials or be able to obtain legal advice with respect to them.

27.13 In Chapter 24 we recommend that there be a statutory requirement of prosecution disclosure. (See Recommendation 252.) In our view, prior to the first court appearance the prosecuting authorities should provide the defendant with a simply expressed statement of material facts and law, criminal record and confessional material together with the complaint. If these materials were made available on the Justice Information Exchange, physical access to that information by a defendant and legal counsel could be provided at the

court. At worst, the case would only need to be 'stood down' until later in the day for the information to be obtained rather than adjourned to a later date, as is currently the practice. Access to information through technology would mean that police would not need to formally deliver materials to the defendant, although the defendant or defence counsel would still need to obtain secure access passwords and have ready access to appropriate technology.

282. Information, including any confessional materials, a simply expressed statement of material facts and particular principles of law relating to a charge, and the defendant's criminal record, should be made available to all defendants on or before their first appearance in court. The information should be provided through the proposed Justice Information Exchange or formally delivered to defendants or their legal representatives.

Legal advice

27.14 Currently once a matter has been adjourned and the necessary information is obtained the defendant may wish to obtain legal advice. Often financial constraints mean that advice is sought from the Legal Aid duty lawyer. Because there is usually only very limited time available for consultation, duty lawyers may be reluctant to advise a defendant to plead guilty in these circumstances.

27.15 Reforms could be instituted to enable a defendant to obtain legal advice before the first appearance in court. The existing Legal Aid duty lawyer scheme operates only a small-scale system for seeing clients a day or more before the first appearance. If relevant information is available to a defendant prior to appearing in court, the time to obtain legal advice should be before — and not after — the first appearance in court. This also would provide an opportunity to advise defendants of the ACCR process described in Chapter 25.

283. The existing Legal Aid duty lawyer system of consultation with defendants prior to their first court appearance should be expanded.

Sentencing issues

27.16 A defendant may wish to collect materials relevant to pleas in mitigation of sentence, such as character references. A defendant also may wish to put his or her affairs in order if facing imprisonment. Both may cause

a defendant to delay pleading guilty even if not intending to contest the charge. Furthermore, the present law on bail operates against bail being granted after conviction and before sentence if the defendant is in custody, regardless of the likely sentence. Another problem, raised in Chapter 26, confronts a defendant who is charged with multiple offences in the Courts of Petty Sessions. The only way to achieve one sentencing date may be to plead not guilty and adjourn one or more of the cases until they ultimately coincide. Being sentenced on the one date is more likely to result in concurrent sentences being handed down. Other advantages are that it may avoid problems in relation to sentence calculation and sentence planning in the prison system. Pre-release programs and parole may be held up by multiple sentencing dates and proposed diversionary schemes may not be able to operate effectively when diversion depends on an early plea of guilty or a final disposition of all outstanding charges. (Defendants facing multiple charges in both Petty Sessions and higher courts are discussed in this Chapter at 27.29 to 27.30.)

27.17 Currently if a defendant pleads guilty, sentencing will not necessarily take place immediately. This can be seen in the current 'fast track' system of committal to a higher court, discussed in Chapter 28. Under that system a defendant who pleads guilty to an indictable offence at an early date is committed to the superior court for sentencing only. There is inevitably a delay in getting into the superior court and in any event adjournment may be allowed so a convicted person can prepare for a plea in mitigation or for imprisonment. There is no presumption against bail being granted during the delay in these circumstances, whether the convicted person is already in custody or not. The fast track system could be mirrored in the Courts of Petty Sessions.

27.18 Delays arising as a result of sentencing issues could be reduced by:

- adjourning sentencing to enable a defendant to prepare for a plea in mitigation or when imprisonment is an option;
- adjourning sentencing to permit sentencing on multiple charges to be handed down at the one time; and
- amending the *Bail Act 1982* (WA) to remove the presumption against bail being granted after conviction.

Additional adjournments of sentencing should not be available for any offences alleged to have been committed after the offender was convicted and released on bail pending sentencing.

284. The criteria for adjournment of sentencing should be extended to include:

(1) preparation for pleas of mitigation;

(2) preparation if imprisonment is an option; and

(3) enabling sentencing on multiple charges in the Courts of Petty Sessions to coincide, provided that none of the offences is alleged to have been committed after the offender was convicted and bailed pending sentence.

285. In order to encourage early pleas of guilty, adjournment for sentencing should be made more attractive to defendants by removing the presumption against granting bail after conviction under the *Bail Act 1982* (WA) Schedule 1, Part C, clause 4.

Pre-trial disclosure by the prosecution

27.19 Part of the statutory prosecution disclosure requirement will be satisfied by the recommended obligations on police, discussed in this Chapter, to deliver to a defendant on or prior to the first court appearance:

- a copy of the complaint
- copies of confessional material;
- the defendant's criminal record; and
- a simply expressed statement of material facts and particular principles of law relating to a charge (See Recommendations 280 and 282.)

We refer to this as 'initial disclosure'. In our view, initial disclosure by the prosecution should attach to all criminal offences. The detail included in the statement of material facts and particular principles of law relating to a charge, however, would be largely at the discretion of the prosecution. The amount of detail provided by the prosecution should correlate with the seriousness or complexity of the charge, which in turn will determine the detail provided in the defendant's statement in response when one is required. (See Recommendations 253 and 288.)

27.20 There is a need to balance the undoubted advantages of disclosure against the expense associated with it. In our view the extent of prosecution disclosure required under Recommendation 252 should be determined by the seriousness of the consequences of the prosecution of an offence for a defendant, and, in particular, whether imprisonment is a potential outcome. Section 86 of the *Sentencing Act 1995* (WA) prohibited the imposition of any prison sentence of less than three months duration. As a result all legislation which provided for prison sentences of less than three months was amended and all short-term prison sentences abolished. The distinction between

offences warranting imprisonment and those which do not is now far more clearly delineated. In our view this distinction provides an appropriate basis for distinguishing cases where initial disclosure is sufficient and where full disclosure should be required. In either event, the potential consequences for a failure to disclose include those indicated in Recommendation 252.

Prosecution disclosure in stages

27.21 For offences for which imprisonment is an option, full prosecution disclosure should be required. Prosecution disclosure, however, should be made in stages. Prosecution witness statements and expert reports should only be made available if the defendant does not enter a plea of guilty after initial disclosure has been made. Only after full prosecution disclosure has been made should defendants be required to make the limited defence disclosure required by Recommendation 253.

286. Initial prosecution disclosure, required for all offences, should consist of the information specified in Recommendations 280 and 282.

287. If the defendant does not plead guilty after initial disclosure, the prosecution, for all offences other than those for which no prison sentence is available on conviction, should disclose its case in chief, including witness statements and expert reports, known as 'full prosecution disclosure'.

Defence disclosure

27.22 The traditional 'right to silence' and prosecution burden of proof are not the only considerations which appropriately limit the requirement for defence disclosure. It also should be remembered that the resources of defendants are, in almost all cases, not comparable to those of the prosecution. To place too large or costly a burden on the defence would delay hearings even longer. As a result, in Recommendation 253, we recommended defence disclosure should be limited to:

- a notice of alibi, if any, similar to that already in place for trials on indictment;
- a statement which would reveal the defence attitude to the facts and law set out in the prosecution statement and to the proof required in relation to records which are proposed to be tendered in evidence by the prosecution. It also would identify any particular ground on which it may be contended guilt will not be proved;
- copies of statements or reports of any expert witnesses the defence intends to call.

Defence disclosure should be required only after full prosecution disclosure. In turn, full prosecution disclosure should be required only for offences where

a prison sentence is available on conviction. Subject to the trial magistrate's discretion, described at Recommendation 298, offences for which no prison sentence is available would, in the usual case, be subject only to initial disclosure by the prosecution and no defence disclosure.

288. If a defendant does not plead guilty, defence disclosure should be required seven days after full prosecution disclosure. Subject to Recommendation 298, defence disclosure should not be required in matters where no prison sentence on conviction is available.

27.23 Documents disclosed by parties could be made available through the proposed Justice Information Exchange. Electronic access to information should result in saving costs associated with the formal delivery of documents.

Inability to disclose

27.24 The Runciman Report (1993) anticipated the reluctance of some counsel and defendants to comply with directions requiring the disclosure of information concerning the defence case. In order to ensure compliance, we recommend sanctions attach to both parties for the failure to disclose. (See Recommendations 252 to 254.) However, where there is good reason for a party's inability to make disclosure, the pre-trial magistrate, recommended in Chapter 7, should be empowered to excuse compliance.

289. There should be provision for the pre-trial magistrate to excuse compliance by the respective parties with any or all of the pre-trial disclosures if good reason is shown.

Time limits

27.25 Disclosure by the prosecution and defence should assist the ACCR process, described in Chapter 25. One matter which may arise out of negotiations between the prosecution and defendant is an agreement to reduce an indictable to a summary charge. (See Recommendation 259.) Significantly, however, the time limits for instituting a summary charge are more restricted than those governing indictable matters. By the time agreement is reached it may be that initiating a summary charge is out of time. To facilitate negotiations, the pre-trial magistrate should have the power to extend the time limit for initiating a summary charge.

290. The recommended pre-trial magistrate should have a power to extend the time limit for instituting summary charges against a defendant provided the extension of time is required in the interests of a resolution to the matters under review in ACCR negotiations and both parties have consented.

The concurrent hearing of charges

27.26 We have recommended that pre-trial procedures focus on the defendant, so that all outstanding charges against a defendant are dealt with concurrently at the pre-trial stage. (See Chapter 7.) We also have recommended that, where possible, multiple charges in the Court of Petty Sessions should be sentenced together. (Recommendation 284.) The issue remains, however, of whether multiple charges in the Court of Petty Sessions also should be heard concurrently. Each defendant in the Court of Petty Sessions is charged on average with more than two offences. The concurrent hearing of charges would lead not only to a more efficient process but also to better informed decisions being made about bail and sentencing. The defendant and witnesses also could be saved time and expense by being required to attend court only once instead of on multiple occasions. However, as discussed in Chapter 26, there is the risk of serious prejudice to a defendant arising from the concurrent trial of independent charges.

27.27 In our view concurrent trial of independent charges only should be at the election of the defendant. If the defendant elects, charges to be tried summarily should be heard concurrently and/or charges to be tried on indictment should be heard concurrently. If the defendant makes no such election, whether the charges are heard concurrently should be determined in accordance with the rules of joinder of offences outlined in Chapter 26.

Matters proceeding to trial

27.28 ACCR will not result in a non-litigated outcome for all criminal charges. While it is important for the ACCR process to continue for as long as both parties are satisfied that there is an opportunity to reduce the issues in dispute, it will become clear that some charges will need to proceed to trial. After disclosure requirements are met, and on the application of either the defence or prosecution, the pre-trial magistrate should refer the matter for trial and the matter should be listed for directions as soon as possible. (See Recommendation 262.) With Recommendation 304 that the DPP be given early access to all police evidence, the DPP prosecutor would be able to make appropriate submissions to the pre-trial magistrate where elections on indictable matters which may be tried summarily need to be determined.

291. After all disclosure requirements are met, and on the application of either the defence or prosecution, the pre-trial magistrate should make a determination as to how the charge or charges are to proceed to trial. The determination may include an order that:

(1) an indictable charge or charges may be determined summarily in accordance with Recommendation 290;

(2) where the defendant elects to do so, any independent matters to be tried summarily may be tried concurrently;

(3) where the defendant elects to do so, any independent matters to be tried on indictment may be tried concurrently; and

(4) charge/s are to be tried 'on the papers' at the election of the defendant and in accordance with Recommendation 13.

Any charge or charges against the defendant to be tried summarily should then be referred to the proposed trial magistrate(s) subject to Recommendations 292 to 294. Recommendations 303 and 312 apply to matters to be tried on indictment.

Multiple charges in the Court of Petty Sessions and superior courts

27.29 Some defendants are charged with summary offences as well as indictable offences which are dealt with in the Court of Petty Sessions before being transferred to a superior court. In 1997/98, 2,596 defendants were sent to the superior courts from the Court of Petty Sessions. When a defendant pleads guilty or intends to plead guilty to all charges potential problems have been largely solved. The fast track procedure and the *Sentencing Act* combine to allow summary matters to be dealt with in the superior court on the same day as sentencing on the charges on indictment.

27.30 Problems may arise where, after disclosure and the ACCR process have been completed, there are pleas or intended pleas of not guilty. On our recommendations such matters generally should be referred to the proposed trial judge and trial magistrate. Because a defendant will often prefer to have the more serious charge(s) dealt with first, the matter(s) in the Court of Petty Sessions may be repeatedly adjourned or at least applications for adjournment made. Witnesses, including victims, police and experts, are kept waiting for months or even years. We recommend that when charges are sent to a superior court all outstanding charges against a defendant, including summary charges, also should be sent there. The trial on summary charges would, in the usual case, be heard in the Court of Petty Sessions. However, the superior court judge would be in a position to set down or adjourn a hearing in the lower court in light of the stage reached in the indictable matter. The exception would be where the summary charges are joined to the indictable charges, in which case the summary charges

should be heard at the trial of the indictable charge(s). In either event, sentencing would be conducted at one time in the superior court because of section 32 of the *Sentencing Act*.

292. When a defendant is charged with a new summary offence, and he or she has a matter pending in the superior court, the summary offence charge(s) may be sent to the superior court once disclosure and ACCR processes are complete. The superior court should deal with the summary charge(s) in all respects except for trial.

293. 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 Recommendation 292.

294. 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(s) should be sent to the superior court to be dealt with in the same way as in Recommendation 292.

The outcomes

27.31 The existing procedure of the Court of Petty Sessions contributed to the following outcomes in the Perth Court in 1996:

- only 45 per cent of matters listed for trial proceeded on the day;
- nearly 20 per cent of defendants listed for trial changed their plea to guilty on the day of trial; and
- nearly 25 per cent of trials were adjourned.

Late pleas of guilty and the late dropping or changing of charges contributed to these outcomes.

27.32 A defendant is already subject to an incentive to plead guilty early, with substantial discounts in sentence available. However, pre-trial magistrates should be granted power to inquire into, and penalise, late changes of pleas and charges in matters referred for summary trial if legal representatives for the defence or prosecution are personally derelict in their duty. As discussed in relation to the failure to disclose, presently there are difficulties imposing professional conduct standards in summary prosecutions because police prosecutors need not be legally qualified. This will be alleviated once DPP officers or lawyers briefed by the DPP prosecute summary charges. Another issue for consideration is the risk that penalising late changes of pleas or charges will be a disincentive to late resolutions which, even if late, are

preferable to the waste of time and cost and inconvenience to witnesses of a trial. However, as we have noted before, existing pressures have created a work practice amongst lawyers to leave consideration of many of the issues until trial. We are of the view that if no sanction is applied our efforts to improve the pre-trial process and shorten delays in the Court of Petty Sessions will have no practical impact.

295. Where a defendant changes a plea from not guilty to guilty or the prosecution drops or changes charges after a matter has been referred to the trial magistrate the reasons should be explained to the pre-trial magistrate subsequent to the plea being made or charge dropped or changed.

296. If the change of plea or dropping or changing of the charges is the result of unjustifiable personal delay on the part of the legal representatives the pre-trial magistrate should have power to make a finding of professional misconduct and the legal representative should be subject to appropriate sanctions.

Case management in the Court of Petty Sessions

27.33 There is currently no formal provision for any type of case management in the Courts of Petty Sessions. Although the court in Perth has introduced a limited pre-trial system, after its first year of operation there was no conclusive evidence that status conferences reduced the number of trial cancellations, nor could any reduction in the length of trials be seen. We believe, however, that as long as it is proportionate to the matters at issue and in conjunction with our other recommendations, case management could assist in the efficiency of court processes. We recommend that after the pre-trial magistrate makes a determination of how charges are to proceed (Recommendation 291), charges to be heard summarily and which are expected to take more than half a day in trial, should be referred to the proposed trial magistrate for case management.

27.34 It may be that the charges are minor and so have not been subject to the full disclosure procedures, even though they are expected to take in excess of half a day at trial. In those instances, the trial magistrate should have a discretion to order full disclosure, as applies to other charges, if he or she was of the view that disclosure would assist the pre-trial or trial process.

27.35 A status conference should be convened and the trial magistrate should investigate whether the defendant is prepared to make concessions and admissions which go beyond the current provisions in section 32 of the *Evidence Act 1906* (WA). The Act currently only allows for a defendant to

make bare admissions of fact. It does not provide for concessions about the form of evidence or its presentation. The proposed new Evidence Act, discussed in Chapter 20, would include a discretion based on the Commonwealth *Evidence Act 1995*, to waive the laws of evidence. Issues of how evidence will be adduced and any other agreed matters arising from the ACCR negotiations which require a direction for trial should also be determined at the status conference where possible. A typical example would be an order allowing undisputed statements or depositions to be admitted into evidence without formal proof. The trial magistrate should exercise the same powers at trial.

297. A status conference should be convened once any case anticipated to last more than half a day at trial is referred to the trial magistrate.

298. The trial magistrate should have a discretion to order both parties to complete disclosure procedures if he or she is of the view disclosure would assist pre-trial or trial procedures and these have not previously been completed.

299. At the status conference a trial magistrate should have power to deal with matters relevant to the conduct of the trial and to set dates, including the power to rule on:

(1) the admissibility of evidence which may be at issue;

(2) how evidence will be adduced; and

(3) any other agreed matters, including any waiver of the rules of evidence, arising from the ACCR negotiations which require a direction for trial.

300. The powers identified in recommendation 299 also should be available to the trial magistrate at trial.

Adjournments

27.36 A practice has arisen in the Court of Petty Sessions for trials which have been commenced but have not been completed to be adjourned for more than one day to the next, often because the trial is taking longer than anticipated. Once a matter is part heard the trial can only proceed once the same magistrate is available to hear the remainder of the trial and counsel, if any, are also available. This can result in extensive delays before an adjourned matter is re-listed. Long adjournments are not only inconvenient for all parties, but also can cause difficulties for the magistrate, prosecution and defence in recalling evidence and the demeanour of witnesses after a long period of time. Delay also causes problems for witnesses' recollection of events, as discussed in Chapter 7. These difficulties may be best dealt with by the

creation of a 'rolling list' to accommodate changes which occur from day to day. At present this may only be feasible at the Perth Courts of Petty Sessions.

301. There should be a limit on the length of time a trial hearing, which has already commenced, can be adjourned. Save in exceptional circumstances, an adjournment of a part heard matter, if necessary, should be from one working day to the next.

28

Preliminary Hearings

What are preliminary hearings for?

28.1 The historical purpose of preliminary hearings, also known as committal hearings, was to ensure that defendants were not put to trial on indictment without sufficient cause. However, in the absence of alternative processes for disclosure, the process has evolved into a mechanism for the defence to obtain information about the prosecution's case. It now also serves several tactical purposes, particularly valued by the defence, including an opportunity for a 'rehearsal' of the trial. Although most defendants choose not to have preliminary hearings, a not insubstantial number are held and consume time and resources in the Courts of Petty Sessions where preliminary hearings are conducted. These hearings seldom result in the dismissal of charges laid.

Historical development

28.2 Some form of preliminary consideration of a charge on indictment has existed in England for many centuries. The preliminary hearing in its present form dates from the combined operation of the English *Prisoner's Counsel Act 1836* (UK) and *Indictable Offences Act 1848* (UK). With some modifications those Acts form the basis of the preliminary hearing procedure in the *Justices Acts* of all Australian jurisdictions to the present day.

28.3 In Western Australia, the preliminary hearing process dates from 1850. The process of committal found its way into the *Justices Act* of 1902 and remained largely unaltered until the introduction of the hand-up brief procedure in 1976. This procedure gives a defendant the right to elect whether or not to have a preliminary hearing and requires the prosecution to give the defendant certain information in order to make that decision. The reform was based on the recommendations of the predecessor of this

Commission (Western Australian Law Reform Committee 1970), and also on trends in other jurisdictions reflecting concerns about the possible adverse effects of publicity associated with preliminary hearings, the inconvenience and expense involved, and the delay in bringing cases to trial.

The 'fast-track' committal

28.4 If a person is charged with an indictable offence which cannot be dealt with summarily, or, if it is a charge which can be dealt with summarily but no election is made, proceedings are adjourned. Unless an order to the contrary is made, the prosecution must provide the defendant with a statement of the material facts and law relevant to the particular charge and copies of confessional material. If the defendant pleads 'guilty' after reviewing the material, the defendant is committed to the Supreme or District Court for sentence. This is an expedited or 'fast-track' committal. If our Recommendations 280 and 282 are adopted, all defendants, whether charged with a summary or indictable offence, would be entitled to a copy of the complaint, a statement of material facts and law, confessional material and a copy of their criminal record before their first appearance in court.

The 'hand-up' brief

28.5 If the defendant does not plead 'guilty' after initial disclosure by the prosecution, the matter is adjourned. The prosecution must then provide the defendant with a copy of the written witness statements the prosecution proposes to tender in evidence in the committal proceedings. This process is not intended to, and frequently does not, comprise a comprehensive disclosure of the case the prosecution will present at trial. The material provided is what is commonly referred to as the 'hand-up brief'.

28.6 When the matter resumes the defendant may plead 'not guilty' but elect not to have a preliminary hearing. In that case the papers comprising the hand-up brief are transmitted to the higher court where the offence is to be tried.

The preliminary hearing

28.7 Should the defendant elect to have a preliminary hearing, the prosecution calls for examination all the witnesses it considers necessary to establish a case for committal. Provided there is no objection, the written witness statements which formed part of the hand-up brief may be tendered as evidence at the preliminary hearing. The maker of the statement must attend to give evidence and be cross-examined but only if required in the interests of justice. There currently is no defence entitlement to particulars of the charge, although in determining the relevance of evidence and cross-examination the court can require particulars.

Establishing a case to answer

28.8 Because the prosecution only needs to establish a case to answer, known as a *prima facie* case, it need not call all material witnesses. The prosecution is not even required to call all witnesses who provided statements in the hand-up brief, nor will it be limited to leading evidence in the hand-up

brief at trial. The *Justices Act* itself now prohibits the calling of children against whom it is alleged certain offences have been committed, except in special circumstances. (See Chapter 20.)

28.9 Once the prosecution has completed its evidence the defendant is invited to speak in answer to the charge and to call or give evidence, although the latter practice is rare. If a case to answer is established, the defendant is committed for trial on indictment. If no case to answer is established the defendant is discharged, although this does not amount to an acquittal and does not bar further proceedings against the defendant on similar or even the same charges.

Committal for trial

28.10 Currently a person is committed for trial if:

- after electing a hand-up brief, he or she pleads not guilty; or
- after a preliminary hearing, the court considers there is sufficient evidence for the trial on indictment to proceed;
- he or she is subject to an *ex officio* indictment presented by the DPP; or
- he or she is indicted as part of a private prosecution.

28.11 If a person is not the subject of private prosecution, no trial on indictment proceeds unless the DPP presents an indictment. The decision of the Court of Petty Sessions to commit is not conclusive of whether a person will in fact be tried, just as the decision not to commit is not conclusive of whether a person will not in fact be tried.

How often is the preliminary hearing used?

28.12 The preliminary hearing is an optional procedure. Only the occasional case is evaluated through this process. The hand-up brief has largely supplanted the preliminary hearing as a means of committal for trial. Each year some 2,500 matters are committed to the District and Supreme Courts with approximately 60 per cent of these being processed through the Perth Court of Petty Sessions. In 1988 just under 90 per cent of committals from the Perth Court were by way of hand-up brief, and the figure in 1997 reached 90 per cent.

28.13 In the Perth Court of Petty Sessions less than half of the matters listed for preliminary hearing in 1997 actually went ahead. This was due to the subsequent withdrawal of charges or the defendant's acceptance of a hand-up brief. Of those that did go ahead, the number of defendants discharged after the hearing was negligible — reflecting the existing low threshold of establishing a case to answer. In the majority of cases the process of committal for trial has become an exercise in which the defendant receives statements from police investigators and by which the authorities responsible for indicting transmit copies of documentary evidence to the court of trial: that is, the hand-up brief.

The purpose of the preliminary hearing — for the defence

28.14 The preliminary hearing has been used for several purposes incidental to, but of greater value than, its primary role as a mechanism for assessing the sufficiency of the evidence. Some preliminary hearings are used for disclosure purposes: obtaining 'discovery' of the prosecution case. Preliminary hearings also provide an opportunity for the defence to experiment with lines of cross-examination which could not be used at trial where unfavourable responses might affect jury perceptions. In addition, preliminary hearings permit the defence to cross-examine prosecution witnesses with a view to 'freezing' their testimony on critical points which, if departed from at trial, will provide grounds for adverse comment on the witness's reliability.

28.15 Even in cases where the defendant proposes ultimately to plead guilty it has been argued that a preliminary hearing may be useful to bring out and establish mitigating factors which may bear on sentencing. However it also should be recalled that credit is given for early guilty pleas. By delaying a plea in order to establish a mitigating factor at the preliminary hearing any sentencing advantage may be negated. (See Chapter 25.) Moreover with the opportunity for trials on contested issues going to sentence this option is arguably a misuse of process.

The purpose of the preliminary hearing — for the prosecution

28.16 Although prosecutors may regard the preliminary hearing process as a waste of time and resources, preparation for the preliminary hearing has the benefit of obliging the prosecution to marshal its evidence in an orderly and comprehensive fashion. The process may demonstrate which parts of the case will be difficult to prove at trial and may result in reducing the charge or indicting on fewer charges. Alternatively, the preliminary hearing also may demonstrate the strength of the prosecution case and result in upgrading the charge or number of charges. Further, the preliminary hearing may result in the defence abandoning hopeless or speculative defences and may even encourage a guilty plea. Nonetheless, the preliminary hearing is generally regarded as offering greater benefits to the defendant than to the prosecution.

Criticisms

Preliminary hearings and charge screening

28.17 There are a number of criticisms of preliminary hearings, some of which have been referred to briefly above. The first arises out of the process of charge screening, a function that now has been conferred on the DPP. The DPP screens charges with reference to considerations apart from the evidence before the Court of Petty Sessions. The considerations, which may be inaccessible to the Court of Petty Sessions, include the public interest in the prosecution and whether there is a reasonable prospect of conviction. Whatever the Court of Petty Sessions decides, it is ultimately the DPP which decides whether a matter will go to trial.

Preliminary hearings and disclosure

28.18 As the function of charge screening has declined, the use of the preliminary hearing as a mechanism for disclosure has remained strong, albeit limited. The hand-up brief requires disclosure of only the statements proposed

to be tendered in a preliminary hearing. The statements prepared by police may overstate the prosecution case or fail to reveal, or may conceal, serious shortcomings in the evidence. The prospect that there *may* be a preliminary hearing acts as a check on any short-comings in the hand-up brief. Depositions at the preliminary hearing may be comprehensive whereas statements may not be.

28.19 The preliminary hearing ensures that the prosecution has, and discloses, *some* case against the defendant. While the prosecution's duties under the existing DPP guidelines demand that there be full and proper disclosure of relevant material, as indicated in Chapter 24 prosecutors' compliance with the guidelines currently cannot be compelled by the defendant. The preliminary hearing also provides a date well in advance of the trial by which a substantial amount of the evidence will be made available to the defence. If our Recommendations 252, 286 and 287 in relation to prosecution disclosure are adopted, access to information about the prosecution case in advance of trial would be available to a defendant without the need to engage in the preliminary hearing process.

The cost and time for preliminary hearings

28.20 Of the 124 preliminary hearings conducted by the DPP in Perth in 1997, the average court time used was 2.6 hours. In part this was because of the few cases which proceeded to hearing. The decision not to proceed with a preliminary hearing after one is listed consumes the time and resources of prosecutors, the courts, police, witnesses, defendants and legal aid bodies. Although this is a major criticism of preliminary hearings, by far the greatest criticism relates to long and unwieldy hearings aimed at frustrating and delaying progress of a case. This is uncommon, however, and may be best dealt with by giving magistrates greater, legislatively sanctioned, control over the witnesses called and the extent of cross-examination as discussed in Chapter 21.

Preliminary hearings and delay

28.21 Preliminary hearings delay bringing a defendant to trial. Many months are added to the period between charge and committal if a defendant elects to have a preliminary hearing. Even if the time were to be reduced between charge and committal, however, this very well might increase the time between committal and trial. This is because a substantial amount of the time between charge and the preliminary hearing is used to carry out tasks preparing evidence and witnesses which would have to be undertaken regardless of whether a preliminary hearing was held or not.

Burden on witnesses and victims of crime

28.22 It is undesirable for victims of and witnesses to crimes to be required to give evidence in court on more than one occasion. For these individuals to be called upon to give and be tested on the same evidence twice is defensible only if unavoidable in the interests of justice. The balance on this issue has already been decided, generally, in favour of the children in cases involving child victims of sexual abuse so that child witnesses or victims may not usually be called upon at preliminary hearings.

28.23 Both the prosecution and defence have the right to call other witnesses at the preliminary hearing. However, there is no reason for the defence to call witnesses whose evidence supports the prosecution case. This is because the defence would not be able to cross-examine witnesses it calls itself. In that sense the defence would not have any real capacity to properly test witnesses' evidence.

Options for preliminary hearings

28.24 We put forward several options for preliminary hearings in the Consultation Draft on this topic:

Proposal A

Retain preliminary hearings without significant change.

Proposal B

Limit the offences for which a preliminary hearing is available.

Proposal C

Retain preliminary hearings, but alter them to improve their effectiveness as a 'charge-screening' mechanism.

Proposal D

Retain preliminary hearings, but allow the use of the evidence of witnesses at the trial.

Proposal E

Retain preliminary hearings solely for the function of charge-screening, and provide alternatives for disclosure and discovery functions:

- Retain the present practice with the prosecution calling witnesses and presenting evidence to obtain committal; or
- Base the decision to commit for trial solely on any written or other material disclosed to the defence by the prosecution and any submissions based upon that material; or
- Base the decision to commit for trial on the written material disclosed to the defence by the prosecution, with the parties having the option to require traditional hearing, or to hear evidence of specific witnesses, if a question arises as to the sufficiency of the evidence to warrant committal for trial; or
- Provide discovery alternatives if the discovery function of the preliminary hearing is eliminated.

Proposal F

Abolish the preliminary hearing and replace it with a procedure enabling scrutiny of the sufficiency of evidence and/or further discovery.

Proposal G

Abolish the preliminary hearing. Leave the functions it serves to the State.

Is there a function for preliminary hearings?

28.25 The public submissions provide considerable support for the abolition of preliminary hearings (Proposal G), although these comments seemed to assume that substantial resources and time are expended on preliminary hearings. In reality, of the approximately 85,000 police charges laid per annum, only some 2,500 matters are committed to the higher courts to be tried on indictment. Preliminary hearing elections are made in only 10 per cent of these indictable charges. Only 144 preliminary hearings proceeded in 1998. There are, in reality, very few preliminary hearings. Such as there are add little to the delays and the utilisation of court resources.

Preliminary hearings and disclosure

28.26 On the same basis, however, it may be argued that preliminary hearings perform no practical function, applying to something less than 0.2 per cent of all police charges. More significantly, however, in our view, recommendations we have made throughout this Report will considerably alter the current position in relation to disclosure of the prosecution case prior to trial. Prior to appearance in court, all defendants will be entitled to a copy of the complaint, a statement of material facts and law, confessional material and criminal record. Should the defendant not plead 'guilty', the matter will be adjourned and a defendant who is facing a possible prison term will be entitled to prosecution witness statements and expert reports. If these recommendations are adopted the defendant will be far better informed of the prosecution case than is currently the position.

Achieving the functions of the preliminary hearing by other means

28.27 Therefore the only remaining legitimate function for preliminary hearings is to screen charges. However, it may be doubted how effectively preliminary hearings perform this function. As indicated, the DPP has a power to indict or not, independently of any determination by a magistrate after committal proceedings. In many ways, the criteria on which the DPP exercises the power to indict are more stringent than those applied in the preliminary hearing process. For example, instead of a bare case to answer being made out, the DPP will only indict if there is a reasonable prospect of conviction. Together with the check provided by our recommendations in Chapter 29 that the DPP provide reasons for late decisions to withdraw of alter indictments for scrutiny by the recommended pre-trial magistrate, we believe the preliminary hearing is now redundant and should be abolished. Its functions can be achieved by other means.

302. The preliminary hearing should be abolished. The functions it serves should be achieved by the implementation of recommendations to:

(1) enact statutory provisions requiring full police and DPP disclosure in advance of trials on indictment (see Recommendations 252, 282, 287 and 291); and

(2) confer power on the courts to examine and, where appropriate, penalise late decisions to withdraw or alter indictments (see Recommendations 307 and 308).

29

Criminal Process in the Higher Courts

Supreme Court pre-trial procedure

29.1 Currently when a defendant is committed by the Courts of Petty Sessions to the Supreme Court for trial, the matter is listed for the next 'pleas' day when, if an indictment has been presented, the defendant must enter a plea. Pleas days are held at the commencement of each sitting and so generally take place monthly. The defendant generally is remanded until the next status hearing — also normally held monthly. At the status hearing a trial date is fixed based on availability of counsel and witnesses. There may also be a directions hearing fixed, and a determination of matters within the terms of section 611A of the *Criminal Code,* which deal with:

- preliminary questions of law or procedure;
- preliminary questions of fact which in a trial could lawfully be determined by a judge without jury; and
- admissions by the defendant.

The need for a section 611A hearing is often not identified until the directions hearing. This sometimes results in no suitable pre-trial date for such a hearing being available.

29.2 The period between committal and trial in the Supreme Court is generally five to six months. The backlog as at 31 December 1998 was 27 cases. According to Chief Justice Malcolm's address at the closing of the 1998 legal year, 75 criminal trials were listed in the Supreme Court in the year to 30 November 1998.

District Court pre-trial procedure

29.3 The procedure in the District Court is similar to that in the Supreme Court. The defendant's first appearance before that court is generally something less than 10 weeks after committal by the Courts of Petty Sessions.

The indictment is generally presented then. The District Court usually holds two status hearings. The practice appears to be that neither the defendant nor his or her counsel is adequately prepared for the first status hearing. A trial date is set, as well as dates for directions and section 611A hearings, if requested by the prosecution or defence. Consequently the risk of matters appropriate to a section 611A hearing only being identified at trial is heightened.

29.4 The backlog in the District Court, other than in circuit districts, as at 31 December 1998 was 700 cases, and it is expected that on average these cases will take 13 months from first appearance in the District Court to resolution. According to Chief Justice Malcolm's close of the 1998 legal year address, 886 criminal trials were listed in the District Court in the year to 31 October 1998 and 581 trials proceeded.

Pre-trial matters

29.5 The regime we have recommended in Chapters 24, 25 and 27 would result in full prosecution disclosure following a plea of not guilty in the Courts of Petty Sessions by a defendant on certain charges, including an indictable charge. If the defendant still does not plead guilty, the defendant will then be required to make limited disclosure. Currently conferences to negotiate charges are sometimes held on an informal basis between the prosecutor and defence in indictable matters. The effectiveness, fairness and transparency of pre-trial processes should be improved by our Recommendation 263 to make negotiations subject to the right of victims of crime to be consulted: see Chapter 25 on ACCR generally. These negotiations, like disclosure, would normally occur before the charges are referred to the higher courts.

29.6 Subject to Recommendation 324, on application to the pre-trial magistrate (recommended in Chapter 7) by either the prosecution or defence, the pre-trial magistrate will refer the charge or charges for trial. In indictable matters the defendant may elect summary trial, if available under our Recommendation 277, or to have indictable charges heard concurrently, as outlined at Recommendation 291. Charges to be tried on indictment, together with any outstanding summary charges as discussed in Chapter 27, should then be sent to the appropriate higher court.

303. The pre-trial magistrate should send a matter to be tried on indictment to the appropriate higher court after disclosure requirements are met and on the application of either the prosecution or defence, and subject to Recommendations 292 to 294. (And see Recommendation 312.)

Presentation of an indictment

29.7 As discussed in Chapters 25 and 28, the DPP is not bound by the results of preliminary hearings and in almost all cases, it is a decision of the DPP whether an indictment will be presented or not. Neither the *Criminal*

Code nor the *Criminal Practice Rules* provides any time limit within which an indictment must be issued and served. So far as the *Code* and *Rules* provide, the defendant learns of the contents of the indictment when it is presented to the court. He or she is entitled to a copy only at that time. In practice, however, a copy of the indictment is sent to defence counsel or, if the defendant is not legally represented, to the defendant, when it is filed.

29.8 The prosecution frequently delays presentation of the indictment, sometimes until shortly before trial. The indictment is not necessarily identical to the charges on which the defendant was committed in the Court of Petty Sessions. It also is not unusual for indictments to be amended after presentation — happening as late as the commencement of trial. This gives rise to new issues which can sometimes require an adjournment of trial, particularly where the defendant is not legally represented. Delays are not necessarily the fault of the prosecution. There is often a delay in receipt by the DPP of the committal papers from the Courts of Petty Sessions or evidence from the police. In some cases, the DPP may direct that further evidence needs to be obtained.

When should the DPP become involved?

29.9 While involvement by the DPP in the earliest stages of criminal investigation is desirable, the reality is that before or immediately following arrest a complaint should be laid by the arresting officer alleging the offences for which the defendant is arrested. As a result, in many cases involving arrest the opportunity to engage the DPP in the identification of the appropriate offence prior to arrest will not exist. Where the defendant is dealt with by way of summons the problem does not arise to the same extent. In any event, if the DPP had early access to all police evidence there is no reason why the indictment(s) charging offences with which the prosecution intends to proceed to trial should not be identified before committal. On our recommendations, full disclosure of the prosecution case and ACCR processes normally would take place before committal to the higher court. Unless the offence is identified in a timely manner, disclosure, negotiations and hearings conducted in the interim may, in the end, be fruitless.

29.10 As discussed in Chapter 27, in addition to indictable matters, the DPP also is empowered to prosecute summary matters, although this has yet to be implemented. Scrutiny by the DPP should result in the early identification of appropriate charges, and may well result in a reduction in the number of summary charges and consequent charge negotiations. The early involvement of the DPP in the identification of summary offences also is recommended.

304. In all cases, the DPP should have early access to all police evidence in order to determine the charge to be laid.

305. To avoid 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 trial judge to extend the time.

306. The indictment and the evidence on which it is based, if different from that served on the defendant under Recommendations 280 and 282, should be served on the defendant within a prescribed time prior to presentation at trial, with power in the trial judge to extend time.

Bills of 'no prosecution'

29.11 Statistics issued by the DPP for 1997/98 put discontinued trials at 4.5 per cent of all trials on indictment for that year. Occasionally charges the subject of indictment are withdrawn and a *nolle prosequi* or bill of 'no prosecution' entered late in the process leading up to trial and even on the day of trial. The waste of time and costs and the effect on the efficient conduct of the criminal justice system are evident. The reasons for late withdrawal of charges are unclear, but anecdotal evidence suggests that, at least in some instances, the late evaluation of evidence by trial counsel results in the identification of previously unnoticed deficiencies. The ability, experience and workload of the individual DPP case manager may be reflected in the different view of the evidence formed by the trial counsel when he or she is briefed, as well as counsel's advantage in interviewing the witnesses in the course of preparation.

29.12 Mandatory police disclosure to the prosecution recommended in Chapter 24 should assist in the timeliness of the presentation of accurate indictments. Together with recommendations that disclosure and ACCR take place prior to committal and the earlier involvement of the DPP, assessment of the evidence will, in the normal case, take place before the indictment issues. In the result, late presentation of bills of no prosecution should be rare. The DPP should have to provide reasons for the late presentation of bills of no prosecution and be subject to sanction if the delay is unjustifiable.

307. Indictments should not be presented until after proper evaluation and assessment of the evidence by the DPP, so that the charges alleged in the indictment have been determined by the DPP as being capable of being proved by the evidence.

308. When a bill of 'no prosecution' is filed the reasons for delay should be made available to the pre-trial magistrate subsequent to the bill being filed.

309. If the delay is the result of unjustifiable personal delay on the part of a staff lawyer of the DPP or other legal representative of the prosecution the pre-trial magistrate should have the power to determine professional misconduct and to impose appropriate sanctions.

Late guilty pleas

29.13 Late guilty pleas, even at the outset of a listed trial, are a feature of our criminal trial system. Statistically they represent 12.9 per cent of trials on indictment listed in a year. They clearly produce 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 trial. They also create delay. There are a number of factors which can contribute to a late plea of guilty. Some of these are addressed in Chapter 27. Broadly these delays relate to either a failure in preparation by the defence or prosecution, or ongoing negotiations between the defence and prosecution.

29.14 The reasons for late guilty pleas should be reduced by our recommendations to:

- make information on charges available to defendants in a more timely manner (Chapter 27);
- require earlier and more complete disclosure (Chapters 24 and 27); and
- provide for more formal negotiations between the parties, namely ACCR (Chapter 25).

Currently, late guilty pleas by a person to be tried on indictment result in the same loss of sentencing discount as occurs in the lower courts. (See Chapter 27.) We recommend that where a late guilty plea is the result of personal dereliction of duty by defence counsel, the legal representative should be subject to the same sanctions as apply in the lower courts.

310. Where a defendant changes a plea from not guilty to guilty after a matter has been committed to the higher court the reasons should be explained to the pre-trial magistrate subsequent to the plea being made.

311. If the change of plea is the result of unjustifiable personal delay on the part of the legal representative of the defendant the pre-trial magistrate should have power to make a finding of professional misconduct and the legal representative should be subject to appropriate sanctions.

Conferences prior to trial

29.15 Although we had originally proposed flexibility in the management of cases prior to trial in the Consultation Draft on this topic (4.6), there are advantages in having one judicial officer responsible for the conduct of all matters related to the trial. Inefficiency results each time a different judge needs to gain an understanding of the issues. However, in criminal matters it is important to avoid any perception of prejudice which may arise from the same judge dealing with multiple charges against the defendant and other potentially prejudicial matters prior to trial and then proceeding to conduct the trial. For that reason we recommended the appointment of a pre-trial magistrate to manage pre-trial matters associated with the progression of a defendant through the criminal justice system.

29.16 However, once it becomes clear that a charge is destined for trial and is committed to the higher court a judge should handle the matter. In most instances this should be the trial judge. Exceptions should be made where a determination will need to be made in relation to trial by judge alone (in which case the identity of the trial judge should not be known in order to avoid 'judge-shopping': see Chapter 30) or in cases where issues of joinder will be ventilated.

29.17 The pre-trial procedure should continue to include directions and section 611A conferences, as the trial judge sees fit. The removal of the requirement for the defendant to attend section 611A hearings and clarification of the presiding judge's powers would improve the efficiency of these hearings.

312. Procedures which relate to the conduct of the trial on indictment in the usual case should be the responsibility of the proposed trial judge and should be conducted by him or her personally. Exceptions to be dealt with by a judge other than the trial judge should include issues of trial by judge alone and joinder.

313. The procedure for trial of offences on indictment should continue to include directions conferences and section 611A hearings as the trial judge considers appropriate in order to identify issues and facilitate the conduct of the trial.

314. After referral of charges to the higher court, the defendant should be remanded to a directions conference at which orders concerning any section 611A hearing if relevant, the conduct of the trial and the fixing of trial dates will be settled.

315. The law should be amended to:

1) remove the requirement for defendants to attend section 611A hearings; and
2) ensure that judges presiding over section 611A hearings have all necessary powers.

316. In conducting directions and other hearings the powers of the convenor should include those specified in Recommendation 299.

Preparation for hearings prior to trial

29.18 An obvious weakness in the existing system is that too frequently counsel, whether defence or prosecution, are insufficiently instructed and not prepared to provide accurate answers to questions put at the status hearing nor to deal with the subject matter of section 611A hearings. With reference to the prosecution, counsel appearing at many of the hearings preceding trial are neither the DPP officer responsible for the matter nor counsel allocated to appear at trial. This often results in the prosecution representative lacking familiarity with the evidence and issues. A similar lack of information frequently characterises representation of the defendant at such hearings. Steps should be taken to facilitate the attendance of trial counsel at pre-trial hearings, including listing the hearings outside of court hours. Also, if the trial judge in most instances is allocated the conduct of a matter from committal this will facilitate the earlier identification of trial counsel. At present, with one judge conducting pre-trial matters and a different judge conducting the trial, counsel cannot undertake to be available throughout the conduct of a matter.

317. Steps should be taken to facilitate the attendance of trial counsel at directions and other pre-trial hearings such as listing pre-trial matters outside court hours, for example at 9 a.m.

Trials

29.19 As stated in Chapter 7, ideally the jury trial will commence and carry on to completion without interruption. All issues to be dealt with in the absence of the jury should have been dealt with at pre-trial conferences and hearings. In practice this is not always possible — for example, matters arising out of inappropriate or irrelevant examination of witnesses may have unforeseeable consequences for the conduct of the trial. Our recommendations in Chapter 21 should reduce the likelihood of inappropriate or irrelevant questioning of witnesses. The following proposals also may assist in the efficient conduct of trials.

Address by counsel

29.20 There is no provision in the *Criminal Code* for an opening address on behalf of the defendant. Traditionally, because of the lack of disclosure by the prosecution, the defendant was not in a position to outline his or her case until the prosecution case had been presented. With the disclosure of the prosecution case prior to trial, there is no reason why the defendant's case should not also be outlined. If the defence opening departs from the

case as revealed by the disclosure process, the court and prosecution would be aware of the variation and in a better position to deal with it by way of evidence.

29.21 Presently, the defence usually makes no opening address and only closes last if the defence calls no evidence. In our view, if defendants are required in the usual case to make an opening address, balance requires that the defence should also, in the usual case, have the right to close last. The exception to the defence's right to close last would be if the address extended to any matters which could not reasonably be anticipated by the prosecution being raised in the defence summation. In those circumstances, the prosecution should have a limited right of reply.

318. A legally represented defendant, by his or her counsel, and, unless excused by the trial judge, a self-represented defendant, should be required at the close of the prosecution opening address and before any evidence is led, to outline the essence of the defence case.

319. At trial, the defence in the usual case should close last. If, in its closing address, the defence raises matters not reasonably anticipated by the prosecution, the prosecution should have a limited right of reply.

Presentation of evidence

29.22 Presently, the evidence of all witnesses proposed to be called by the prosecution is recorded as a statement and made available prior to trial. In the main it is the evidence on which the defendant has been committed, supplemented by additional evidence. This evidence is generally proved at trial by the witness being called to present oral evidence. It is not unusual for undisputed evidence 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, causing delay and expense. Initiatives we have recommended concerning ACCR (Chapter 25), the appointment of a pre-trial magistrate (Chapters 7 and 27) and the role of the trial judge in pre-trial hearings may assist in the identification of witnesses' evidence which is undisputed. However, where parties do not consent to the admission of witness statements to stand as evidence in chief, the witness should be called to give oral evidence before the jury. The powers of the convenor of pre-trial hearings identified by Recommendations 299 and 316 should be sufficient to allow the admission of undisputed statements without formal proof and to have these read into evidence.

Business records, technical and scientific evidence

29.23 The proof of business records, and technical and scientific evidence would be improved by the adoption of our recommendations in Chapters 20 and 35, but also could be facilitated by the pre-trial process and directions hearings. These may identify undisputed material and achieve agreements as to the written form of producing such evidence to the jury. These processes could also be used to isolate areas of agreement and disagreement between competing expert testimony. Although we propose a different process for the exchange of expert witness evidence in civil and criminal matters, many of our recommendations on expert witness evidence in Chapter 22 should apply to criminal matters — in particular the distinction between expert advisers and witnesses.

29.24 A statutory power to order the admission of evidence at trial not strictly in accordance with the laws of evidence, including the power to permit documentary evidence, also could assist in minimising the length and cost of a trial, as discussed in Chapter 20. The powers of the convenor of pre-trial hearings identified by Recommendations 299 and 316 would allow the waiver of the rules of evidence. It is important that the trial judge should have the same powers in conducting the trial.

320. The powers identified in Recommendation 299 also should be available to the trial judge at trial.

Trial judge's charge to the jury

29.25 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 excessive length and complexity may be the result of successful appeals being lodged because of trial judges' failure to direct on relevant matters or in an even-handed manner. There is further anecdotal evidence that judges' directions confuse juries, particularly the legal jargon incorporated in the judge's charge. It is arguable, given the role of the jury as the finder of fact, that the trial judge should not have to comment on the evidence. The jury, having heard all the evidence, generally should not require the judge to sum up the prosecution and defence case.

29.26 At present, directions as to the need or desirability of corroborative evidence are required on the assumption that the jury itself cannot perceive the strength or weakness of the relevant evidence. These directions could be dispensed with. Further, the requirement that the judge gives directions as to a range of possible defences also could be dispensed with, particularly in light of the clarification of defence issues through the disclosure process we recommend. (See Chapters 24 and 27.)

321. Trial judges should be relieved by law from any obligation to summarise the respective cases of the prosecution and defence for the jury, except where the defendant is self-represented.

322. Trial judges should 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.

323. The law should be amended to emphasise that the predominant requirement of a judge's direction to the jury is that it assists the jury to fairly understand the case it is trying. The current legal requirements relating to essential directions covering a wide variety of different topics should be removed.

30

Trial by Judge Alone

Trial by judge alone or trial by jury

30.1 A defendant's right to trial by jury when charged with a serious criminal offence is regarded by some as a key feature of our justice system. However, trial by judge alone may reduce the time and cost of criminal trials. Moreover, sometimes it is the defendant who is seeking trial by judge alone. Can trial by judge alone ever be appropriate in cases involving serious criminal charges?

Summary trials

30.2 Non-jury trials have long existed in the Court of Petty Sessions of Western Australia which not only tries summary charges without a jury but also those indictable charges which may be heard summarily. Some indictable charges can be tried summarily at the election of the prosecution and others at the election of the defendant. Where summary trial is available at the election of the defendant, the defendant first must be given a notice in the prescribed form explaining the procedures, and the court must then determine whether the charge can be adequately dealt with summarily: *Justices Act* sections 98, 99. Although trial without a jury has not generally been used for serious criminal offences, some serious indictable matters are presently heard without a jury at the discretion of the prosecution or the defendant and Court of Petty Sessions.

Trial by jury

30.3 Although we received many submissions which supported the principles of jury trial, many other submissions were highly critical of juries, pointing to the problems arising from:

- jury exemptions and challenges;
- jurors' prejudices and lack of experience;
- the ineffectiveness of judicial warnings; and
- the limitations on evidence which jurors are allowed to consider.

30.4 In our view there are sound principles which justify maintaining jury trials. While there have been occasional calls for the abolition of trial by jury altogether, none of the Law Reform papers nor any of the trial judges consulted as part of the review process supported such a proposition. There is evidence that the abolition of trial by jury may reduce the costs and delays associated with the criminal justice system, but saving money and promptness should not override the more fundamental objectives of the justice system.

30.5 In principle, the jury system is an effective institution for determining guilt which has the important benefit of being able to do justice in the particular case because jurors, unlike judges, are not bound to apply the law in a strict and technical way. As such, jury trials safeguard against arbitrary or oppressive conduct in making, applying or enforcing the laws by the State and/or the authority prosecuting the case. The jury also is the quintessential link between the community and criminal justice system. Public participation ensures that the criminal justice system meets minimum standards of fairness and openness. Moreover, as one of the few instances where there is direct participation of lay people in the justice system — a principle frequently invoked in public submissions to us — juries incorporate democratic features and thereby validate the administration of the system of justice as discussed in Chapter 7. One basic step to enhance the effectiveness of jury trials in their existing form would be not to identify reserve jurors at the outset, but only when the jury retires for deliberations. This would encourage all jurors to closely follow the evidence at trial.

324. Trial by judge alone should not, in general, be the preferred method of trial for serious criminal offences.

325. Summary trials should be mandatory only in respect of offences which the legislature can fairly characterise as 'not serious offences' having regard to community values (and see Recommendation 277, 'Summary Offences').

326. The seriousness of an offence should be reflected by the sentence legislated, so that, as recommended at No. 277, the method of trial is linked to the nature of the offence.

327. Reserve jurors should not be identified until the jury retires for deliberations.

Trial by judge alone

30.6 Trials conducted in the absence of a jury have a number of limitations. First is the lack of community input. The significance of this may not be the same from case to case, but for offences which include elements defined

according to community standards — such as what is reasonable, provocation, self-defence, fraud or indecency — the jury's absence can be perceived as a serious deficiency. Moreover, the public is unlikely to assume every judge is always free of bias and prejudice or can always exclude such matters from his or her deliberations. Also, some judges may not be sensitive to prevailing community values. While imperviousness to public pressure can be a strength of the legal system, as indicated in Chapter 1, where the offence is intended to reflect community standards the absence of community input may be a limitation.

30.7 Since 1994, trial by judge alone has been available for all indictable charges at the election of the defendant and with the consent of the prosecution. In Chapter 27, we recommend that legislation should identify those charges which the legislature considers generally require jury involvement.

Appeals from jury verdicts

30.8 Most appeals against verdicts in criminal trials on indictment are in respect of the rulings and directions of the trial judge. This may in part reflect the limited grounds of appeal against jury verdicts, but it does not give any reason to suppose that the criminal justice system would necessarily be more efficient without or with fewer juries. Furthermore, judges hearing indictable offences alone are required not only to set out the findings of fact but also to provide full reasons on the verdict on each charge tried. This may take considerable time, and the defendant may well be in custody for the duration. The cost and time savings assumed to attach to trial by judge alone may in practice prove illusory.

The law on trial by jury or judge

30.9 The Australian *Constitution* requires that indictable offences under Commonwealth law be tried before a jury. Under the *Criminal Code* of Western Australia a person accused of an indictable offence can elect to be tried by judge alone, but the election will not have any effect unless the prosecution consents. Traditionally the right to trial by jury has been seen as protecting individuals from the arbitrary or oppressive use of power by the State. On the other hand it also has been seen as safeguarding public confidence in the impartiality and openness of the administration of justice. It is the latter which justifies the present discretion by the prosecution to override the election of the defendant.

328. Trial by judge alone should be available as an alternative to trial by jury in appropriate cases on indictment but not as of right for either the defence or the prosecution.

Why trial by judge alone?

30.10 A defendant may elect to have a trial by judge alone for a variety of reasons. These may include the belief that his or her trial might otherwise be

prejudiced by previous media publicity or by evidence which the jury might find revolting. The defendant may elect for trial by judge if he or she considers that, because of racial, religious or cultural differences, the risk of a prejudiced jury exists. The election also could be made for tactical reasons, such as 'judge shopping'. That is, once the defendant finds that the judge allocated to the case has a reputation for leniency, the defendant may believe the judge will be more likely to acquit outright or find him or her guilty on lesser charges than a jury. However, section 651A of the *Criminal Code,* designed in part to deal with this issue, makes the potential for 'judge shopping' remote.

329. The application to have a matter heard by judge alone should be dealt with by a judge other than the proposed trial judge once a case is committed to the higher court.

Applying for trial by judge alone

30.11 Currently there is no requirement for the defendant to give reasons for an election to be tried by judge alone. The election may be made for reasons which have no relevance to a fair trial. Similarly, there is no requirement that reasons be given by the prosecution for the grant or refusal of consent to the defendant's election. Further, there are no guidelines setting out the principles on which the prosecution should act in making a decision about whether or not to consent. Presumably the power which is vested in the prosecution to consent or not is to ensure that the public interest is met — and seen to be met — by any trial by judge alone on an indictable offence. The process therefore should be more open to public scrutiny.

30.12 If required in the interests of justice, the judge should have the power to suppress from publication the defendant's reasons for applying for a trial by judge alone and any part of the prosecution's reasons. There should also be power to order that the matter be heard *in camera* — in private.

330. A defendant's application to a judge to be tried by judge alone for an indictable offence should be supported by grounds and reasons.

331. The DPP should publish guidelines establishing the principles on which a defendant's application for trial by judge alone will be considered.

332. Notice of the application for trial by judge alone should be served on the prosecution which should be entitled to appear and be heard in opposition to the application.

333. Except where the interests of justice otherwise require, the defendant's reasons for applying for trial by judge alone and the prosecution's reasons for granting or refusing consent to the defendant's application, should be made public.

334. There should be provision for an application for trial by judge alone to be heard in private if the judge considers it to be in the interests of justice and a fair trial.

Reasons for trial by judge alone

30.13 Unlike other jurisdictions where similar provisions apply, there is no requirement in Western Australian that the defendant must have received legal advice before applying to be tried by judge alone. In our view, the defendant should be entitled to notice in a prescribed form explaining the procedures prior to making any application, similar to that which applies in elections for summary trial. The availability of reasons for the application by the defendant also should assist a judge in determining whether the defendant understands the implications of the application.

30.14 The current law allows the prosecution to veto a defendant's application for trial by judge alone. This approach gives rise to a strong perception of unfairness. Where the prosecution opposes an application for trial by judge alone, the judge should have an overriding discretion to grant the trial on the terms requested by the defendant. Our Recommendation 277 should provide legislative assistance to judges in the exercise of their discretion.

335. Formal notice of the procedures for and implications of an application for trial by judge alone should be provided to a defendant prior to any application being made.

336. Before deciding the application for a trial by judge alone, the judge should be satisfied that the defendant understands the effect and consequences of the order if made. If the defendant is legally represented this may be achieved by the judge consulting defence counsel.

337. Unless the judge is of the opinion that the interests of justice require the trial to be by a judge and jury, and with due consideration of Recommendation 277, the application should be granted.

Multiple charges and defendants

30.15 Joinder of offences and joinder of defendants are discussed at Chapter 26. Currently the law provides that if a person is charged with multiple offences, the application for trial by judge alone must be made with respect to all of the offences charged. It also provides that where a defendant is jointly charged with another or others, an application for trial by judge alone made by one defendant does not have effect unless the other or others make a similar application. The existing provisions do not make any allowance for trials by judge alone where an order has been made that the offences or the defendant have been ordered to be heard separately in any event.

338. Where a defendant 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 unless the judge is satisfied in respect of each offence 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 a separate trial.

339. When the defendant is charged jointly with another or others, in the absence of an order for separate trial of the co-defendants, no order for trial by judge alone shall be made unless each of the jointly charged defendants joins in the application and unless the judge is satisfied in respect of each such defendant that the interests of justice do not require a trial by judge and jury. An order may be made in respect of any defendants granted an order for a separate trial.

Assessing the interests of justice

30.16 In recommending that the judge should consider what is required in 'the interests of justice' when assessing issues of trial by judge alone and joinder we are conscious that the expression 'the interests of justice' lacks precise definition. It is, however, a concept known to the law. It involves the exercise of discretionary power: a function recognised by the law and the public. We also note that appeal after trial from a refusal of an application will result in delay and cost in disposing of the indictment. The risk of a successful appeal after trial, however, currently applies in respect of other rulings sought prior to trial, such as those relating to joinder.

The right of appeal

30.17 Similar considerations to those considered in Chapter 26 in relation to joinder apply to the potential for any appeal from a determination of an application for trial by judge alone. In particular, allowing the right of appeal on the issue of trial by judge alone *prior* to trial would avoid the possibility for

a successful appeal on these grounds and the need to re-hear the matter after the initial trial (save for appeal to the High Court in exceptional circumstances).

Prosecution rights

30.18 We have considered whether there are certain offences for which the prosecution should be able to seek trial by judge alone. In our view, however, there is potential for the power of the prosecution to seek a trial by judge alone for bringing the criminal justice system into disrepute. This is particularly so in cases where community values are involved and the trial judge is subject to a real risk of public opprobrium by interests dissatisfied with his or her verdict. Therefore we have concluded that trial by judge alone should not be at the application of the prosecution. (For similar reasons, we recommend at 277 that there no longer be any indictable offences tried summarily at the election of the prosecution.) Nor do we think it is in the interests of justice to allow the prosecution a right of appeal from a judicial determination allowing a defendant's request for trial by judge alone.

340. When a ruling on a trial by judge alone application has been made:

(1) only the defence should have a right of appeal;

(2) the right of appeal should be to the Court of Criminal Appeal;

(3) strict time limits should apply to prevent any disruption to the trial process — for example, the appeal should be lodged seven days from the making of the order; and

(4) no right of appeal on the ruling will be available after the trial has been conducted.

31

Criminal System — Costs

Costs in criminal proceedings

31.1 Under the common law, the State in criminal matters neither pays nor receives costs. The only way the State can be liable to pay or receive costs is if the common law position has been altered by legislation. Given that the State, in one form or another, is almost always the prosecutor in criminal proceedings, subject only to the exception of private prosecutions, legislation forms the basis of most awards of costs in criminal matters.

31.2 In broad terms criminal matters can be tried either summarily or on indictment. The *Official Prosecutions (Defendants' Costs) Act 1973* and the *Justices Act* contain legislative provisions altering the common law position, permitting the award of costs in summary criminal proceedings. As a general proposition costs are awarded both for and against parties to summary proceedings (that is, the prosecution and the defendant), as well as on appeal from the Courts of Petty Sessions to a higher court. In indictable matters costs, as a general rule, are not awarded for or against the prosecution. If a prosecution has been brought for illegitimate purposes, a defendant may commence a civil action for damages against the arresting police officer personally through the tort of malicious prosecution. However, under legislation dating back to 1853 and known as the Shortening Ordinance, anyone bringing such an action risks being liable for triple costs if unsuccessful, although no application of this rule has been reported in the last 50 years.

The ALRC's view of who pays for litigation

31.3 In its 1995 report on *Costs Shifting: Who Pays for Litigation*, the ALRC recommended that the prosecution should not be able to recover costs unless:

- the court is satisfied the person convicted had unreasonably failed to comply with the court's directions;

- the court is satisfied the person convicted had unreasonably prolonged proceedings;
- the court is satisfied the person convicted had unreasonably withheld significant evidence until a late stage of the proceedings; or
- there is a specific right in the legislation allowing recovery of costs by the State.

31.4 The ALRC found that defendants convicted of an offence should not normally be liable for the costs of the prosecution given that:

- they are already subjected to some form of penalty;
- a prosecutor is performing a public duty and is backed by the resources of the State;
- in many jurisdictions the sentence imposed after a trial does not attract the discount which would have been given for an earlier plea of guilty, so a defendant who is found guilty is effectively already subject to sanction for having taken the matter to trial;
- the prosecution can use its power to seize and forfeit assets of criminals on conviction if a sufficient connection with the offence can be established.

The current law on the recovery of costs in criminal matters in Western Australia is neither internally consistent, nor consistent with the recommendations of the ALRC.

Official Prosecutions (Defendants' Costs) Act 1973

Costs

31.5 The *Official Prosecutions (Defendants' Costs) Act* provides that a successful defendant in official summary proceedings is entitled to costs. It also allows for costs to be recovered on successful appeal by a person who has been convicted of a summary offence. The Act was passed to counter the long-established rule of practice of not awarding costs against unsuccessful police who laid criminal complaints. The only exceptions had been if it could be proved that the police had acted unreasonably or without good faith. Traditionally, it was thought bad for the administration of justice if members of the police force failed to lay charges or prosecute informations for fear of having costs awarded against them. However, once police officers became entitled to be indemnified out of public funds for any costs awarded for bringing prosecutions in good faith, the rationale for this practice no longer existed.

The successful defendant

31.6 Generally the successful defendant can obtain costs under the *Official Prosecutions (Defendants' Costs) Act*. The Act limits the circumstances in which the court may order that a successful defendant cannot recover all or part of his or her costs. The circumstances are:

- where a defendant has been found guilty but no conviction is recorded;
- where a defendant is at fault for unreasonably contributing to the institution or continuation of the proceedings — other than by an act or omission the subject of the charge; or

- where a defendant is at fault by unnecessarily prolonging the proceedings or making them unnecessarily expensive.

In relation to the last two points, it is worth noting that costs may be reduced on the basis of a defendant's failure to disclose his or her defence. The courts have held that this is not necessarily an abrogation of the right to silence and even if it is, costs may still be refused.

Appeals

31.7 If a defendant who is acquitted appeals against the refusal of the Court of Petty Sessions to award him or her costs, the defendant is not entitled to the costs of the appeal under this legislation. That is because the *Official Prosecutions (Defendants' Costs) Act* provides for costs on appeal under subsection 5(3) only if the defendant is successful in having the charge dismissed, withdrawn, struck out or quashed. As an appeal over costs does not result in these outcomes, costs cannot be awarded. In any event, it is unclear whether subsection 5(3) requires the appeal court to stipulate the actual amount of costs awarded on appeal, or whether it is sufficient for the amount to be determined on a separate assessment by the court.

Scale of costs

31.8 The costs recovered under the *Official Prosecutions (Defendants' Costs) Act* are, under subsection 5(5), based on the low amounts set under the *Legal Practitioners Act* in 1991 (which subsequently were held to be invalid — but are still applied as a guide). It seems that prosecutors are entitled to be awarded costs on a much higher rate, because the *Official Prosecutions (Defendants' Costs) Act*, as the name suggests, applies only to defendants' costs.

Costs under the Justices Act

31.9 The *Justices Act* provisions apply to all costs awards in summary prosecutions not subject to the *Official Prosecutions (Defendants' Costs) Act.* Therefore, the *Justices Act* provisions apply to costs awarded to either party in private summary prosecutions and to the prosecution in successful official summary prosecutions. The *Justices Act* also governs preliminary hearings conducted by the Courts of Petty Sessions (Chapter 26), although costs cannot be awarded in preliminary hearings under the provisions of that Act.

31.10 The *Justices Act* provides a discretionary power to award costs against a person convicted of summary offences, although this power may be excluded by the particular statute under which a charge is laid. Costs also may be awarded against a private prosecutor under the *Justices Act* on the dismissal of a complaint. In considering the award of costs under the *Justices Act* the court must examine a number of factors including:

- an assessment of the relevant conduct of both parties; and
- the successful party's expectation that, in the absence of special circumstances, a costs order will be made in his or her favour.

Under the *Justices Act* the award of costs must form part of the order of conviction or dismissal and the amount stated in the order. This contrasts with section 8 of the *Official Prosecutions (Defendants' Costs) Act* which provides that determination of the quantum of costs may be adjourned.

The means to pay and proportionality

31.11 In awarding costs against a person found guilty, the court also should inquire into that person's means to pay. Another factor to be considered is the award of costs together with the penalty imposed. Where the combined 'penalty' of a fine and the costs of the prosecution's case is totally out of proportion to the offence either a fine or costs award should be scaled down. In practice, the prosecution tends to be awarded a very modest amount of costs.

31.12 Currently, the costs awarded in successful prosecutions are generally much lower than those awarded when defendants succeed. This is because many summary prosecutions are prosecuted by police officers and the professional costs for solicitors or counsel are not awarded. However, the Attorney General has proposed that legal practitioners employed by or on brief from the DPP should prosecute summary charges rather than police officers. This would lead to prosecution costs which include professional fees and could see a significant increase in the costs claimed on successful prosecution of summary matters.

Costs for proceedings on indictment

31.13 Awarding costs in proceedings on indictment is limited to the very rare circumstances referred to in the *Criminal Code*. Apart from costs relating to private prosecutions, the *Code* provides only that a person found guilty on indictment for a personal as opposed to property offence may be required to pay the injured person's costs of prosecution.

Reforming costs in the criminal justice system

31.14 The present law on awarding costs in criminal matters is complex, technical and filled with inconsistencies and anomalies. Our Consultation Draft on this topic (4.9) had proposed many reforms which sought to make costs a more coherent component of the criminal justice system. A principal consideration was the existing stark contrast between the law concerning the awarding of costs on matters tried summarily and on indictment. In our view some very serious prosecutions, with important public interest issues (for example, company offences and environmental offences) often proceed summarily and involve important exercises of discretion on the part of prosecuting authorities. The distinction between the awarding of costs for or against the prosecution in summary and indictable cases is artificial and the same rules should apply, particularly if the costs on summary prosecutions are likely to increase substantially.

31.15 Our reference in this Report was to make recommendations which would assist in making the justice system comprehensible, certain and

reasonably expeditious while not sacrificing fairness or justice, nor overlooking the special considerations which need to be brought to bear in criminal matters. (See Chapter 1.) We are now of the view these ends are best achieved by making all criminal jurisdictions 'no-costs'.

A 'no-costs' jurisdiction?

31.16 The reversion to a no-costs jurisdiction has much to commend it in terms of simplicity. It may, however, be thought unfair to those who are acquitted after summary trial and who currently are entitled to recover costs. While this is a valid consideration, it should not be overstated. Currently 90 per cent of summary prosecutions of police charges are resolved by a guilty plea. Of the other 10 per cent which complete trial approximately five per cent result in conviction and the other five per cent in acquittal. In any event, even if a defendant is successful the award of costs is not absolute and is limited in practice to the low amounts (invalidly) set under the *Legal Practitioners Act* in 1991. There seem to be few people who in fact derive substantial benefit from the *Official Prosecutions (Defendants' Costs) Act.*

31.17 On our recommendations, a defendant who successfully defends criminal charges will no longer be able to recover any costs. If the defendant believes the prosecution was brought for an improper purpose, however, the defendant should be entitled to bring an action for malicious prosecution without facing the sanction of triple costs under the Shortening Ordinance if unsuccessful.

341. The *Official Prosecutions (Defendants' Costs) Act 1973* (WA) should be repealed.

342. All provisions relating to the award of costs in official prosecutions in the following legislation should be repealed:
(1) the *Justices Act;* and
(2) the *Criminal Code.*

343. The provisions of the 'Shortening Ordinance', incorporated through section 138 of the *Police Act 1892* (WA) allowing triple costs for an unsuccessful action for malicious prosecution should be repealed.

An alternative?

31.18 On the face of it a recommendation that costs be awarded in all criminal jurisdictions would equally meet the demands of simplicity. However, in practice this is unlikely to prove true. Current case law indicates that in awarding costs against a person convicted of an offence, the costs plus the sanction must not be disproportionate to the offence. The court also is required to assess the means of the convicted person to pay costs. Awarding costs to a defendant who is acquitted is similarly based on a complex assessment of the conduct of the defendant. As a result, the calculation of

costs awards in criminal matters has the potential to consume an undue amount of court time and resources, particularly as higher costs awards will make appealing any initial decision more attractive. Irrespective of issues of fairness or justice, it is unlikely that a reform to award costs in all criminal jurisdictions has much to commend it in terms of efficiency, certainty or simplicity. The potential cost of such a proposal to the State also would need to be evaluated before any such recommendation could be considered.

The Suitors' Fund

31.19 Any unfairness arising from the removal of an innocent defendant's ability to recover costs in summary jurisdictions, and indeed in any jurisdiction, may be reduced by improving access to the Suitors' Fund. Currently section 14 of the *Suitors' Fund Act* relates to 'abortive proceedings and new trials' in criminal matters. It sometimes happens that a judge becomes ill or needs to disqualify him or herself on the grounds of ostensible bias. In criminal cases trials also may be aborted because, through no fault of anyone, the jury becomes aware of prejudicial material or cannot agree a verdict. (See sections 14 (1) (a) and (c).) Section 14(1)(b) deals with costs where a new trial is ordered because an appeal has been allowed on a question of law against the conviction of a person after a trial on indictment. (The *Official Prosecutions (Defendants' Costs) Act* deals with the costs of successful appeals on matters tried summarily.) Under section 14 the costs recoverable are limited to the costs associated with the original trial. The costs of the appeal are not covered.

31.20 Section 12A(1) of the *Suitor's Fund Act* allows a costs certificate for the costs of the appeal, subject to a limit of $2,000, where an appeal is allowed against a conviction on an indictable offence, but only where no new trial is ordered. It does not allow the recovery of any costs associated with the original trial. Sections 14(1)(b) and 12A(1) appear incongruous with the provisions allowing unsuccessful respondents in civil matters to access the Suitors' Fund, because under those sections a successful appellant in a criminal matter is not entitled to reimbursement for costs in successfully appealing. However, the unavailability of the Suitors' Fund for the costs of the original trial, where there is no retrial ordered, is consistent with neither the State nor the defendant being able to recover costs for trials on indictment. It is also of note that while section 14(1) allows the recovery of unlimited costs associated with an initial trial, access to the Suitors' Fund is otherwise limited to just $2,000. As recommended in Chapter 16 (on civil costs), the amount of costs generally recoverable under the *Suitors' Fund Act* should be more realistic.

344. The provisions of the *Suitors' Fund Act* should be amended to enable any additional costs incurred by defendants through no fault of their own after an initial criminal trial to be fully met from the Fund.

32

Appeals

The system of appeals

Appeals serve ... 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.

Lord Woolf, *Access to Justice* (1996) 153, para 2

32.1 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, in both civil and criminal matters, and the determinations of various boards and tribunals. Appeals generate a major workload for courts at all levels and can significantly extend the time and cost of obtaining a final resolution to a case. Restriction of the right of appeal may simplify litigation and reduce costs, but any reform also must be consistent with the maintenance of a fair and equitable judicial system.

32.2 In the existing civil and criminal court system of Western Australia appeals are generally to the next highest court. Criminal appeals from the Court of Petty Sessions are the exception. These appeals omit the District Court and, under the provisions of the *Justices Act*, go to a single judge of the Supreme Court and then to the Full Court. Although these are appeals of criminal matters from the Court of Petty Sessions, they fall within the civil jurisdiction of the Supreme Court and are not heard by the Court of Criminal Appeal. The Full Court of the Supreme Court only sits as the Court of Criminal Appeal for appeals from decisions of District and Supreme Court judges and/or juries under the provisions of the *Criminal Code*.

The right of appeal

32.3 There is no common law right of appeal. The jurisdiction to hear appeals is conferred on courts by legislation. The fact that many Acts confer various appeal rights has resulted in a complex system of appeals. For some decisions there is no right of appeal. For those decisions with a right of appeal, there are several kinds of appeal. Sometimes the appeal court considers only whether the judgment appealed from was correct when given, and no new evidence or changes in the law are considered. These are known as appeals in *stricto sensu*, in the strict sense. Sometimes the appeal court hears

the matter afresh. These are known as appeals *de novo* or anew. Appeals also may allow for changes in the law or new evidence, but in other respects the transcript of evidence from the original trial is relied upon. These are known as appeals by way of rehearing. At times, legislation does not clearly stipulate which kind of appeal right is being conferred.

Restrictions on the right of appeal

32.4 There can be restrictions imposed on the right of appeal. When a person has an unqualified right to have a decision reviewed this is an 'appeal as of right'. In many cases, however, 'leave' or permission of the court must be obtained before the appeal can be heard. Sometimes only certain aspects

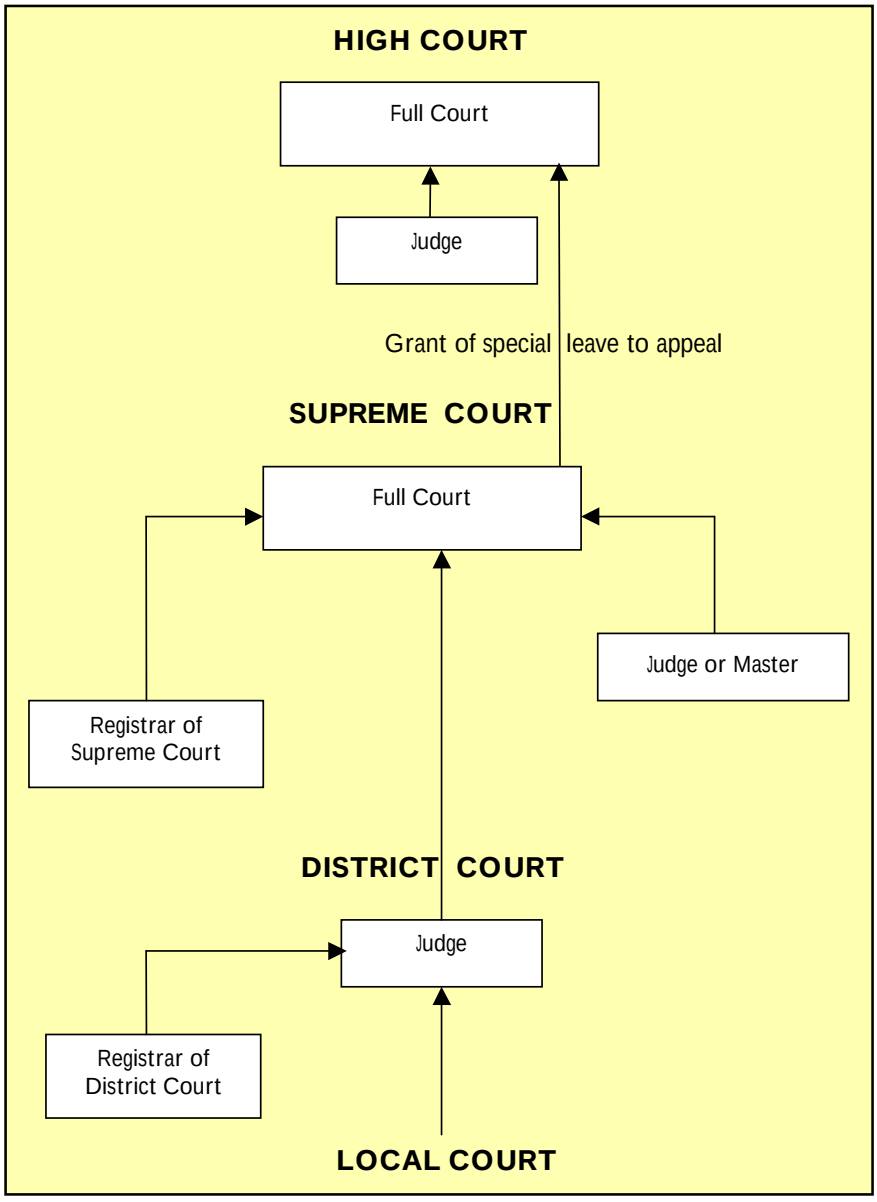


Figure 1: The Civil Courts

of a decision can be appealed, for example, questions of law but not findings of fact.

32.5 Because there is no common law right of appeal, the relevant legislation under which a decision is made determines:

- whether the decision is appealable;
- what kind of appeal is allowed;
- whether leave is required; and
- what matters can be appealed.

As a result, the overall appeals system has developed over many years in a fragmented fashion. The system is filled with inconsistencies and highly technical distinctions which cannot be easily reformed.

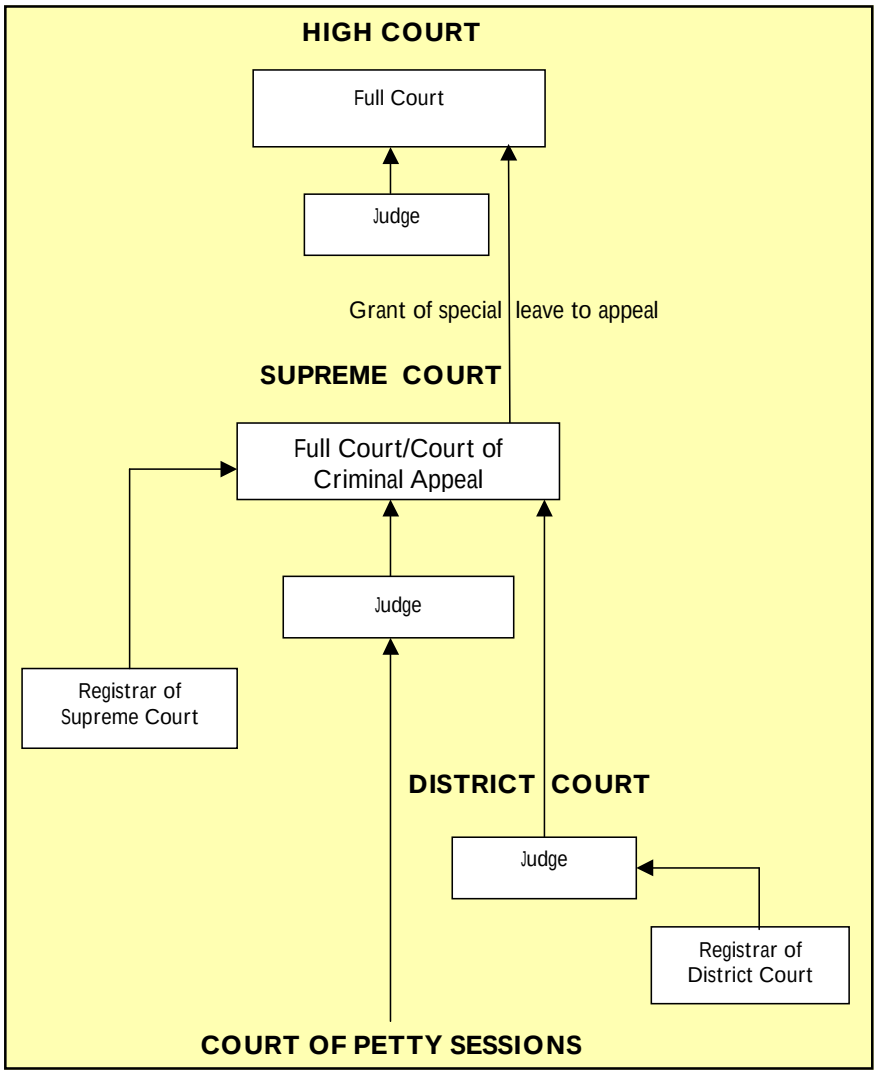


Figure 2: The Criminal Courts

345. The statute conferring a right of appeal in all cases should clearly specify the nature of the appeal, any limitations on the appeal, and the procedure to be followed on the appeal. (But see Chapter 33.)

Supreme Court jurisdiction: civil and criminal

32.6 Section 20 of the *Supreme Court Act* confers jurisdiction upon the Supreme Court over appeals from the lower civil and criminal courts of Western Australia. That jurisdiction is expressed, awkwardly, in terms of the jurisdiction held by the court 'immediately before commencement of this Act'. This is similar to the general jurisdiction of the Supreme Court in section 16. However, the general jurisdiction of the court needs to preserve all inherent jurisdiction and so is appropriately expressed in historical terms. (See Chapter 3.) The same does not apply to the appellate jurisdiction because jurisdiction over appeals is purely statutory. We believe the appellate jurisdiction of the Supreme Court should be more precisely expressed.

346. Section 20 of the *Supreme Court Act* should be amended to delete any references to the appellate jurisdiction existing before the Supreme Court was established.

A single judge of the Supreme Court

32.7 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' — any two or more judges. Unless the *Supreme Court Act*, Rules or other statute give jurisdiction to the Full Court, all causes or matters, including criminal and civil appeals, are heard and determined by a single judge. 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. Under the *Justices Act* leave is required for any further appeal from the appellate jurisdiction of a single judge. In our view the requirement of leave to appeal should apply to any further appeal from a single judge of the Supreme Court.

347. 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 by a requirement of leave to appeal.

The Full Court of the Supreme Court/Court of Criminal Appeal

32.8 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*.

In limited circumstances, the High Court of Australia may hear appeals from the Supreme Court sitting as a Full Court or as the Court of Criminal Appeal.

32.9 In practice the Full Court of the Supreme Court nearly always consists of three judges. One important exception, however, relates to interlocutory appeals, that is, appeals concerning matters which do not finally conclude a case. In interlocutory appeals it is usual for only two judges to constitute the Full Court. When sitting as the Court of Criminal Appeal, the court must consist of an uneven number of judges. The *Supreme Court Act* does not prohibit the judge appealed against from sitting on the appeal. Section 687(6) of the *Criminal Code* expressly excludes objection to the same judge taking part in the appeal against his or her own decision. However, in modern practice he or she never does so. We believe the legislation should be amended to reflect the current practice.

348. Relevant legislation should be amended so that the composition of any court of appeal does not include the judge whose decision is under review.

The powers of one member of an appeal court

32.10 The powers of any judge who is a member of the Full Court are limited whether with reference to civil appeals or to criminal appeals under the *Justices Act*. 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. Following the decision and publication of reasons, a Full Court judge may deal with matters relating to costs of the appeal. The position in relation to appeals under the *Criminal Code* is clearer, with section 702 granting a single judge of the Supreme Court specific powers of the Court of Criminal Appeal. While the section does not allow a single judge to deal with costs issues, this would not be required if our recommendations in relation to criminal costs are adopted. (See Chapter 31.) One member of a civil or criminal appeal court currently has no power to deal with issues such as the form of orders.

349. The powers of a member of the Full Court of the Supreme Court or of the Court of Criminal Appeal should be specified with regard to the form of orders and incidental matters following the determination of any civil or criminal appeal.

Applications to appeal 'on the papers'

32.11 As a result of an examination of the civil Court of Appeal in the United Kingdom, the Bowman Report (1997) proposed that applications for leave to appeal be considered 'on the papers', that is, on the basis of documents filed with the court and without oral argument by the parties. We recommend significant reductions in the requirement to apply for leave to appeal in criminal matters, at No. 367. However, there seems no reason why the option to have the application considered 'on the papers' should not be extended to leave applications in civil matters and appropriate criminal cases where the leave requirement is retained (for example, on a further appeal from an appeal to a single judge under the *Justices Act*).

350. Applications for leave to appeal in civil and criminal matters should be dealt with, if possible, without oral argument. After consideration of an application for leave to appeal, the court would have the option to:

(1) allow the application for leave to appeal without oral argument;

(2) hear argument on the application for leave to appeal;

(3) increase the number on the bench to hear the application for leave and hear argument at the same time as the appeal; or

(4) refuse the application.

351. An application for leave to appeal should either be accompanied by a written submission or the submission should be filed very soon after the filing of the application.

Appeal books

32.12 The preparation of an appeal book, which generally must contain all relevant documents from the original hearing, can be one of the major expenses associated with civil and criminal appeals. Multiple copies of appeal books must be produced, filed and served. In appeals against conviction or sentence under the *Criminal Code*, however, a judge of the Supreme Court settles the contents of the appeal book with the parties prior to listing the matter. Practice directions allow the omission of agreed materials and the contents of these appeal books are relatively standard and not lengthy. This has meant that, apart from delays caused by litigants who have no legal representation, these appeals can be listed for hearing relatively quickly.

32.13 While there appears to be an effective process for settling the contents of appeal books for appeals against conviction or sentence under the *Criminal Code* the same is not true of *Justices Act* or civil appeals. Responsibility for preparation of those appeal books lies with the parties, primarily the appellant. Supreme Court Practice Direction 6 of 1997 requires practitioners to give personal consideration to:

- questions of relevance of materials;
- legibility of documents;
- duration of appeals; and
- suitability for mediation.

The Direction also requires practitioners, whether they act for the appellant or the respondent (the party against whom an appeal is lodged), to provide a detailed certificate of correctness. It seems, however, that there is still much included in appeal books which, in most cases, is never referred to in the course of appellate proceedings and which therefore creates needless expense and delay. As a result an appellant who is eventually successful may nonetheless be refused costs of preparation of irrelevant material in the appeal book. We have recommended that the Supreme Court have power to order parties to enter into ADR to limit or define the issues on appeal. (See Recommendation 75.) We believe that before resorting to ADR, it would be useful to encourage parties to any complex appeal to confer with a view to agreeing the facts and identifying the issues for determination on appeal.

352. Except for appeals against sentence or conviction under the *Criminal Code* where a satisfactory process is already in place, parties to complex appeals should:

(1) be encouraged to confer with a view to agreeing a summary of the facts and proceedings from the court/tribunal/board below and agree to identify the issues for determination on the appeal. Consolidated outlines of facts should be agreed before a hearing date is set; and

(2) prepare appeal books containing 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.

Information technology

32.14 A means of reducing the expense associated with the production of appeal books would be to utilise advances in information technology. The Supreme Court of Western Australia has a pilot project for electronic appeals. It was initiated under the Electronic Appeals Project endorsed by the Council of Chief Justices of Australia and New Zealand in 1996. The pilot is very successful and already has saved an enormous amount of work and paper in the preparation of appeal books for some of the longest-running appeals in the State. The Supreme Court is now expanding its capacity to operate in this way.

353. All civil and criminal appellate courts should expand the use of advances in information technology to develop electronic appeals procedures.

Written briefs and limiting oral argument

32.15 Currently, appeals are determined after oral argument before the courts. Parties are required to file outlines of submissions and lists of authorities. Unless a direction has been made under Order 65B of the *Supreme Court Rules* parties do not ordinarily file full written submissions. The Supreme Court introduced Order 65B as part of the 1996 reform of procedure. (See Chapter 8.) It provides an 'Appeals Registrar' with powers to case manage appeals in addition to the powers of the Full Court or a single judge to give directions in particular cases. The appeals registrar may, under Order 65B, direct the parties to attend a mediation conference for the purposes of identifying, resolving and narrowing issues on appeal. We discuss the mediation of civil appeals in Chapter 10.

32.16 The appeals registrar also may direct parties to file written submissions and give directions limiting the time to be taken to present a case at hearing. Issues which the appeals registrar may consider when setting time limits under Order 65B rule 3 (3)b include the:

- complexity or simplicity of the appeal;
- state of court lists;
- time expected to be taken for the appeal; and
- importance of the issues and the case as a whole.

32.17 Consideration of the 'state of the court lists' currently also is included in Order 34 rule 5A of the *Rules of the Supreme Court* providing for judicial control over the time spent in trial in relation to a number of matters, including the examination and cross-examination of witnesses. In Chapter 21 we recommend that this factor be amended to make clear that it is the interests of other litigants and the community as a whole which are important. The same amendment should be made to Order 65B rule 3.

32.18 In Chapter 15 we recommend increased use of written submissions in civil matters. At the very least, judges of any appeal court should have the power to impose time limits on oral argument and to require written submissions. Currently the appeals registrar exercises powers under Order 65B in relation to some but not all criminal appeals. In our view there is no reason why these powers should not be exercised in relation to all civil and criminal appeals.

354. Order 65B rule 3 of the *Rules of the Supreme Court* should be retained, but the reference in Order 65B rule 3(b) to 'the state of the Court lists' should be deleted.

355. Order 65B rule 3 (3)b of the *Rules of the Supreme Court* should be amended to read 'the interest of other litigants, and the community, in proceedings being resolved expeditiously and without undue expense and delay'.

356. The power to direct the filing of written submissions and to limit the time for presenting an appeal should be exercised by judges of appellate courts with reference to the criteria specified in the amended *Supreme Court Rules* Order 65B rule 3 (3)b, including the complexity of the appeal and the importance of the issues involved in the case. These determinations should be made before the parties file a consolidated outline of the appeal case.

357. All appellate courts should make greater use of written submissions.

358. All appellate courts should limit oral argument or dispense with oral argument altogether in appropriate cases.

Appeals and self-represented litigants

32.19 Litigants who are not legally represented will be further disadvantaged by proposals placing greater obligations on the parties in advance of the hearing to prepare appeal books, including written submissions and additional detailed material, such as summaries of evidence and issues. In many cases self-represented parties will be less able or completely unable to comply. Legally represented applicants may, in effect, obtain priority in listing due to being able to comply with the time limits.

32.20 Chapter 18 deals with issues raised by self-represented litigants in the civil justice system and makes a number of specific recommendations about appeals. It is generally accepted, however, that there is a greater delay in getting the cases of self-represented persons ready for hearing whether in civil or criminal matters. Chief Justice Malcolm in his Closing of the 1997 Legal Year Address stated that the proportion of self-represented persons before the Court of Criminal Appeal had increased in that year to more than one in three. A scheme established by the Chief Justice to provide free legal assistance to appellants in criminal cases who would otherwise be self-represented has just commenced. The recommendations made in Chapter 18 relating to civil appeals also should apply to self-represented litigants in criminal appeals.

359. Resources should be made available to assist self-represented persons in the conduct of both criminal and civil appeals when they cannot obtain legal aid or afford legal representation. In particular Recommendations 200 and 201 should be extended to apply to self-represented litigants in criminal matters.

Delivering judgments

32.21 In Western Australia the Full Court normally convenes in order to deliver judgment and hand down its reasons. Although one member of the appeal court has only limited powers as discussed in paragraph 32.10, not all the members of the court who heard the appeal need to convene to hand down the judgment. The New South Wales Supreme Court 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 a requirement that the parties be present.

32.22 Where all issues have been dealt with at the appeal, there is no need for the Full Court to reconvene to hand down the judgment and reasons. In cases where further submissions need to be made regarding the form of orders or incidental matters, these may be sufficiently dealt with by the appointment of one member of the Full Court. (See Recommendation 349.) The Full Court should reconvene only where there are more substantive disputes over the form of orders and incidental matters. 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 a need for the court to reconvene and identify the matters in contention.

32.23 The court should have a discretion to deliver its decision and reasons by making these available to the parties at the court registry from a specified time. The discretion should be subject to direct notice being given to the parties and to public notification of the availability of the decision and reasons through announcements posted in the court building and published in the newspapers. Similar procedural changes should apply to the Full Court when sitting as the Court of Criminal Appeal.

360. The Full Court of the Supreme Court and 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.

361. 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 reasons. The court should have a discretion to make these available to the parties at the court registry from a specified time. The discretion should be subject to direct notice being given to the parties and to public notification of the availability of the decision and reasons through announcements posted in the court building and published in the newspapers.

Short form judgments

32.24 Not only is there no existing procedure in Western Australia to streamline the delivery 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 may 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.

362. The Supreme Court, including the Court of Criminal Appeal, should use a short form of judgment for appeal cases raising no significant issue of principle.

Civil appeals

Final judgments or orders

32.25 Civil appeals to the Full Court of the Supreme Court from the final judgments or orders of judges and masters sitting in court are generally governed by Order 63 of the *Supreme Court Rules*. In most cases there is an appeal as of right against a final judgment or order of a judge or master. The appeal to the Full Court is by way of re-hearing, applying the law as it is at the time of the appeal and not at the time of the original trial. New evidence is allowed only in special circumstances, and the appeal proceeds on the transcript from the trial.

Leave to appeal

32.26 An expansion of the requirement to obtain leave to appeal in civil appeals received considerable support in the United Kingdom. The 1997 Bowman Report stated that under the expanded leave requirements in the United Kingdom just over two thirds of potential appeals were eliminated at the leave stage. The success rate of appeals where leave was granted was twice that of where there was appeal as of right. If similar results can be achieved when applied more generally there is the potential for a significant reduction in the time and costs associated with appeals.

32.27 One of Lord Woolf's (1996) touchstones for the review of civil procedure in the United Kingdom was proportionality. If proportionality is maintained between the process and the subject of the litigation, it may be necessary to consider imposing leave requirements by reference to amount (the monetary value of the claim) or subject matter. Such a requirement is already in place in New South Wales: *District Court Act 1973* (NSW) section 127 (2)(c). If the leave stage is dealt with quickly and without requiring that both parties be present in accordance with the expedited process under the *Supreme Court Rules* the respondent may be saved further expense where there are insufficient grounds for the appeal to go further. The resultant increase in expense for the prospective appellant who may ultimately succeed is not a sufficient reason for abandoning the requirement that the appellant obtain leave to appeal. In any event, if our Recommendation 350 is adopted

for applications for leave to be dealt with, where possible, without oral argument, the cost should be reduced.

363. 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.

364. In determining whether to give leave to appeal in civil matters the court should consider the value of the subject matter of the appeal. Leave to appeal should be required in civil matters involving any property or right with a value of less than the monetary jurisdictional limit of the Local Court.

365. The expedited process under Order 63A of the *Supreme Court Rules* should extend to all leave applications for civil appeals. See also Recommendation 350.

Interlocutory matters

32.28 In relation to civil appeal procedure for interlocutory matters, applications for leave to appeal and appeals to the Supreme Court are dealt with by an expedited process under Order 63A of the *Supreme Court Rules*, unless directed otherwise. Appeals in interlocutory matters are not available as of right but only with a grant of leave to appeal. There is a broad discretion to grant or withhold leave to appeal. The requirement for leave balances the need to discourage unnecessary interlocutory appeals against the need to prevent injustice between the parties. It is difficult, however, to formulate a satisfactory test of whether an order or decision is final or interlocutory. Presently leave to appeal is sought in chambers before the judge or master who made the order and without the other party being present. In practice leave is generally refused and the question is left to the Full Court, if the applicant wishes to pursue it further. This process introduces a step which arguably is pointless and which adds unnecessary time and cost.

32.29 We had originally proposed in the Consultation Draft on this topic (5.1) to combine leave and appeal procedures in interlocutory matters. On reflection, combining leave and appeal procedures is unlikely to reduce the preparation and costs involved for parties even if a single hearing may lead to a speedier resolution (which is particularly important in interlocutory matters). Parties may also not benefit from the proposed process of seeking leave 'on the papers' (Recommendation 350) in these circumstances. In criminal matters where the application for leave and the appeal are heard together, we have recommended the abolition of the requirement to obtain leave because it brought no benefit to the process. (See Recommendation 368.) On balance, although we generally endorse the expansion of leave

requirements in civil matters we believe the present ineffectiveness of the leave process in interlocutory appeals is best addressed by omitting the requirement to obtain leave to appeal in these matters.

366. There should be no requirement to obtain leave to appeal in interlocutory civil matters, and appeals should be made directly to the Full Court of the Supreme Court, ordinarily constituted by two judges.

Appeals from boards and tribunals to the Supreme Court

32.30 Appeals also lie to the Supreme Court from many boards and tribunals constituted under a range of acts. The range is wide and includes:

- the professional bodies regulating medical practitioners, optometrists, pharmacists, etc;
- 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 present division of appellate review of statutory boards and tribunals by a single judge with or without further appeal to the Full Court and according to different processes has no logic or consistency. Many of these 'appeals' are really merit reviews, that is, a rehearing of the evidence with the court substituting its own decision for that of the original administrative decision-maker.

Appeals from boards and tribunals to the lower courts

32.31 Currently, appeals also lie to the District Court as well as to the Local Court from a range of tribunals. A search of the consolidated Acts of Western Australia shows appeals to the District Court from various tribunals constituted under 21 Acts. These range 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* (WA) and the *Retirement Villages Act 1992* (WA). In two Acts there is an express appeal to a District Court judge in chambers. In some cases there is a further right of appeal to the Supreme Court. In other cases the decision of the District Court is final. Some appeals require leave; others do not. The Local Court and the stipendiary magistrates in Petty Sessions also hear appeals from a number of boards and tribunals.

32.32 It is difficult to identify why an 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.

Report of the Tribunals Review

32.33 An extensive study of 84 tribunals and similar organisations culminated in a 1996 report, *Report of the Tribunals Review to the Attorney General.* It recommends the creation of a Western Australian Administrative Appeals Tribunal with a right of appeal to the Supreme Court by leave. Leave would be granted in accordance with statutory criteria only. In Chapter 33 we discuss the report in more detail and our recommendations are based largely on the 1996 Report's recommendations.

Criminal appeals to the Supreme Court

32.34 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 affecting criminal appeals.

Criminal appeals under the Criminal Code

32.35 As is generally the case, the statute creating the appeal determines the permissible grounds of appeal and appeal process. The *Criminal Code* establishes separate appeal entitlements for a convicted person and for the prosecution. A convicted person has the right to appeal conviction and/or sentence. The DPP has a separate set of rights of appeal over a range of decisions, not including jury verdicts, including a decision staying or adjourning proceedings on indictment. All appeals under the *Criminal Code* involve final judgments and no appeal against interlocutory decisions currently is permitted. (But see our Recommendations 275 and 340 in relation to joinder and trial by judge alone.)

Appeals against verdict after trial on indictment

32.36 Appeals by a convicted person against conviction on indictment lie 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 to appeal generally 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. To successfully appeal, the convicted person must also be able to show that there has been a substantial miscarriage of justice.

32.37 The DPP 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. The DPP, however, 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. The distinction between what is a question of law alone or a question of combined law and fact can be a difficult one. While the DPP has

no appeal against an acquittal by verdict of a jury, section 693A of the *Criminal Code* provides that the Attorney General may have the trial judge refer any question of law which arose at the trial to the Court of Criminal Appeal for its consideration and opinion. 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 under section 693A does not in any way affect the verdict given at trial.

Appeals against sentence after trial on indictment

32.38 A convicted person may appeal as of right against a sentence of indefinite imprisonment under Part 14 of the *Sentencing Act*. Otherwise an appeal against sentence on indictment is by leave of the Court of Criminal Appeal. There is little procedurally to distinguish an application for leave from an appeal.

32.39 The DPP has an appeal as of right against the punishment imposed or order made against a convicted person. While the appeal lies of right, the Court of Criminal Appeal has regarded the power to increase or alter a sentence on a DPP appeal as one to be exercised sparingly. To uphold an appeal against sentence by the DPP the court must be satisfied that the appeal is necessary to:

- establish and maintain adequate standards of punishment;
- correct idiosyncratic views of individual judges; or
- correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience.

The practical restrictions on DPP success in appeals against sentence have no basis in the language in the section of the *Code* granting the right of appeal. However, appeal courts are reluctant to overturn discretionary judgments and sentencing is a primary example of the exercise of discretion. A strong view against upholding prosecution appeals also arises because the offender is, in effect, placed in double jeopardy — being on trial for the same matter twice.

Criminal appeals under the Justices Act

32.40 Appeals under the *Justices Act* often concern criminal offences tried summarily. These appeals generally go to a single judge of the Supreme 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. However, the general principles governing costs in civil proceedings which apply in *Justices Act* appeals are not necessarily appropriate to those appeals which are truly criminal in their nature. In Chapter 31 we recommend no costs be awarded in criminal matters and that the Suitors' Fund be made available to cover costs incurred by defendants on appeal through no fault of their own. At the very least, costs for criminal appeals to the Supreme Court under the *Justices*

Act should be specifically dealt with and put on the same footing as costs on appeal in other criminal matters.

367. 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.

Justices Act grounds of appeal

32.41 The grounds of appeal under the *Justices Act*, available to both the defendant and the prosecution, set out in section 186(1), are:

> (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.

Leave to appeal under the Justices Act

32.42 The *Justices Amendment Act 1989* (WA) replaced the procedure of the order *nisi* to review the decisions of justices and magistrates — an order sought by a party who feels aggrieved by the court's decision, which calls on the other party to show why the decision should not be reviewed. The *Justices Amendment Act* substituted a single appeal by leave of a judge of the Supreme Court to either a single judge or to the Full Court. The application for leave to appeal may be made in the prescribed manner to a judge in the absence of the other party. Leave to appeal is granted unless the judge considers the appeal to be frivolous or vexatious or that the grounds of appeal advanced do not disclose an arguable case. The application for leave to appeal can be granted on the papers filed without the need for any party to attend a hearing. Consistent with our Recommendation 350, applications should be considered on the papers where leave to appeal continues to be required, although it appears that proposed amendments may abolish the requirement for leave under the *Justices Act* in any event.

Leave to appeal against conviction and sentence

32.43 Leave to appeal is generally required under the *Criminal Code* for appeals involving conviction and sentence. All appeals under the *Justices Act* also require a grant of leave. Apart from some of the more complex issues discussed previously concerning whether issues are questions of fact or law, the leave requirement does not add any particular complexity to the procedure. With hearings of applications for leave generally conducted as a hearing on the merits of the appeal as well, there are no delays arising from the leave requirement. 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. There appears to be no practical benefit in retaining the leave requirement.

368. The requirements for leave to appeal against conviction/acquittal and sentence under both the *Criminal Code* and the *Justices Act* should be abolished.

Time limits for criminal appeals

32.44 Under section 695 of the *Criminal Code*, a convicted person must give notice of appeal or the application for leave to appeal within 21 days of conviction. A similar time limit applies for an appeal against sentence or other order — being 21 days from the decision the subject of appeal. The notice requirement for appeals under the *Justices Act* is also 21 days. Where a person is convicted and then remanded for sentence, this creates different dates for conviction and sentence. In turn this results in different days by which application or appeal against conviction and sentence must be notified. This may require that appeals against conviction be lodged before sentence is imposed. Should an appeal against sentence be lodged once the sentence is handed down, then two applications are required. Time to lodge the appeal or application can be extended in each case and where delay is lengthy the court will only grant an extension of time if it is satisfied that a substantial miscarriage of justice has occurred.

32.45 It also is possible that the time to lodge an appeal against conviction may have expired before the convicted person knows whether the prosecution is going to challenge the 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 prosecution subsequently challenges the sentence, the convicted person may well wish to pursue the possible appeal against conviction. Increased flexibility in lodging notices of appeal or application against conviction would remove the need to apply for an extension of time in the above circumstances.

369. 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.

32.46 In our Consultation Draft on this topic (5.1) we considered recommending the adoption of a single notice of appeal or application within a specified number of days from sentencing and a single hearing. However, in some instances it is important for a person to appeal conviction prior to

sentence. Where a person is remanded in custody pending sentence and is seeking release on bail, it may be relevant that the remanded person shows the court that the conviction is being appealed. Therefore, a move towards a single notice or application may result in unfairness. Moreover, as it is sometimes the case that a result in one kind of appeal may lead to the other not being pursued, any insistence that both appeals be heard together may increase the workload of appellants, respondents and the courts.

'Guideline judgments'

32.47 Under section 143 of the *Sentencing Act* the Court of Criminal Appeal, in any proceeding considered appropriate, may give a 'guideline judgment' containing guidelines to be taken into account by courts when sentencing offenders. There is no special procedure for appeals which may result in such judgments. Foreshadowed changes to sentencing laws may make the guideline judgment redundant in any event. However, we recommend that the court permits submissions in addition to those of the particular appellant and respondent. The Court of Criminal Appeal should give notice that more general guidelines will be made and allow submissions from a 'friend of the court', *amicus curiae*, who by his or her special expertise or interest in an area may, on an important issue, be able to bring a broader perspective to bear than the particular parties to the case.

370. Where a case raises appropriate matters for a guideline judgment, the Court of Criminal Appeal should give notice to the parties so that the DPP or a friend of the court, by leave, may address wider issues of sentencing in the appeal.

33

Boards and Tribunals

Boards and tribunals

33.1 Boards and tribunals are similar to courts in several significant ways. They are structurally independent of the government of the day and often have adjudicative functions. Their processes usually allow participation by people whose rights may be affected by their decisions to participate. Generally, however, boards and tribunals offer less formal and adversarial processes than are available in the courts. Boards and tribunals have proliferated in recent years. However, this has occurred with a lack of uniformity and a confusing variety of both internal and operational procedures and appeal rights to the courts. (See Chapter 32.)

Adjudicative functions of boards and tribunals

33.2 The adjudicative functions of many boards and tribunals involve reviewing decisions by government administrators at the request of aggrieved parties or resolving issues in contention between individuals, or individuals and organisations. Sometimes boards and tribunals adjudicate issues which involve neither administrative review nor dispute resolution. For example, the Guardianship and Administration Board makes determinations for the protection of those incapable of dealing with their own affairs. The adjudicative functions of boards and tribunals can be divided into two categories: those involving decisions on review or appeal, and those making original or first-instance decisions.

Judicial review and 'merits review'

33.3 Unlike judicial review of administrative decisions by the courts, which is principally concerned with questions of law and proper administrative process, where boards and tribunals have review or appellate functions they usually conduct 'merit review' of administrative decisions. This means matters are fully reheard and the board or tribunal can substitute its own decision for that of the original decision-maker.

Non-adjudicative functions

33.4 Most boards and tribunals also have non-adjudicative functions, including administrative, investigative, educative and policy development roles. Some administer professional registration and licensing, often subject to review by the courts. Others investigate complaints relating to a code of conduct prior to referring the matter for determination if there is a case which warrants adjudication.

Administrative review in other jurisdictions

33.5 A Commonwealth Administrative Appeals Tribunal (AAT) was introduced in 1976 to provide an alternative to judicial review of administrative decisions. Since then all States and Territories have considered the need for merit review of administrative decisions, although not all Australian States and territories have created an administrative review body. Where administrative review bodies have been established they have taken the form of either tribunals or an administrative division in the courts.

33.6 Administrative review tribunals in New South Wales and Victoria have significantly expanded jurisdictions. These extend beyond administrative review functions, and indeed 'review' functions at all. As a result the tribunals are no longer known as administrative review tribunals. The Victorian Civil and Administrative Tribunal's expanded jurisdiction and the recently established New South Wales Administrative Decisions Tribunal both have an original jurisdiction and make first-instance decisions about certain complaints and issues in contention between individuals as well as review functions: see the *Civil and Administrative Tribunal Act 1998* (Vic) and the *Administrative Decisions Tribunal Act 1997* (NSW).

Previous recommendations

33.7 There have been a number of reports and seminars on boards and tribunals in Western Australia. One of the most recent was the 1996 *Report of Tribunals Review to the Attorney General* by Commissioner J Gotjamanos and Mr G Merton (the 'Gotjamanos Report'). The report excluded tribunals and boards in industrial relations and WorkCover areas but identified 360 different appeal provisions to 54 appeal bodies. More tribunals and boards have since been established. The Gotjamanos Report, like other Western Australian reports and seminars, focussed on the need for a single review body to be established.

33.8 Recommendations concerning the form of the proposed single review body vary. This Commission (1982) previously recommended the establishment of an Administrative Law Division of the Supreme Court. The *Commission on Government Report No. 4* (1996) recommended that all administrative review bodies without exception be amalgamated into one Administrative Review Tribunal. The Gotjamanos Report favoured the establishment of a State AAT which would assume the appellate and review functions of most existing boards and tribunals and provide a simplified and

consistent process for appeals from AAT decisions. The Gotjamanos Report also recommended that some specialised bodies remain separate from the AAT, but be co-located with the AAT for administrative economies.

Reform in Western Australia

33.9 We have considered the various Western Australian reports and examined the administrative review bodies in other States and Territories. Adopting the Gotjamanos Report recommendations, we have concluded that an administrative review body should be established in Western Australia amalgamating the review and appellate functions of existing boards and tribunals, apart from those in industrial relations and Workcover areas.

33.10 Developments in other States since the Gotjamanos Report have seen the significant extension of the jurisdiction of administrative review bodies. In light of these developments, we recommend that an enlarged jurisdiction similar to that of the Victorian Civil and Administrative Tribunal be established. It should be known as the Western Australian Civil and Administrative Tribunal (WACAT). The enlarged jurisdiction should include all adjudicative functions — both original and on review —currently exercised by boards and tribunals and certain lower civil court divisions. We include the jurisdiction of lower civil court divisions as we believe in some instances a tribunal setting, because of its informal and less adversarial nature, is better suited to the nature of small-scale disputes.

371. A Western Australian Civil and Administrative Tribunal (WACAT) should be established to amalgamate the adjudicative functions of existing boards and tribunals, except in industrial relations and Workcover areas.

372. The WACAT jurisdiction should extend beyond administrative review or appeals, to other adjudicative functions currently determined by tribunals, boards and lower civil courts including the Small Claims Tribunal, the Commercial Tribunal, the Residential Tenancies Tribunal and the Small Disputes Division of the Local Court.

Amalgamation into a single tribunal?

33.11 We are of the view that, as far as possible, all adjudicative functions of existing boards and tribunals should be incorporated into the WACAT. The establishment of a single tribunal should provide a rationalised procedure to be followed in cases of merit review of administrative decisions and will permit abolition of the multiplicity of boards and tribunals whose functions are purely adjudicative. Investigation of complaints, as presently undertaken by the Equal Opportunity Commission and other bodies, should continue

but matters should be referred to the WACAT for determination if these bodies establish that there is a case warranting adjudication. While professional boards and other bodies also should continue to undertake administrative functions and other non-adjudicative processes, where relevant, the proposed WACAT should have jurisdiction to conduct reviews or appeals.

Exceptions

33.12 The Gotjamanos Report recommended that some existing boards and tribunals remain separate because of the degree of specialisation required and for other reasons. In particular, the report recommended that review of decisions under the *Freedom of Information Act 1992* (WA) should continue to be separate, largely due to its recent origin and a review of the operations and effectiveness of the Act which was due to be conducted in 1996. Some three years later, these same considerations do not apply. We also are of the view that the proposed structure of the WACAT should be able to sufficiently accommodate specialisation and other issues so that incorporation of all adjudicative functions is feasible.

Specialised knowledge

33.13 Recent innovations in Victoria and New South Wales have resulted in the inclusion of various divisions and lists in equivalent bodies to the proposed WACAT. This has enabled members with specialised knowledge to be appointed to each list. If a similar approach is adopted in Western Australia this could ensure that members only determine matters which fall within the lists specified in their appointment and that the appropriate expertise is available to adjudicate matters.

Status of members

33.14 The Gotjamanos Report identified the status of members of the Guardianship and Administration Board and the Legal Practitioners Complaints Tribunal as creating difficulties in incorporating these bodies within an AAT structure. Judges or practitioners of long-standing chair these bodies. We agree that there would be difficulties incorporating these bodies within the structure of the AAT proposed in the Gotjamanos Report. However, we believe that if the WACAT was chaired by a member of equal standing this problem could be avoided. In particular, given our recommendations to restrict rights of appeal from the WACAT, it is appropriate that the tribunal be chaired by a member of high legal professional status. The appointment of a chairperson is discussed at 33.22.

373. The jurisdiction of the WACAT should include the adjudicative functions of the Equal Opportunity Tribunal, Freedom of Information Commissioner, Guardianship and Administration Board and Legal Practitioners Disciplinary Tribunal.

374. If all board and tribunal adjudicative functions are not incorporated into the WACAT, any board or tribunal which continues to exercise adjudicative functions should be co-located with the WACAT for administrative economy.

375. Where an existing body has an investigative function to determine if a regulation or code of conduct has been breached, then the investigative function should remain with that body and the matter be referred to the WACAT for adjudication if there is a case warranting determination.

376. The WACAT should comprise an Administrative Division and a Civil Division, consisting of various lists. These may include:

(1) Administrative Division
   i. General List (including Freedom of Information reviews and other matters not currently subject to review);
   ii. Taxation List;
   iii. Planning List;
   iv. Occupational and Business List; and
   v. Land Valuation List

(2) Civil Division
   i. Anti-Discrimination List;
   ii. Civil Claims List;
   iii. Credit List;
   iv. Domestic Building List;
   v. Guardianship List;
   vi. Real Property List;
   vii. Residential Tenancies List;
   viii. Commercial Tenancies List;
   ix. Legal Practitioners Complaints List.

WACAT procedures

33.15 Much could be done to rationalise the processes of adjudication through the amalgamation of adjudicative functions of existing boards, tribunals and lower civil court divisions within the one tribunal. At the same time access could be improved and formality reduced. To achieve these ends the WACAT, in conducting all functions, should:

- be inquisitorial in nature;
- travel on circuit as regularly as necessary;
- accept evidence by telephone and video-conference; and
- not be bound by the rules of evidence.

Another significant reform, in keeping with recommendations of this Report, would be to increase the emphasis on ADR as a means of settling disputes.

377. The WACAT should be inquisitorial in nature and demonstrate a commitment to informality and accessibility for applicants.

378. The WACAT should ensure accessibility by travelling on circuit to determine matters where necessary and permit evidence to be taken by telephone and video-conference link where possible.

379. The WACAT should not be bound by the rules of evidence, legal technicalities or legal forms. It should be able to inform itself as it thinks fit and act according to equity, good conscience and the substantial merits of the case.

380. The procedure of the WACAT should rely heavily on conciliation, mediation and the facilitation of settlement of matters prior to hearing.

Additional procedures on review and appeal

33.16 There are additional considerations which should apply to the review or appellate jurisdiction of the proposed WACAT. The Gotjamanos Report emphasised the existing variety of appellate procedures to and from boards and tribunals. We believe that the review or appellate procedures of the WACAT should be rationalised with a particular emphasis on increasing accessibility. We also are of the view that decisions of the Assessor for Criminal Injuries, which were not considered in the Gotjamanos Report, could appropriately be subject to the appellate jurisdiction of the WACAT, rather than the District Court as is currently the case.

33.17 Our recommendations are intended to apply not only to the WACAT review of administrative decisions by government, boards and tribunals, but also appeals from those original decisions within the civil jurisdiction of the WACAT which can appropriately and efficiently be handled within the WACAT structure.

381. Administrative decisions of boards and tribunals should be subject to review by the WACAT rather than a court.

382. Appeals from decisions of the Assessor for Criminal Injuries should be to the WACAT instead of the District Court.

383. Original decisions made within the civil jurisdiction of the WACAT should be subject to review within the WACAT, where these can be appropriately and efficiently handled within the WACAT structure.

384. The WACAT procedure for review or appeal should be uniform:

(1) parties should be entitled to representation, either legal or non-legal, but the procedures should be as user-friendly as possible to ensure self-represented parties are not disadvantaged;

(2) the evidence should be considered anew with the tribunal standing in the shoes of the original decision-maker;

(3) further evidence available at the time of the review or appeal, which may or may not have been available to the original decision-maker, should be taken into consideration; and

(4) administrative review by the WACAT should take into account government policy only as certified by the Minister or Chief Executive Officer of the relevant department as being in existence at the time of the reviewable decision.

Appeals from the WACAT

33.18 The Gotjamanos Report not only identified a range of appeal or review rights to boards and tribunals, but also a confusing array of appeal rights from the decisions of boards and tribunals, including some decisions for which there is no further right of appeal. We have considered the present system and are of the view that appeals from decisions on appeal or review by the WACAT should be rationalised. In our view, decisions of the WACAT on administrative review or appeal should only be permitted to go further on appeal to the Supreme Court on a question of law, because of complexity or when in the public interest.

385. An appeal to the Supreme Court from an administrative review or appeal determination by the WACAT should be available.

386. The only grounds for appeal from any WACAT decision to the Supreme Court should be:

(1) questions of law;
(2) the complexity of the case; or
(3) when in the public interest.

The cost of applications to the WACAT

33.19 While some costs savings may accrue through the amalgamation of the multiplicity of review and appellate jurisdictions and other adjudicative functions currently undertaken by boards, tribunals and lower civil court divisions, funding is likely to remain an issue. In other jurisdictions the fees charged do not allow for full cost recovery, although the charges range according to the nature of the application or the number of tribunal members required to determine a matter. For example, there are no fees for some lists and generally higher fees for commercial matters. Given our recommendations in relation to court fees, and for the reasons given in Chapter 16, we prefer the distinction to be one of whether the matter is business-related. Fees charged in other jurisdictions also are higher in disciplinary matters and for appeals because of the increased number of members who are required to determine those matters.

387. Applicants seeking to have an administrative decision reviewed by the WACAT should be required to meet a modest application fee and not full cost recovery.

388. WACAT application fees should vary according to the nature of the application with fees for matters which are business-related being at a higher rate.

389. Waiver provisions should be available for financially disadvantaged persons.

Party/party costs

33.20 Party/party costs are not usually allowed in matters of administrative review by tribunals. However, there are some circumstances where costs should be awarded against a party, for example when one party has put the other to expense by delay or frustration of the case management process or is unreasonable or malicious.

33.21 Not all matters before the proposed WACAT will be administrative review applications. Where an application is for an original decision in relation to a civil dispute or an appeal from a decision in a civil dispute there should be a discretion to award costs depending on the circumstances of the matter and the costs necessarily incurred to enforce an existing right.

390. Party/party costs should only be permitted in matters of administrative review by the WACAT in special circumstances including groundless or malicious applications, or unreasonable conduct by a party.

391. Where the matter is an original decision or appeal in a civil dispute there should be a discretion to award costs where a party has incurred costs to enforce an existing right.

Chairperson and members

33.22 The Chairperson of the WACAT should be appointed from the legal profession and should have sufficient status to be the senior presiding officer to members of the guardianship and legal practitioners complaints lists (See 33.14.) The appointee should not have permanent tenure but be appointed for a considerable length of contract. Members, both full- and part-time, should be appointed with a variety of skills and expertise as required, including legal members. Depending on their expertise, members should be appointed to one or both proposed Divisions, to sit on one or more Lists. From the membership a Head of List should be appointed with special responsibility for that List. The selection process for members must be independent and open if public confidence in the WACAT is to be gained and maintained.

392. The chairperson of the WACAT should be appointed for a period of up to seven years and should be a legal practitioner with appropriate qualifications and status.

393. Full-time and part-time members should be appointed for a period of up to five years to one or both Divisions and may be appointed to hear matters in one or more Lists depending on their expertise.

394. A Head of List should be appointed from the members to have special responsibilities related to that List.

395. There should be an independent and open selection process for the appointment of members of the WACAT, with annual reporting to Parliament of recommendations of the selection panel and the appointments made by the appointing authority.

Conferring jurisdiction on the WACAT

33.23 The Gotjamanos Report recommended that the AAT should be established by statute but that the statute relating to the administrative decision in question should confer the AAT's jurisdiction relating to the particular administrative matter. We support that recommendation, and extend its application to the conferral of jurisdiction in relation to other proposed functions of the WACAT where appropriate. We believe that conferring jurisdiction through the legislation relevant to a decision or complaint, based

on the Commonwealth model, provides an accessible basis for aggrieved parties to identify their appeal rights and is more user-friendly.

396. Jurisdiction should be conferred on the WACAT by legislation relating to the subject matter of the decision or complaint where appropriate.

34

The Court Environment

Architectural psychology

An increased understanding of the role which architecture plays in access to justice issues is related to a changing perception of the relationship between the courts and the public. As your own consultants bear out, there are many judges and court administrators concerned about the environmental effects of court architecture.

ALRC submission to the Law Reform Commission of Western Australia (1999f)

34.1 The physical and social environment of the courts and its impact on how citizens experience court processes may be an essential component in improving the justice system. This is because the design and aesthetics of court buildings may affect users' perceptions of the judicial system. To an extent, the importance of court buildings has been recognised in the justice system of this State by the establishment of a Courts Accommodation Planning Committee by the present Chief Justice. That Committee's task is to act as a policy forming body and assist the Ministry of Justice in fulfilling the government's duty to provide an appropriate standard of accommodation to meet the needs of all users of the court. The Ministry of Justice already acknowledges the importance of court design and has conducted feasibility studies and examined design processes. The Ministry surveyed court users, including the judiciary, concerning the adequacy of court facilities in an effort to identify necessary improvements. However, little specific work has been done in any jurisdiction on the psychological impact of court architecture on court-users' perceptions of the justice system. We feel that it is useful to approach law reform from the perspective of what is known as architectural psychology.

Court design

34.2 In this Chapter, we examine what (non-verbal) messages are given to users of court services, the public and participants in the justice system, by the physical environment of court facilities including:

- layout of waiting rooms or jury rooms;
- how and where parties are seated in court rooms; and
- differences in accommodation provided to judges, juries, vulnerable witnesses, and prisoners.

We also examine what visions court buildings embody and how they 'shape' users' experience of the justice system.

Politics and design

34.3 Public buildings express political values. 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. Practical aspects noted in a United States study of the link between political values and design include:

- shape (rectangular, square, round);
- location of the formal courtroom and other facilities in the building;
- the use of staircases;
- placement of officials, flags and public galleries;
- whether views of faces or backs are provided to the public;
- symbols and artwork in the buildings;
- design of seating; and
- use of doors, windows, skylights, acoustics and lighting. (Goodsell 1988)

While existing studies highlight how design features can link to political values, there has been surprisingly little analysis of the architectural psychology of the courts. The most significant of these studies have been of the French courts.

34.4 Several of these studies highlight the connection between court symbolism, appearances and design and the implementation of justice in an orderly and accountable way. While some studies indicate that the credibility of today's legal decisions derive from the authority of the past, others indicate that there is no single source of authority. Often several conflicting sources develop over time. So, for example, the robes of the judiciary may be linked to the authority of the monarchy but the presence of the jury links to notions of the sovereignty of the people. The elaborate ornamentation of older court buildings may indicate the aspirations of empire. It may be that courts are inherently hierarchical places and the integrity of justice might be compromised by attempts at intimacy and equality. Others assert that court design should be about equality and reconciliation rather than majesty.

Spatial enclosure

34.5 The word 'court' comes from an old French word meaning 'enclosed space'. Law courts display many approaches to spatial enclosure. It is useful to examine registry, foyer and courtroom layouts and the circulation systems for court-users. Many courts evoke classical themes of hierarchy and exclusiveness through their physical structure. Spaces are not just separated from the outside world. Each internal space is discrete: foyers, courtrooms, registry areas, galleries, chambers, jury boxes and deliberation rooms and, in the courtroom itself, the bench, the bar tables and the dock. Not only are

there walls, railings, different levels and barriers; there is also separation through language, dress, tradition and rules.

Openness: access and accountability

34.6 A counterpoint to 'enclosed' is 'open'. Are the courts open to their environment, not just to the sky and air but to the public? One of our major questions has been whether courts are accessible. How do courts handle complaints, scrutiny, and accountability? The AIJA report on *Public and the Courts* (Parker 1998), referred to in Chapter 5, revealed a low level of customer satisfaction from court-users throughout Australia. There was dissatisfaction with basic issues of service, availability of information, the language used, the clarity of literature and procedures, the helpfulness of staff, the atmosphere in the courts and the psychological and emotional support available. While court administrators believe they are generally responsive to the needs of the public, this belief was emphatically not shared by the public itself. Although there are important limits to how responsive courts can be to public expectations, stemming from the need to apply existing laws and to comply with existing procedures, many reforms could be implemented. Some of the recommendations contained in the AIJA report are dealt with in more detail elsewhere in this Report, but in our view many could usefully be implemented in Western Australian courts.

397. In order to keep the community informed about the courts and court activities, all courts should develop community education strategies, including web sites, annual reports, fact sheets, and judicial outreach programs.

398. Media liaison officers should be appointed to all jurisdictions and appropriately resourced.

399. All courts should have clearly designated procedures for handling complaints about court service.

400. Access to courts by telephone should be improved, for example, by the establishment of a call centre.

Modern justice

34.7 Modern criminology emphasises the trial as ordeal, and seeks to use it in a transformative way through 'reintegrative shaming' in family group conferencing and other reintegrative kinds of criminal resolutions discussed briefly in Chapter 25. (Reintegrative shaming, broadly, is aimed at bringing offenders back into society by making them recognise and make amends for the damage they have caused.) Ultimately the reality is that court processes and trial procedures should not be viewed simply as legislation being enforced, but as ordeals being endured by a variety of people in a variety of different conditions and contexts.

Emotional and psychological needs

34.8 We believe that if the emotional and 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 the justice system. The Western Australian Court Services' Customer Service Charter commits court staff to 'treat all our customers with courtesy, respect and dignity, by providing services which meet their needs.' This statement accepts the relevance to successful court operation of meeting, to the extent possible, the emotional and psychological needs of court-users. Unfortunately the Charter does not have a counterpart generally applicable to all professional participants in the justice system. Court design and operations should encourage all participants in the justice system to treat each court-user with courtesy, respect, and dignity.

401. To the extent possible, courts should provide services to meet user needs. Together with the survey recommended at No. 3, procedures, processes and attitudes should be reviewed to ensure that participants in the justice system deal with all users courteously, respectfully and fairly.

Court buildings

34.9 Court buildings convey information about the justice system. Good court design may communicate that justice is accessible; safety and privacy are respected; and contributions to the process are welcomed. All too frequently, however, architecture may send out other messages:

- the courts are isolated from our physical and cultural environment;
- the courts are closely linked to other law enforcement agencies;
- all 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 participants in the justice system.

Architecture and hierarchy

The courts are the servants of 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 ideals.

Arthur Erikson, architect, Vancouver Law Courts, British Columbia, Canada.

34.10 The characteristics of the courthouse spaces tacitly inform users of their status before the law. The standard of court accommodation in rural areas may be inadequate for all regional court-users. Some design aspects and behaviours signal that the defendant is a 'criminal' — regardless of the presumption of innocence, while the judge is a valued contributor to the justice system. As a result, and whether consciously 'reading' the environment in these terms or not, different users will experience court facilities differently.

34.11 The quality and quantity of space allocated to various participants within the court building can indicate the importance and value accorded

them. Court space can be 'read' consciously or unconsciously according to location, access to natural light and/or views, and the cost and quality of furnishings. One example in the Perth Central Law Courts is the comfortable offices on the top level at the front of the building allocated for judges and magistrates, while the facilities for children waiting to appear as witnesses consist of a small, narrow room in a remote corner of the building. Consistent design standards throughout the court buildings 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 equality and aesthetics. Design should indicate to court-users that all participants in the justice system are seen to be equal and respected by providing facilities appropriate to their particular needs.

402. 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.

403. Future court design briefs should consider the degree of hierarchy to be reflected by the design. As much as possible, there should be consistent design standards and equality of furnishings and fittings throughout court buildings.

Special needs

34.12 Architectural design reflecting equal treatment of all court-users does not preclude the justice system from accommodating special needs of users. Access for those with disabilities to court buildings, information and jury boxes, witness stands, defendants' docks, bar table and judges benches should be convenient and respectful. The tradition of judges and juries being raised above the floor of the court causes further difficulties of access for disabled persons. Hearing impairments and language difficulties for those of non-English speaking backgrounds also should be accommodated. In devising ways to address special needs it is essential that there be full consultation with groups, including disabled groups, indigenous people and migrant communities from non-English speaking backgrounds.

404. Any significant renovations or construction of new court buildings should take into account the diverse needs of court-users.

405. There should be a study of the involvement of indigenous Australians and population groups from non-English speaking backgrounds with the justice system, with particular emphasis on alternative dispute resolution and developing services and facilities which meet their needs.

Symbolism

34.13 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, retaining prominence and centrality alongside the symbols of corporate power: the office towers. In addition to their judicial role many courthouses are also of aesthetic and historical significance. In the past the use of gargoyles, domes, triangulated pediments and pillars in court designs expressed authority and stability with classical resonances. Often new courts in Australia seek to emulate traditional court designs, placing emphasis on authority from the past rather than architectural references to popular sovereignty. Other modern courts communicate power and importance through monumental size, strong geometry, limited window areas and separation from the outside world. Again, however, the message is one of exclusion: the law is closed and inaccessible.

406. 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.

Art

34.14 Art can play an important role in the architectural psychology of court buildings. Some classical sculptors symbolised justice as a maiden holding scales who would evenhandedly adjudicate between the parties. German artists in the 16th century put a blindfold on the figure to indicate the corruption of the courts. Blindfolded *Justicia* became so well-known she is now almost an artistic cliché. Ironically, the bandage which first indicated the folly of law reversed its meaning and came to represent impartiality.

34.15 In addition to its symbolic aspect there is a less obvious role art and architecture can play in the courts. Surroundings which are experienced as institutional and cold may give rise to negative impressions. The considered use of art in the courts can change these impressions.

407. Art should be integrated into courts to assist in making a respectful environment. This might include temporary exhibitions, works commissioned and integrated into 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.

Location

34.16 Does the frequent co-location of courts and police stations say something about the relationship between the two institutions? The placement

of courts adjacent to police stations visually implies judges and police are part of the same team. While co-location may have been the result of practical considerations, from the perspective of an accused, and in particular an indigenous or other accused unfamiliar with British political theories associated with the Westminster tradition, the criminal justice system may appear to be a single homogeneous entity working harmoniously to process alleged offenders. Countering this impression, courts are frequently made of different and usually more expensive materials than police stations. Despite the visual differentiation, the result is that the courts and police are seen to share similar views, even though policing is accorded a lower status.

34.17 The existing policy of the Courts Accommodation Planning Committee, referred to in paragraph 34.1, is that there should be a clear visual separation of police and court facilities in court complexes. Furthermore, proposals that the DPP assume responsibility for the prosecution of all police charges together with the Ministry of Justice project to 'outsource' the function of prisoner management within the courts will lessen the administrative connection between police and the courts.

408. Court and police buildings should be visually separate and clearly demarcated architecturally to demonstrate the independence of the courts from the policing function.

Integration

34.18 How should courts be integrated into the social and commercial life of the community? Should courts be self-contained blocks or 'porous' in their nature, soaking in the life of the surrounding city? Court precincts could be made far less formidable by integrating shopping and leisure activities, eating facilities, social and health services, churches, schools and banks, public libraries and local councils. For example, the Family Court in Melbourne features a café where people can wait, prepare for hearings and consult with lawyers. The Western Australian Courts Accommodation Planning Committee already is giving specific consideration to the incorporation of cafés and the like into court buildings.

409. Court planners should incorporate user friendly facilities including cafés or other eating facilities in court buildings.

Safety

34.19 Does court layout encourage people to be more or less aggressive, communicative or stressed? In answering this question it needs to be noted

that 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 or law enforcement agencies. Victims may want restitution, retribution or even revenge. Judges focus on applying the law and procedures fairly to those appearing before them. Even if all these views are somehow accommodated, there are also the needs of other court-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 stage would be beneficial. (See Recommendations 402 and 406.) The ultimate goal would be to create a safe and comfortable environment for all participants.

410. Prior to commencing significant renovations or new construction of courts 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.

411. All courts should develop safety plans, including (but not limited to) signs in various languages advising people where to go or whom to contact if they feel unsafe.

Secure areas

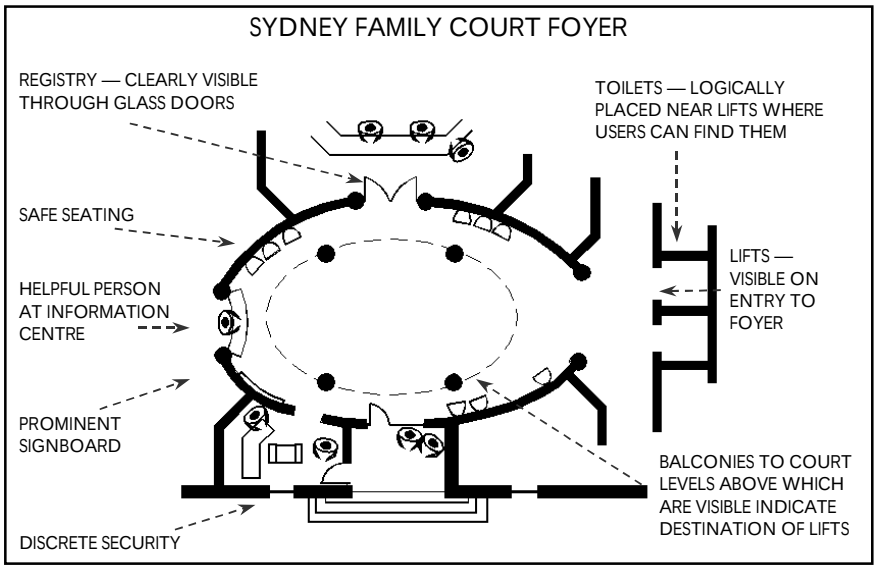
34.20 One might assume that people arriving at court in a secure prison vehicle or from a police station experience more stress than most court-users. Some individuals also may be violent or aggressive. The environment provided for them is of the utmost importance yet in nearly all facilities inspected for this Report the holding cells and detention facilities were psychologically depriving. The cells had concrete floors, stark 'anti-graffiti' painted walls, hard benches and no natural light or outlook. Holding individuals in demeaning conditions contradicts notions of justice and signals that accused persons are considered guilty before their cases are heard.

34.21 Studies indicate that environments of deprivation make residents devalue themselves with a resultant loss of self-esteem and self-respect. A vicious cycle of damage, repair and even greater damage is the inevitable result. More appropriate accommodation may reduce maintenance costs and also may reduce the level of hostility to which police and court staff are subjected. Given that security staff and police work in secure areas, improved secure areas not only benefit defendants but also those for whom the area is a work environment.

412. Future court design briefs should specify secure areas which accord greater respect for those who are held in them and also those who work in them, without diminishing the level of security.

Public foyers

34.22 Public parts of a court building include the foyer, the registry, waiting areas, interview rooms and shared service areas. 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. People entering an unfamiliar building in a state of distraction often may miss signs, instructions and warnings. A crucial issue is the design and location of information services. An excellent example of a well-designed foyer can be found in the Family Court in Sydney.

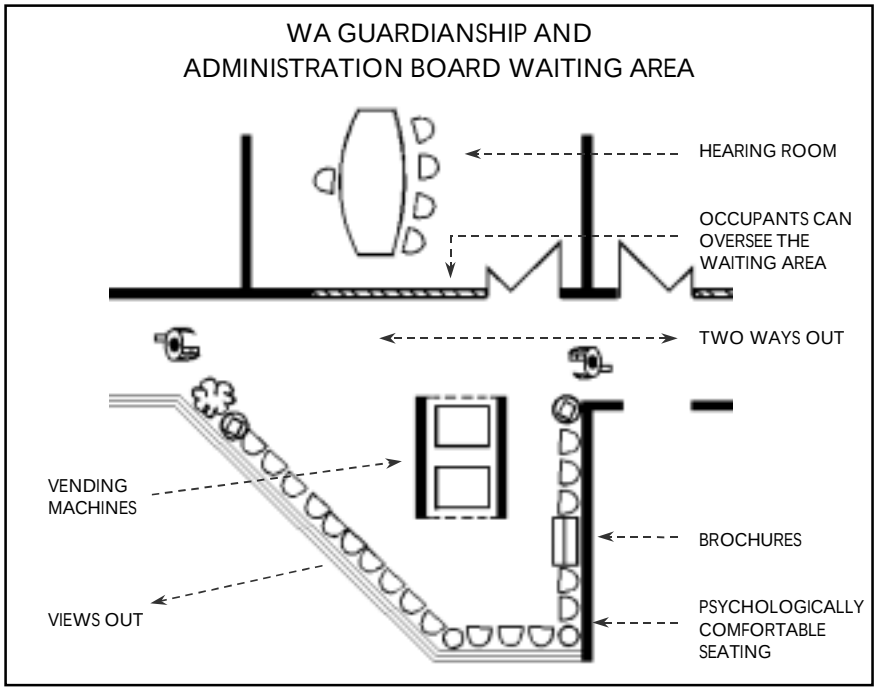


Registries and public waiting rooms

34.23 Waiting rooms, where people wait for their cases to be called or enter into informal conferences and negotiations, often are full of people who are anxious, bored, impatient, angry, and occasionally, violent. In some matters, such as restraining order applications, issues of privacy are paramount. In small country courthouses registry design problems are particularly acute. Other important issues, particularly for registry staff who deal with angry and annoyed users, are adequate staff numbers and training.

34.24 Waiting area design must cater for two conflicting possibilities: chosen contact and safe separation. Waiting areas may provide a last minute

opportunity to negotiate a settlement between the parties, or they may subject victims of violent crime to further intimidation, stress and insecurity by unnecessary contact with the defendant. Views, natural light, soft furnishings, alternative exit options which are open and visible, visual oversight by court staff, seating which backs onto walls so that people do not feel exposed, all may assist in the creation of a comfortable design. The Western Australian Guardianship and Administration Board waiting area has certain positive design aspects for users' physical and psychological comfort.



413. User surveys should form the 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 the design of new, court facilities.

Court communications

34.25 A significant part of the frustration people feel with the justice system seems to revolve around communication. The names of the courts are confusing in that they do not communicate jurisdictional distinctions effectively. The 1998/99 telephone directory court listings under the Ministry of Justice add to the confusion. Listings presently exist for a Local Court and a Court of Petty Sessions for Perth, but suburban courts are listed as 'Magistrates

Courts'. As discussed in Chapters 1 and 17, the Magistrates Courts' legislation is yet to be enacted. It appears that forms used in suburban courts continue to use the terminology 'Local Court' and 'Court of Petty Sessions'. This creates difficulties for court-users seeking to contact the relevant court and causes dissatisfaction and frustration with the justice system. Although perhaps not a fundamental flaw, the confusion over court names is symptomatic of the failure to communicate effectively with court-users.

34.26 While courts provide various brochures describing legal procedures, general brochures may not provide information which is detailed or specific enough to be helpful. Information needs to be presented in plain English, other languages and alternative formats. It may be helpful to deliver brochures to every witness concurrently with the summons to appear rather than expecting the witness to locate relevant brochures amongst a confusing array of similar-looking documents in a display stand located at the entry foyer on the day of the court appearance.

414. Court communications and procedures should be simple, straightforward and clear enough to be understood by ordinary users.

User feedback

34.27 Courts, like other public institutions, are now required to establish and meet performance objectives which often include customer satisfaction. Effective communication between busy governmental service providers and the citizens who utilise services presents particular difficulties in the justice system. Being able to continuously obtain quality feedback from court-users would enable the managers of court facilities to implement changes and ensure ongoing monitoring of changes implemented to assess their effectiveness. We believe communication between the users of the justice system, the legal profession and court staff could be improved by installing feedback booths in court foyers, registries or waiting areas. The booths also could refer court-users to other relevant agencies, as recommended by the AIJA *Public and the Courts* report and provide access to the computerised facilities discussed in Chapters 17, 27 and 35.

415. Courts should provide user-friendly booths in foyers, registries or waiting areas, staffed by suitably trained representatives of user groups, including women, indigenous Australians and young people. Staff should pro-actively seek feedback from court-users and provide a referral service about local advice and support services in the community. The booths also should be linked to computer access facilities recommended at Nos 162, 212, 281, 282 and 426.

416. Courts should introduce a review procedure to act on the suggestions of court-users and make changes as appropriate.

Information services

34.28 For the law to be, and be perceived to be, fair and just, all court-users should be entitled to understand what is happening and be given the opportunity to participate in an informed manner. 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. Some users feel they cannot have a fair hearing without being represented by a lawyer. Some of our recommendations in this Report are designed to address the problems associated with self-represented litigants in the justice system. (In particular, see Chapter 18 for a discussion of self-represented litigants in the civil system.)

34.29 People who do not qualify for legal assistance or cannot afford or do not wish to spend their money on lawyers, may feel resentful and abused because they must participate in a system they can neither afford nor easily understand. To address this problem information services should be developed as recommended in Chapter 35. Associated services such as affordable and safe childcare, support services, and translation and interpreting services also should be developed.

34.30 The ALRC (1999f) response to our Consultation Draft on this topic (5.2) noted its particular interest in our proposal to provide information services in the court. However, in that Draft, we proposed that information sessions be run at regular times, similar to those provided by the Family Court, to assist in making information about the court system intelligible to non-lawyers. This would be a useful complement to Recommendations 397 and 398 to improve court liaison with the public, and of particular assistance to self-represented litigants. However, there is a time constraint on litigants associated with information sessions run at the court. Where possible 'self-help' information should be available in a format which allows maximum access to potential litigants.

417. In conjunction with the staffed booths recommended at No. 415, courts also should provide self-help centres to facilitate access to information and services for all users, particularly for self-represented litigants.

418. Self-help information, as far as possible, should be available in a format which can be taken home by potential litigants. Availability of information through videos, obtainable through public libraries, community law centres, or through the internet, should also be implemented where possible.

Self-represented litigants plan

34.31 The ALRC supported the approach adopted in the Consultation Draft on this topic (5.2) of consulting with tribunals to develop a broader understanding of the problems, and some solutions, and other proposals relating to self-represented parties. Although statistics are unavailable it is generally believed that the number of self-represented litigants in the courts, and the associated problems, are increasing. A number of recommendations were made in relation to self-represented litigants in the civil system in Chapter 18. However, one of the recommendations contained in the AIJA report *Courts and the Public*, discussed earlier in this Chapter, was that courts develop plans to manage self-represented litigants. The recommendation should be implemented in all Western Australian civil and criminal courts.

419. All courts should develop a Self-Represented Litigants Plan dealing with every stage of the process, from filing to enforcement or the equivalent in criminal matters, and including guidelines for judicial officers about how best to conduct hearings where one or more parties are not legally represented.

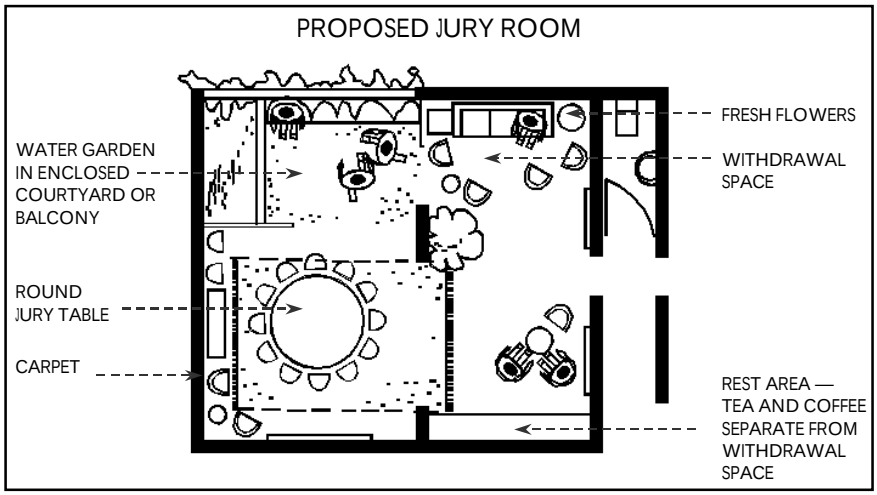
Juries

34.32 The importance of the jury system for the criminal justice system in particular is discussed in Chapters 7 and 30. The jury system depends on the support and goodwill of the community. Yet many jury rooms are cell-like spaces with low quality fittings. The design of jury rooms is often physically adequate but psychologically impoverished. Jurors, while doing 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. Juries have to cope, generally unassisted, with the emotional stress and life disruption associated with jury service and exposure to traumatic details of cases. The disproportionately small allocation of architectural funds and space in existing courts may by implication indicate to jurors that they are not important.

34.33 We are conscious that the privacy of jury deliberations must be maintained and the process of discussion not exposed. Modern facilities, through the use of one-way glass, enclosed courtyards or strategic location in high-rise buildings, secure that privacy. There is no justification for denying juries access to natural light.

34.34 Tables in jury rooms inspected for this Report were all rectangular. Seating at rectangular as opposed to round tables has an impact on speaking patterns and deference behaviour. Round tables are more likely to accord equal status to all participants. In conference table situations, some jurors may be disadvantaged by the social habits of others who interrupt, raise their

voices and silence people by means of (often unnoticed) social dominance behaviours. A 'withdrawal space' would provide a significant brake on the capacity of a dominant personality or groups to control jury deliberations.



420. The importance of jury service should be recognised by providing pleasant facilities for jurors including round tables in jury rooms with natural light, appropriately screened outside views, withdrawal spaces, comfortable seating, and good quality fittings and furnishings.

421. Instructions for juries should be developed to provide each juror with an equal opportunity to speak and be heard during deliberations.

The legal profession

34.35 As the legal profession is a frequent user of the courts, spaces which serve the profession 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 Chapter.

422. The design requirements and practical needs of the legal profession as regular court facility users should be surveyed prior to developing or renovating future court facilities.

Courtrooms

34.36 Courtrooms are complex places. They require separate entrances and circulation systems for judges, prisoners, the public and, in some cases,

vulnerable witnesses. Courts use different height elevations for different participants. Courtrooms increasingly include security devices, computerised information systems, closed circuit television and other equipment (See Chapter 35.) Separation, elevation, information; these criteria make the design of courtrooms a costly and difficult process.

34.37 Courtrooms in Australia have largely remained unchanged in their traditional configurations for at least a century, while new technology has been added around the existing shapes and spaces. In the traditional courtroom:

- 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.

Social distance, personal space and audibility

34.38 Studies have been undertaken which document the culturally defined boundaries of social distance and personal space. Court processes often violate these boundaries through inappropriate intimacy or excessive distancing. It also is probable that such spacings will impact differently upon people from various cultural, social or occupational groups. Other studies have shown that schizophrenics and violent prisoners also have different perceptions of what are appropriate personal spaces.

34.39 Audibility is another problem in modern courtrooms. The furniture layout, the distances involved, the exposed nature of the witness box, the lack of adjacent support people and the adversarial nature of questioning combined with the formality and the lack of familiarity with 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. Non-verbal gestures also are a significant component in properly interpreting testimony. Audibility issues, broadly defined, raise further issues of gender and culture that are not addressed merely by better acoustics.

Flexible architecture

34.40 One of the few predictions that can be made with any certainty is that the demands placed on courtrooms are likely to change in ways which cannot be foreseen. In a technologically evolving society, and for the reasons given above, flexibility of furniture and layout are highly desirable. The ALRC (1999f) believes that the provision of facilities for alternative processes within the court is extremely important to furthering the success of, and confidence in, such processes within the existing court structures. We agree.

423. Prior to commencing significant renovations or construction of court buildings a new flexible model for civil and criminal courts should be researched, developed and trialled.

35

Technology and Justice

The impact of technology on law and justice

35.1 Technology, the law and the justice system increasingly intersect. Technology has the power to assist in some areas while it raises concerns in others. Each area requires serious consideration and informed debate, rather than blind denial or, worse still, blind acceptance. In this Report it has not been possible to assess the totality of technological impacts on the justice system. We discuss the potential uses of technology for administrative purposes within the justice system and as a means for ensuring public access to the system, and the particular impacts on the legal system of digital representation of documents, evidence and the courtroom. Important impacts, such as the proliferation of copying technologies and the potential increase in copyright infringement, are not addressed.

35.2 The impact of technology in the area of privacy should not be overlooked. 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, where they go, whom they communicate with via telephone, fax and Internet. These capabilities raise difficult questions because their application can be for useful and legitimate purposes as well as for invasive, oppressive or criminal purposes. Sometimes the line is difficult to discern. Further research into the privacy aspects of the digital world is necessary.

Measuring the justice system

35.3 In order to assess a justice system it is essential first to determine what that system is supposed to do. The various aims of the justice system have been discussed in Chapter 1, 'Touchstones' and ways to measure the effectiveness of that system have been discussed in Chapter 5 — although both the aims and measures of the justice system remain contentious.

Nevertheless, as soon as it is said that systems need to be measured in order to check their performance against their aims, it is implied that data needs to be gathered, stored and analysed so that information can be presented to inform observers whether the system is performing as expected or not. Information also may need to be gathered to assess proposed reform of the system. So, whatever the aims of a justice system and the measurement methods, there are clear requirements as to how information should be stored if it is to be useful and effective. For example, information needs to be complete, accurate and structured so that consistent observations can be made over time and compared over different time periods. Information also needs to be stored in a form that lends itself to rapid and easy application. Digital representation of information currently appears to meet these criteria.

35.4 Defining the information needed to 'measure' the justice system properly requires that participants in the system identify the things that are important for them in operating and understanding the workings of the justice system. This cannot be left to technologists. The non-technological work associated with defining data structures to ensure that all parties talk the same language is an essential starting point in the work required for the exchange of data in electronic form. A common set of information definitions endorsed and supported by all participants in the justice system should be developed. How this may be achieved is discussed in Chapter 5 on 'Measuring the Effectiveness of the Justice System', in particular Recommendations 3 and 4.

Tracking through the justice system

35.5 People, items and information involved in the processes of the justice system are spread across many organisational boundaries. They flow from one process to another. The administrative tracking of people and things throughout the justice system, and particularly the criminal justice system, is essential in order to support decision-making at an operations level. The tracking of offenders, information, warrants, evidence, bail and parole conditions all require that the system identify the correct person or piece of information. Agreement needs to be reached by all parties involved in the administration of the justice system about how to define precisely all data items and to answer issues of ownership and accountability. Only after these issues are resolved can technologists be of any assistance.

424. The information items used throughout the Western Australian justice system should be rationalised and issues of ownership and accountability in relation to each information item should be determined.

Uniformity in the justice system

35.6 The potential uses of technology are not confined to administrative processes within government; they also extend to the administrative processes of the courts. Again, lack of uniformity limits the use which currently can be made of electronic data. One example, referred to in Chapter 32 on Appeals, is the Council of Chief Justices Appeal Book Project. While the project is supported as a prime solution to the introduction of electronic use across courts, the most significant impediment to its introduction has been the lack of uniform standards across jurisdictions. The development of standards will require attention to detail for accuracy, integrity, selection and editing of the material. Australian appellate courts have implemented changes to formatting and citation during 1999.

Justice Joint Agency Office

35.7 Definitions of the 'data items' which may be useful for the Western Australian justice system's administrative and legal processes require coordination at the highest levels. For example, the Ministry of Justice has eight individual sets of offence codes held in three distinct formats. Data cannot be shared between those systems reliably. Having a well-defined standard of offence codes will facilitate data exchange between justice agencies. 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, implies the creation of a body that would coordinate this work and ensure the maintenance of data structures. This body would need to have a management group comprised of chief executive officers and senior executives within the justice system, whose areas would be directly impacted by this initiative.

425. A Justice Joint Agency Office should be created with a Board of Management representing all justice system stakeholders that will establish and maintain 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.

Information resources

35.8 If justice is to be seen to be done, the community must have access to resources concerning the law and the justice system. We have discussed these issues throughout this Report, particularly in Chapters 17, 18, 27 and 34. But what is the community? And what resources and access are appropriate? The community is not merely the legal profession or the agencies

of government. When considering access, issues of disadvantage are relevant. Disadvantage may embrace financial restrictions resulting in the inability to afford legal representation, physical or mental disability, or even may be the isolation which is a consequence of the vastness of this State.

35.9 Collections of specialist legal information in paper and electronic form exist now and continue to grow, but public access to either information source is severely limited. The problem is not simply physical limitations of access to libraries, hard copy materials and the internet. There are the further limitations arising from difficulties for users in interpreting the information. Navigation through vast quantities of information — which could be 'bad', outdated or lacking an identified source — becomes another major challenge to be faced.

Digital access to legal advice

35.10 People can be digitally represented either by image-taking, such as video, or by the digitalisation process including 'virtual reality modelling'. There is great potential for digital technology. Consider the availability of legal and other expert advice through teleconferencing technology. Another option is the 'avatar': a digital representation of a person that can provide useful information when the person represented cannot be present. Instead of 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 in a State the size of Western Australia. Provision of a wide range of legal advice avatars on the internet would bring knowledge about the justice system to more people throughout the community and achieve greater access to justice. The access to basic advice on rights and obligations will continue to be an imperative in the future.

426. Pilot projects to research and implement legal advice avatars for general public use over the internet should be implemented.

Digital representation of paper

35.11 Paper is ubiquitous throughout the justice system. In many instances representations on paper of facts, information and knowledge constitute the only official form of material upon which legal decisions are based. However, in commercial matters there has been a rapid movement to almost exclusive digital representation of information. Consider electronic data exchanges, such as purchase orders and consolidated service invoices and statements, electronic fund transfers, financial information reporting and transfers of government notices. Current Western Australian legislation does not directly address the move towards a digital world, which is critical from a commercial perspective. It therefore creates legal issues relating to the use of digital information as evidence, particularly over time, as well as issues of access.

Authenticity of digital information

35.12 One pressing issue affecting the use of digital information and records at law is the concern about the authenticity of the data. As stated in Chapter 20, in Western Australia the rule against hearsay applies to business records, unlike the law elsewhere. This is because in Western Australia business records still are excluded as only a 'second-hand' account of what is recorded in them. Should the reforms we recommend be adopted, business records and other digital records would become an exception to the hearsay rule in Western Australia. It is therefore worth inquiring into how well the exception has worked elsewhere. In the early days of computing, computer programmers were called at trial to testify that the computer printouts tendered in evidence accurately reflected the ultimate facts for which they were introduced as proof. After computers became commonplace, courts and litigants became complacent and tended to assume that computer records were accurate. However, at the same time, it seems that both continuous custody of the records and credible anti-tampering security procedures were lacking. 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.

35.13 A range of technological solutions is currently available to address these issues and could be legislated for, along with a framework for addressing other issues raised by electronic dealings. However, rather than a comprehensive response, a minimalist approach at this stage would enable the jurisdiction to deal with the urgent issue of authenticating digital records while also allowing it to gradually specify, develop and implement the required regulations, rules, policy and other details required to make the whole system work. It would allow for accommodation of improvements and updates in relation to technology and other initiatives, especially those which may occur elsewhere. Once better means of preserving the authenticity of digital information is in place, there is no reason why digital information should not be given the same evidential credibility and weight as paper or other forms of communication.

427. An Electronic Dealings Framework Act should be enacted in Western Australia. It initially should cover only essential matters like the urgent issue of authenticating digital records.

428. The Evidence Act recommended at No. 221 should ensure that digital representation of information is given the same evidential credibility and weight as paper and other forms of communication.

Digital records as 'best' evidence

35.14 The precise status of digital-only records for legal purposes is currently unclear. The simplest interpretation of the current situation is that only

evidence in physical form is acceptable in the legal system. Current wisdom is that if an electronic transaction, such as an email or operational on-line computer dealing, must be kept for evidentiary purposes it should be printed and maintained in paper form. As business becomes more automated and electronic this option will become less feasible. If proper safeguards for the authenticity of digital data are implemented, information in digital form, rather than a paper version, should be regarded as the best evidence available.

429. The new Evidence Act of Western Australia recommended at No. 221 should incorporate sections to accommodate evidence (of all types) in digital form — allowing digital evidence to be accorded such 'best' evidence status as is required.

Maintaining digital records

35.15 Issues associated with the maintenance of information stored in electronic form for historical record-keeping and archiving purposes have been raised by many organisations around the world, particularly libraries. Of specific concern is the maintenance of the integrity of materials. Unlike paper, where preservation of the artefact is preservation of the information contained in it, electronic information is easily transferred from one medium to another. These issues impact on the ability of the justice system to refer to historical materials in the pursuit of justice.

430. Legislation and policy should be enacted to ensure electronic materials are properly maintained for historical purposes.

Electronic filing

35.16 The approach of retaining current court forms and replacing the paper with an electronic photographic image is the simplest and most expeditious means of electronically communicating with the 'external' world. It reduces storage requirements considerably. Unfortunately this approach does not allow any systems to be implemented that provide one of the advantages of electronic interactions: computer-readable documents that can interact with computer based systems. For example, if digitally entered, a document giving notice of an upcoming hearing could interact with computerised calendaring software. Electronic Data Interchange (EDI or 'messaging') has the potential to radically improve the operations of the 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 back to the sender as well as to other parties involved in the matter.

35.17 Recent work in Western Australia has identified XML (Extensible Markup Language) 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 information transfer with the private profession and individuals or parties. XML offers the advantage that it can operate with the lowest 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. (Refer to the Justice Information Exchange recommended in Chapter 27.)

431. Information transfer systems using XML in standard structures and formats should be rapidly implemented for the entire justice system, as defined by the Justice Joint Agency Office recommended at No. 425.

Digital representation of evidence

35.18 The use of digital technologies to represent situations, events and objects as evidence may have substantial benefits for the justice system. The requirement to physically move objects of evidence from one location to another, to adequately store the evidence at the various locations, and to transfer control of the object from one person to another, increases the likelihood of evidence being lost, damaged or mishandled. It also increases costs. If the object was digitised, the original physical object of evidence could be securely stored in a single locked location until required in court, if at all.

432. An integrated digital evidence management system, used by the Western Australia Police Service, DPP, courts and defence counsel, should be implemented.

433. Legislation should be enacted or amended to allow digital renditions of evidence to be used in court, by consent of the parties.

The courtroom as a digital environment

35.19 The use of digital representation technology in Western Australian courtrooms has already commenced with both closed circuit television and video-conferences. In December 1995, the Video Technology in Courts Steering Committee was established to oversee the development and implementation of video technologies. A number of video-conferencing systems have since been installed in selected courts and a remand centre. Legislation establishing safeguards enables a significant amount of court work

to be effected by video: see the *Acts Amendment (Video and Audio Links) Act 1998* (WA). With increased access to video facilities, there should be:

- reduced travel costs for the State and other parties;
- better access from regional locations; and
- enhanced communication between city and country personnel in the justice system.

The future of case management

35.20 Courts are increasingly adopting case management practices in order to manage the workload and complexity of court administration. In particular, differential case management, which allows for differentiated treatment of certain categories of cases, as recommended for civil matters in Chapter 9, can assist in the maximisation of judicial and staff resources in addition to other potential benefits. To work effectively, the implementation of case flow management requires information technology support for a variety of functions including registration, definition of case flow, milestones and tracks, monitoring and reporting against milestones, and maintaining statistics. In terms of efficiency it is essential that the case flow management system is integrated with other information systems such as court registries and listings.

35.21 As also indicated in Chapters 9 and 27 on case management, there is some evidence that costs, for at least some cases, may increase as a result of the adoption of case management procedures. The implementation of appropriate technological support should provide sufficient management information concerning the operation of the court so that the costs and benefits in relation to the implementation or reform of the system of case management can be assessed.

434. All courts and other justice related jurisdictions should implement a single consistent advanced computerised system. Such a system should record all details of cases and their status as they progress through the courts, providing management information to assist in improving court operations.

The virtual courtroom

35.22 Some court rooms currently operating in Perth have the capacity to be 'total digital environments', enabling access to:

- electronic presentation of almost any document/exhibit/ computer-generated enactment or video application;
- court computer systems;
- Internet services; and
- digital recording systems.

35.23 In the longer term, the concept of a completely 'virtual' courtroom may be implemented, whereby the parties, the judge and other support staff would not physically be in the courtroom. Rather the hearing would be held by linking the various participants by only electronic connections. Whether such a scenario eventuates will depend more on the social and psychological needs of the justice system participants than the available technology. Indeed, much of the required technology is available now and is used by many large corporations. The potential to save the time and costs associated with having counsel and others wait in court rooms before their matters are called, by itself, is considerable.

35.24 Significant issues need to be addressed before embarking on the use of all available video technologies in court. Video systems are currently expensive to install. There is a need for court officers to develop the skills required to operate the modern technologies. The more abstract issue of the remoteness or 'virtualness' of exchanges by video presents other questions. Will a sentence for a serious offence have the same impact if delivered by video as compared to a judge addressing the offender in open court before affected families and friends and members of the public? Anecdotal evidence indicates that for certain witnesses video was effective: parties could focus on the evidence in addition to options, such as a 'close-up' on the face of the witness in order to better observe facial expressions. Ambivalence about the benefits of the use of such technology currently is reflected in the *Acts Amendment (Video and Audio Links) Act* referred to previously. It allows the court to order a video appearance or sentence as long as it is in the interests of justice to do so. Parties are able to present their arguments for and against orders for presentations. We recommend further research be conducted.

435. Further research should be conducted into the likely impact of video technologies on individual participants and on the quality of justice that ultimately results.

Self-represented litigants

35.25 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. Costs constraints should not mean that the needs of self-represented litigants are placed last in the list of priorities. Typically it is more expensive to build systems for the totally inexperienced than it is to build them for those who have had extensive training and who use the system all the time. Will we find that lack of funding by the Government will disadvantage precisely those for whom the justice

system should provide equity? This is an extremely vexing area, which is currently under consideration in relation to legal aid, criminal representation and many other justice related issues raised by this Report. The point to be made is that the technological area is not immune from such considerations.

436. All technological systems implemented in the justice system should have facilities to allow self-represented litigants to participate on an equal basis with all other parties.

Technology and the justice system

35.26 Technology can assist in the attainment of justice. It can connect — and efficiently connect — the components of the justice system. It can assist in measuring the effectiveness of the justice system, allowing more fine-grained monitoring and control of the system. These functions may assist in allowing the justice system to respond more readily to community needs. On the other hand, technology may be used as an oppressive means of continuing the distinction between those who are empowered within a technologically sophisticated society and those who are not. The technological advances that are implemented must be wisely selected to advance the ends of the justice system and not subsume them.

36

The Legal Profession

The legal profession

36.1 The day to day work of lawyers is increasingly diverse. A lawyer may be a partner in a large firm or a sole practitioner. He or she may work outside a legal firm altogether: in accountancy, business, a community legal centre or a government department. Lawyers may specialise or have a general practice. They may be involved in tasks such as conveyancing or may appear in court on a daily basis. Indeed, the assumption that lawyers practise in the courts is out of date. The centre of gravity for the typical lawyer's world is the office. This fact influences how lawyers behave in court.

36.2 Lawyers' experience and behaviour in the resolution of disputes also are more varied than sometimes assumed. For example, the procedures used in different Australian courts vary, as well as differing considerably from those used in the past. Similarly, more legal controversies are resolved within tribunals than within courts. Most tribunals have procedures which are less adversarial than courts. (See Chapter 33.) No matter how varied lawyers' practices are, however, all practitioners are bound by legal professional ethics.

What are legal ethics?

36.3 Lawyers' ethical duties divide into two sets: lawyers' duties to the courts and lawyers' duties to their client. When the two sets of duties conflict a lawyer's duty to the court comes first.

36.4 Legal ethics in Western Australia are based largely on the assumption that the legal system is adversarial. Because it is assumed that courts play a passive role, courts are not funded on anything like the scale which would enable them to take on the responsibility for the investigation and conduct of

cases. This in turn makes courts heavily reliant on lawyers — if parties are legally represented. Courts rely on lawyers not to:

- actively conceal relevant information;
- mislead the court;
- make unfounded allegations about third parties; or
- commence cases without legal merit for the sake of some related benefit for their client or themselves.

Courts also rely on lawyers' skills, particularly in cross-examination, to reveal the weakness of the opposing party's case. Legal ethics are supposed to ensure that the courts' reliance on lawyers is not misplaced. However, codes of professional responsibility, including legal ethics, are expressed in general terms. This leaves a considerable amount of discretion with practitioners as to whether the code applies in particular circumstances.

Enforcing legal ethics

36.5 Most lawyers' duties are legal as well as ethical. Duties to the courts can be found in:

- the rulings of superior courts in cases involving professional misconduct;
- cases about whether to order costs be paid personally by a lawyer;
- the law on abuse of process or contempt of court; and
- decisions about lawyers' immunities and procedural matters.

Duties to clients are derived from statute law, common law and equity. Particular duties to clients may be found in contract law through implied terms in the contract of retainer, or in equity through the construction of the lawyer's obligations as fiduciary.

36.6 Because lawyers' duties are ethical and legal, the enforcement system is spread between professional and regulatory bodies, such as the Law Society, Bar Association, Legal Practice Complaints Board and the courts. There is no clear division between their roles. There is little which explains the principles of punishment for breaches of legal ethics. Whether it is the duty of the regulatory bodies or the courts to deal with any breach it is almost always lawyers who review the conduct of other lawyers. Indeed, it did not go without public comment that our own Commission included no lay people.

Problems with the justice system

36.7 Some critics lay responsibility for the problems of the justice system solely at the feet of the legal profession. Others assert the system itself has produced the present problems, not least of which is a growing dissatisfaction with the system. Wherever the fault lies, and there is likely to be more than one cause, the public submissions we received reveal a serious public disillusionment with the legal profession. In this Chapter we examine the

role of the legal profession in the criminal and civil justice system of Western Australia.

Ethics and public accountability

36.8 Complaints against lawyers in the public submissions we received range widely: from the legal charges for photocopying to the treatment of child witnesses in court; from lawyers' failure to respond to correspondence, to the content of their correspondence; from withdrawing from cases to drawing them out unnecessarily. Individual grievances, in part, may be attributable to a failure by lawyers to adequately explain their conduct to their clients. Lawyers may be able to do much to alleviate dissatisfaction on a personal level by keeping clients reasonably informed of the status of their matters, promptly complying with requests for information and assisting clients to make informed decisions about the conduct of the litigation. It is, however, the broader issues raised by these complaints which are the focus of our recommendations in this Chapter — issues of the adequacy of lawyers' ethics and the perception that the profession is insulated from answering to the wider community. Criticism of the cost of legal services is raised within both contexts. Although legal costs are dealt with in detail in Chapters 16 and 31, in this Chapter we examine the broader impact of changes in the legal profession on legal costs.

An increasing commercial orientation

36.9 At the same time as the lawyer's office assumed a greater significance for legal practice, the self-image of law firms shifted towards an increasingly commercial orientation. The result has been for commercial pressures on many lawyers to mount. Partners compete with other partners to demonstrate their worth to the firm. Junior solicitors struggle to reach budget targets so that their partnership prospects increase. The key component in legal fees charged to clients is usually the 'billable hours'. Lawyers charge for every six or 10 minutes of time spent working on a client's case. Time based charging has only been a feature of legal practice in Western Australia since about the early 1980s.

'Billable hours'

36.10 Timesheets are now kept in almost every legal firm. Two of the main performance indicators of solicitors are 'fees rendered to budget' and 'fees recovered to budget'. In Western Australia most costs agreements entered into between solicitor and client require the client to pay for the time spent on the case by the solicitor. These costs agreements are based on the premise that the fees allowed in the scales of costs are insufficient. Time based agreements:

- are likely to involve a conflict between the duty of solicitors to their clients and their own self-interest;
- are apt to reward the inefficient;
- lack anything that shows the appropriateness of the person for the work

— for example, a more junior practitioner may well have been able to adequately complete the task; and

- may encourage lawyers to 'over-lawyer'.

The obvious concern with a system based on billable hours is that it provides an incentive to undertake unnecessary work and to maintain inefficient ways of doing necessary work. Reducing the focus on time-costing is consistent with our recommendations, in Chapter 16, to have capped costs and lump sum costs awards.

Early settlement of disputes and legal costs

36.11 There is an assumption, evident in the public submissions, that when a lawyer makes money according to the amount of time spent on a matter, there is a strong economic disincentive for the lawyer to settle matters expeditiously. This situation puts the current legal charging practice in opposition to the objectives of this review: to cut costs and delay. The sentiments expressed in public submissions against members of the legal profession often reflect a realisation of the actual conflict of interest that underlies current billing procedures by lawyers in private practice which create disincentives for the early or prompt resolution of matters.

Understanding legal costings

36.12 The ALRC (1999g) stated in its submission to us that 'there is much to be done within the profession and the public to generate a better understanding of the basis for costing and purpose of legal services.' We believe a review of legal costings undertaken in consultation with all relevant parties and the public could be an important first step in improving communication.

437. The legal profession, in consultation with those responsible in the courts for the assessment of legal costs together with members of the public, 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.

Legal ethics and public accountability to the public

36.13 Beyond the 'ethics' of legal costings, lawyers' ethics raise a variety of issues in practice.

- There remains uncertainty over what conduct by lawyers amounts to an abuse of process and, in particular, what prospects for the success of a court action justify commencing or continuing proceedings.
- The requirement that legal representatives do everything lawful and ethical on behalf of their client fails to take into account proportionality on behalf of a client.

- While there are general obligations not to waste court time and resources, there is little attention paid to the meaning of these obligations when lawyers act for well-resourced clients who can, in practice, pursue every avenue for tactical purposes without regard to the taxpayer. The tax deductibility of legal fees as a business expense aggravates this problem.
- Should there be different ethical standards depending on who is being represented and the nature of the dispute? For example, traditionally criminal defence lawyers, who represent defendants against the power of the State, are regarded as entitled to be partisan and zealous. Prosecutors, however, are supposed to act in a less partisan manner. Should civil lawyers have different ethical standards? How does the increasing presence of self-represented litigants affect lawyers representing the opposing side? Should all lawyers, including criminal defence lawyers, be required to see themselves primarily as agents of the justice system?

The ALRC is currently considering the adequacy of the present professional practice rules in Australian jurisdictions. Much of the emphasis is on providing better guidance to practitioners in an increasingly diverse profession, formulating adequate sanctions and disciplinary systems, and clarifying the role of the courts in disciplining lawyers.

438. A task force should be established, comprising representatives of professional bodies, the judiciary, the law schools, members of the public and the Ministry of Justice to examine:

(1) the adequacy of the present rules of professional conduct in light of the ideas outlined in this Report, the Consultation Drafts and relevant public submissions to this Commission; and

(2) the production of best practice protocols.

Legal defences

36.14 If lawyers are to become, at first instance, agents of the justice system, the goals of that system need to be made clear. One means of achieving this in the civil system would be to enshrine the goals of the justice system in relevant legislation and Rules of Court, as recommended in Chapter 3. It also is important that other parts of the justice system are not inconsistent with these principles. For example, in New South Wales, the *Barristers' Rules* have been amended so that lawyers will not be liable in negligence for contradicting a client's instructions and confining litigation to what they believe is 'the real issue' (*Barristers' Rules* (NSW)). Legal protection from negligence claims for thoughtful omissions needs to be developed if lawyers' conduct is to change.

439. There should be 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 civil justice system is said to rest.

Legal education

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.

Justice David Ipp,
Supreme Court of
Western Australia
(1995) 69 ALJ 790, 820

36.15 The issues relating to legal ethics require thorough examination. They arise, in part at least, as a result of the failure of the legal profession to give sufficient weight to ethical issues. There is a need to review ethics in light of the changing circumstances and values of our society. Legal ethics currently have only a minor place in the initial and continuing education of lawyers, although the review of continuing legal education proposed in the Law Society of Western Australia's strategic plan for 1998 to 2000 illustrates the increased emphasis on continuing legal education within the profession itself. Significantly, in light of recommendations made throughout this Report, continuing legal education can also serve the important function of informing lawyers of their changing professional and ethical obligations.

440. Legal ethics training should be required for students to obtain undergraduate law degrees. Attendance at legal ethics continuing legal education courses also should be required for practitioners in order to renew practise certificates.

441. A program of mandatory Continuing Legal Education should be established in Western Australia. Accredited providers should be obliged to include coursework on legal ethics and legal procedures.

A journal of legal ethics

36.16 We support the establishment of 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 could be 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 could 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.

Enforcement mechanisms

36.17 The existing deficiencies in the enforcement of legal ethics need urgent redress. In conjunction with the clarification of ethical duties, there also should be identification of relevant penalties — from striking-off powers

through to the option to order that costs be paid by the lawyer personally. A new penalty, similar to 'community service', also could be instituted where lawyers are required to undertake a specific number of hours of unpaid work. Perhaps most importantly from a public perspective, the regulatory bodies of the legal profession and of the law itself, such as the Law Reform Commission, should have a substantial representation of non-lawyers.

442. The mechanisms for enforcing ethical obligations should be made more effective and the range of penalties and the principles on which the penalties are to be imposed should be developed through consultation with the profession, the courts and the public.

443. For public confidence in both the process of review and its implementation there should be significant community representation in the membership of regulatory bodies of the legal profession and the Law Reform Commission.

444. In conducting its examination, the task force (recommended at No. 438) should consider the public submissions sent to the Law Reform Commission of Western Australia when conducting this review.

Legal qualifications

36.18 The suggestion that there be a limited right of practice based on limited legal training is one aspect of the National Competition Policy agenda. This concept has been developing since the reports of the Independent Committee of Inquiry, the Hilmer Report (1993) and the Council of Australian Governments Legal Profession Reform Working Group (1996). These recommendations were based on the application of what were described in the Hilmer Report as 'competitive conduct rules' to the restrictive practices of the legal profession. We oppose those recommendations. The recommendations presume, in our view wrongly, that areas of law can be discretely understood and practised. If implemented, it is our view that such recommendations would lead to a significant reduction in professional standards and service to the pubic in ways which the public cannot readily judge nor the market properly price.

37

Private Civil Courts

The adversarial system and publicly funded courts

37.1 It is usual for an adversarial styled legal system to have relatively minimal court fees. The idea is that the State uses public money to create the infrastructure within which disputes are litigated or settled. One justification for this use of taxpayers' funds is the public interest in the adjustment of legal norms to new ideas and circumstances over time. Another justification is that the courts are a civilised society's substitute for vengeance. Without State involvement, unfair or anti-social behaviour would be used to settle grievances. But how fair is the adversarial system? While adversaries may be required to settle their disputes within the framework of the judicial system, nothing ensures that they have equal access to legal assistance, information concerning issues in the case, or funds.

37.2 One potential advantage of a co-existing privately funded civil court system is that while the court costs would be much higher to cover court infrastructure and personnel, lawyers' fees may be lower. This is the logic behind a move towards an inquiry model of justice — where funds are directed towards a more active role of the courts there will be less reliance on, and role for, legal representatives.

Why have private courts?

37.3 The State is obliged to ensure that all citizens and lawful organisations can enforce their rights and defend their liberties in courts of law. This has promoted a view that the State should have a monopoly on the provision of justice which requires heavy subsidisation by public funds. An alternative is to acknowledge the obligation to ensure civil justice — but to reframe the State monopoly confining it to the imposition of lawful force only. There is, after all, usually only a limited public interest in civil litigation.

37.4 If this approach is accepted, one option is the co-existence of non-State civil justice providers as well as the State courts, with both relying on State enforcement of their decisions. This would strike a new balance between public benefit and private gain in civil cases. The public benefit will derive from the development of civil common law and the availability of a dispute resolution system that deters anti-social or violent alternatives. However, access to private courts for a fee also implicitly acknowledges the element of private gain which often is the result of using the civil legal system.

How would private courts work?

37.5 Private organisations could be licensed to provide court services in certain matters up to the jurisdictional limit of the Supreme Court. The adjudicating officers would need to meet qualification standards. Legal obligations relating to natural justice, confidentiality and the avoidance of conflicts of interest would also be imposed. Appeals from the decisions of private courts would be to the District Court or a single judge of the Supreme Court, depending on the amount involved. Procedural fairness in private courts also could be subject to judicial review by the Supreme Court. Judgments in private courts would be enforced by registration in the appropriate court of civil jurisdiction depending on the amount involved. A private court could decide its own costs regime.

445. A pilot project for the establishment of parallel private civil courts should be commissioned.

The limits of private courts

37.6 The jurisdiction of a private court should arise out of informed consent by both the parties, possibly through a contractual term before the dispute arose — in much the same way that arbitration clauses operate now. To ensure that the jurisdiction of the private courts only arises out of circumstances where there is genuine consent, relationships where there is a significant power differential should be excluded from private court jurisdiction. This is because undue pressure may be brought to bear on less powerful parties to agree to litigation in a private court and thereby to forego some of the existing (and our recommended) procedural safeguards of the public justice system. For example, employers should not be able to require a private court dispute resolution involving workplace injuries in individual workplace agreements; insurers should not be allowed to include such a clause in personal insurance policies. The jurisdiction of private courts should serve interested parties with comparable bargaining power.

446. Private courts should have no jurisdiction where there is a significant power differential between parties, for example in matters arising between employees and employers or insurance claimants and insurers.

Public costs of private courts

37.7 The proposed private court system would be reliant on publicly funded enforcement mechanisms. Even if litigants from the private system did not need to resort to enforcement procedures, there can be no doubt that the effectiveness of any private court resolution would benefit from the availability of publicly funded enforcement. If access to such enforcement mechanisms was free, it would effectively be a public subsidy for the private, profit driven corporations which establish the private courts. Litigants seeking the benefits of the private court system should be required to contribute towards the cost of public enforcement from which they benefit.

447. Litigants should be required to pay a fee to the public court system on lodging any proceedings with the private courts, to reflect the benefit obtained through the availability of publicly funded enforcement mechanisms. An additional fee would be charged on registration and enforcement of private court orders.

Appendix 1

Acknowledgments

The members of the Law Reform Commission of Western Australia — Wayne Martin QC (Chairman), Robert Cock QC and Professor Ralph Simmonds — wish to acknowledge the contribution of our consultants and the project team:

Consultants

Jeremy Allanson
Carol Bathurst
Andrew Beech
Jennifer Chauvel
Michael Denis Cole
Craig Colvin
John Fiocco
Hon Edward Morrissey Franklyn QC
Floris Gout
Peter Hannan
Patrick Hogan
Jennifer Inkster
Narelle Johnson QC
Margaret Jordan
Anthony Karstaedt
Nuala Keating
Terry McAdam
Peter Marshall
Kenneth James Martin QC
Paul Mendelow
Michael Mischin
Nicholas Mullany
David Newnes
Professor Stephen Parker
Tom Percy QC
Dr Jeannine Purdy
Peter Quinlan
Wendy Ryan
Louise St John Kennedy
Gwenda Steff
Tony Sutherland
Dr David Tait
Hon John Toohey AC, QC
Assoc Prof William van Caenegem
Anthony Willinge

Project Team

Marion Brewer (Administrative Officer)
Lyn Auld
Brionie Ayling
Craig Bydder
Fiona Camarri
Jane Carr
Gillian Clark

Jeanne D'Arcy
Sean Dworcan
Ferdinand Gomes
Fiona Goswell
Siobhan Hey
Melanie Holden
Alma Kurtz
Danielle Leib
Jennifer Lim
Cheryl MacFarlane
Sylvia McCallum
Cathrine McIntosh
Ashleigh Murray
Marianna Papaliari
Lorna Paterson
Jeannie Read
Sean Redden
Mark Tulloch
Vince Turner
Anne Yardley
Naomi Yellowlees

The following individuals and organisations contributed to Project 92 by making submissions, attending a public meeting or assisting consultants who produced research papers for the Review of the Criminal and Civil Justice System. Others who wish not to be named also contributed to this report.

Philip Achurch
Richard Agar
Ailsa Allen
Commissioner M Allen, Ombudsman (WA)
Sue Allen, WA Child Protection Council
Catherine Allett
Sheila C Amsden, Legal Aid (WA)
Marcus J Anderson
D Anderson
Murray Anderson
David Andrews, Administrative Appeals Tribunal (WA)
Ross Annear
H Anstey
Belle Arnell
Claire Arnell
Sarah Arnell
John Arthur
Reverend Attila Balla
Sally Attwood, Lord Chancellor's Dept (London)
Carol Bahemia
Austin Bailey
Jo-Anne Bailey
Mila Bake
George Baker
Di Baker
Den Baker
Rob Banks
Nigel Barker
Michael Barnett, ALRC
Thomas Barnett, Deputy President, Administrative Appeals Tribunal (WA)
Maeve Barry
Paul Bartholomew, Disability Services Commission
Ted Barton
Peter A Bass
Ken Bates, Office of the DPP (WA)
Marion Beauyear
Mary Bell
Yvonne Bell
GI Bellamy, Attorney General's Dept (ACT)
Brian Bennett
ES Bew
Emilia Biemmi
David Bird
Robert Black, Stipendiary Magistrate
Lani Blackman, ALRC
HTJ Blakeley
BH Boeyboer
KM Boothman, Stipendiary Magistrate
Lisa Boston, Criminal Lawyers Assoc (WA)
Lawrence Boulle, National ADR Advisory Council
Christopher Boyle
Ivan Bozac
Robert Bradshaw, Northern Territory LRC
Denise Brayley
Master TR Bredmeyer CBE, Supreme Court of WA
Kathleen Brennan
Maureen Briggs
Kathleen Bronson

Charles Brookes
Douglas Brown
Clive Brown
Michael Brown
Ron Brown
Keith MCM Brown
Ivan G Brown, Stipendiary Magistrate
Joseph Buch
Jan Burgess
Chris Burke
D Burns
A Burrough
Amanda Burrows, Criminal Lawyers Assoc (WA)
RH Burton, Stipendiary Magistrate
David Burton-Woods
Bret Busby
K Butler
CL Caine
Margaret Calabrese
GN Calder, Stipendiary Magistrates' Society (WA)
Manuel Calzada
G Campbell, House of Representatives
D Candeloro
Robyn Carroll
Hon Justice C Carr, Federal Court of Australia
Stephen Carson
R Cavanagh
Adrian Chadwick
Paul Chadwick
John Chaney
Adam Chappell
Arthur Chappell
Narelle Chappell
Rosemary Charsely
Lisa Chighine
Patti Chong, Office of the DPP (WA)
Paul Chong
Laura Christian
Bobby Chudziak
Fernando Chugnak
AE Clark
J Clayton
ME Clayton
Frances Clogham
Peter Cock
Peter Cockson
RT Cole
Debora Colvin
Edgar Connor
Dr Elizabeth Constable, Legislative Assembly
Frank Cooper
John Cope
Marlene Cowan
Nathan Cox
Peter J Cox
Hon Ross Cranston, Office of the Solicitor General WA (England)
JS Cream
Mark Criddle
Helen Croasdale
Dr Kathryn Cronin, ALRC
Fiona Cross
F Crowley
Paul Crown
Christine Cuccaro
Dee-Anne Cuccaro
Jennifer Cuccaro
Michelle Cuccaro
Tony Cuccaro
Maureen Cuddy
Sean Cuddy
Brian Cunningham
Peter Daniel
Reverend George Davies
Dr Martin JS Davies
John Dawson
Christine Dawson
John Dean
Laurene Dempsey, Office of Ombudsman
Lyn Dias, Crown Solicitor's Office (WA)
I Dibden
G Difrancesco
Tom Dillon
Effie Dimopoulos
NE Dixon
Simon Dixon, Supreme Court of WA
Shawn Doherty
Don Douglas
John Down
Michael Drowns
Jim Duffield
EP Duffy, False Memory Association
FJ Dunstar
John Durey
Helen Dyer
P R Eaton, WA Bar Association (Inc)
Philip Eaton
James Edelman
Jim Edmondson

PM Edward
Anne Edwards
Kerry Edwards
Jean Edwards
John Edwards
Gabrielle Egan
Ken Ellis
Allan Ellis
Vic Evans, Insurance Comm (WA)
Jeanette Evans
Robin Faceuts
RA Fagents
Mal Fairclough
Scott Farris
Antoinette Fedele
Sheena Ferguson
Ray M Finlayson
Robert Fisher, Disability Services Commission
Dave Fitch
Dr Robert E Fitzgerald, Policy and Legislation, Ministry of Justice(WA)
Susan Flett
Martin Flynn,
Joe Forrest MA
Richard Foster, Court Services, Ministry of Justice (WA)
John Foster, Association of Consulting Engineers Australia
Kay Fraser
Hon Justice R French, Federal Court of Australia (WA)
Neville Friedman
Joanna Fung
Anna Furina
Donna Furina
Elia Furina
John Furina
Alison Gaines, Law Society of WA
Michael Garbin
Norma Garbin
M Garnett
David Garnsworthy
Jennie Gausten
Geoffrey Gell, Local Court of WA
Professor Hazel Genn, University College London
John Gerry
Hans Gersch
Michael Gething
RJ Gething, Stipendiary Magistrate
Guy Gibson
Natalie Gibson
Ralph Gielow
Anne Gisborne
JA Gleeson
Lindsey Glenn
Robert Glynn, Stipendiary Magistrate
J Gordon
Commissioner John Gotjamanos
Anne Grasser
HR Green, WA Police Service
Annette Green
Aroha Greenwood
Hannah Greig, Lord Chancellor's Department (London)
Bob Griffith
Desmond Grimmer
ZJ Gulish
Hon Judge IR Gunning, District Court of WA
BV Haddon
Alison Hagan
Robert D Hall
Hon Judge KJ Hammond, Chief Judge, District Court of WA
Franklyn C Hamsher
Brian Handcock
Peter J Hannan
Rohan Hardcastle, Associate, Federal Court of Australia (WA)
MJ Harding
Julia Harrison, Attorney General's Dept (NSW)
Laurie Hatch
Barbara Hatch
Richard Hatchett
Sonia Hawes
Todd Hawes
Julie Hawkins
Karen Hayne
Fred Haynes
Paul Healy
SA Heath, Stipendiary Magistrate
Hon Justice DC Heenan, Supreme Court of WA
Professor Laurie W Hegvold
Glen Helgelend
Dr Arthur J Hempel
Helen Henderson
Kevin R Herbert
M Herron
Caroline Hickling
S Hicks

Lizzie Hill
Giselle Hobbs
R Hobson
Kirsten Hoeft
Patrick Hogan, Legal Aid (WA)
Hon Justice M Holden, Chief Judge, Family Court of WA
Mr Hollander
Jack Holmes
John Holtoway, American Bar Assoc
Janice Hoover
Charles AO Horner
Jill Howieson
Shane Howlett
Brad Hucker
KP Hutchinson
David Imlah, Aboriginal Legal Service
JF Ingvarson
C Iozzelli
E Iozzelli
Hon Justice DA Ipp, Supreme Court of WA
Doug Irvine
Deenie Jacka
Hon Judge HH Jackson, District Court of WA
HA Jaensch
Rob Jago
B James
Bridget James
Colin James
L James
T James
Martin TF Jan, Registrar, Federal Court of Australia (WA)
Lee Jarman
Chantelle Jeans
Simon Jelly
P Jenkins
Joy Jesnoewski
J Johansen
Paul Johnson
Ben Johnston
Clayton Johnston
Michael Johnston
Rebecca Johnston, Administrative Appeals Tribunal (WA)
Margaret Jordan, Administrative Appeals Tribunal (WA)
Murray J Joyce
Rebecca Jury
Vic Justice
Helen Justice
Carol Kagi, Women's Policy Development Office
Colma Keating
Maxine Keeffe
Hannah Kendall
Paul Kennard
Hon Justice G Kennedy, Supreme Court of WA
Richard Kessell
Michelle Keys
Peta Kierath
John King
Steve King
George Kingsley, Registrar, District Court of WA
EG Kirk
D Kitching
Brad Kneebone
Peter Knight
John Knowles, Disability Services Commission
Kathy Krajcak
S Krysiak
T Krysiak
M Lakin
Megan Lam
J Langford
Wyn Langouland
Dr Gaye Lansdell
George Larkman
Peter Law
Geoff Lawrence, Office of the DPP (WA)
Paul Le Fort
E Leech
Alastair Leonard, Helena College
Karen Lewis
John Ley, President, Law Society of WA
John Lightowlers, Public Sector Management
R Lindsay, formerly Legal Aid Comm (WA)
Merinda Logie
Jo Lohrey
R Lovat
Steve Lowe
Paul Lucas, Legislative Assembly (Qld)
GJ Luke
Max Luscombe
Elisabeth Lynn, National ADR Advisory Council (ACT)
Ian MacFarlane
John Maguire
M Maguire

Steven P Mailey
Ian Main
Hon Justice DK Malcolm AC, Chief Justice, Supreme Court of WA
Kath Mallott
Jody Mancini
V Markovich
S Marks
Barry Marlow
Archie Marshall
Peter Marshall
Sarah E Marshal
Lloyd Martin
Rita Martin
Sian Martin, Public Affairs, Ministry of Justice (WA)
Ian Martin, former Deputy Chief Stipendiary Magistrate (WA)
Janet Martin, Registrar, Supreme Court of WA
Ian Martindale
David Martinu
John Robert Mascarenhas
Ian May
Joy McAloon
Kevin McAloon
D McCaffery, WA Police Service
Ann-Marie McCann
Frank McCarthy
Graham McCorry
Michelle McDiarmid, Sussex Street Community Law Service Inc
Karen McDonald, Helping All Little Ones
John McDonough, Court Services, Federal Court of Australia
Hannah McGlade
Annette McGready
Greg McIntyre
John McKechnie QC, former DPP
Peter McKerrow
Kevin McMahon
Gregg McMichan
Carol McPherson
Richard McPherson
Owen Meeks
Peter Mellor
Paul Mendelow
Bruce Menzies
Gavin Meraden
Julie Mercer
Brian Merritt, Family Court of WA
Leon Michaels
Ivan Miles, District Court of WA
Tom Miller
Robyn Millett
Pippa Minchim
David PA Moen
Gregory Mohen, Law Society of WA
Josephine Moir
Peter Money
RE Monger
Adam Moore
M Moore
Mavis Moore
Warren Moore
K Moore, Stipendiary Magistrate
Kevin Moran
Alexa Morcombe
Margaret Morgan
Steve Morgan
SL Moss
Adam Mucjanko
DF Muir
Mark Mullins, Attorney General's Dept (ACT)
Nick Murfett
G Murphy
Hon Justice M J Murray, Supreme Court of WA
Lyndy Murray, Office of the DPP (WA)
Rochelle Mutton
Dieter Nack
Sue Nack
Tatiana Naumova
Shannon Naylor
Trevor Newman
Beverley Newton
Hon Justice RD Nicholson, Federal Court of Australia (WA)
Elizabeth Nicholson
Medalla Nicklin
Marnie Noonan
AL Nottage
EA Nottage
Baron Nourish
Melanie Nye
L Nyman
Kate O'Brien, former President, Law Society of WA
J O'Dea
Paul O'Halloran
Margie O'Halloran
Patrick O'Neal

Hon Judge MDF O'Sullivan, District Court of WA
E Oakley
Shane Odea
Noel Olive
Dick Oliver
D Oliver
Mitch Orman
Kerry Ottobrino
Justice NJ Owen, Supreme Court of WA
Robin Parkes
Karen Joy Patterson
L Pavlinovich
J Pease
Steven Penglis, Law Society of WA
Shane Peterson
Angela Petros
Pauline Phillips, Victim Support Service
Lyn Phillips
AD Phillipson
The Hon Justice WP Pidgeon, Supreme Court of WA
Clare Pike
Catherine Pine
Martin Pinnell
Trevor Pinnell
Alan Piper, Director General, Ministry of Justice (WA)
D Pirie
Leonie Plant
HO Platel
Plowman
Joe Poland
Loretta Poland
Kyriacos (Kary) Politakis
KJ Porter, WA Police Service
Tony Power
C Roger Pratt
Helen Prince, Criminal Lawyers Assoc (WA)
Sheena Prince
Hon AKR Prince, Legislative Assembly
John Prior, Criminal Lawyers Assoc (WA)
Deane Prosser
Julia Prynne
Joel Puddey
S Purvis
P Quinlan
Margaret Quirk, National Crime Authority
France Radford
Shaun Ramsden
J Rando
Jeanie Read
Lynda Reavell
John Redgment
Barbara Reeves
Professor Greg Reinhardt, AIJA
Richard Reynolds
W Richards
James Richardson, Community Action Legislation Lobby
Margaret Richardson
David Roberts, Attorney General's Dept (ACT)
Julie Roberts
Lionel S Roberts
Len Roberts-Smith
Maureen Robinson-Dickes
Lisa Roche
Shane Rooney
Alan Rose, ALRC
Dean Ross
Rob Rowe
Hon BW Rowland QC, Parole Board (WA)
Wendy Ryan, Librarian, Supreme Court of WA
Hon Judge GT Sadleir, District Court of WA
Michael Said
Robert E Sammells
Anthony M Sampson
Wayne Michael Saunders
Rachel Schairer-Vertannes
Jeff Scholz, Office of the Cth DPP (WA)
John Schulz
Sandra Scott
Ron Scott
CL Searle
John Secker
Jim Shannon
EW Shannon
Ross Sharland
Noel Sharp
Dr Ruth Shean, Disability Services Comm
Mr Shenton
E Sheppard
H Sheppard
Julian Sher
G Sherwood
Sally Shine

Brenton Siviour, Forensic Accounting Special Interest Group
C Slater
Christine Slattery
Clive Small
Gordon Smith
Graeme Smith
John Smith
Karry Smith
Kevin Smith
Lorraine Smith
Peter Smith, Metropolitan & Country Bailiffs' Assoc
Rosemary Smith
Hon Justice T Smith Supreme Court of Victoria
Wayne Smyth
Warwick Soden, Registrar Federal Court of Australia
David Standen
Ian Steele, Institution of Engineers Aust
Greg Steinepreis, LEADR (WA)
Brooke Stephens
Justin Stephenson
Scott Stevens
Mark Stevenson
Hon Justice CD Steytler, Supreme Court of WA
Rodney F Stone
David Strang
Faye Strang
George Strang
Oliver Strang
Hon Judge M Strong, Country Court of Victoria
Murray Stubbs
S Suba
Tracey Summerfield
Milos Supljegla
A Sutherland
Matthew Swainston
Margaret Swaving
Lou Swaving
Max Szulc
Alex Tag
Carol Talbot
C Tan
Carolyn Tan
Andrew Taylor, ASIC
B Taylor
EV Taylor
Geoff Taylor
R Taylor
Deborah Templeman
Brian Tennant Australian False Memory Association
Jan Ter Horst
J Tevake
S Tevake
Stephen Thackray, Registrar, Family Court of WA
Anita Thick
Ray Thompson
Dorothy Thompson
Katheryn Thomson
Joshua Thomson
Tlipe Tlic
W Trevor Tobin
Rosa Tognela, County Women's Assoc
Lyn Tolliday
Carolyn Tomich
Joanne Tomkins
Joan Torr
Arthur Torr
Ron Troughton
John Tully
Glenn Turner
Haylie Turner
Jenny Turner
Stella Turner
A Turner
J Twiss
D Ullrich
Richard Usher, Institution of Engineers Aust
J Verkerk
Mike Vernem
Rose Vernem
Nick Vickery
Jim Vondeling
John Vulcovich
Helen Vulcovich
Julie Wager
Ben Walker
M Wallace
Kristen Wallwork
June Walmsley
Dr KC Wan
Janine Ward, Attorney General's Dept (ACT)
CM Ward
Jamie Ward
J Warrick
R Washing

Anna Wasylkewycz
MJ Watson
Judy Watson
Michael J Watson
P Watson
Bev Watterson
Michael Watterston
Kevin Waycott
Peter Wayte, Crown Solicitor's Office (WA)
Lucy Webb, Occupational Therapy Services
Professor David Weisbrot, ALRC
Dallas Weller
BJ West
Willie Westlake
Peter Weygers, President, Council of Civil Liberties (WA)
Hon Justice CA Wheeler, Supreme Court of WA
Mr Whitbridge
Evan Whitton
Leon Wilken
Christopher Williams, Sussex Street Community Law Service Inc
Mark Willia
Daryl Willis
William P Wilson
Bruce Wilson
Stephen Wilson
William P Wilson
Marlene Winfield, National Consumer Council (London)
Doug Wise
Margaret Wise
CJ Worthington
Robert Wright
Professor Ted Wright, Justice Research of Australia
RW Wylde
Lisa Wyman
Hon Judge MA Yeats, District Court of WA
John Young, Crown Solicitor's Office (WA)
Grahame Young
B Zimmermann

Appendix 2

Glossary

Term	Definition
AAT	Administrative Appeals Tribunal. A statutory body with powers to review government decisions, usually by conducting 'merit review'. This means matters are fully reheard and the tribunal can substitute its own decision for that of the original decision-maker.
ABS	Australian Bureau of Statistics.
Ad hoc	For this purpose, without consideration of wider application.
Administrative review	Review of the processes, powers and decisions of government bodies, usually with the review body making the decision afresh. To be contrasted with judicial review.
ADR	Alternative Dispute Resolution — various methods by which parties attempt to resolve their dispute with the assistance of a neutral third part. An alternative to formal litigation in the courts. Includes mediation.
AIC	Australian Institute of Criminology.
AIJA	Australian Institute of Judicial Administration.
ALRC	Australian Law Reform Commission.
Appeal book	A collection of copies of all relevant documents from the original hearing prepared by the appellant for consideration by the appeal court.
Appellate jurisdiction	The jurisdiction of courts to hear appeals. Each court deals with different classes of appeals, so that the appellate jurisdiction of courts varies from one to another.
Appellant	The term used to refer to the party initiating an appeal.

Applicant	Person applying to the court — proposed in this Report to replace the term 'plaintiff' in civil cases.
Application to strike out	An application made to the court to disallow an opposing party's case statement (pleadings) on the basis that it does not reveal any case to answer, is frivolous or vexatious or on other grounds
Arbitration	Where the parties agree to the selection of a neutral third party, the arbitrator, who determines the outcome. Unlike other ADR processes, arbitration results in a determination by the arbitrator which is potentially enforceable.
Attorney General	The principal legal officer of the Crown or State.
Bar Association	The Western Australian Bar Association, an incorporated association whose members are legal practitioners who practice exclusively as barristers.
Barrister	A lawyer who works in the court or gives opinions and who only takes work from other legal practitioners. Also known as 'counsel'.
Case management	The system implemented in the courts by which court officers or judges supervise the progress of cases from inception to trial. Supervision may include orders specifying a timetable for performance of major steps in a case, determining which steps are to be taken and active supervision of compliance.
Case management conference	Used in this Report to refer to a conference to assess the suitability of civil cases for referral to ADR.
Cause of action	The facts which give rise to a right by action.
Certified practitioner	A person who is on the roll of legal practitioners kept by the Supreme Court and who holds a current practising certificate as a barrister and solicitor.
Challenge for cause	An objection to a potential juror where the party objecting is required to give reasons.
Chattels	Physical personal property, such as computers or cars.
Class Actions	Procedures where a number of applicants (plaintiffs) are grouped together for the purposes of determining a dispute against a particular respondent (defendant). The group can be described by reference to applicants with certain characteristics rather than listing all the applicants by name.
Clear-up rates	The rate at which police identify and apprehend persons accused of committing crimes.
Committal hearing	Refer to 'Preliminary hearing'.
Common law	Generally used to distinguish 'judge-made law' from parliamentary legislation, known as statutory law. Can also be used to refer to systems of law based on the English model and distinguished from mainland European 'civil law' systems.
Community Based Corrections Officer	Ministry of Justice position which oversees the management of community based supervision orders e.g. parole.

Complainant	A person who commences civil or criminal proceedings. This Report proposes that complainants in civil proceedings should be known as 'applicants'. In criminal proceedings complainants are police officers or other officials who 'swear' the complaint which initiates criminal proceedings.
Complaint	May refer to a civil or criminal legal grievance, includes the form for initiating criminal proceedings under the *Justices Act.*
Conciliation	A process for settling disputes, particularly industrial, whereby a neutral third party attempts to bring the parties to an agreement. Although they play an active role, the conciliators must not impose their own views or terms on the agreement.
Concurrent sentence	A term of imprisonment imposed for one offence to be served at the same time as a prison sentence imposed for another offence.
Contingency fees	A method of paying legal fees usually based on lawyer's entitlement to recover a percentage of any monies paid to a party successfully represented by the lawyer.
Costs in the cause	Costs in a preliminary matter to be awarded to the party who is ultimately successful when the case or 'cause' is concluded.
Counsel	Another term for barrister.
Counterclaim	A grievance argued by the respondent against the applicant which could have been raised independently but is brought within an existing lawsuit for convenience.
Court of Criminal Appeal	Full Court of the Supreme Court sitting to hear appeals under the *Criminal Code*.
Crime	Conduct which violates the rights of the community at large, punishable by recognised criminal sanction upon proof of guilt in criminal proceedings generally initiated and prosecuted by offices of the State or its agencies or on admission of guilt.
CRC	Crime Research Centre.
Criminal Injuries Compensation	Compensation payable to the victims of crime as a result of the enactment of legislation establishing a Criminal Injuries Assessor. The Assessor determines the existence and extent of criminal injuries on the basis of the balance of probabilities.
Cross-examination	When a witness for one party is called by the other party or his or her legal representative to give evidence. Unlike evidence in chief, leading questions may be asked in cross-examination.
Defendant	A person against whom either criminal or civil proceedings are brought. In civil cases we propose that this person be known as a 'respondent'.
Deposition	The written record of the testimony of a witness and the defendant, if he or she elects to give evidence, at a preliminary hearing.
Director of Public Prosecutions (DPP)	A State government funded agency a fundamental objective of which is to bring to justice those who commit offences. It has a discretion to determine whether charges ought to proceed having regard to whether there is a case to answer and what is in the public interest. The DPP prosecutes all criminal charges in the District and Supreme Courts.

Disbursements	Money paid out. Often used to refer to additional costs, other than fees, incurred by legal practitioners in representing litigants.
Discovery	The pre-trial procedure available to parties in civil proceedings which enables them to compel others to make available a list of documents in their possession. We propose significant changes to this procedure and that it be known as 'disclosure'.
District Court	The District Court of Western Australia has jurisdiction for civil disputes up to $250,000 and for personal injuries matters without limit.
DPP	Director of Public Prosecutions.
Duty counsel	Legal practitioner, employed by Legal Aid or other service, available in the lower criminal courts to provide free legal advice and limited representation to self-represented defendants.
Early neutral evaluation	A process that is used at an early stage, where the parties to a dispute present argument to a neutral third party and a determination is made about key issues of the dispute.
Ejectment	Common law action to recover the possession of land and seek damages.
Entry of appearance	A formal process of filing a document by which the respondent gives notice to the applicant that he or she intends to contest the applicant's claim.
Equity	The body of law originally developed by the English Court of Chancery. Traditionally distinguished from the laws and process developed through other courts which were considered overly legalistic with a tendency towards harsh and unjust results. Currently only higher courts exercise equitable jurisdiction.
Evidence-in-chief	The evidence led by a party — to be contrasted to evidence obtained through cross-examination.
Ex officio indictment	A written accusation stating the defendant has been charged with an offence to be trialled by jury given 'by virtue of the office' of the DPP — that is, at the discretion of the DPP.
Ex parte	On behalf of. Where one party makes applications in proceedings in the absence of the other party.
Expert appraisal	Where a third party with expert knowledge about the subject matter of the dispute investigates the dispute and provides advice.
Facilitation	Where the neutral third party, usually working with a group, has no advisory or determinative role.
'Fast-track' committal	Where a person charged with an indictable offence pleads guilty after viewing a statement of the material facts relevant to the charge and copies of confessional material, and the matter is remitted to the superior courts for sentencing.
Felony	Originally applied to common law offences punishable by the giving up of all the defendant's property; a denial of the right of inheritance; and the death penalty. The

	term now refers to more serious crimes such as murder or armed robbery but is not subject to the same punishments as defined felonies at common law.
Filing of entry for trial	Once the court is satisfied that all aspects of preparing for trial have been completed satisfactorily, parties can apply to have the case listed for trial.
Hand-up brief	The brief that the prosecution prepares in indictable matters consisting of a copy of each witness's written statement that the prosecution is proposing to tender in evidence in the committal. It is not intended to, and usually does not, comprise a comprehensive disclosure of the case the State will present at trial.
Hearsay	Material tendered in evidence as proof of the truth of facts stated by a person not called as a witness.
High Court of Australia	The most senior judicial tribunal in Australia. Appeals from the Supreme Court are only allowed with the grant of special leave by the High Court.
Implied assertion	Relevant to the hearsay rule. An example of an implied assertion is a statement such as 'Hello Mary'. The statement does not assert that Mary was present at the time it was said as would the statement 'Mary was there', but it implies that she was. In terms of the rule against hearsay, an implied assertion is regarded as more reliable than a direct assertion.
In camera	In private; excluding the public from judicial proceedings.
Indemnity costs	An award of costs against the losing party to indemnify the winning party for all but unreasonable costs incurred in the litigation. Can include costs above scale rates. Normally used as a sanction.
Indemnity principle	Like the 'loser pays principle', the losing party will pay the winning party for costs reasonably incurred in the proceeding. Rarely in practice an 'indemnity'.
Independent Bar	Although all certified practitioners in Western Australia are admitted as barristers and solicitors, the Independent Bar consists of lawyers who practise only as barristers and who only take work from other legal practitioners.
Indictable offence	Criminal offences of a more serious nature which are usually dealt with by a judge and jury in either the District or Supreme Court. In some instances, an election may be made to have an indictable offence dealt with summarily — in the lower courts without a jury, or by a judge alone in the higher courts.
'Individual docket system'	The case management system implemented in the Federal Court, with a judge being allocated management of a case from commencement to conclusion. It provides for directions, procedures and listings that are individually tailored to the case, at the judge's discretion.
Informations	Documents which contain the details of criminal charges of which a person is accused. Another term for the 'Complaint' used to commence criminal proceedings in the Court of Petty Sessions. The equivalent of indictments in higher courts.
Injunction/injunctive relief	Court orders which either restrain a party from doing, or compel him or her to do, a particular thing.

'Interest-based' mediation or dispute resolution	A form of dispute resolution concerned with reconciling the parties' underlying interests as opposed to determining which one is 'right'.
Interlocutory processes or procedures	The various steps which take place between the commencement of a case and trial; matters incidental to a case and not finally determinative of the outcome.
Internet	Short for the 'International Network', the Internet is a linkage of computers joined by telephone lines and fibre-optic cables.
JJT	Juvenile Justice Team.
JP	Justice of the Peace.
Judicial review	Review of legal determinations by the courts — may be applied to the review of governmental determinations if those determinations raise issues of law.
Judge	Judicial officer of the higher courts (District and Supreme) — different to magistrates who sit in the Court of Petty Sessions and Local Court. Note however, the term is not always strictly applied and can be used to include magistrates also — as often meant by 'trial judges' or 'judicial officers'.
Judgment by consent	Where both parties agree to the decision of the court.
Judgment by default	Where a plaintiff obtains judgment in his or her favour because of the defendant's failure to defend the complaint.
Judgment: summary	A procedure where the court gives one party judgment without proceeding to a full trial. Evidence is on affidavit.
Jurisdiction	Refers to the authority conferred on a particular court to 'adjudicate' or decide a dispute.
Justice of the Peace (JP)	Person appointed by the State to be a justice within a certain area. In most States except Western Australia justices of the peace have had their judicial functions reduced and now only have powers in relation to bail applications.
Juvenile Justice Team (JJT)	A diversionary procedure for the victims of juvenile offenders to negotiate with the offender and his or her family to achieve an outcome satisfactory to all. The victim's consent is required to any proposed outcome of a JJT process.
Leading question	A question which suggests the answer being sought.
Leave	Permission — as in 'leave of the court is required to appeal'.
Legal Professional Privilege	The rule of evidence according to which certain communications between a client and his or her legal adviser cannot be produced in evidence.
Listing conference	Presently, conferences held shortly after a matter is entered for trial or application is made for a hearing date. The listing conference is held before a judge in chambers. The judge may review documents, enquire about settlement, establish which documents can be admitted into evidence by consent, the number and availability of witnesses, the time their evidence will take and so on. The judge may also determine any question of

	law or procedure. We propose that listing conferences continue to be held in the higher courts, but only be available in lower court matters in exceptional circumstances.
Litigation	A lawsuit, in which the court is umpire.
Local Court	The Local Court of Western Australia has jurisdiction with regard to civil disputes to a maximum value of $25,000 in the General Division, $3,000 in the Small Disputes Division and rental matters to the value of $6,000 in the Residential Tenancy Division.
'Loser pays'	A presumption that a winning litigant's taxed legal costs incurred in the litigation will be paid by the loser. In fact, it is only a partial indemnity, and the 'winner' may still be liable for substantial costs.
Magistrate	Judicial officer in the Court of Petty Sessions and the Local Court.
Mediation	Where the neutral third party (sometimes referred to as the 'neutral') has no role to advise the parties or determine the outcome.
Misdemeanour	A crime for which the punishment at common law was a fine, imprisonment or both.
Natural justice	Also referred to as procedural fairness - administrative law principles based on fair treatment which includes a right to be heard and the unbiased nature of the tribunal.
Neutral	The neutral third party who conducts alternative dispute resolution processes, for example, a mediator, conciliator or arbitrator.
'No-costs' jurisdiction	A jurisdiction in which the court generally makes no order as to costs, effectively each party bearing his or her own costs irrespective of the outcome of the case.
Nolle prosequi	A decision by the State not to proceed with prosecution under an indictment. It is not an acquittal and the case may be reopened at a later date.
Originating motion	One of the processes used to commence civil proceedings in the Supreme and District Courts. Used for proceedings which are not commenced by writ or heard in chambers. Includes appeals and contempt proceedings.
Originating process	A term used to refer to the various kinds of forms which must be completed to commence an action in the courts.
Originating summons	One of the processes used to commence proceedings in the Supreme and District Courts, is meant to provide a simpler and shorter means of dealing with matters in which the facts are not significantly at issue. Contains a concise statement of the nature of the claim made. Used in civil matters which may be heard in chambers or for issues relating to estates or the construction of statutes etc. Usually tried on affidavit and without pleadings.
Peremptory challenge	An objection to a potential juror where the party challenging is not required to give reasons.
Peruvian Guano test	The test for discovery of all documents which may directly or indirectly enable the party seeking discovery to advance his or her case or damage that of his or her adversary. The name comes form the case in which the test was established — *Compagnie Financiere Du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55.

Plaint	The process used to commence civil proceedings in the Local Court.
Plaintiff	The party who brings a case in civil proceedings. We propose that plaintiffs now be known as applicants.
Practising certificate	A certificate issued annually to a legal practitioner by an appropriate authority entitling the holder to practise law for the forthcoming year.
Preliminary hearing	An optional process available to those accused of an indictable offence. The charge is 'screened' at a preliminary hearing in the Court of Petty Sessions to determine whether the State has enough evidence to put the accused on trial on indictment.
Prerogative writ	A writ issued out of the superior courts requiring the proper administration of justice by those individuals and bodies having the power to administer it.
Prima facie	'On the face of it'; 'on the first impression'.
Pro bono work	Work done 'for good' — without charge.
Proof	Evidence on which a court is satisfied as to the truth of a fact.
'Proofs' of evidence/ 'given a proof'	Witness statements for trial prepared by solicitors.
QC	Queens Counsel.
Queen's Counsel	Senior barristers — also referred to as 'silks'.
Re-hearing	Where there have been changes in the law since the date of the trial, the appeal court may receive fresh evidence and examine evidence from the trial. This is different from ordinary appeals, where the court looks at whether the first judgment was correct.
'Reintegrative shaming'	Contemporary criminological approach to the process and purpose of criminal law - to bring offenders back into society by making them recognise and make amends for the damage they have caused.
Remand	A defendant is remanded while a criminal matter is adjourned either on bail or in custody. When a defendant is 'kept on remand' he or she is kept in custody pending trial or sentence.
Res gestae	Literally 'the things done': facts which although not part of the facts in issue are so closely related they are treated as part of the claim or offence.
Res judicata	A thing already judged or settled; a case decided once and for all. The doctrine can be invoked in trial to prevent questioning of an earlier judgment.
Respondent	The term used to refer the party against whom an appeal is lodged. We are proposing that the term now be used more generally for those responding to any civil application — including those previously known as defendants in civil matters.
'Rights- based' mediation or dispute resolution	A form of dispute resolution that focuses on determining which party is 'right' — generally associated with litigation.

Rules of Court	The rules made by judges, exercising powers granted to them under legislation, to govern the practice of a court.
Scale of costs	Determinations by the Legal Costs Committee of the rate that can be charged by practitioners for litigation where there is no costs agreement between the practitioner and client.
Section 611A conference	Conferences held in accordance with section 611A of the *Criminal Code*, which deal with: • preliminary questions of law or procedure; • preliminary questions of fact which in a trial could lawfully be determined by a judge without jury; and • admissions by the defendant.
Serve/service	Refers to the operation of bringing the contents or effect of a document to the knowledge of the person concerned. There are a number of ways this can be done - but for court documents what counts as service is usually regulated by the relevant Rules of Court or legislation. We use the terms 'deliver/delivery'.
Security for costs	The payment into court by a plaintiff to cover the defendant's probable costs should the plaintiff's action fail.
Set-off	A claim made by the defendant which is formulated as a defence to all or part of the plaintiff's claim. It is limited to money claims, to extinguish or reduce a debt claimed by a creditor plaintiff, and is not framed as an action which is capable of being argued independently of the plaintiff's action.
SGML	Standard Generalized Markup Language. A mechanism for 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.
Similar fact evidence	Evidence of a person's previous conduct which tends to indicate that he or she has a propensity to behave in a particular way.
SM	Stipendiary Magistrate — see Magistrate.
Stakeholders' survey	Survey of judges, magistrates and others involved in the administration of the justice system conducted by the Law Reform Commission of Western Australia as part of the present Review.
Star Chamber	During the reign of the British King Edward III the royal council sometimes sat in the Star Chamber, one of the rooms in Westminster Palace. It later became an instrument for the repression of the Puritans and became a synonym for a tribunal with arbitrary and brutal powers.
Stated case	Where the facts of a case are 'stated' in a written submission and then sent to a higher court so that an opinion may be given on the question of law raised by the facts.
Status conference	Currently used as part of the case management process in civil and criminal matters to bring all parties before a court officer at the earliest possible time. Options for settlement

	and a timetable for the case can be reviewed. We propose maintaining the status conference in civil and criminal matters, but only after other methods of resolving issues or charges have been investigated, and extending the powers which may be exercised by the convenor.
Status quo	The position as it presently is.
Stay [of proceedings]	The refusal of a court to allow proceedings to continue either temporarily or permanently.
Striking-off powers	The power to strike lawyers off the Supreme Court roll of solicitors and barristers; effectively means the lawyer can no longer practise.
Subpoena	'Under penalty' - a document which is issued to require witnesses to attend to give evidence at criminal or civil proceeding and may require witnesses to bring any material documents in their possession.
Summons	A document issued to commence proceedings in court requiring a person to attend court to answer the claims of another party. Other witnesses in proceedings also may be summonsed to attend court and be examined.
Summary judgment	Refer to Judgment — summary.
Summary offences	Criminal offences of a less serious or regulatory nature which are dealt with by justices of the peace or a magistrate in a Court of Petty Sessions. To be contrasted with indictable offences.
Supreme Court	The most senior judicial tribunal in Western Australia. Has jurisdiction over all indictable criminal matters and unlimited civil jurisdiction.
Taxation (of legal costs)	The process whereby a court officer fixes the precise amount of legal costs. Used where there is a dispute between a client and his or her solicitor or between the winning and losing litigants. We have used the term 'court assessed costs' in this Report and the current Review.
Taxed costs	Costs which have been assessed by the court as appropriate.
Third Party Notice	A notice issued by a defendant to a person who is not already a party to the proceedings.
Tort	A civil wrong such as defamation or negligence.
Trial on preliminary issues	Traditionally ordered only where the court comes to the view that the determination of the preliminary issue, whether a question of law or fact, will necessarily determine the outcome of the litigation between the parties.
Ultra vires	Beyond the powers of.
'Up lift fees'	A variation of contingency fees which allows lawyers for a successful party to recover an added percentage on top of their normal fee.
Victim Impact Statement	Statement made to the court by the victim of crime when an offender's sentence is being determined.

Violence Restraining Order	An injunction issued by a court restraining contact between parties where there is an apprehension that violence may be inflicted.
Voir dire	'To speak the truth'. A 'trial within a trial' in which the court determines issues such as the competency of witnesses or the admissibility of evidence. In jury trials the jury will not be present for the *voir dire*.
WACAT	Western Australian Civil and Administrative Tribunal (proposed).
Web Browser	Computer software enabling Internet access and search.
Westminster system	British theory of constitutional government based on the notion that the executive, legislative and judicial arms of government work independently of each other.
Writ	Writ of summons
Writ of summons	One of the processes used to commence proceedings in the Supreme and District Courts. Although not required by legislation, civil actions which involve factual disputes to be determined in open court are usually commenced in this way. The processes of pleadings and discovery flow automatically. A writ must be indorsed with a concise statement of the nature of the claim and the relief or remedy sought and in most actions the full statement of claim may be indorsed on the writ.
XML	Extensible Markup Language, a subset of SGML.

REVIEW OF THE CRIMINAL AND CIVIL JUSTICE SYSTEM

Bibliography

Bibliography:

Bibliography of In-text References

Texts

Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (Canberra: AGPS, 1994).

Australian Institute of Criminology, *Australian Crime: Facts and Figures 1998* (Canberra: AIC, 1998).

Australian Law Reform Commission

Evidence, Interim Report No 26 (1985).

Evidence, Report No 38 (1987).

Costs Shifting – Who Pays for Litigation (1995).

Review of the Adversarial System of Litigation – ADR – Its Role in Federal Dispute Resolution, Issues Paper No 25 (1998).

Unpublished submission to LRCWA on Consultation Draft 1.2 'Advantages and Disadvantages of the Adversarial System in Civil Proceedings', *Review of the Criminal and Civil Justice System,* Vol 1 (1999a).

Unpublished submission to the LRCWA Consultation Draft 2.5 'Pleadings — Sacrificing the Sacrosanct', *Review of the Criminal and Civil Justice System,* Vol 1 (1999b).

Unpublished submission to the LRCWA Consultation Draft 2.3 'The Use of Court-based or Community Alternative Dispute Resolution and Alternative Forums for Adjudication', *Review of the Criminal and Civil Justice System,* Vol 1 (1999c).

Experts, Background Paper No 6 (1999d).

Unpublished submission to the LRCWA Consultation Draft 3.3 'Expert Evidence', *Review of the Criminal and Civil Justice System,* Vol 2 (1999e).

Unpublished submission to the LRCWA Consultation Draft 5.2 'Court Perspectives: Architecture, Psychology and Law Reform in Western Australia', *Review of the Criminal and Civil Justice System*, Vol 2 (1999f).

Unpublished submission to the LRCWA Consultation Draft 5.4 'The Role of the Legal Profession', *Review of the Criminal and Civil Justice System*, Vol 2 (1999g).

Review of the federal civil justice system, Discussion Paper 62 (1999h).

Bentham, J quoted in Weinberg, M 'The Right to Silence — Sparing the Judge from Talking Gibberish' (Paper presented at session 24, 30th Australian Legal Convention, November 1997).

Bowman, Sir Jeffery, *Review of the Court of Appeal (Civil Division)* (London: Lord Chancellor's Department, 1997).

Browne-Wilkinson, Lord Nicolas, 'The UK Access to Justice Report: A Sheep in Woolf's Clothing', (1999) 28 *The University of Western Australian Law Review* 181-191.

Cannon, AJ, 'An Evaluation of Some Ways of Limiting and Reducing the Costs to Parties of Conducting Litigation in the Magistrates Court (Civil Division) in South Australia' (unpublished Master of Laws thesis, University of Wollongong, 1996).

Civil Justice Review, *Report of the Review Body on Civil Justice* (London: Lord Chancellor's Department, 1988).

Commission on Government, *Commission on Government Report No 4* (Perth, 1996).

Council of Australian Governments, *Reform of the Legal Profession in Australia: Report of the Council of Australian Governments Legal Profession Reform Working Group* (Canberra: AGPS, 1996).

Davies, Justice GL, 'Managing the Work of the Courts' (Paper presented at the Australian Institute of Judicial Administration Conference, Plenary Session 3, Sydney, 22-24 August 1997).

Dillon, JF (1907) '"Bentham's Influence in the Reforms of the Nineteenth Century" in Association of American Law Schools' (eds) *Select Essays in Anglo-American Legal History* (Boston: Little, Brown, 1907) Vol 1.

Erikson, A, 'Professional Development Program on the New American Courthouse' (The Harvard University Graduate School of Design, 21-23 July 1998).

Ferrante, AM, Loh, NSN and Fernandez, JA. *Crime and Justice Statistics for Western Australia: 1997* (Perth: Crime Research Centre, 1998).

Gleeson, Chief Justice Murray, 'Access to Justice — A New South Wales Perspective', (1999) 28 *The University of Western Australian Law Review* 192-198.

Goodsell, C, *The Social Meaning of Civic Space: Studying Political Authority through Architecture* (Lawrence, Kansas: University of Kansas Press, 1988).

Gotjamanos, Commissioner J and Merton, G, *Report of Tribunals Review to the Attorney General* (Perth, 1996).

Hill, M, 'The Seduction of the Fix' in Australian Institute of Judicial Administration *Reform*

of Court Rules and Procedures in Criminal Cases, (Melbourne: AIJA, 1998) 133-144.

Hilmer, FG, Raynor M and Taperell G, *National Competition Policy: Report by the Independent Committee of Inquiry* (Canberra: AGPS, 1993).

Ipp, Justice David, 'Reforms to the Adversarial Process in Civil Litigation — Part II' (1995) 69 *Australian Law Journal* 790.

Ipp, Justice David, 'Opportunities and Limitations for Change in the Australian Adversarial System' (Paper presented at the Australian Institute of Judicial Administration conference, Brisbane, August 1997).

Kakalik, JS, Dunworth, T, Hill, LA, McCaffrey, D, Oshiro, M, Pace, NM and Vaiana, ME 'Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Reform Act' (RAND Corporation, USA, 1996).

Law Reform Commission of Western Australia

Report on the Review of Administrative Decisions: Appeal Project 26, Pt I (1982).

Courts of Petty Sessions: Constitution, Powers and Procedure, Discussion Paper No 55 (1984).

Local Courts: Jurisdiction, Procedures and Administration, Project No. 16 Pt I (1988).

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

Report on Police Act Offences, Project No 85 (1992).

United Kingdom Statutes in Force in Western Australia, Project No. 75 (1994).

Report on Limitation and Notice of Actions, Project No 36 Pt II (1997).

Malcolm, Chief Justice DK

'Annual Review: Address at the Closing of the 1997 Legal Year of the Supreme Court of Western Australia' (Perth, December 1997).

'Annual Review: Address at the Closing of the 1998 Legal Year of the Supreme Court of Western Australia' (Perth, December 1998).

Media Release, Supreme Court of Western Australia (Perth, 16 February 1999)

Mason, A, 'The Role of the Courts at the Turn of the Century', (1993) 3 *Journal of Judicial Administration* 156.

McKechnie, J, Unpublished submission to LRCWA *Reforming the Justice System: An Issues Paper* (27 August 1998).

Ministry of Justice, *Ministry of Justice 1997/8 Annual Report* (Perth, 1998).

Mouzos, Jenny, *Femicide: The Killing of Women in Australia 1989-1998* (Canberra: Australian Institute of Criminology, 1999).

Parker, S, *Courts and the Public*, (Melbourne: Australian Institute of Judicial Administration, 1998.)

Runciman, Viscount WG, *The Royal Commission on Criminal Justice* (London: HMSO, 1993).

Smith, Justice 'Foreword' to S Odgers, *Uniform Evidence Law* 2nd ed, (Sydney: Federation Press, 1997).

Weinberg, Mark QC, 'The Right to Silence — Sparing the Judge from Talking Gibberish' (Paper presented at the Australian Legal Convention, November 1997).

Western Australian Law Reform Committee, *Committal Proceedings*, Project No 4 (1970).

Woolf, Lord, *Access to Justice — Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1996).

Cases

Beach Petroleum NL v Johnson (No 2) (1995) 57 FCR 119

Browne v Dunn, (1893) 6 R 67

Byrnes v The Queen [1999] HCA 38

Cachia v Hanes (1994) 179 CLR 403

Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD 55

Dietrich v The Queen (1992) 177 CLR 292

Garrett v Nicholson [1999] WASCA 32

Grassby v The Queen (1989) 168 CLR 1

Hall v Eve (1876) 4 Ch D 341

Hoch v The Queen (1988) 165 CLR 292

Jones v Dunkel (1959) 101 CLR 298

Jones v National Coal Board [1957] 2 QB 55

Lee v The Queen (1998) 74 ALJR 1484

Pollitt v The Queen (1992) 66 ALJR 613

R v Whitehorn (1983) 152 CLR 657

Ratten v The Queen (1974) 131 CLR 510

Re Keely; Ex parte Ansett Transport Industries (Operations) Pty Ltd (1990) 64 ALJR 495

Re Wakim; Ex parte McNally [1999] HCA 27

Sutton v The Queen (1984) 152 CLR 528

Weissensteiner v The Queen (1993) 178 CLR 217

Legislation

Commonwealth

Administrative Appeals Tribunal Act 1975 (Cth)

Administrative Decisions (Judicial Review) 1977 (Cth)

Constitution (Cth)

Evidence Act 1995 (Cth)

Family Law Act 1975 (Cth)
Federal Court Rules 1979 (Cth)

Imperial

Judicature Acts' 1873 - 1875

New South Wales

Administrative Decisions Tribunal Act 1997 (NSW)
District Court Act 1973 (NSW)
Supreme Court Rules 1970 (NSW)

Queensland

Criminal Code 1899 (Qld)

Victoria

Victorian Civil and Administrative Tribunal Act 1998 (Vic)

Western Australian

Acts Amendment (Video and Audio Links) Act 1998 (WA)
Bail Act 1982 (WA)
Chicken Meat Industry Act 1977 (WA)
Court of Petty Sessions Fees Regulations (WA)
Criminal Code Act 1902 (WA)
Criminal Code Act Compilation Act 1913 (WA)
Criminal Practice Rules (WA)
Director of Public Prosecutions Act 1991 (WA)
Evidence Act 1906 (WA)
Freedom of Information Act 1992 (WA)
Human Reproductive Technology Act 1991 (WA)
Industrial Relations Act 1979 (WA)
Justices Act 1902 (WA)
Justices Act Regulations (WA)
Legal Practitioners Act 1893 (WA)
Limitation Act 1935 (WA)
Local Courts Act 1904 (WA)
Local Court Rules 1961 (WA)
Misuse of Drugs Act 1981 (WA)
Official Prosecutions (Defendants' Costs) Act 1973 (WA)
Police Act 1892 (WA)

Residential Tenancies Act 1987 (WA)
Retirement Villages Act 1992 (WA)
Road Traffic Act 1974 (WA)
Sentencing Act 1995 (WA)
Strata Titles Act 1985 (WA)
Suitor's Fund Act 1964 (WA)
Supreme Court Act 1880 (WA)
Supreme Court Act 1935 (WA)
Supreme Court Rules 1971 (WA)
Vexatious Proceedings Restriction Act 1930 (WA)
Young Offenders Act 1994 (WA)

United Kingdom

Courts and Legal Services Act 1990
Civil Procedure Rules 1999
Indictable Offences Act 1848
Police and Criminal Evidence Act 1984
Prisoner's Counsel Act 1836

REVIEW OF THE CRIMINAL AND CIVIL JUSTICE SYSTEM

Recommendations

Recommendations

List of Recommendations

The justice system

1. The proposed Magistrates Court Acts should be enacted, taking into account our recommendations for the establishment of a Western Australian Civil and Administrative Tribunal. (See Recommendations 371 and 372.) [2.15]

2. While maintaining the distinction between civil and criminal matters and in so far as possible, uniformity of rules for different courts and plain English should be implemented when revising or drafting new legislative and procedural provisions in response to recommendations in this Report and generally. [2.16]

3. Large-scale and anonymous public surveys should be conducted on an annual basis on justice related issues including:

(1) victimisation;

(2) self-reporting of offences;

(3) attitudes towards and satisfaction with the criminal justice system on the basis of identification as victim/witness/defendant/relative in criminal matters etc;

(4) attitudes towards and satisfaction with the civil justice system;

(5) quantitative information on dealings and outcomes in the civil justice system; and

(6) other matters identified through preliminary research with the public and professionals involved in the justice system. [5.26]

4. In devising public surveys, arrangements should be made to actively seek the views of special needs groups who may otherwise be excluded. [5.26]

The adversarial system

Civil litigation

5. The civil justice system should be managed in order to be expeditious, proportionate, and both procedurally and substantively just. [6.7]

6. Legislation should be enacted applying the objects clause (at Recommendation 5) to all legislation impacting upon civil justice, including Rules of Court, so that the principles on which the civil justice system rests are clearly set out. [6.7]

7. Rules and procedures should be amended to allow courts to require legal representatives and self-represented litigants to report to case managers (in confidence) where a matter has settled so that surveys can be carried out. [6.12]

8. Where litigants are able to make a greater contribution to the cost of accessing the civil justice system they should do so and it should be proportional to the cost to the public of conducting the case. [6.17]

9. As new court fee scales are scheduled, the costs for businesses to access the public civil justice system should be higher than the fees charged to other users, to balance the tax deductibility of legal expenses for businesses. [6.18]

Criminal litigation

10. The court registry 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. [7.24]

11. Each file relating to an individual defendant in the Courts of Petty Sessions should be allocated to a magistrate other than the trial magistrate to exercise jurisdiction over pre-trial matters concerning the defendant. [7.24]

12. The pre-trial magistrate should have powers to:

(1) grant investigative or forensic powers, such as issuing warrants for search and seizure upon application by the police or prosecution;

(2) impose time limits on the parties;

(3) oversee the exchange of information between the prosecution and defence— subject to the defendant's right not to disclose his or her defence; and

(4) assist in the identification of issues. [7.24]

13. An abbreviated documentary procedure for trial of certain summary offences should be introduced and available at the election of the defendant. [7.26]

14. The *Criminal Code 1913* (WA) should be amended to include, as far as possible, all indictable offences. All matters relating to criminal procedure should be removed. [7.29]

15. A Summary Offences Act, as recommended by this Commission in 1992, should be enacted to include, as far as possible, all summary offences. [7.29]

16. A comprehensive code of criminal practice procedure should be developed. [7.29]

17. In rationalising criminal law and procedure in Western Australia consideration should be given to the recommendations of this Commission (1994) in its report on the British Imperial legislation which continues to apply in Western Australia. [7.29]

Means of commencing civil proceedings

18. The sole form of originating process in Western Australia should be known as an 'Application'. [9.9]

19. In the usual case, the Application should be endorsed with details of the applicant's case. (See Recommendation 26.) In exceptional circumstances leave of the court may be obtained to provide details of the case separately. [9.9]

20. Prerogative writs should be abolished and actions for judicial review of public agencies and officers should be commenced by Application like other civil actions. [9.12]

21. There should be no requirement to establish an 'error of law on the face of the record' in an Application to review actions of public agencies and officers. [9.12]

Pleadings

22. The system of formal written pleadings and the procedural code of rules by which it is governed should only apply in exceptional cases, to be identified by a case manager. (And see Recommendations 36 and 37.) [10.8]

23. The term 'pleadings' only should be used to refer to the exception referred to in Recommendations 36 and 37. Generally 'case statements' should be used to describe Applications, Responses and other documents which parties exchange in civil actions to outline their cases. [10.8]

24. Case managers should have the power to order parties to confer and file a statement of agreed facts. [10.9]

25. The failure to agree facts not in contention should result in costs orders as appropriate. [10.9]

26. In a concise narrative and non-legalistic form, case statements should state:

(1) in chronological order the facts which are material to the claim or defence;

(2) the legal nature of the claim or defence;

(3) the contentions of law on which parties intend to rely, including any statutory provisions; and

(4) in an application, or cross-application, the relief sought. [10.10]

27. All case statements should:

(1) identify the principal documents on which reliance will be placed; and

(2) annex copies of the principal documents on which reliance will be placed. [10.13]

28. For the purposes of Recommendation 27, 'principal' documents are those documents which make the case statement intelligible and will usually be referred to in the case statement. [10.13]

29. The respondent should be required to file and deliver a Notice of Intention to Respond within 14 days of delivery of the Application. [10.14]

30. Within a maximum of 28 days from the delivery of the Application, the respondent should file and deliver a Response providing information comparable to that required to be provided in the Application. [10.14]

31. Delivery of case statements for higher civil court proceedings should comply with the same requirements as set out in relation to Local Court process at Recommendations 169 and 170. [10.16]

32. The parties should be required to verify Applications, Responses and other case statements on oath or affirmation so as to assert:

(1) the truth of allegations of fact; and/or

(2) the falsity of facts which are denied; and/or

(3) inability to ascertain the truth of facts not admitted despite having made all proper inquiries. [10.17]

33. When filing an Application, Response or other case statement, every legal practitioner responsible for the substantive preparation of the document must certify:

(1) the document is correct according to instructions provided by the Applicant or Respondent;

(2) the document is not presented for any improper purpose;

(3) the practitioner has reasonable grounds to believe that evidence will be available to sustain the factual allegations made; and

(4) all the issues raised in the document are, in the view of that practitioner, reasonably arguable. [10.17]

34. If a party verifies a case statement in the knowledge it is false, the party may be punished as a contempt of court. If a legal practitioner certifies a case statement without any reasonable basis, the practitioner should be dealt with for professional misconduct. [10.17]

35. At the status hearing the case manager shall:

(1) assess the adequacy of the documentation filed; and

(2) ensure that the true nature and scope of the dispute has been identified. [10.18]

36. Upon application by any party, the case manager should be empowered to determine:

(1) whether pleadings are appropriate to the case at issue; and

(2) the extent and nature of such pleadings. [10.18]

37. Before the case manager allows a pleadings process for a particular case the party making the application must show that pleadings:

(1) are likely to save time;

(2) are likely to save costs; and

(3) the cost associated with pleadings would be proportional to the value of the dispute and the cost of litigation. [10.18]

38. Where ADR is unsuitable or not successful, 14 days prior to the status hearing and unless the case manager orders otherwise, the applicant must file and serve a supplement to the Application (Application Part II: Pre-Trial Procedure Memorandum) and the respondent must file and serve a supplement to its Response (Response Part II: Pre-Trial Procedure Memorandum) seven days prior to the status hearing.

The Pre-Trial Procedure Memoranda should:

(1) state how each allegation of fact will be proved;

(2) state the names, addresses, occupations and qualifications of the witnesses who will be called to give oral evidence; and

(3) annex outlines or statements of the evidence of each non-expert witness. [10.19]

39. Amendments to case statements, including pre-trial memoranda, must be certified by the legal representative or self-represented litigant as raising

issues or facts that were either:

(1) unknown to the party at the time of the original case statement; or

(2) not foreseen at that time as being relevant to an issue in the case. [10.20]

40. The case manager should have a discretion to disallow amendment to case statements, including memoranda, on the basis that the amendment:

(1) could prejudice any other party and the prejudice could not be adequately compensated by an appropriate costs order; or

(2) if it would be contrary to the public interest in the efficient administration of justice. [10.20]

41. The previous recommendations of this Law Reform Commission (1997) to amend the outdated *Limitation Act 1935* (WA) should be implemented so that in the interests of justice there is a judicial discretion to extend the limitation period from the date the Applicant knew of the claim or from the date the claim arose. [10.22]

42. Extension of the period within which the Response must be filed and delivered should be permitted only by court order. [10.23]

43. A respondent seeking extension of the period within which to file and serve a Response should be required to provide the court with a verified statement setting out:

(1) the documentation for appending to the Response which he or she has been able to assemble;

(2) a detailed outline of the additional documentation necessary to properly defend the Application;

(3) an explanation of the basis upon which the extension is sought; and

(4) an indication of the length of the extension required. [10.23]

44. The Professional Conduct Rules recognise that:

(1) it is appropriate professional conduct for a practitioner to decline an instruction to prepare and file an Application or a Response when the demands of the practitioner's practice do not allow sufficient time and attention to be devoted to prepare that document properly and in a timely manner. No professional sanction should be levied against a practitioner who declines an instruction on this basis;

(2) if a practitioner accepts an instruction to prepare and file an Application or a Response he or she undertakes that the demands of his or her practice are such that sufficient time and attention can be devoted to prepare that document properly and in a timely manner; and

(3) if, having accepted an instruction to prepare and file an Application or Response, a practitioner fails to prepare that document fully and in a timely manner professional sanctions may be levied against a practitioner for professional misconduct. [10.25]

45. A party should be allowed to go beyond his or her case statement at trial unless the trial judge decides that:

(1) the facts or legal propositions relied upon are substantially different from those disclosed in the course of the pre-trial procedures; and

(2) another party will be substantially prejudiced in the presentation of its case at trial. [10.26]

Alternative dispute resolution

46. There should be an appropriate level of community mediation services in Western Australia. Infrastructure, coordination, operation, information support services, mediators, the training of staff and volunteers, and promotion of the services will need to be provided for if community mediation services are to be successful. [11.10]

47. A system should be implemented in the various courts to determine after each case is filed whether ADR is suitable, and, if so, which method of dispute resolution is best suited to the case. [11.11]

48. Guidelines should be developed to assist in evaluating the suitability of each dispute for ADR with regard to the following:

The Dispute

- whether the dispute arose due to a misunderstanding between the parties;
- the subject matter of the dispute;
- how the dispute arose;
- whether the dispute concerns the interpretation of a statute;
- whether the matter is a 'test case'; and
- whether the claim is to recover a debt.

The Parties

- the degree of privacy desirable;
- the relationship between the parties;

- whether there is an ongoing relationship between the parties;
- the nature of the parties (individuals, organisations, government entities or businesses);
- the views of the parties;
- the views of the parties' legal representatives, if any; and
- the potential for, or degree of, power imbalance between the parties, if any.

Disclosure Issues

- whether the dispute is the result of failure to disclose information; and
- whether there is a need for further information of a technical nature in order to resolve the dispute. [11.11]

49. The information to assess a case for ADR will usually not be apparent from the initial court process. A questionnaire and a confidential case management conference will generally be required. [11.11]

50. When determining appropriate ADR processes and neutrals, consideration should be given to any associated costs to the parties with reference to:

(1) the value (monetary and non-monetary) of the dispute;
(2) the financial positions of the parties; and
(3) the merits of the competing claims. [11.12]

51. There should be a presumption in favour of ADR unless the case manager to whom the matter is referred has reason to decide otherwise. Unless the case manager certifies that a dispute either could not or should not be resolved other than by adjudication, the parties should be expected to make a good faith effort to resolve the dispute by an appropriate method of ADR. [11.16]

52. The expectation that parties make a good faith effort to resolve the dispute by an appropriate method of ADR means only that parties are expected to reconsider those parts of their case which they accept, or after discussion realise, are not clear or strong. [11.16]

53. Failure by parties genuinely to attempt to resolve a dispute during ADR after commencing litigation should be considered by the court in assessing costs. The matter should be brought before the court, after adjudication, by means of certification by the neutral. Matters to be considered by the court in imposing cost disincentives should include:

(1) the principles of natural justice; and
(2) the inequity to parties who may be in differing financial circumstances. [11.17]

54. The current practice of recording on the court file that an ADR process was concluded without settlement being attained is appropriate and should continue. Matters relating to the imposition of cost disincentives should be raised only after adjudication of the dispute. [11.17]

55. Disputes assessed as suitable for ADR should be referred to ADR prior to the commencement of any other procedure associated with litigation, with the exception in limited circumstances of disclosure and/or interrogatory procedure as determined by the case manager. [11.20]

56. If resolution cannot be achieved initially through ADR, the case manager should retain a discretion to refer the parties again to ADR at any later appropriate time. [11.20]

57. Court officials who undertake ADR should have successfully completed training in ADR in a course of an appropriate level. [11.23]

58. Appointed or retired judges and senior court officers should conduct court-based mediation. [11.23]

59. Where one or more parties to a dispute are not legally represented:

(1) the neutral should have experience in the area of law relating to the subject matter of the dispute; and/or

(2) the process may be interrupted to allow for the parties to obtain further information including legal advice. [11.25]

60. The case manager should have an option to refer parties to ADR using an approved list of neutrals. [11.28]

61. Should the parties elect to have a neutral who is not court-approved, the case manager should take into consideration the views of the parties as to the appropriate neutral to conduct ADR. [11.28]

62. The Mediation Act (at Recommendation 69) should establish a process for regulating ADR including registration of approved neutrals for the purposes of court-ordered ADR. The Act also should provide a means for parties and others to apply to have a neutral registered. [11.28]

63. The recommended Mediation Act should impose an obligation on anyone conducting court-ordered ADR to ensure that parties undertaking ADR are acquainted with their legal rights. [11.29]

64. The recommended Mediation Act should enshrine the desirability of parties who undertake ADR being aware of their legal rights. [11.29]

65. The parties should bear the cost of ADR prior to litigation. [11.32]

66. ADR after the status conference should be conducted by a court-based, publicly funded neutral; otherwise the parties should pay the cost of ADR. [11.32]

67. Court-ordered ADR should have greater status by ensuring:

(1) legal representatives attending must either have conduct of the file or authority to settle the matter; and

(2) the parties, and not just their representatives, must attend ADR conference(s). [11.34]

68. The civil litigants' handbook (see Recommendations 123 and 124) should include a substantial discussion of ADR, explaining the processes and emphasising its significance, once ADR is assessed as appropriate, as a means for resolving disputes in a non-adversarial, efficient, cost-effective and prompt manner. [11.34]

69. A Mediation Act should be enacted which encourages mediation and includes provisions based on the *Evidence Act 1995* (Cth) which:

(1) ensure the confidentiality of mediation conferences; and

(2) provide ADR neutrals privilege from being required to give evidence of what transpires during the course of ADR. [11.36]

70. If there are to be exceptions to the provisions conferring confidentiality on ADR conferences and privilege to neutrals, these should be clearly identified in the recommended Mediation Act. [11.36]

71. The litigation cost scales should be amended to allow for solicitors' reasonable costs incurred prior to litigation. [11.37]

72. The *Legal Practitioners Act 1893* (WA) should be amended to impose an obligation on all legal practitioners instructed in a civil matter to:

(1) consider the possibility of ADR;

(2) apprise clients of the possibility of ADR;

(3) give clients specific advice about the availability of ADR resources; and

(4) discuss with clients the costs implications of ADR. [11.37]

73. Cost disclosure orders should be made as part of an order for referral to ADR in all courts. The solicitors for the parties should be directed to bring a copy of the cost statement to the ADR process and the neutral should be permitted to inspect the statement upon request if the neutral thinks it appropriate to do so. [11.38]

74. The neutral conducting the ADR, as well as the officer making case management directions, should also be permitted to require the solicitors for the parties to provide updated cost statements from time to time. [11.38]

75. The power to order parties to an appeal to enter into ADR under Order 65B of the *Supreme Court Rules* should be limited to:

(1) exceptional cases; or

(2) narrowing or defining the issues on appeal. [11.39]

Case management

76. In the usual case there should be only three mandatory pre-trial conferences. Judicial intervention beyond that should be restricted to large or complex matters or on the basis of demonstrable need, including the involvement of self-represented litigants. (See Recommendation 202.) A special list should be established for cases requiring extensive case management. [12.4]

77. If assessed as not suitable for ADR at a case management conference, a status conference should be held within four weeks of that assessment. If assessed as suitable, but not resolved through ADR, a status conference should be held within four weeks of the determination. The status conference would follow the form of the current status conference in the Supreme Court. At that hearing the court would consider what level of continuing management is appropriate and give such case management directions as the court thinks fit based on:

(1) an examination of issues related to disclosure, case statements and expert evidence; and

(2) consideration of the potential for summary judgment or trial of preliminary issues, and an agreed statement of facts. [12.4]

78. A listing conference should be held once a case has been entered for trial. That conference would follow the procedure of the current listing conference in the Supreme Court. A party would not be entitled to enter a case for trial where any previous case management directions had not been complied with, except with the leave of the court. [12.4]

79. A registrar should conduct the case management conference, unless the parties consent to it being conducted by the supervising judge. In the usual case, the proposed trial judge should conduct the status and listing conferences. [12.7]

80. An Inactive Cases List should be established. Any case in which no party has taken any steps for a period of six months should be transferred to the Inactive Cases List. No step in the proceeding could be taken while a case is on the Inactive Cases List without leave of the court. Legal

representatives should be required to notify their clients and, in particular, advise that no action has been taken on the case for six months when the matter is entered on the Inactive Cases List. An inactive case may be removed from the List only by order of the court. After six months on the List a proceeding should be administratively dismissed for want of prosecution. A party should require leave of the court to re-issue proceedings. [12.10]

81. Any case dismissed for want of prosecution, whether judicially or administratively, should require leave of the court to re-issue proceedings. Leave to re-issue should be determined on the same criteria as ought to apply to leave to issue proceedings outside the limitation period as recommended previously by this Commission in our 1997 Report, No 36, Part II, and only should be given in the interests of justice. [12.10]

Disclosure

82. The case manager should have a discretion, usually exercised at the status conference, to order disclosure of documents that are directly relevant to the issues in dispute. The party who is seeking the documents should apply for disclosure. Leave should only be granted where the case manager has identified a category of documents which bears directly on an issue arising out of the exchange of case statements. The case manager must be satisfied the disclosure would contribute to the just resolution of the case so that the time and cost involved are proportional to the significance of the dispute. [13.8]

83. The court should retain a discretion to order disclosure in phases, particularly for, but not limited to, drawing a distinction between documents relating to issues of liability, and documents relating to issues of damages. [13.8]

84. Strict time limits for complying with orders for disclosure should be imposed and not be departed from unless there exists very good cause. [13.8]

85. No *subpoena* against a party to compel production of documents in relation to a civil action should be allowed. [13.9]

86. Applications for further and better disclosure ought to be allowed where there exist reasonable grounds for belief that a document exists which has not been disclosed and which falls within a category identified by the case manager as bearing directly on an issue arising out of the exchange of case statements. [13.10]

87. Disclosure by verification on oath of a list of documents should be retained. In the affidavit of disclosure a party should depose that reasonable enquiries have been made and there exist no documents other than those

specified in the list that are directly relevant to any of the categories of documents identified by the case manager. [13.12]

88. In every case in which disclosure is provided, the solicitor, if any, shall certify that:

(1) the obligations of disclosure have been fully explained to the client; and

(2) the solicitor is not aware of any documents that are directly relevant to any of the categories of documents identified by the case manager which have not already been disclosed. [13.12]

89. When it is clear that a party providing disclosure appears to be misinterpreting the test of direct relevance, or shielding behind that test, the case manager should have a discretion to permit cross-examination on an affidavit of disclosure prior to trial. [13.12]

90. Leave to interrogate must be obtained from the case manager in any matter, usually at the status conference. [13.14]

91. Leave to deliver interrogatories should only be granted if a case manager is satisfied that there is not likely to be available any other reasonably simple and inexpensive way of proving the matter at trial. Leave also should be granted if the party seeking to deliver interrogatories can demonstrate an unfair disadvantage if leave is not granted. The application should be accompanied by a draft of intended interrogatories. [13.14]

92. The number of interrogatories should be as few as is practicable and generally not more than 30 unless the case manager otherwise directs. The number of interrogatories is to be determined by treating each distinct question as one interrogatory. [13.14]

93. All disclosed documents, including those appended to case statements, should be automatically capable of being admitted into evidence without reference to a witness, unless the authenticity of the document is disputed. The weight to be given to any disclosed documents will be a matter for the court. [13.15]

94. The only opportunity to query or object to an interrogatory should be at the time the case manager's approval of the draft list of interrogatories is being sought. [13.16]

95. An answer to an interrogatory should be given directly and without evasion or resort to technicality. [13.16]

96. If parties fail to properly answer interrogatories, case managers should have a discretion to require them to attend for oral examination prior to trial. [13.16]

Summary judgment, interlocutory injunctions and trials of preliminary issues

97. A single procedure for summary judgment should replace the existing procedures and enable applicants and respondents to bring an application for summary judgment or to strike out case statements disclosing no reasonable cause of action or defence. [14.4]

98. The test for summary judgment should be reformulated so that summary judgment should be entered unless the opposing party demonstrates his or her case has a reasonable prospect of success. [14.6]

99. Upon review of an application for summary judgment the court should have the power to enter judgment for any party, regardless of which party brought the application. [14.8]

100. On a summary judgment application the court should have the power to order that a disputed fact or question of law be determined finally as part of the application. This power may be exercised on application by a party or on the court's own motion at any point before the determination of the application. [14.9]

101. Where a question of law is the only issue arising between the parties, the court hearing a summary judgment application should make a final determination of the question of law and enter judgment accordingly. [14.10]

102. Where a question of law is the only issue arising between the parties in an interlocutory injunction application, the court should make a final determination of the question of law and enter judgment accordingly. [14.11]

103. The court should be required to consider whether, on any application for an interlocutory injunction, the substantive case can be disposed of rather than just the injunction application, and have power to make orders to that effect. [14.11]

104. Order 14 of the *Supreme Court Rules* should be amended to encourage greater use of partial summary judgment. [14.12]

105. Following an unsuccessful summary judgment application, a party may only bring a further application with the leave of the court. Leave should only be granted on the basis that the applicant demonstrates that there is fresh evidence which is:

(1) material to the application;
(2) likely to dispose of the case; and
(3) could not by reasonable diligence have been discovered at the time of the party's original summary judgment application. [14.14]

106. Either party should be entitled to apply for summary judgment at any time until 60 days after the completion of disclosure or the holding of the status conference if no disclosure of additional documents or interrogatories is ordered, or at any later time by leave of the court. [14.15]

107. The *Legal Practitioners Act* should be amended to require legal practitioners to consider summary judgment in any civil proceedings. [14.16]

108. Order 14 rule 8 of the *Supreme Court Rules* should be repealed and the costs of summary judgment applications should be generally in the discretion of the court. [14.17]

109. The court should have the power on its own motion to order the trial of a preliminary issue at any stage in proceedings. [14.19]

110. The test for whether a question or issue of law or fact be tried as a preliminary issue should be whether the trial of the issue will substantially promote the resolution of the dispute between the parties, including resolution by settlement of the whole or part of the proceedings. [14.20]

111. A single procedure for the trial of preliminary issues should replace the existing procedures under Order 31 rule 1, Order 31 rule 2 and Order 32 rule 4 of the *Supreme Court Rules*. [14.21]

Written and oral submissions

112. For the purposes of trials of civil actions, the court should give consideration in every case to whether time limits on oral submissions should be imposed. If imposed, time limits should be determined at the listing conference and based on the parties' estimates. Time limits may only be exceeded with the leave of the court at the hearing. [15.4]

113. For the purposes of civil trials of actions, the court should give consideration in every case to imposing limits on the length of written submissions. If imposed, limits on written submissions should be determined at the listing conference and based on the parties' estimates. In the absence of a particular order, the limit should be five pages. Written submissions in excess of that limit or as ordered may only be filed with leave of the court. [15.5]

114. Except for applications for leave to appeal, which are dealt with at Recommendation 350, in any civil interlocutory proceeding the parties should file a written outline of submissions stating whether the party intends to present oral argument. The applicant must file the outline with the application and the respondent must then reply within seven days. The applicant may file any additional submissions in reply within a further seven days. Where neither party intends to present oral argument the application may be determined based on the papers and written submissions in support without

the need for appearance, subject to any requirement by the judicial officer that there be oral argument. (And see Recommendation 366.)[15.6]

115. The court should retain a discretion to limit oral argument, conduct interlocutory hearings by telephone conference, or even decline to take oral submissions when written submissions have been filed. [15.6]

Costs — civil system

116. Order 83A of the *Supreme Court Rules* should be amended to follow the *Federal Court Regulations* (Cth) so that when considering the waiver or deferment of filing fees:

(1) there is a list of specific factors to be considered;
(2) there are categories of litigant entitled to exemption;
(3) there is a detailed application form; and
(4) there is a right of review. [16.6]

117. Order 83A of the *Supreme Court Rules* also should be amended to allow for a waiver of filing fees on the grounds that the litigation is in the public interest. [16.6]

118. The District Court should have jurisdiction to grant both primary and ancillary equitable relief within its monetary jurisdiction. [16.16]

119. Order 66 Rule 17 of the *Supreme Court Rules* should be amended to provide for lower court scales of costs to apply where the only reason the action is brought in the Supreme Court is because some equitable or other relief is sought which the lower court is not able to grant. [16.16]

120. The District Court should be given its own scale of costs. Within that scale there should be a special scale tailored to the steps peculiar to personal injuries actions. The special personal injuries scale should make provision for cases in which quantum is the only issue. [16.17]

121. The *Legal Practitioners Act* should be amended to impose an obligation on solicitors to advise their clients from time to time, and not less than once every 12 months, of an estimate of the likely cost of resolving the dispute. [16.19]

122. Should a solicitor fail to comply with the obligation to advise a client of the likely cost of resolving a dispute, the *Legal Practitioners Act* should prohibit the solicitor from recovering fees from the client. [16.19]

123. The requirement to provide a standard form civil litigants' booklet or video should be made by amendment to the Professional Conduct Rules and/or as a prerequisite to entering into a valid costs agreement with a client. [16.20]

124. Court staff should be directed to provide a copy of the civil litigants' booklet or video to self-represented litigants, or provide internet access, immediately upon filing an Application or a Response. [16.20]

125. The *Supreme Court Act* and/or the *Supreme Court Rules* should be amended to state a general rule that an unsuccessful public respondent to an application for judicial review should pay the costs on the loser pays principle. The applicant may enforce the costs order as a debt owed by the State. [16.22]

126. The recommendation of the ALRC in the 1995 report *Costs Shifting — Who Pays for Litigation*, that the loser pays rule be retained in civil litigation but subject to a number of specific exceptions where parties bear their own costs, should be followed. [16.23]

127. The loser pays rule should apply in the absence of a declaration that a civil case falls within one of the exceptions. If the court makes a declaration that a particular exception applies, then the rule that each party bear his or her costs becomes the presumptive rule in place of the loser pays rule. The presumptive rule should only be displaced for good reason — for example, the other side makes an offer of settlement which is unreasonably rejected. This presumptive rule should be identified at the start of the proceedings. The applicant should be permitted to discontinue with no order as to costs if the presumptive costs rule on which he or she reasonably hoped to litigate is declared not to apply. [16.23]

128. An Order 66A should be inserted into the *Supreme Court Rules* which corresponds with Order 62A of the *Federal Court Rules* (Cth) allowing the case manager to specify the maximum costs which may be recovered on a party/party basis. [16.24]

129. The *Supreme Court Rules* should require the case manager in every case to give consideration to whether the specification at Recommendation 126 should be made. [16.24]

130. Amendments should be made to existing rules of court or a separate Legal Costs Act (see Recommendation 152) should be introduced establishing the principle that when determining costs a party is entitled to recover a fair and reasonable amount for work that was reasonably required for the litigation. [16.27]

131. To reduce the gap between party/party and solicitor/client costs, the scales should be amended to recognise the fact that as between solicitor and client file management work is done and properly charged for. [16.28]

132. For the purposes of a court assessment of party/party costs this solicitor/client file management work should be expressed as a flat percentage of the

amount at which the party/party bill would otherwise be allowed. The percentage should be determined after consultation with the Law Society, consumer groups, the Legal Costs Committee and the officers of the Supreme Court involved in assessing costs. [16.28]

133. A flat hourly rate for file management should be identified in the scale for the purpose of a court assessment of solicitor/client costs where the solicitor does not have an enforceable cost agreement and the scale must be applied. The flat hourly rate for file management work should also be used by the court in making an indemnity costs order. [16.28]

134. The *Legal Practitioners Act* should be amended so that the solicitor has the option of referring any bill rendered to a client to the Supreme Court for court assessment on the solicitor's own motion. [16.29]

135. The *Legal Practitioners Act* also should be amended so that in any proceedings before a court by a practitioner against a client seeking the recovery of fees, the court (for example, the District Court or the Local Court) has the power to direct that the question of the amount and reasonableness of the fees charged be determined after the conduct of an assessment of solicitor/client costs before an officer of the Supreme Court. [16.30]

136. Order 66 of the *Supreme Court Rules* should be amended to adopt the estimate and provisional costs assessment procedures of Order 62 rule 46 of the *Federal Court Rules* (Cth). [16.31]

137. The *Legal Practitioners Act* should be amended to allow the use of costs assessors. The Legal Practitioners Board should be given a discretion to certify persons who are 'fit and proper' to be costs assessors. [16.32]

138. The case file should be referred to the assessor without the necessity for the solicitor to draw a formal bill. The assessor should be entitled to call for and receive written submissions but only if the assessor believes this will assist. Upon issuing a formal assessment the client or the solicitor should have (say) 21 days to refer the matter to an officer of the Supreme Court for assessment. If the matter is not referred to the Supreme Court then the client (if there is a refund due to the client) or the solicitor (if further money is due to the solicitor) should be able to register the assessment in the Local Court and enforce it as a judgment of the Local Court. [16.32]

139. Data on costs assessments by all courts and tribunals should be published similar to those published by the Federal Court. [16.33]

140. Courts should identify procedures and issue practice directions as to the costs which will be awarded by way of lump sum rather than proceeding to a court assessment of costs. [16.34]

141. Limited contingency fee agreements should be permitted in all cases (save criminal law and family law matters) where two conditions are satisfied:

(1) all other means of avoiding the use of a contingency fee arrangement have been exhausted; and

(2) the client is financially unable to conduct the litigation without the use of a contingency fee arrangement. [16.36]

142. The contingency reward to the lawyers should be in the form of an up lift on fees rather than a percentage of the amount recovered. Contingency fee arrangements should be available to both applicants and respondents. The safeguards set out in the 1994 Access to Justice Advisory Committee Report, *Access to Justice: An Action Plan*, should be adopted. [16.36]

143. The amount of the up lift should be calculated not on the bill the solicitor renders to his or her own client but on the amount of costs recovered from the other side by court assessment or agreement. [16.37]

144. An up lift agreement between solicitor and client should only be entered into with leave of the court. In assessing whether the amount of up lift is approved the court should consider the risk and financial burden to the solicitor involved and the conditions specified in Recommendation 141. [16.37]

145. A disbursements fund should be established to assist lawyers in representing clients who cannot afford up-front costs of litigation. [16.38]

146. Order 66 of the *Rules of the Supreme Court* should be amended to provide for the circumstances in which costs of an interlocutory application should be ordered to be assessed and paid forthwith. The court should be given a discretion to order that costs be assessed and paid forthwith where the application was unreasonably brought or unreasonably opposed unless the making of such costs order would, having regard to the loser's financial circumstances, prejudice the ability of the loser to continue the litigation. The court also should be given a discretion not to make such an order where the winner of the application is in a financially stronger position compared to the loser of the application. [16.40]

147. Order 66 rule 5 of the *Rules of the Supreme Court* should be amended to allow an order to be made against an employed solicitor. [16.42]

148. An amendment to Order 66 of the *Rules of the Supreme Court* should be made by inserting a rule 5A applying to barristers in the same terms as Part 52A rule 43A of the *Supreme Court Rules* 1970 (NSW). [16.42]

149. The *Legal Practitioners Act* should be amended to require solicitors to inform their clients of all costs orders made against the client and the reasons for making those orders. [16.43]

150. Should a solicitor not comply with the obligation to advise a client of a costs order, the solicitor should be personally liable for those costs. [16.43]

151. If a practitioner asserts that the reason for a default leading to a costs order to be paid immediately relates to the conduct of the client the practitioner should be required to prove to the court that notice of the assertion was given to the client. [16.44]

152. A separate Legal Costs Act should be enacted which formulates the principles of legal costs as rules with the scales of costs included as regulations under the Act. [16.45]

153. The *Suitors' Fund Act 1964* (WA) should be amended so that, subject to judicial discretion, the unsuccessful respondent is entitled to have paid out of the Suitors' Fund an amount equal to the court assessed party/party costs recovered by the appellant. [16.48]

154. The reference in section 10(1) of the *Suitors' Fund Act* to 'on a question of law' should be deleted. The sole criterion for invoking the judicial discretion to award a Suitors' Fund certificate should be the fact that the appeal succeeded. The Act should be further amended to provide that the discretion of the court is to be exercised having regard to the conduct of the respondent at the appeal stage and also in the court or courts below. [16.49]

155. A component of the increased revenue raised as a result of Recommendations 8 and 9 relating to higher court filing fees should go to the Suitor's Fund. [16.50]

Local Courts

156. Magistrates in the Local Court should be given power to grant both primary and ancillary equitable relief within the limit of the monetary jurisdiction of the court. [17.2]

157. The proposed 'Minor Claims Division' of the court should have jurisdiction to determine claims for damages. However, in accordance with our Recommendation 372, it should be incorporated into the Western Australian Civil and Administrative Tribunal and subject to the appeal procedures of the Tribunal. [17.2]

158. All new Local Court procedures should force the parties to come to terms with and understand the issues and evidence as soon as possible. [17.4]

159. The rules of the new Civil Division of the Magistrates' Court, like other legislation which applies to civil justice (see Recommendations 5 and 6) should state clearly the object of the rules and the context in which proceedings are to be conducted. For example:

> *The Local Courts should be managed in order to be expeditious, proportionate, and both procedurally and substantively just.* [17.4]

160. All Local Court actions should be commenced using a simple standard form Application which is available in a simple booklet that outlines the court's procedure. [17.6]

161. The standard form Local Court Application should be in plain English and advise respondents:

(1) that legal proceedings have been commenced against them;
(2) how to respond; and
(3) the deadline for responding. [17.6]

162. The Local Court should develop (perhaps by way of Practice Directions) plain language forms for various types of common causes of action. These standard forms should be capable of being accessed and, perhaps, completed over the internet, on disk, and at terminals in court registries and public libraries. [17.6]

163. The Local Court should be particularly sensitive to the special needs of self-represented litigants and those with English as a second language or other special needs, by providing multi-lingual and multi-format guides and materials. [17.6]

164. Case statements must not contain general assertions or denials. [17.8]

165. All case statements must contain:

(1) a concise and simply expressed statement of facts and law on which the party relies, with relevant details;
(2) a list and copies of principal documents referred to in the case statement which are to be relied on at trial; and
(3) where applicable, the relief sought. [17.8]

166. Case statements must contain a statutory declaration by the party that the facts stated are true to the best of the signatory's knowledge and belief. [17.8]

167. If a party is legally represented, the practitioner must certify the party's case statement:

(1) is correct according to instructions provided;
(2) is not presented for any improper purpose; and
(3) all issues raised are, in the view of that practitioner, reasonably arguable. [17.8]

168. If a party verifies a case statement in the knowledge it is false, the party may be punished for contempt of court. If a legal practitioner certifies a case

statement without any reasonable basis, the practitioner should be dealt with for professional misconduct. [17.8]

169. The court should arrange delivery of the Application, normally by post, and a delivery receipt should be returned to the court. [17.10]

170. Delivery of Local Court documents should only be effected by:

(1) personal delivery to the recipient; or

(2) any form of mail service which involves delivery to the recipient and acknowledgment of delivery by the recipient; or

(3) in the case of a corporation in any manner permitted by relevant corporations legislation; or

(4) as specified in an order for substituted delivery. [17.10]

171. Notice of Intention to Defend should be abolished and respondents be required to file, within 21 days of delivery of the Application, a Response which, in addition to the requirements set out in Recommendation 161, states any fact or matter which:

(1) would mean the Application could not be maintained;

(2) indicates whether the Application is denied in whole or in part;

(3) indicates whether liability is admitted, and, if so, whether the amount is disputed.

The Response also should:

(1) indicate whether an action against the applicant arises out of the identical transaction or same set of circumstances; and/or

(2) the details of any debt the respondent claims he or she is owed by the applicant which is to be included as a defence in the proceedings.

An extension of time to file the Response should be available with leave of the court only if good cause can be shown. [17.15]

172. A respondent should be able to commence an action against the applicant in the same proceedings, a 'Counter-Application', only if the facts and circumstances on which it is based are identical or directly related to the facts and circumstances on which the Application is based or an identical transaction. [17.15]

173. A respondent intending to file an action against the applicant or a third party which is to be included in the original proceedings only should be able to do so:

(1) in a form specified in a practice direction (which has the same requirements as to form and content as an Application); and

(2) at the same time as the Response is filed. [17.15]

174. Unless good cause can be shown any action against the applicant or a third party, or defence of a debt owed, which the respondent intends to be included in the same proceedings as the original action by the applicant, must be filed in the time permitted. [17.15]

175. Unless good cause can be shown the applicant should be able to file a response to any Response, Counter-Application or claim of debt by the respondent within 14 days after delivery of the action or claim and prior to the case management conference. [17.15]

176. When applying for default judgment, the applicant should be required to confirm that the debt claimed in the original Application is continuing with an option to enter judgment for a lesser amount if that is the present liability. [17.17]

177. The class and amounts of claims for damages in respect of which judgment in default may be obtained should be liberalised. In the case of damages for pecuniary loss the applicant should be entitled to enter judgment by default if the damages claim does not exceed a prescribed amount. [17.17]

178. As soon as practicable after a respondent files a Response a case management conference should be held, attended by the parties personally, which determines whether the matter is appropriate for ADR in accordance with the processes set out in Recommendations 48 and 50. [17.18]

179. Appropriate court officials of the Local Court should conduct case management conferences. [17.18]

180. If a dispute is assessed as not suitable for ADR or if ADR fails to resolve all issues in dispute, a status conference, conducted by the proposed trial magistrate, should be convened. [17.19]

181. At the status conference the proposed trial magistrate should:

(1) define and clarify the issues in dispute;

(2) decide the best method of resolving the issues and make orders accordingly (ie. to deal with all interlocutory matters); and

(3) provide a fixed trial date not more than two months ahead. [17.19]

182. The discretions which may be exercised at a status conference should include:

(1) requiring the parties to give additional details;

(2) granting leave to parties to amend case statements with copies of additional documents to be relied on at trial;

(3) settling, with the cooperation of the parties, a statement of facts and contentions;

(4) that referred to in Recommendation 242, concerning the use of expert evidence;

(5) ordering that a document may be filed in electronic form;

(6) ordering that there be an exchange of written statements of the intended evidence of each witness;

(7) ordering how the statements referred to in 6) can be used;

(8) ordering the preparation and filing of an agreed list of exhibits that are page numbered and indexed (in appropriate order); and

(9) ordering the preparation of written submissions on a question of law raised, and the filing of copies of authorities relied on.

These powers should be exercised in relation to the aims identified in Recommendation 159 and, in particular, proportionality. [17.19]

183. The proposed trial magistrate, at the status conference, should have the power to order additional limited disclosure bearing in mind the aim of proportionality of associated costs with the value or significance of the matter in dispute. [17.22]

184. The court should have the power to deny a party the right to rely at trial on a document he or she deliberately neglected to disclose. Alternatively, if the document advantages the non-disclosing party, an order should be made that the defaulting party pay all or part of the costs of the action. [17.22]

185. The question of whether interrogatories are allowed should be left to the discretion of the status conference convenor. [17.22]

186. Our Recommendations 98 and 99, to extend the availability of summary judgment, should apply to Local Court proceedings. [17.23]

187. Where either party applies for summary judgment or an application is made by consent, the convenor of the status conference should have the same powers as recommended for the higher courts to make findings of fact or rulings of law and to make these final. (See Recommendations 100 and 101.) The convenor should have power to enter summary judgment if warranted. [17.23]

188. The convenor of the status conference should have additional powers to:

(1) order the Application or Response or part of either or both be struck out if there has been a failure to comply with a rule,

practice direction or direction given by the court;

(2) direct that a party may not call evidence on a particular issue, or call a particular witness or use a particular document;

(3) order the action proceed to trial as soon as practicable;

(4) fix time limits in respect of any subsequent proceedings;

(5) fix the date for trial of the action; or

(6) order the Application or Response or other case statements be dismissed in whole or in part. [17.23]

189. A party may not, without leave, subsequently apply for particulars, disclosure, summary judgment or any of the matters that were or could have been dealt with at the status conference. Leave should only be granted if good cause can be shown. [17.24]

190. A listing conference may be held shortly before the trial to enable the proposed trial magistrate to make orders concerning the conduct of the trial but only in exceptional circumstances. [17.25]

191. The proposed trial magistrate may make orders at either a status or listing conference:

(1) referring the parties to a mediation conference;
(2) concerning the order of evidence at trial;
(3) limiting the time to be taken in examination, cross-examination and re-examination of a witness;
(4) limiting the number of witnesses (including expert witnesses) that a party may call on a particular issue;
(5) for the parties to exchange witness statements;
(6) limiting the time to be taken in making any oral submission;
(7) limiting the time to be taken by a party in presenting its case; and
(8) limiting the length of the trial. [17.25]

192. The attendance of a witness at a trial should not be required if:

1) the party calling the witness serves an affidavit of the witness on all other parties not less than 14 days before the date fixed for trial; and
2) within seven days after the affidavit is served, another party has not objected to the use of the affidavit at the trial;
3) an objection, if any, giving reasons is in writing;
4) the court may receive as evidence an affidavit properly served and to which no objection has been made; and
5) the court is to order a party whose objection it considers unreasonable to bear relevant costs. [17.26]

193. The Local Court should have the power to strike out an Application if the applicant fails to attend at the trial or any conference or hearing without:

(1) reasonable excuse; and

(2) advance notice to the court and all parties and witnesses.

Similarly, the Local Court should strike out the Response if the respondent does not attend without reasonable excuse and advance notice. [17.28]

194. Judgment entered as a result of the failure to attend should be capable of being set aside. [17.28]

195. Parties should be able to apply for an order sanctioning another party for non-compliance with an order made at a conference. [17.29]

196. The court should have the power to impose a penalty on parties if they have failed, without reasonable excuse either to have complied with an order or caused delay in complying with an order, on the application of another party to the proceedings. [17.29]

197. Penalty costs orders payable to the court or other party should be payable forthwith and in an amount in the discretion of the court but sufficient to be an effective deterrent. [17.29]

Self-represented litigants

198. Data should be collected by the courts to:

(1) profile litigants;

(2) categorise their legal disputes;

(3) determine the cost of resolving matters; and

(4) record the quality, nature and satisfaction of the results. [18.5]

199. There should be a manual for court staff, specific guidelines for the judiciary and magistracy, and training for all court personnel, including the judiciary and magistracy, to assist in dealing even-handedly with self-represented litigants and other litigants. [18.9]

200. The *Supreme Court Rules* should be amended to create a panel to provide free legal assistance similar to that instituted by Order 80 of the *Federal Court Rules* (Cth) for litigants who are otherwise unable to obtain legal assistance in higher court proceedings. [18.11]

201. Court registry resources should be developed to assist self-represented litigants in the presentation and compilation of court documents in order to facilitate adjudication of cases on merit. [18.13]

202. A special 'self-represented litigants track' should be established in the higher courts, the purpose of which is to enhance support for self-represented litigants. [18.14]

203. The Local Court should operate on the presumption that most litigants will, and should be able to adequately, represent themselves. [18.16]

204. A scheme should be implemented in the Local Courts whereby registry staff may refer potential litigants to a magistrate in chambers for legal information prior to filing a matter, complemented by other information services. [18.17]

205. A duty counsel scheme, providing free legal advice and limited representation to self-represented litigants, should be established for civil matters modelled on Legal Aid's existing criminal duty counsel scheme. [18.18]

206. Court advice schemes, including referrals for financial or personal counselling, should be established. (See, too, Recommendation 415.) [18.18]

207. Community-based programs should be extended to provide assistance not appropriately provided by court officers or lawyers. [18.18]

208. Government employed lawyers should participate as rostered court-based advisers to provide free advice or information to potential litigants. [18.18]

209. An expanded Law Access or similar type of organisation should increase services available to:

(1) coordinate volunteer and low fee advice and representation;

(2) provide shopfront advice; and

(3) refer potential litigants to alternative diversionary bodies or coordinate legal representation. [18.18]

210. All public libraries should carry current commonly required legal materials and court forms, perhaps accessible through computer terminals. [18.18]

211. There should be on-going monitoring of information technology developments in the justice system to ensure self-represented litigants have access to legal information and assistance. [18.18]

212. As soon as adequate information technology support is available, a 'one stop shop' information service should be introduced on a trial basis at selected courts. (See, too, Recommendation 417.) [18.18]

Unreasonable and malicious litigants

213. The language of the existing grounds for requiring leave to file under Order 67 rule 65 of the *Supreme Court Rules* should be updated to 'groundless or malicious' in place of 'frivolous or vexatious'. [19.6]

214. Order 67 rule 65 of the *Supreme Court Rules* should be amended to allow a registrar to require the litigant to obtain leave of the court before filing proceedings on the additional grounds of:

(1) a history of frequent issue of proceedings without cause by a potential litigant; or

(2) 'unreasonable conduct' by a litigant of a particular action. [19.6]

215. The case manager should have a discretion to order that interlocutory applications or applications to appeal in an ongoing action should not be filed without leave of the case manager on the grounds that a party has made frequent applications in the action without cause.

The case manager's discretion may be exercised either at the request of a party with an interest in the proceedings or at the initiative of the case manager. Leave to file may be made subject to the litigant first paying costs of the matter. [19.6]

216. In an application for security for costs, the case manager should have a discretion to order any litigant to provide a sworn statement of disclosure concerning any previous litigation in any jurisdiction including whether, and when, any judgments were satisfied. [19.9]

217. Factors relevant to the exercise of discretion whether to grant any security for costs application should include:

(1) default in paying any previous judgments or any costs award;

(2) the financial status of the litigant; and

(3) the manner in which the litigant conducts litigation. [19.9]

218. If a litigant is impecunious, bankrupt or has a record of failing to pay costs, the merits of the case may be dealt with through expanded summary judgment procedures, a trial of preliminary issues or a summary hearing process. [19.9]

219. If a litigant is impecunious, bankrupt or has a record of failing to pay costs, the case manager may ration, limit or apply proportionality principles to the procedures allowed in any matter. [19.9]

220. The *Vexatious Proceedings Restriction Act 1930* (WA) should be amended so that:

(1) The Act is renamed the Malicious Proceedings Restriction Act, and references to 'vexatious' conduct or litigants be amended to 'malicious' conduct or litigants.

(2) The test of a malicious litigant includes issuing process that is unreasonable and unmeritorious.

(3) The Act includes, as part of the malicious litigant's behaviour indicative of or relevant to the conduct of any proceedings, actions by the litigant or by a third person or representative acting in concert with the litigant:
   i. issuing process or proceedings in tribunals or equivalent bodies including quasi-judicial bodies;
   ii. issuing interlocutory proceedings and appeals;
   iii. failing to meet deadlines;
   iv. failing to cooperate (including with settlement processes);
   v. failing to comply with orders and judgments; and
   vi. engaging in possible delaying tactics.

(4) A court granting leave to a declared litigant to institute proceedings or to continue should have a discretion to make such leave to issue or proceed conditional.

(5) Available conditions on leave to issue or proceed should include:
   i. security for costs;
   ii. representation by counsel; and
   iii. a limit to the number of interlocutory proceedings initiated by a particular party in a claim or regarding a particular aspect of a claim.

(6) The court's discretion in making a conditional order for leave to issue or proceed should include making an order about particular litigation, a particular aspect of the litigation, a particular class of litigation, all litigation, or the commencement of any specified type of legal proceeding. This may include a particular person or class of persons forever or for a limited period.

(7) Any court, of its own motion, at any stage of proceedings and without the need for an application under the Act (subject to natural justice being provided to the litigant) should have the power to make an order declaring the litigant malicious where it appears to the court there are proper grounds to make such an order.

(8) Any court, tribunal or quasi-judicial body should be able to refer a matter to the Attorney General for consideration of an application being made under the Act where it appears to the court, tribunal or quasi-judicial body that there are proper grounds for such an application.

(9) The litigant the subject of an action under the Act may be ordered to provide, on oath or affirmation, a schedule of all applications, motions, summonses, writs and appeals which the litigant has filed in any court or tribunal. In addition the litigant may be ordered to provide, on oath or affirmation, a schedule

of all orders relating to such matters and a history of compliance, including final orders thereof and judgments and subsequent compliance.

(10) Standing to bring an application to have a litigant declared malicious should include, along with the Attorney General, a registrar or equivalent in any court or tribunal covered by legislation, the DPP, or with the leave of the court any other interested or aggrieved person. [19.13]

Evidence

221. The *Evidence Act 1906* (WA) and related Western Australian legislation should be rewritten to embody the *Evidence Act 1995* (Cth), but also to include the specific advantages of Western Australian legislation, for example:

(1) provisions concerning the evidence of children and special witnesses;

(2) the protection afforded complainants in sexual assault matters; and

(3) specific matters recommended in this Report. [20.7]

222. In drafting the new Evidence Act, the provisions of the *Evidence Act 1995* (Cth) relating to hearsay should be adopted. [20.13]

223. The law of evidence in Western Australia concerning documentary evidence should be based as substantially as possible on the provisions of the *Evidence Act 1995* (Cth), subject to:

(1) our Recommendation 93, concerning the admissibility of disclosed documents; and

(2) adopting clause 33 of the Evidence Bill 1991 (Cth). [20.17]

224. In conjunction with the drafting of a new Evidence Act recommended at 221, the rules of court, evidence and procedure should be reviewed to ensure that appropriate provision is made for the resolution of disputed evidentiary matters prior to trial if required. [20.19]

The limits of examination and cross-examination

225. Case managers should have a discretion to order that witnesses, in appropriate criminal cases, are not to be subject to direct cross-examination by the defendant. In those cases, cross-examination should take place through the medium of closed-circuit television or, if that is not available, the use of screens. Particular consideration should be given to the nature of the alleged offence and the wishes of the witness in the exercise of this discretion. Trial judges must provide careful direction to the jury, where relevant, explaining that this is a standard procedure which does not reflect upon the defendant, but rather arises due to the absence of legal representation. [21.6]

226. The use and exchange of witness statements in all civil proceedings should be strongly encouraged. Subject to Recommendation 192 in relation to Local Court proceedings, witness statements should be available to the other party no later than seven days before the listing conference. [21.9]

227. There should be no change to the traditional rule that the unexplained failure by a party to call a witness or lead evidence, or its extended application to the questioning of witnesses, may lead to a conclusion that the witness, evidence or questioning would not have assisted the party's case. [21.11]

228. Should a witness decline to provide a witness statement to a party involved in a civil dispute, that party should be entitled to call the witness to give evidence at trial and cross-examine him or her, if required. [21.14]

229. There should be no change to the rule that if a witness does not have notice of an opponent's case, the nature of that case must be put to him or her during cross-examination. The rule is satisfied so long as notice of the case has previously been given to the party calling the witness. [21.16]

230. The rule that if a witness does not have notice of an opponent's case, the nature of that case must be put to the witness before cross-examination should be applied in both the Court of Petty Sessions and the Local Court, subject to Recommendation 229. The consequences of a failure to follow the rule should be tailored to meet the individual circumstances of the case, including whether a party is legally represented or not. [21.17]

231. 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. [21.22]

232. Order 34 rule 5A (2)g of the *Rules of the Supreme Court* should be amended to read 'the interest of other litigants, and the community, in proceedings being resolved expeditiously and without undue expense and delay'. [21.22]

233. Order 34 rule 5A of the *Rules of the Supreme Court* should be amended to include consideration of what constitutes unduly prolix examination and cross-examination in the context of whether the cost and time involved are proportional to the significance of the case and necessary to its just disposition. [21.22]

234. The court should be encouraged to use Order 34 rule 5A of the *Rules of the Supreme Court* in appropriate cases. [21.22]

235. The *Local Court Rules* should be amended by adding a rule based on Order 34 rule 5A of the *Rules of the Supreme Court*, with any appropriate modifications. [21.23]

236. 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 which are clearly stated and subject to the interests of justice and the right of a defendant to a fair trial in criminal matters. [21.24]

237. There should be no change to the basic principle that it is the degree of judicial intervention, rather than the intervention itself, which causes concern, and no change to the rules relating to reasonable apprehension of bias, as they relate to judicial intervention to control excessive examination and cross-examination. [21.25]

Expert evidence

238. All courts should encourage parties to agree to use a single expert in all matters in which expert opinion is genuinely required. [22.3]

239. In civil matters, the courts should order costs associated with the use of multiple experts against parties who do not cooperate in the appointment of a single expert witness. [22.3]

240. Experts should be required to prepare for and answer questions from parties upon payment prior to trial of the reasonable costs of answering questions. [22.4]

241. No expert evidence should be adduced without the leave of the court. [22.7]

242. In civil matters, the case manager at the status conference should consider whether the primary facts should be agreed first and then an agreed expert appointed or expert reports exchanged. (See Recommendations 24 and 25.) [22.7]

243. The practice and procedure of all courts should maintain a clear distinction between expert advisers and expert witnesses. The distinction should be established by requiring expert witnesses to disclose, prior to trial, the nature of their relationship with the parties, which may be subject to cross-examination. [22.9]

244. The scales of costs should provide for appropriate fees for expert advisers in civil matters, so that a party who is successful at trial may recover these costs. [22.9]

245. Where a party calls its own expert adviser to give evidence there should be a waiver of legal professional privilege in respect of all communications with the expert, except communications consisting of statements and other communications from other witnesses. [22.13]

246. Where there are opposing expert witness statements filed, each expert should be required to:

(1) certify that he or she has considered the other opinions that have been expressed;

(2) specify the matters with which the expert agrees; and

(3) state those with which the expert does not agree and explain the basis of the disagreement. [22.14]

247. Civil courts should disallow costs in full for overly long experts' reports. [22.16]

248. All expert witness statements should contain a detailed declaration that all appropriate enquiries had been made in a form required by the courts. [22.17]

249. When drafting a new Evidence Act for Western Australia (Recommendation 221) the provisions of the *Evidence Act 1995* (Cth) relating to expert evidence, as modified by these recommendations, should be adopted. [22.21]

250. An Expert Evidence Forum should be established. [22.23]

The 'right to silence'

251. The existing prohibition on any adverse comment at trial concerning a defendant's exercise of the right to silence under police questioning should be maintained. [24.11]

252. The law on pre-trial disclosure should be amended to:

(1) introduce a statutory disclosure requirement for the prosecution, including police, along the lines of the DPP guidelines published on 14 December 1993 (but see Recommendations 286 and 287);

(2) specify potential consequences, in addition to those at Recommendation 254, for failure by the prosecution to provide proper disclosure including rulings that the failure to disclose resulted in:

i. a miscarriage of justice; or

ii. wrongful conviction. [24.14]

253. Subject to Recommendation 288, the law on pre-trial disclosure should be amended by statute to:

(1) require defence disclosure of statements by expert witnesses, but not other witnesses;

(2) require a statement from the defence specifying:

i. any of the factual elements of the offence or particular proposition of law identified by the prosecution (Recommendation 282) upon which it may be contended that guilt may not be proved;
ii. documents disclosed by the prosecution to which objection will be taken, with grounds; and
iii. any particular ground upon which it may contend guilt will not be proved.

(3) require a notice of alibi, if any, similar to that already in place for trials on indictment;

(4) provide a range of sanctions for wilful failure by the defendant to provide proper disclosure including:
i. adverse comment by the judge and, with leave, by the prosecution, if the defendant personally and deliberately failed to comply with a disclosure requirement; and
ii. a right for the prosecution to re-open its case, if necessary.

Special consideration should be given to the position of a self-represented defendant, where the defendant is genuinely unable to obtain or afford legal representation. [24.20]

254. If the legal representative of the prosecution or defence wilfully fails to disclose, the pre-trial magistrate should have power to make a finding of professional misconduct and the legal representative should be subject to appropriate sanctions. [24.22]

255. The law on the right to silence at trial should be amended to:

(1) permit the jury to have regard to a defendant's silence as one of the circumstances or part of the evidence but not, in and of itself, permitting an inference of guilt, so long as the jury is first directed as to the defendant's right to be silent; and

(2) permit prosecution comment upon the silence of the defendant within the same limits as those applying to a permissible direction by the judge. [24.24]

Alternative criminal charge resolution

256. The diversionary scheme based on family group conferencing currently available only to juvenile offenders should be extended to include young adults who are not recidivist and first offenders of any age for appropriate offences. [25.5]

257. Pre-trial negotiations between prosecution and defence should be formalised into a process known as Alternative Criminal Charge Resolution (ACCR). [25.13]

258. If practicable, all outstanding charges against the defendant should be dealt with through the one ACCR process. [25.13]

259. The purpose of ACCR should be to reach agreement between the parties about:

(1) which charges will continue to hearing and in which jurisdiction;

(2) whether these charges can be heard concurrently;

(3) evidentiary issues, including disclosure of copies of statements of non-expert witnesses whom the defence proposes to call, if the defence wishes to do so;

(4) notice of which prosecution witnesses will be required to be present, if the defence wishes to do so; and

(5) the possibility of other admissions. [25.13]

260. The victims of crime the subject of charges being negotiated, if any, should have the right to be consulted by the prosecution prior to negotiations between the prosecution and defence. [25.13]

261. Where agreement is reached involving a change of plea, the matter should be listed in court as soon as possible and the new plea taken. [25.13]

262. Where agreement cannot be reached and there is a need for directions to be issued prior to the trial, the matter should be listed in court, as soon as possible, for directions. [25.13]

263. Victims of crime the subject of charges to be negotiated, if any, should be informed of the pre-trial negotiation process and be entitled to provide a written statement for consideration by the parties. Irrespective of whether victims submit a statement or wish to be consulted about the negotiations they should be notified of the outcome and reasons for the outcome. [25.14]

264. ACCR negotiations and any information available only as a result of the process, including victim statements and advice of outcomes and reasons, should be 'without prejudice'. [25.16]

265. All parties involved in the ACCR process should be made aware of their obligations to maintain confidentiality and the reasons for those obligations, and be required to sign a undertaking to that effect. Signed undertakings to maintain confidentiality should not have 'without prejudice' status. Confidentiality should be clearly stated to apply so long as the charges subject of negotiation may be tried or re-tried. [25.16]

266. The media should be prohibited from publishing the contents of any ACCR negotiations or any information available as a result of that process so

long as there remains a risk that it may prejudice the trial or re-trial of any of the charges subject to negotiation. [25.16]

267. All persons for whom a prison sentence is a real possibility on conviction who want legal representation should be legally represented in ACCR negotiations. [25.17]

268. There should be a statutory obligation on the prosecution which precludes agreement being entered into between the prosecution and the defence in relation to charges without the prosecution taking all reasonable steps to consult the victims. [25.19]

269. The *Legal Practitioners Act* should be amended to impose an obligation on legal practitioners instructed in a criminal matter to:

(1) give clients specific advice about the availability of ACCR;

(2) discuss with clients the costs implications and other potential benefits and limits of ACCR; and

(3) provide access to information concerning ACCR in a standard form booklet, video, or through the internet and available in translation. [25.19]

270. Court staff should be directed to provide access to information on ACCR in a standard form booklet, video, or through the internet, in the relevant translation, to defendants who are defending themselves. Court staff should also be required to explain the process to self-represented defendants. [25.19]

Joinder

271. The existing principles of law which hold that a direction by the trial judge to the jury cannot overcome the prejudice to the defendant arising from joinder of charges should be overridden. The law should be amended so that if the judge before whom the issue of joinder is brought concludes that prejudice can be overcome by an appropriate direction by the trial judge joinder of charges at trial should be permitted. [26.6]

272. In considering potential prejudice, embarrassment or other reason for ordering separate trials under provisions relating to the joinder of alleged offences of a sexual nature, the court should 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. [26.8]

273. The existing principles of law which hold that a direction by the trial judge to the jury cannot overcome the prejudice to co-defendants arising from joinder should be overridden. The law should be amended so that if the judge before whom the issue of joinder is brought concludes that prejudice

can be overcome by an appropriate direction by the trial judge joinder of defendants at trial should be permitted. [26.13]

274. In exceptional circumstances, such as in cases with highly vulnerable victims or other witnesses, it should be possible to empanel multiple juries in cases of joinder of defendants where the court determines that there should be separate trials, and two or more defendants elect a jury trial. [26.14]

275. When a ruling on a separate trial application on indictment has been made:

(1) the right to appeal should be open to the prosecution as well as the defence;

(2) the right of appeal should be to the Court of Criminal Appeal;

(3) strict time limits should apply to prevent any disruption to the trial process — for example, the appeal should be lodged seven days from the making of the order; and

(4) no right of appeal on the ruling will be available after the trial or trials have been conducted. [26.15]

276. An equivalent provision to that set out in Recommendation 275 should be included in the *Justices Act* for appeals against a ruling on a separate summary trial application, with a final right of appeal to a judge of the Supreme Court. [26.15]

Criminal process in the Court of Petty Sessions

277. Offences should be classified into the following categories:

(1) **Serious Indictable Offences**

All offences which carry a maximum penalty of a life sentence should be heard by a Supreme Court jury with the option of trial by judge alone subject to 2) below.

Intermediate Indictable Offences

All offences which carry a maximum penalty of less than a life sentence but more than 15 years imprisonment should be heard by a District Court jury with the option of a trial by judge alone subject to 2) below.

Lesser Indictable Offences

All offences which carry a maximum penalty of between five to 15 years should be heard by a District Court jury with the option of trial by magistrate subject to 2) below. Where trial by magistrate is allowed, the summary conviction penalty available shall be no more than five years imprisonment.

Summary Offences

All offences which carry a maximum penalty of less than five years imprisonment must be heard by a magistrate.

Minor Summary Offences

Offences carrying no prison term may be heard by magistrates or justices of the peace.

(2) When Parliament is of the view that the proper adjudication of an offence requires a jury trial in order to establish contemporary community standards, the legislation should stipulate that there is a presumption that the offence should be tried by jury.

(3) Where trial by judge alone or magistrate is available it should be at the election of the defendant, unless opposed by the prosecution, in which case the issue is to be determined by the court. [27.3]

278. Defendants detained in custody should be transferred to an appropriate court for determination of outstanding charges as a matter of urgency. [27.4]

279. The initiating document for the Court of Petty Sessions should be redrafted in plain English and make allowance for joinder of offences and/or defendants where applicable. [27.9]

280. In all cases of arrest, there should be an obligation imposed on police to read a formal charge and provide copies of the initiating form, free of charge, before the defendant appears in court. [27.9]

281. There should be a Justice Information Exchange providing facilities for electronic exchange of information in Western Australia. [27.10]

282. Information, including any confessional materials, a simply expressed statement of material facts and particular principles of law relating to a charge, and the defendant's criminal record, should be made available to all defendants on or before their first appearance in court. The information should be provided through the proposed Justice Information Exchange or formally delivered to defendants or their legal representatives. [27.13]

283. The existing Legal Aid duty lawyer system of consultation with defendants prior to their first court appearance should be expanded. [27.15]

284. The criteria for adjournment of sentencing should be extended to include:

(1) preparation for pleas of mitigation;

(2) preparation if imprisonment is an option; and

(3) enabling sentencing on multiple charges in the Courts of Petty Sessions to coincide, provided that none of the offences is alleged to have been committed after the offender was convicted and bailed pending sentence. [27.18]

285. In order to encourage early pleas of guilty, adjournment for sentencing should be made more attractive to defendants by removing the presumption against granting bail after conviction under the *Bail Act 1982* (WA) Schedule 1, Part C, clause 4. [27.18]

286. Initial prosecution disclosure, required for all offences, should consist of the information specified in Recommendations 280 and 282. [27.21]

287. If the defendant does not plead guilty after initial disclosure, the prosecution, for all offences other than those for which no prison sentence is available on conviction, should disclose its case in chief, including witness statements and expert reports, known as 'full prosecution disclosure'. [27.21]

288. If a defendant does not plead guilty, defence disclosure should be required seven days after full prosecution disclosure. Subject to Recommendation 298, defence disclosure should not be required in matters where no prison sentence on conviction is available. [27.23]

289. There should be provision for the pre-trial magistrate to excuse compliance by the respective parties with any or all of the pre-trial disclosures if good reason is shown. [27.24]

290. The pre-trial magistrate should have a power to extend the time limit for instituting summary charges against a defendant provided the extension of time is required in the interests of a resolution to the matters under review in ACCR negotiations and both parties have consented. [27.25]

291. After all disclosure requirements are met, and on the application of either the defence or prosecution, the pre-trial magistrate should make a determination as to how the charge or charges are to proceed to trial. The determination may include an order that:

(1) an indictable charge or charges may be determined summarily in accordance with Recommendation 290;

(2) where the defendant elects to do so, any independent matters to be tried summarily may be tried concurrently;

(3) where the defendant elects to do so, any independent matters to be tried on indictment may be tried concurrently; and

(4) charge/s are to be tried 'on the papers' at the election of the defendant and in accordance with Recommendation 13.

Any charge or charges against the defendant to be tried summarily should then be referred to the proposed trial magistrate(s) subject to Recommendations 292 to 294. Recommendations 303 and 312 apply to matters to be tried on indictment. [27.28]

292. When a defendant is charged with a new summary offence, and he or she has a matter pending in the superior court, the summary offence charge(s) may be sent to the superior court once disclosure and ACCR processes are complete. The superior court should deal with the summary charge(s) in all respects except for trial. [27.30]

293. 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 Recommendation 292. [27.30]

294. 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(s) should be sent to the superior court to be dealt with in the same way as in Recommendation 292. [27.30]

295. Where a defendant changes a plea from not guilty to guilty or the prosecution drops or changes charges after a matter has been referred to the trial magistrate the reasons should be explained to the pre-trial magistrate subsequent to the plea being made or charge dropped or changed. [27.32]

296. If the change of plea or dropping or changing of the charges is the result of unjustifiable personal delay on the part of the legal representatives the pre-trial magistrate should have power to make a finding of professional misconduct and the legal representative should be subject to appropriate sanctions. [27.32]

297. A status conference should be convened once any case anticipated to last more than half a day at trial is referred to the trial magistrate. [27.35]

298. The trial magistrate should have a discretion to order both parties to complete disclosure procedures if he or she is of the view disclosure would assist pre-trial or trial procedures and these have not previously been completed. [27.35]

299. At the status conference a trial magistrate should have power to deal with matters relevant to the conduct of the trial and to set dates, including the power to rule on:

(1) the admissibility of evidence which may be at issue;

(2) how evidence will be adduced; and

(3) any other agreed matters, including any waiver of the rules of evidence, arising from the ACCR negotiations which require a direction for trial. [27.35]

300. The powers identified in Recommendation 299 also should be available to the trial magistrate at trial. [27.35]

301. There should be a limit on the length of time a trial hearing, which has already commenced, can be adjourned. Save in exceptional circumstances, an adjournment of a part heard matter, if necessary, should be from one working day to the next. [27.36]

Preliminary hearings

302. The preliminary hearing should be abolished. The functions it serves should be achieved by the implementation of recommendations to:

(1) enact statutory provisions requiring full police and DPP disclosure in advance of trials on indictment (see Recommendations 252, 282, 287 and 291); and

(2) confer power on the courts to examine and, where appropriate, penalise late decisions to withdraw or alter indictments (see Recommendations 307 and 308. [28.27]

Criminal process in the higher courts

303. The pre-trial magistrate should send a matter to be tried on indictment to the appropriate higher court after disclosure requirements are met and on the application of either the prosecution or defence, and subject to Recommendations 292 to 294. (And see Recommendation 312.) [29.6]

304. In all cases, the DPP should have early access to all police evidence in order to determine the charge to be laid. [29.10]

305. To avoid 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 trial judge to extend the time. [29.10]

306. The indictment and the evidence on which it is based, if different from that served on the defendant under Recommendations 280 and 282, should be served on the defendant within a prescribed time prior to presentation at trial, with power in the trial judge to extend time. [29.10]

307. Indictments should not be presented until after proper evaluation and assessment of the evidence by the DPP, so that the charges alleged in the indictment have been determined by the DPP as being capable of being proved by the evidence. [29.12]

308. When a bill of 'no prosecution' is filed the reasons for delay should be made available to the pre-trial magistrate subsequent to the bill being filed. [29.12]

309. If the delay is the result of unjustifiable personal delay on the part of a staff lawyer of the DPP or other legal representative of the prosecution the pre-trial magistrate should have the power to determine professional misconduct and to impose appropriate sanctions. [29.12]

310. Where a defendant changes a plea from not guilty to guilty after a matter has been committed to the higher court the reasons should be explained to the pre-trial magistrate subsequent to the plea being made. [29.14]

311. If the change of plea is the result of unjustifiable personal delay on the part of the legal representative of the defendant the pre-trial magistrate should have power to make a finding of professional misconduct and the legal representative should be subject to appropriate sanctions. [29.14]

312. Procedures which relate to the conduct of the trial on indictment in the usual case should be the responsibility of the proposed trial judge and should be conducted by him or her personally. Exceptions to be dealt with by a judge other than the trial judge should include issues of trial by judge alone and joinder. [29.17]

313. The procedure for trial of offences on indictment should continue to include directions conferences and section 611A hearings as the trial judge considers appropriate in order to identify issues and facilitate the conduct of the trial. [29.17]

314. After referral of charges to the higher court, the defendant should be remanded to a directions conference at which orders concerning any section 611A hearing if relevant, the conduct of the trial and the fixing of trial dates will be settled. [29.17]

315. The law should be amended to:

(1) remove the requirement for defendants to attend section 611A hearings; and

(2) ensure that judges presiding over section 611A hearings have all necessary powers. [29.17]

316. In conducting directions and other hearings the powers of the convenor should include those specified in Recommendation 299. [29.17]

317. Steps should be taken to facilitate the attendance of trial counsel at directions and other pre-trial hearings such as listing pre-trial matters outside court hours, for example at 9 a.m. [29.18]

318. A legally represented defendant, by his or her counsel, and, unless excused by the trial judge, a self-represented defendant, should be required

at the close of the prosecution opening address and before any evidence is led, to outline the essence of the defence case. [29.21]

319. At trial, the defence in the usual case should close last. If, in its closing address, the defence raises matters not reasonably anticipated by the prosecution, the prosecution should have a limited right of reply. [29.21]

320. The powers identified in Recommendation 299 also should be available to the trial judge at trial. [29.24]

321. Trial judges should be relieved by law from any obligation to summarise the respective cases of the prosecution and defence, except where the defendant is self-represented. [29.26]

322. Trial judges should 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. [29.26]

323. The law should be amended to emphasise that the predominant requirement of a judge's direction to the jury is that it assists the jury to fairly understand the case it is trying. The current legal requirements relating to essential directions covering a wide variety of different topics should be removed. [29.26]

Trial by judge alone

324. Trial by judge alone should not, in general, be the preferred method of trial for serious criminal offences. [30.5]

325. Summary trials should be mandatory only in respect of offences which the legislature can fairly characterise as 'not serious offences' having regard to community values (and see Recommendation 277, 'Summary Offences'). [30.5]

326. The seriousness of an offence should be reflected by the sentence legislated, so that, as recommended at 277, the method of trial is linked to the nature of the offence. [30.5]

327. Reserve jurors should not be identified until the jury retires for deliberations. [30.5]

328. Trial by judge alone should be available as an alternative to trial by jury in appropriate cases on indictment but not as of right for either the defence or the prosecution. [30.9]

329. The application to have a matter heard by judge alone should be dealt with by a judge other than the proposed trial judge once a case is committed to the higher court. [30.10]

330. A defendant's application to a judge to be tried by judge alone for an indictable offence should be supported by grounds and reasons. [30.12]

331. The DPP should publish guidelines establishing the principles on which a defendant's application for trial by judge alone will be considered. [30.12]

332. Notice of the application for trial by judge alone should be served on the prosecution which should be entitled to appear and be heard in opposition to the application. [30.12]

333. Except where the interests of justice otherwise require, the defendant's reasons for applying for trial by judge alone and the prosecution's reasons for granting or refusing consent to the defendant's application, should be made public. [30.12]

334. There should be provision for an application for trial by judge alone to be heard in private if the judge considers it to be in the interests of justice and a fair trial. [30.12]

335. Formal notice of the procedures for and implications of an application for trial by judge alone should be provided to a defendant prior to any application being made. [30.14]

336. Before deciding the application for a trial by judge alone, the judge should be satisfied that the defendant understands the effect and consequences of the order if made. If the defendant is legally represented this may be achieved by the judge consulting defence counsel. [30.14]

337. Unless the judge is of the opinion that the interests of justice require the trial to be by a judge and jury, and with due consideration of Recommendation 277, the application should be granted. [30.14]

338. Where a defendant 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 unless the judge is satisfied in respect of each offence 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 a separate trial. [30.15]

339. When the defendant is charged jointly with another or others, in the absence of an order for separate trial of the co-defendants, no order for trial by judge alone shall be made unless each of the jointly charged defendants joins in the application and unless the judge is satisfied in respect of each such defendant that the interests of justice do not require a trial by judge and jury. An order may be made in respect of any defendants granted an order for a separate trial. [30.15]

340. When a ruling on a trial by judge alone application has been made:

(1) only the defence should have a right of appeal;

(2) the right of appeal should be to the Court of Criminal Appeal;

(3) strict time limits should apply to prevent any disruption to the trial process — for example, the appeal should be lodged seven days from the making of the order; and

(4) no right of appeal on the ruling will be available after the trial has been conducted. [30.18]

Costs — criminal system

341. The *Official Prosecutions (Defendants' Costs) Act 1973* (WA) should be repealed. [31.17]

342. All provisions relating to the award of costs in official prosecutions in the following legislation should be repealed:

(1) the *Justices Act;* and

(2) the *Criminal Code.* [31.17]

343. The provisions of the 'Shortening Ordinance', incorporated through section 138 of the *Police Act 1892* (WA) allowing triple costs for an unsuccessful action for malicious prosecution should be repealed. [31.17]

344. The provisions of the *Suitors' Fund Act* should be amended to enable any additional costs incurred by defendants through no fault of their own after an initial criminal trial to be fully met from the Fund. [31.20]

Appeals

345. The statute conferring a right of appeal in all cases should clearly specify the nature of the appeal, any limitations on the appeal, and the procedure to be followed on the appeal. (But see chapter 33.) [32.5]

346. Section 20 of the *Supreme Court Act* should be amended to delete any references to the appellate jurisdiction existing before the Supreme Court was established. [32.6]

347. 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 by a requirement of leave to appeal. [32.7]

348. Relevant legislation should be amended so that the composition of any court of appeal does not include the judge whose decision is under review. [32.9]

349. The powers of a member of the Full Court of the Supreme Court or of the Court of Criminal Appeal should be specified with regard to the form of orders and incidental matters following the determination of any civil or criminal appeal. [32.10]

350. Applications for leave to appeal in civil and criminal matters should be dealt with, if possible, without oral argument. After consideration of an application for leave to appeal, the court would have the option to:

(1) allow the application for leave to appeal without oral argument;

(2) hear argument on the application for leave to appeal;

(3) increase the number on the bench to hear the application for leave and hear argument at the same time as the appeal; or

(4) refuse the application. [32.11]

351. An application for leave to appeal should either be accompanied by a written submission or the submission should be filed very soon after the filing of the application. [32.11]

352. Except for appeals against sentence or conviction under the *Criminal Code* where a satisfactory process is already in place, parties to complex appeals should:

(1) be encouraged to confer with a view to agreeing a summary of the facts and proceedings from the court/tribunal/board below and agree to identify the issues for determination on the appeal. Consolidated outlines of facts should be agreed before a hearing date is set; and

(2) prepare appeal books containing 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. [32.13]

353. All civil and criminal appellate courts should expand the use of advances in information technology to develop electronic appeals procedures. [32.14]

354. Order 65B rule 3 of the *Rules of the Supreme Court* should be retained, but the reference in Order 65B rule 3(b) to 'the state of the Court lists' should be deleted. [32.18]

355. Order 65B rule 3 (3)b of the *Rules of the Supreme Court* should be amended to read 'the interest of other litigants, and the community, in proceedings being resolved expeditiously and without undue expense and delay'. [32.18]

356. The power to direct the filing of written submissions and to limit the time for presenting an appeal should be exercised by judges of appellate courts with reference to the criteria specified in the amended *Supreme Court Rules* Order 65B rule 3 (3)b, including the complexity of the appeal and the importance of the issues involved in the case. These determinations should

be made before the parties file a consolidated outline of the appeal case. [32.18]

357. All appellate courts should make greater use of written submissions. [32.18]

358. All appellate courts should limit oral argument or dispense with oral argument altogether in appropriate cases. [32.18]

359. Resources should be made available to assist self-represented persons in the conduct of both criminal and civil appeals when they cannot obtain legal aid or afford legal representation. In particular Recommendations 199 and 200 also should apply to self-represented litigants in criminal matters. [32.20]

360. The Full Court of the Supreme Court and 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. [32.23]

361. 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 reasons. The court should have a discretion to make these available to the parties at the court registry from a specified time. The discretion should be subject to direct notice being given to the parties and to public notification of the availability of the decision and reasons through announcements posted in the court building and published in the newspapers. [32.23]

362. The Supreme Court, including the Court of Criminal Appeal, should use a short form of judgment for appeal cases raising no significant issue of principle. [32.24]

363. 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. [32.27]

364. In determining whether to give leave to appeal in civil matters the court should consider the value of the subject matter of the appeal. Leave to appeal should be required in civil matters involving any property or right with a value of less than the monetary jurisdictional limit of the Local Court. [32.27]

365. The expedited process under Order 63A of the *Supreme Court Rules* should extend to all leave applications for civil appeals. See also Recommendation 350. [32.27]

366. There should be no requirement to obtain leave to appeal in interlocutory civil matters, and appeals should be made directly to the Full Court of the Supreme Court, ordinarily constituted by two judges. [32.29]

367. 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. [32.40]

368. The requirements for leave to appeal against conviction/acquittal and sentence under both the *Criminal Code* and *Justices Act* should be abolished. [32.43]

369. 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. [32.45]

370. Where a case raises appropriate matters for a guideline judgment, the Court of Criminal Appeal should give notice to the parties so that the DPP or a friend of the court, by leave, may address wider issues of sentencing in the appeal. [32.47]

Boards and tribunals

371. A Western Australian Civil and Administrative Tribunal (WACAT) should be established to amalgamate the adjudicative functions of existing boards and tribunals, except in industrial relations and Workcover areas. [33.10]

372. The WACAT jurisdiction should extend beyond administrative review or appeals, to other adjudicative functions currently determined by tribunals, boards and lower civil courts including the Small Claims Tribunals, the Commercial Tribunal, the Residential Tenancies Tribunal and the Small Disputes Division of the Local Court. [33.10]

373. The jurisdiction of the WACAT should include the adjudicative functions of the Equal Opportunity Tribunal, Freedom of Information Commissioner, Guardianship and Administration Board and Legal Practitioners Disciplinary Tribunal. [33.14]

374. If all board and tribunal adjudicative functions are not incorporated into the WACAT, any board or tribunal which continues to exercise adjudicative functions should be co-located with the WACAT for administrative economy. [33.14]

375. Where an existing body has an investigative function to determine if a regulation or code of conduct has been breached, then the investigative function should remain with that body and the matter be referred to the WACAT for adjudication if there is a case warranting determination. [33.14]

376. The WACAT should comprise an Administrative Division and a Civil Division, consisting of various lists. These may include:

(1) Administrative Division
   i. General List (including Freedom of Information reviews and other matters not currently subject to review);
   ii. Taxation List;
   iii. Planning List;
   iv. Occupational and Business List; and
   v. Land Valuation List

(2) Civil Division
   i. Anti-Discrimination List;
   ii. Civil Claims List;
   iii. Credit List;
   iv. Domestic Building List;
   v. Guardianship List;
   vi. Real Property List;
   vii. Residential Tenancies List;
   viii. Commercial Tenancies List;
   ix. Legal Practitioners Complaints List. [33.14]

377. The WACAT should be inquisitorial in nature and demonstrate a commitment to informality and accessibility for applicants. [33.15]

378. The WACAT should ensure accessibility by travelling on circuit to determine matters where necessary and permit evidence to be provided by telephone and video-conference link where possible. [33.15]

379. The WACAT should not be bound by the rules of evidence, legal technicalities or legal forms. It should be able to inform itself as it thinks fit and act according to equity, good conscience and the substantial merits of the case. [33.15]

380. The procedure of the WACAT should rely heavily on conciliation, mediation and the facilitation of settlement of matters prior to hearing. [33.15]

381. Administrative decisions of boards and tribunals should be subject to review by the WACAT rather than a court. [33.17]

382. Appeals from a decision of the Assessor for Criminal Injuries should be to the WACAT instead of the District Court. [33.17]

383. Original decisions made within the civil jurisdiction of the WACAT should be subject to review within the WACAT, where these can be appropriately and efficiently handled within the WACAT structure. [33.17]

384. The WACAT procedure for review or appeal should be uniform:

(1) parties should be entitled to representation, either legal or non-legal, but the procedures should be as user-friendly as possible to ensure self-represented parties are not disadvantaged;

(2) the evidence should be considered anew with the tribunal standing in the shoes of the original decision-maker;

(3) further evidence available at the time of the review or appeal, which may or may not have been available to the original decision-maker, should be taken into consideration; and

(4) administrative review by the WACAT should take into account government policy only as certified by the Minister or Chief Executive Officer of the relevant department as being in existence at the time of the reviewable decision. [33.17]

385. An appeal to the Supreme Court from an administrative review or appeal determination by the WACAT should be available. [33.18]

386. The only grounds for appeal from any WACAT decision to the Supreme Court should be:

(1) questions of law;
(2) the complexity of the of the case; or
(3) when in the public interest. [33.18]

387. Applicants seeking to have an administrative decision reviewed by the WACAT should be required to meet a modest application fee and not full cost recovery. [33.19]

388. WACAT application fees should vary according to the nature of the application with fees for matters which are business-related being at a higher rate. [33.19]

389. Waiver provisions should be available for financially disadvantaged persons. [33.19]

390. Party/party costs should only be permitted in matters of administrative review by the WACAT in special circumstances including groundless or malicious applications, or unreasonable conduct by a party. [33.21]

391. Where the matter is an original decision or appeal in a civil dispute there should be a discretion to award costs where a party has incurred costs to enforce an existing right. [33.21]

392. The chairperson of the WACAT should be appointed for a period of up to seven years and should be a legal practitioner with appropriate qualifications and status. [33.22]

393. Full-time and part-time members should be appointed for a period of up to five years to one or both Divisions and may be appointed to hear matters in one or more Lists depending on their expertise. [33.22]

394. A Head of List should be appointed from the members to have special responsibilities related to that List. [33.22]

395. There should be an independent and open selection process for the appointment of members of the WACAT, with annual reporting to Parliament of recommendations of the selection panel and the appointments made by the appointing authority. [33.22]

396. Jurisdiction should be conferred on the WACAT by legislation relating to the subject matter of the decision or complaint where appropriate. [33.23]

The court environment

397. In order to keep the community informed about the courts and court activities, all courts should develop community education strategies, including web sites, annual reports, fact sheets, and judicial outreach programs. [34.6]

398. Media liaison officers should be appointed to all jurisdictions and appropriately resourced. [34.6]

399. All courts should have clearly designated procedures for handling complaints about court service. [34.6]

400. Access to courts by telephone should be improved, for example, by the establishment of a call centre. [34.6]

401. To the extent possible, courts should provide services to meet user needs. Together with the survey recommended at No. 3, procedures, processes and attitudes should be reviewed to ensure that participants in the justice system deal with all users courteously, respectfully and fairly. [34.8]

402. 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. [34.11]

403. Future court design briefs should consider the degree of hierarchy to be reflected by the design. As much as possible, there should be consistent design standards and equality of furnishings and fittings throughout court buildings. [34.11]

404. Any significant renovations or construction of new court buildings should take into account the diverse needs of court users. [34.12]

405. There should be a study of the involvement of indigenous Australians and population groups from non-English speaking backgrounds with the justice

system, with particular emphasis on alternative dispute resolution and developing services and facilities which meet their needs. [34.12]

406. 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. [34.13]

407. Art should be integrated into courts to assist in making a respectful environment. This might include temporary exhibitions, works commissioned and integrated into 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. [34.15]

408. Court and police buildings should be visually separate and clearly demarcated architecturally to demonstrate the independence of the courts from the policing function. [34.17]

409. Court planners should incorporate user friendly facilities including cafés or other eating facilities in court buildings. [34.18]

410. Prior to commencing significant renovations or new construction of courts 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. [34.19]

411. All courts should develop safety plans, including (but not limited to) signs in various languages advising people where to go or whom to contact if they feel unsafe. [34.19]

412. Future court design briefs should specify secure areas which accord greater respect for those who are held in them and also those who work in them, without diminishing the level of security. [34.21]

413. User surveys should form the 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 the design of new, court facilities. [34.24]

414. Court communications and procedures should be simple, straightforward and clear enough to be understood by ordinary users. [34.26]

415. Courts should provide user-friendly booths in foyers, registries or waiting areas, staffed by suitably trained representatives of user groups, including women, indigenous Australians and young people. Staff should pro-actively

seek feedback from court-users and provide a referral service about local advice and support services in the community. The booths also should be linked to computer access facilities recommended at Nos 162, 212, 281, 282 and 426. [34.27]

416. Courts should introduce a review procedure to act on the suggestions of court-users and make changes as appropriate. [34.27]

417. In conjunction with the staffed booths recommended at No. 415, courts also should provide self-help centres to facilitate access to information and services for all users, particularly for self-represented litigants. [34.30]

418. Self-help information, as far as possible, should be available in a format which can be taken home by potential litigants. Availability of information through videos, obtainable through public libraries, community law centres, or through the internet, should also be implemented where possible. [34.30]

419. All courts should develop a Self-Represented Litigants Plan dealing with every stage of the process, from filing to enforcement or the equivalent in criminal matters, and including guidelines for judicial officers about how best to conduct hearings where one or more parties are not legally represented. [34.31]

420. The importance of jury service should be recognised by providing pleasant facilities for jurors including round tables in jury rooms with natural light, appropriately screened outside views, withdrawal spaces, comfortable seating, and good quality fittings and furnishings. [34.34]

421. Instructions for juries should be developed to provide each juror with an equal opportunity to speak and be heard during deliberations. [34.34]

422. The design requirements and practical needs of the legal profession as regular court facility users should be surveyed prior to developing or renovating future court facilities. [34.35]

423. Prior to commencing significant renovations or construction of court buildings a new flexible model for civil and criminal courts should be researched, developed and trialled. [34.40]

Technology and justice

424. The information items used throughout the Western Australia justice system should be rationalised and issues of ownership and accountability in relation to each information item should be determined. [35.5]

425. A Justice Joint Agency Office should be created with a Board of Management representing all justice system stakeholders that will establish and maintain 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. [35.7]

426. Pilot projects to research and implement legal advice avatars for general public use over the internet should be implemented. [35.10]

427. An Electronic Dealings Framework Act should be enacted in Western Australia. It initially should cover only essential matters like the urgent issue of authenticating digital records. [35.13]

428. The Evidence Act recommended at No 221 should ensure that digital representation of information is given the same evidential credibility and weight as paper and other forms of communication. [35.13]

429. The new Evidence Act of Western Australia recommended at No. 221 should incorporate sections to accommodate evidence (of all types) in digital form — allowing digital evidence to be accorded such 'best' evidence status as is required. [35.14]

430. Legislation and policy should be enacted to ensure electronic materials are properly maintained for historical purposes. [35.15]

431. Information transfer systems using XML in standard structures and formats should be rapidly implemented for the entire justice system, as defined by the Justice Joint Agency Office recommended at No 425. [35.17]

432. An integrated digital evidence management system, used by the Western Australia Police Service, DPP, courts and defence counsel, should be implemented. [35.18]

433. Legislation should be enacted or amended to allow digital renditions of evidence to be used in court, by consent of the parties. [35.18]

434. All courts and other justice related jurisdictions should implement a single consistent advanced computerised system. Such a system should record all details of cases and their status as they progress through the courts, providing management information to assist in improving court operations. [35.20-35.21]

435. Further research should be conducted into the likely impact of video technologies on individual participants and on the quality of justice that ultimately results. [35.24]

436. All technological systems implemented in the justice system should have facilities to allow self-represented litigants to participate on an equal basis with all other parties. [35.25]

The legal profession

437. The legal profession, in consultation with those responsible in the courts for the assessment of legal costs together with members of the public, 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. [36.12]

438. A task force should be established, comprising representatives of professional bodies, the judiciary, the law schools, members of the public and the Ministry of Justice to examine:

(1) the adequacy of the present rules of professional conduct in light of the ideas outlined in this Report, the Consultation Drafts and relevant public submissions to this Commission; and

(2) the production of best practice protocols. [36.13]

439. There should be 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 civil justice system is said to rest. [36.14]

440. Legal ethics training should be required for students to obtain undergraduate law degrees. Attendance at legal ethics continuing legal education courses also should be required for practitioners in order to renew practise certificates. [36.15]

441. A program of mandatory Continuing Legal Education should be established in Western Australia. Accredited providers should be obliged to include coursework on legal ethics and legal procedures. [36.15]

442. The mechanisms for enforcing ethical obligations should be made more effective and the range of penalties and the principles on which the penalties are to be imposed should be developed through consultation with the profession, the courts and the public. [36.17]

443. For public confidence in both the process of review and its implementation there should be significant community representation in the membership of regulatory bodies of the legal profession and the Law Reform Commission. [36.17]

444. In conducting its examination, the task force (recommended at No. 438) should consider the public submissions sent to the Law Reform Commission of Western Australia when conducting this review. [36.17]

Private civil courts

445. A pilot project for the establishment of parallel private civil courts should be commissioned. [37.5]

446. Private courts should have no jurisdiction where there is a significant power differential between parties, for example in matters arising between employees and employers or insurance claimants and insurers. [37.6]

447. Litigants should be required to pay a fee to the public court system on lodging any proceedings with the private courts, to reflect the benefit obtained through the availability of publicly funded enforcement mechanisms. An additional fee would be charged on registration and enforcement of private court orders. [37.7]