Foreword

History of the Review of the Justice System

The Attorney General Peter Foss, QC, MLC, asked the Law Reform Commission of Western Australia (LRCWA) to review the Criminal and Civil Justice System in September 1997. This was the largest reference in the Commission's 30-year history. Two years later the Commission delivered its Report.

To accomplish the Review within such a relatively short period of time it was necessary to transform the Commission and its approach to law reform. The Commission began with a major outreach for submissions in the belief that those with first hand experience of the justice system should suggest areas for change.

In December 1997 the Commission advertised for submissions and launched an Internet web-site. A few submissions trickled in and the web-site was averaging 300 hits or visits per month through May 1998.

Then, in June 1998, the Commission released a 12 page Issues Paper and commenced a series of public meetings in order to obtain submissions. During the review of the Criminal and Civil Justice System, the Commission held or participated in 10 'Have Your Say' public meetings in Karratha, Kalgoorlie, Bunbury, Geraldton, Albany and Perth. These events brought Commissioners face to face with Western Australians, many of whom were eager to speak out concerning their experiences with the justice system.

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 they could call to speak to the three members of the

Wayne Martin QC
Chairman

LRCWA. The objective was to give Western Australians living in remote parts of the State an opportunity to express their views.

Members of the Commission and its Administrative Officer spoke to newspaper and broadcast journalists in Western Australia and the eastern states. The Commission distributed 17,000 copies of the Issues Paper around Western Australia and numerous more through the Internet.

Once news of the Review of the Criminal and Civil Justice system spread, an average of 4000 visitors a month opened the Commission's Internet web-site home page. Visits peaked in August 1999 with a total of 9095 hits to the site. More than 70,000 visitors examined the Commission's web-pages during the course of the Review.

The Commission also made staffing and facility changes at the beginning of the Review which enabled more people than ever before to participate in producing law reform publications. A total of 66 consultants with diverse skills and expertise helped produce more than 2000 pages of material for publication by the Commission in connection with this Review. In Appendix II the Commission acknowledges them as well as those who made submissions and helped in other ways with this project.

More than 650 people and 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. These are summarised briefly in a separate Submissions Summary, which synthesises thousands of pages of material provided to the Commission, and includes suggestions received on a wide variety of topics, including issues outside the current project's Terms of Reference.

The Report reveals that the system in place in Western Australia is in better shape than some critics suggest. The Commission's recommendations build on innovations and efficiencies already working or being implemented by the Courts and the Ministry of Justice. The Commission's recommendations seek to reduce delay, cut costs and demystify the justice system by making it faster, simpler and easier to understand.

Wayne Martin QC
Chairman

How to Use this Document

This Project Summary carries a CD ROM in a back cover pocket and provides a concise overview of the background to, and main themes of, the Review of the Criminal and Civil Justice System.

The Law Reform Commission's principal recommendations formed at the conclusion of the Review can be found in the Final Report, a document of over 400 pages. Other documents produced as part of the project accompany the Report. These include a two volume set of Consultation Drafts and a summary of submissions. These documents are produced on compact disks for use in a computer. Both disks also include some additional audio-visual material. Except the Submissions Summary, the project papers are on the CD at the back of this Project Summary.

If you want to follow up something interesting, how would you locate it in the Report and the other materials?

The quickest way to target a particular topic is to use the Cross Referencing Index in Appendix I of this Project Summary. The Index will help to guide you to the appropriate pages of the Report, the Consultation Drafts, the Submissions Summary, or all of these. With the Index, you may use the terms employed in this Summary, such as the 'Right to Silence', 'Disclosure' or 'Alternative Criminal Charge Resolution', 'Case Management', 'Private Courts' or 'Self-representation', to find relevant references.

1

Reviewing the Justice System

Touchstones

Submissions to the Law Reform Commission received during the course of the Review of the Criminal and Civil Justice System suggest the justice system is expensive, misunderstood, takes too long to resolve matters and lacks regard for the lay person. As the Commission was asked to make recommendations to improve the justice system, the first question is: what criteria or touchstones should guide reform efforts? What structural and procedural changes can be made to make the justice system work better, faster and still be fair?

Principles, rules and discretions make up the system of procedure and direct how disputes are to be resolved. Procedure, then, is the focus of this Review and most of the recommendations for reform. Changing the system in order to cut costs and curb delay without sacrificing justice, fairness and openness requires the balancing of competing issues.

English precedents

Two significant recent studies of aspects of the English justice system provided guidance. Lord Woolf's review of the civil justice system (1996) posed some 'touchstones' against which proposals for reform can be judged. His report concluded that a publicly funded dispute resolution system should be just, fair, comprehensible, certain and reasonably expeditious. The earlier Runciman Report (1993) on criminal justice required that the risk of the innocent being convicted and the guilty being acquitted be as low as humanly possible.

The constitutional presumption that all people are equal before the law provides the basis for the principle that courts should be equally open and accessible to all. This noble principle has always been a source of tension

between access to justice and the inevitable associated legal costs. The objective of reform should be not only to resolve disputes but also to facilitate access for all litigants without regard to their financial means. Access is essential for a legal system to qualify as a justice system. The system must also provide just results. The true difficulty lies in reforming the system without losing sight of all of the various elements and competing touchstones of a justice system.

The adversarial system

Western Australia inherited its justice system from England. It has been modified over the years to meet local conditions. Before advancing ideas for reform it is essential to consider how the system has evolved and understand how it works at present.

Our adversarial system, with passivity on the part of judges and the heightened role of lawyers, dates from the 18th century. The traditional model involves little intervention by court officials in the management of litigation. Thus settlement is rarely explored in depth until a trial date is near.

Some of the public submissions blame lawyers for perpetuating the adversarial system. Several of the Consultation Drafts and Chapters 1-8 and 23 of the Final Report examine the existing structure of the justice system and the adversarial-inquisitorial debate in order to lay the groundwork for the Commission's proposals for change.

Alternatives to the present system

The Commission observed limits in proposing reform of the adversarial process particularly with regard to criminal matters in the belief that it would be wrong to prejudice fundamental rights. But, which rights are fundamental and what procedures actually achieve the objective of protecting a person from abuse of power by the State? These questions lead to others.

What is or should be the role of the courts and the justice system in our society? What is properly within the province of the court system and when are alternative methods of resolving disputes a better option? The benefits of alternative dispute resolution are many but it is the task of the courts to preserve the rule of law and, particularly in criminal matters, to provide the balance to the power of the State as prosecutor.

Not all actions, either criminal or civil are capable of settlement and not all actions should be settled. Courts in a free society ultimately must provide an open and public place and the means for resolving disputes between individuals and dealing with offences against public order. Openness to scrutiny ensures that justice will be, and be seen to be, done.

Another objective was to reform the existing system in order to make court processes less complicated, resulting in lower costs and less time waiting for matters to be considered. The Law Reform Commission examined the various alternatives before arriving at its Recommendations in the Final Report.

2

Clarify, Simplify and Demystify

The public submissions convinced the Law Reform Commission that there is no point in having a justice system that people don't understand. Moreover it would be wrong to call it a 'justice system' if the prevailing view is that the system is unjust and unfair. The Commission heard from many people who feel that the present system is not accessible because it isn't comprehensible to the ordinary participant or observer. If, at the end of legal proceedings, people feel aggrieved by the process and procedures, the system is neither effective nor fair.

The solutions to these problems call for significant changes in many areas. The first of these is found in the Commission's call for clarity and simplicity. The Commission itself is changing its approach to law reform by attempting to communicate its ideas clearly, directly and succinctly. This Project Summary is part of that effort. The Commission has tried to eliminate Latin and archaic terminology and to avoid 'legalese'.

By expressing its ideas for reform in plain English the Commission hopes that some day all rules, statutes and communications concerning court proceedings in Western Australia will be capable of being understood by the average person.

Simplify by uniform rules

To simplify the justice system and make it more easily understood the Commission recommends uniform rules in all courts. All statutes should include a statement of purposes or principles upon which the legislation is founded. **[Recommendations 5-6]**

Clarify by plain English

The Report recommends court communications and procedures should be simple, straightforward and clear enough to be understood by ordinary users. **[Recommendations 2, 6, 161-162]** Those dealing with legal materials should use plain English when:

- revising laws,
- drafting legislation, and
- developing new procedures.

Demystify

The Recommendations call for far more than simply telling people what is happening in court. Courts and lawyers should have an active role in providing proper information so that people are fully informed of the process whether they are litigants, victims, witnesses or accused offenders.

People attending the Commission's public meetings and making submissions claim not to have enough accurate information about the court proceedings in which they are involved. To resolve this problem the Commission recommends all participants in the justice system communicate with people in a way that gives them proper information. Moreover, providers of justice system services should, with an interested mind, seek the views of all of those who become involved with the system.

Seeking the truth

The Law Reform Commission proposes parties should verify on oath or affirmation the claims they make in civil lawsuits. **[Recommendation 32]**

Legal practitioners should certify their belief that the evidence exists to sustain allegations made in documents they file in court. **[Recommendation 33]**

In criminal matters the Commission specifically recommends holding lawyers accountable for delay and any failure to disclose appropriate information. **[Recommendation 254]**

These changes, if adopted, should assist the court in dealing with matters more expeditiously. Moreover, if a party knowingly and falsely verifies facts, it should be an abuse of the judicial system and punishable as a contempt of court.

3

Criminal Issues

Many public submissions concerning the criminal justice system dealt with sentencing issues which were outside the scope of this Review. The Commission's work considered procedural matters only relating to how the court handles pre-trial and trial processes, hears evidence, treats witnesses, and manages particular evidentiary issues in criminal proceedings.

Common law origins

The criminal law in Western Australia is based on English common law and a criminal code borrowed from Queensland in 1902. Today the *Criminal Code 1902* (WA) contains many, but not all, of the substantive offences dealt with by the courts in Western Australia. When dealing with criminal matters it may also be necessary to examine the *Justices Act 1902* (WA), the *Evidence Act 1906* (WA), the *Police Act 1892* (WA), the *Road Traffic Act 1974* (WA), or the *Misuse of Drugs Act 1974* (WA), to name a few. *Criminal Practice Rules* (WA) apply to charges tried in the higher courts. This system has been cobbled together over the past century.

Clarify and simplify

Over time the classification of offences as summary, indictable with the option of summary trial or indictable with the option of trial by judge alone, or jury, has evolved in a piecemeal way. There is no coherent basis for the classification either with reference to the seriousness of the offence or the importance of having community input through a jury trial.

In the Commission's view, restructuring how offences are classified is long overdue. **[Recommendation 277]** Offences should be classified into categories of:

- serious indictable offences,
- intermediate indictable offences,
- lesser indictable offences,

- summary offences, and
- minor summary offences.

Justices of the peace should only be entitled to decide matters where no prison penalty is available. Under the recommended new classification system these would be categorised as 'minor summary offences'. This will mean that defendants in country regions who have been detained in custody pending their hearing must be transferred to an appropriate court for the determination of outstanding charges as a matter of urgency. **[Recommendation 278]**

The present complaint form, which initiates criminal court proceedings, dates from 1902. This document should be redrafted in plain English. The complaint should be provided and read to each defendant before the first court appearance. **[Recommendations 279, 280]**

Changes to criminal procedure

The majority of the public submissions relate to crime and problems with criminal aspects of the justice system. After careful study and consultation the Law Reform Commission made more than 100 recommendations dealing specifically with criminal matters. **[Recommendations 10-17, 251-344]** The Commission prepared nine Consultation Drafts and a Background Information Paper dealing exclusively with criminal topics and the evidence and general topics concern criminal problems as well.

Reducing delay

Most, indeed, 90 per cent of all criminal charges are resolved by a plea of guilty. Inefficiency arises from pleas of guilty being entered late in the process. Defendants wait to plead because they:

- lack information;
- need to obtain legal advice;
- want to collect material relevant to mitigation; and
- require time to put affairs in order if expecting a prison sentence.

By recognising these needs, procedural changes can be made that should result in earlier pleas. **[Recommendations 282-285]**

A defendant charged with multiple offences may be advantaged by waiting for one sentencing date before finalising all pending matters. To allow for an adjournment on bail to prepare a plea in mitigation and bring multiple charges together for sentencing at the same time the Court of Petty Sessions should have a procedure similar to the present 'fast track' system of committal for sentence in superior courts. **[Recommendation 291]**

Some defendants are charged with summary offences as well as indictable offences. The present procedure allows guilty pleas on both summary matters and charges on indictment to be dealt with in the superior court on the same day. However, where not all charges are the subject of a guilty plea, trials proceed in two different courts. The superior court should have the power,

if appropriate, to dispose of the multiple charges including trials of summary matters. **[Recommendations 292-294]**

Currently through procedural mechanisms, defendants are encouraged to enter a guilty plea at an early date. Despite the existing incentives substantial numbers do not plead guilty until, or just before, the date of the trial. Pre-trial magistrates should have the power to inquire into late changes of plea or withdrawal of charges and impose sanctions on defence or prosecution lawyers if the lawyers were personally derelict and caused delay. **[Recommendations 295-296]**

Criminal process in the higher courts

When a defendant is committed to the Supreme Court for trial, the matter is listed for the next 'pleas' day. If an indictment (a court document in which charges are made) is presented at that time, the defendant will enter a plea. The defendant is generally remanded to a status conference when a trial date is fixed. A directions hearing may also be listed to determine preliminary questions of law or procedure, evidence and admissions by the defendant. The period between committal and trial in the Supreme Court is generally five to six months.

The procedure in the District Court is similar to that in the Supreme Court except that usually two status conferences are listed and the process from first appearance to trial is usually thirteen months. Commonly neither the defence nor the prosecution is adequately prepared for the first status conference.

Often there is delay in presenting the indictment. Where the indictment is not identical to the charges on which the defendant was committed the defence may require a further adjournment.

In 1997/8 the Director of Public Prosecutions (DPP) discontinued 4.5 per cent of all indictments. Sometimes charges are withdrawn late in the process, even on the day the trial is scheduled to begin. Procedural delay of this nature wastes the resources of the criminal justice system as a whole. Indictments should not be presented until after proper evaluation and assessment of the evidence by the DPP. **[Recommendation 307]**

The DPP should have early access to all police evidence in order to determine the charge to be laid. **[Recommendation 304]** A time should be prescribed from committal by which the indictment must issue. **[Recommendation 305]** The reasons for any delay in filing a notice of withdrawal of charges should be made available to the pre-trial magistrate. **[Recommendation 308]** Sanctions should be imposed where the prosecution causes unjustified delay. **[Recommendation 309]**

A similar waste of time and resources is caused by late guilty pleas which represent 12.9 per cent of indictments listed for trial. This delay is often

due to either a failure in preparation by the defence or prosecution. It can be due to late finalisation of negotiations between the parties. Sanctions should be imposed where the defendant's legal representative causes unjustified delay. **[Recommendation 311]**

The right to silence

Some of the most passionate public submissions received dealt with the right to silence. The right to silence is based on the presumption of innocence and the adversarial nature of the common law system. Presently, a suspect has a right to silence in the police station. A defendant to a formal charge has the right not to disclose his or her defence prior to trial (except for an alibi). There can only be comment by the judge on a defendant's silence at trial in limited circumstances. The Commission recommends that the right to silence during police questioning be maintained. **[Recommendation 251]** However, the same considerations do not apply to the trial.

At trial, the accused will be fully aware of the case he or she has to answer. Because of this, the Commission recommends the jury be able to consider the exercise of the right to silence as one of the circumstances or part of the evidence. This does not mean that silence of itself should be seen to imply guilt. As long as the jury is appropriately directed as to the defendant's right to silence, it should be open to a jury to draw its own conclusions from the circumstances and the evidence. The prosecution should be permitted to comment on the silence of the defendant within the same limits as apply to directions from the judge. **[Recommendation 255]**

Increased disclosure

The DPP's guidelines require prosecution disclosure in serious matters where the charges are made in an indictment. In summary matters, involving less serious offences, the defendant only has the right to particulars of the charge and no access to the evidence by which the charge may be proved. The Commission recommends a statutory obligation on police to disclose all evidence to the prosecution including records of interview and witness statements. **[Recommendation 304]** The prosecution must then disclose the evidence to the defence in all criminal matters.

The accused has fewer resources than the prosecution. However, the Commission formed the view that limited reform is required to balance the legitimate expectations of the public and, particularly, victims of crime. If guilt can not be proved because of evidence the defence has, the evidence precluding proof of the factual elements of the offence or any related proposition of law should be disclosed. Disclosure should include any objection to prosecution documents, an alibi notice and any expert witness statements. **[Recommendation 288]**

The DPP should provide disclosure in stages. At or before the first appearance, the defendant should have access to the complaint, a statement of material facts and law, and copies of criminal records and any confessional

material. Upon a plea of not guilty the prosecution should disclose all witness statements and expert reports. **[Recommendation 287]**

Defence disclosure for offences where a prison sentence is not available on conviction should be required one week after full prosecution disclosure. **[Recommendation 288]** Following disclosure, upon application by either the prosecution or defence, the pre-trial magistrate should determine how the charge or charges are to proceed to trial. **[Recommendation 291]**

Alternative criminal charge resolution

Currently in Western Australia police decide both whether or not to charge and the level of seriousness of the offence. Sometimes there is negotiation between the prosecution and the defence or the self-represented defendant as to what charges should proceed to trial and what concessions can be made.

Some of the criminal justice system's problems can be addressed by reforms so that matters bypass the court and charges are resolved during pre-trial negotiations. This may result in admissions of guilt and restitution for victims.

The Commission recommends a formal pre-trial negotiation process: Alternative Criminal Charge Resolution ('ACCR'). **[Recommendation 259]** The Commission recommends that all outstanding charges against a defendant should be considered at the same time in order to decide:

- which charges will continue to trial and in which court;
- whether charges may be heard concurrently; and
- whether the defendant can agree to any facts or admit any charges.

ACCR must be distinguished from plea bargaining as used in the United States. The Commission suggests ACCR be a formalised process for confidential negotiation of evidence and charges. The Commission developed the concept of ACCR in order to encourage the prosecution and the defence to assess the quality of the evidence and identify the real issues in dispute. Once facts are agreed it is easier to bring matters to a speedy resolution.

In plea bargaining as it operates in the United States the prosecution negotiates the ultimate outcome: an offender's sentence. The Commission believes the sentence should be determined and imposed by the courts. However, the ACCR approach gives greater opportunity for the agreed resolution of criminal charges and encourages meaningful consultation with victims.

Victims of crime should be informed of the ACCR process and be entitled to provide a written statement. **[Recommendations 260, 263 264, 268]** There should be an obligation to maintain the confidentiality of the ACCR process, with the media being prohibited from publishing any information until the matter is finally resolved. The recommendation that there be no resolution of criminal charges without the prosecution attempting to consult

the victims should assure those who have suffered that they have a respected and important role in the process.

To avoid unfairness, persons for whom a prison sentence is a real possibility must be legally represented. **[Recommendation 267]** Representation in the ACCR process may be by private counsel, Legal Aid or a suggested Public Defender's Office. Legal practitioners should provide advice and access to information on ACCR prior to entering into a cost agreement in a criminal matter. **[Recommendation 269]** Courts should help self-represented defendants access information on ACCR. **[Recommendation 270]**

Joinder: bringing individuals and matters to court together

It is critical to the administration of justice that criminal trials take place promptly and at reasonable cost. However, these aims should not be attained at the expense of the victim and other witnesses. The manner in which these interests are balanced is particularly difficult in certain situations involving multiple victims, offenders and/or charges.

Joinder refers to two scenarios:
- combining a number of charges against an individual defendant in a single indictment, and
- bringing related charges against a number of defendants together in one indictment.

The purpose of joinder is to save costs, time and judicial resources while providing juries with a more complete picture and reducing trauma to witnesses. There is, however, a general prohibition against joinder because the presumption of innocence could be eroded by the risk of evidence in one charge being heard in connection with evidence of other offences.

Presently, joinder is only permitted where there are allegations that:
- charges are part of a series of offences or are of the same or a similar character;
- several offences are constituted by the same acts or omissions; or
- several criminal acts are committed or omitted for a single purpose.

Even if charges are joined, the court must order separate trials if the hearing of all charges at the one trial would result in prejudice to the defendant. The Commission suggests that the law should permit the judge to join charges at trial where any possibility of prejudice can be overcome by an appropriate direction to the jury. **[Recommendation 271]**

Joinder of more than one defendant is permitted where the persons are charged:
- with procuring or committing the same offence;
- as accessories after the fact;
- with receiving property allegedly stolen by others also charged; or
- with offences arising out of substantially the same or closely related facts.

Joinder helps avoid inconsistent verdicts and prevents abuse of the criminal justice system.

Preliminary hearings

Committal proceedings, or 'preliminary hearings', are a procedure originally designed to protect against the abuse of power by the State. They are held before a Magistrate in the Court of Petty Sessions. The procedure was instituted in England several hundred years ago to ensure that defendants were not put to trial without good reason. In Western Australia the preliminary hearing dates from 1850 and has remained largely unaltered until the introduction of the 'hand-up brief' procedure in 1976. This comparatively new procedure gives a defendant the right to elect whether or not to have a preliminary hearing.

In 1998, preliminary hearings were held in only 10 per cent of criminal cases destined to be heard in the District or Supreme Court. Less than half of the preliminary hearings listed in the Perth Court of Petty Sessions in 1997 actually proceeded due either to the subsequent withdrawal of charges or the defendant accepting a hand-up brief. Very few preliminary hearings result in a discharge of the defendant and even in these rare cases the DPP may bring a special indictment if it is still appropriate to proceed to trial.

The preliminary hearing is largely a discovery and delaying tactic mainly for the benefit of the defence. It may also provide an opportunity for the defence to cross-examine some witnesses and 'freeze' testimony on critical points. Sometimes evidence may be given to establish mitigating factors should the defendant ultimately plead guilty.

The historical circumstances which led to the institution of the preliminary hearing procedure no longer apply. The DPP now screens charges prior to trial and DPP guidelines demand full and proper disclosure of relevant material. The preliminary hearing process is costly. It consumes the time and resources of prosecutors, the courts, police, witnesses, defendants and legal aid organisations. It also permits, in the uncommon case, long and unwieldy hearings aimed at frustrating and delaying the ultimate disposition of criminal charges.

Preliminary hearings now perform no practical function that cannot be achieved in another way. The Commission recommends preliminary hearings be abolished. **[Recommendation 302]**

Victims

The Commission proposes, as we have already indicated, that victims have the right to be consulted by the prosecution when negotiations are being finalised to dispose of a criminal case without trial.

The Report also recommends expanding existing procedures to ease the role of the victim when giving evidence in court. For example, if the accused person does not have a lawyer, the existing rules and technology permit the

victim to appear in court for questioning by video. The Commission proposes an expansion of those facilities into a broader range of cases.

If the recommendation to abolish preliminary hearings is accepted victims won't have to submit themselves to a trial run by defence counsel at the preliminary proceedings. They would only have to go to court once to be questioned once.

Trial by judge alone

A defendant's right to trial by jury when charged with a serious criminal offence has been regarded as a key feature of our justice system. It is protected in the Australian Constitution with regard to Commonwealth indictable offences. This right is said to protect individuals from the arbitrary or oppressive use of power by the state. It safeguards public confidence in the impartiality and openness of the administration of justice. The jury system is an effective institution for determining guilt. It is also a link between the community and criminal justice system.

Trials conducted by a judge alone, in the absence of a jury, lack community input. This could be important when the offence includes elements defined according to community standards such as what is 'reasonable', provocation, self-defence, fraud or indecency.

Presently trial by judge alone is available for all indictable offences at the election of the defendant and with the consent of the prosecution.

The reasons why a defendant may choose to elect trial by judge alone include:

- possible prejudice by media publicity,
- evidence that a jury may find revolting,
- the risk of prejudice due to racial, religious or cultural differences, and
- the belief that a more lenient judge may be more likely to acquit outright or find guilt on lesser charges.

At the present time, the defendant is not required to give reasons for the election for trial by judge alone. Similarly there is no requirement for the prosecution to give reasons for granting or refusing the request to consent to the election.

While trial by judge alone should be available, it should not be the preferred method of trial for serious criminal offences. **[Recommendation 324]** It should not be available as of right for either the defence or the prosecution. **[Recommendation 328]**

Where an election for trial by judge alone is made:

- any dispute as to whether there should be trial by judge alone should not be decided by the judge who will hear the trial; **[Recommendation 329]**
- the election for trial by judge alone should be supported by grounds and reasons; **[Recommendation 330]**
- the DPP's response should be based upon published guidelines; **[Recommendations 331-332]**

- except where the interests of justice require, both the reasons for the election and the response of the DPP should be made public; **[Recommendation 333]** and
- the judge must be satisfied prior to the making of any such order that the defendant understands the effect and consequences of an application for trial by judge alone. **[Recommendation 336]**

Currently the law provides that if a person is charged with multiple offences, the election for trial by judge alone must be made in respect of all offences. Similarly where a person is jointly charged with another, an election for trial by judge alone made by one defendant does not have effect unless the other defendant(s) also make that election or there is already an order that the other charges against other defendant(s) are to be heard separately. In these circumstances no order for trial by judge alone should be made unless the court is satisfied in respect of each offence to be heard together that the interests of justice do not require a trial by judge and jury. **[Recommendation 337]**

In deciding whether it is in the interests of justice to allow trial by judge alone, the judge should be able to exercise discretion, having regard to all of the circumstances. Only the defence should have a right of appeal from a decision refusing trial by judge alone. **[Recommendation 340 (1)]** Further, the appeal, which must be lodged within 7 days, should be to the Court of Criminal Appeal. **[Recommendation 340 (3)]**

Proportional procedures for serious matters

Once it becomes clear that a charge is destined for trial and is committed to the higher court, the matter should be handled by the trial judge. A judge other than the trial judge should deal with a request for trial by judge alone or issues relating to joinder. **[Recommendation 312]**

Frequently legal representatives attending status hearings do not have sufficient knowledge of the matter. To encourage the attendance by the counsel instructed in the matter, hearings should be listed outside normal court hours, for example at 9 a.m. **[Recommendation 317]**

Order of addresses

Presently, the defence usually makes no opening address and only closes last if the defence calls no evidence. To make the trial easier for the jury and the public to understand, the defence should be required to outline the essence of the defence case at the close of the prosecution's opening address. The defence should close last. Only where the defence raises matters not reasonably anticipated by the prosecution, should the prosecution have a limited right of reply. **[Recommendations 318-319]**

Charge to the jury

The trial judge's charge to the jury can be lengthy, complex, and sometimes confusing to some jurors. 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 unrepresented. The judges should not be

required to warn the jury as to the dangers of acting on the evidence of any witness. The law should emphasise the judge's direction to the jury is primarily to assist the jury to understand the case it is trying. **[Recommendations 321-323]**

Costs in criminal matters

Under the common law, the State neither pays nor receives costs in criminal matters. However, the common law position is altered by the *Official Prosecutions (Defendants' Costs) Act 1973* which permits costs to be awarded to a defendant who successfully defends charges in the Court of Petty Sessions. Costs may be awarded except where a defendant has been found guilty without recording a conviction and where a defendant has unnecessarily increased the cost of prosecution. A defendant may also recover costs on a successful appeal where the charge is dismissed, withdrawn, struck out or quashed. The amount of costs recovered under this legislation is based upon amounts set in 1991 under the *Legal Practitioners Act 1893* (WA).

The *Justices Act 1902* (WA) permits costs to be awarded to the State when a defendant is convicted. These provisions also apply on appeal to a higher court. Where matters are tried on indictment in the superior courts, costs may only be awarded in exceptional circumstances. The costs awarded to the prosecution on conviction of a defendant under the *Justices Act 1902* are discretionary. The court must consider a number of factors including the defendant's ability to pay costs in addition to the penalty imposed. In practice, the prosecution tends to be awarded a modest amount of costs.

The Commission concluded that there should be no costs awards associated with criminal matters. The Commission recommends the *Official Prosecutions (Defendants' Costs) Act 1973* (WA) be repealed as well as provisions relating to awarding costs under the *Justices Act 1902* (WA) and the *Criminal Code 1913* (WA). **[Recommendations 341-342]**

Under current law if a prosecution has been commenced for improper purposes, a defendant may bring a civil action for malicious prosecution. However, due to a rule called the 'Shortening Ordinance', if such an action is unsuccessful there is a risk of the court awarding three times the amount of the police officer's costs. The Commission recommends the 'Shortening Ordinance' be repealed. **[Recommendation 343]**

The *Suitors' Fund Act 1964* (WA) provides for an award of costs to defendants in circumstances where, due to no fault of their own, they incur additional costs. This might occur when a trial must be repeated because the original trial was aborted, or if a jury could not agree on a verdict, or where an appeal was allowed on a question of law. This Act permits a recovery of costs up to $2,000 for a successful appeal against conviction on an indictable offence when no new trial is ordered. The Commission recommends amendment of the *Suitors' Fund Act 1964* (WA) to enable defendants to fully recover costs unreasonably incurred through no fault of their own. **[Recommendation 344]**

4

Civil Issues

Changes to civil procedure: simple forms and fewer procedures

The Local Court handles more disputes than any other court in Western Australia. There are more than 200 complex, archaic forms in use in the Local Court and it is necessary for a litigant to make sense of quaint terms including 'plaint', 'praecipe' or 'allocatur'. While a term like 'subpoena' has come to have a generally understood meaning: ie, if you get one you have to go to court or take something there, many of the words used and forms required by courts are confusing and unnecessarily complicated.

The Commission recommends a quiet revolution. All court procedure should be simplified and codified. **[Recommendations 2, 16, 414]** Anyone should be able to figure out quickly what the case is all about, by reference to a simple case statement. Important documents should be attached. **[Recommendations 26-28, 30]** These are significant recommendations for change from the current system.

The civil litigation system: complex and adversarial

Courts are now open to all who require a judge to determine the outcome of a civil dispute. Courts, however, are the most formal and expensive means of resolving disputes. The expense and, to the layman, the often incomprehensible procedures, limit the reality of access to justice for all. Further dissatisfaction arises from delay.

The essential features of the present system of civil justice in Western Australia originated in England. The English reforms arising out of the rapidly changing social and economic conditions in England in the 19th century were adopted here, and the civil justice system has remained largely unchanged for more than a century.

In recent times, the reduced availability of legal aid has led to an increasing number of self-represented litigants. This has had an impact on all aspects of the civil justice system.

The current call for reform has at its core the objectives of reducing cost and delay. However, attaining these goals must not be at the expense of justice. The Commission's recommendations seek to preserve a rational, coherent system of dispute resolution with its principal goal being the achievement of justice between the parties involved.

Means of commencing civil proceedings

In the District and Supreme Courts, civil proceedings are generally commenced in one of three ways: by a Writ of Summons, an Originating Summons or an Originating Motion although there are also some other forms in use. Usually the nature of the dispute determines the document to be used. The form used for beginning the case largely determines the pre-trial processes and the costs that can be recovered by the successful party.

A Writ of Summons is used where there are likely to be disputed questions of fact requiring pleadings and discovery. A Writ of Summons allows for an award of costs 10 times higher than for an Originating Summons. This differential reflects the additional costs involved in preparing the case. In the Local Court, all proceedings are commenced with a Plaint. The Federal Court has adopted a single form of originating process called an Application.

A new single form of Application for all civil matters

The Commission recommends that the sole form of originating process in Western Australia should be called an 'Application'. **[Recommendation 18]** An Application should begin all legal proceedings in all courts in Western Australia. This will do away with old-fashioned legalistic forms of action and other forms of proceeding used to challenge official action (called 'prerogative writs'). **[Recommendations 18-28, 160-175]** An answer to an Application will be a 'Response' if the Commission's recommendations are adopted.

Prerogative writs are normally used to initiate judicial review of governmental actions in cases involving public officers or agencies. In Western Australia there is no equivalent to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and the *Administrative Appeals Tribunal Act 1975* (Cth) so the only means of seeking judicial review of administrative decisions at law is through a prerogative writ.

Prerogative writs are an archaic anomaly in the civil justice system. There are a number of different forms which often have obscure or Latin names. Prerogative writs currently in use include the writs of 'prohibition' (to prevent an authority from exceeding jurisdiction); 'mandamus' (to compel an authority to do its duty); and 'certiorari' (to review the official record of a decision that was made without jurisdiction or determined wrongly at law). Actions against

public officers should be commenced by Application like any other civil action. It should not be necessary to prove 'error of law on the face of the record' to initiate such an action. **[Recommendations 20-21]**

Once commenced, parties responding to civil claims in court cases are entitled to details of the claims at the earliest possible opportunity. In some unusual circumstances it may be appropriate for case details to be provided separately, but this should be rare and only with permission from the court. In the usual case, the Application should be endorsed with details of the applicant's case. In exceptional circumstances, leave of the court may be obtained to provide details of the case separately.

Pleadings

Pleadings are the formal documents exchanged by parties in civil actions commenced by writ. Pleadings are supposed to define, at the earliest possible stage, precisely the matters in dispute and the material facts upon which reliance is placed to support the claim or the defence. The rules of pleadings under which Western Australian courts operate are based on those used in England in the 19th century. In the overwhelming majority of civil cases, the time and expense consumed by the pleading process are wholly disproportionate to the utility of pleadings in the ultimate resolution of the dispute. The Commission recommends fundamental reform.

In all but exceptional cases the system of formal written pleadings and the procedural code of rules by which it is governed should not apply. **[Recommendation 22]** 'Pleadings' should be used only in those exceptional cases identified by a judicial case manager.

Case Statements

The Commission recommends the term 'case statements' be used to describe Applications, Responses and other documents which parties exchange in civil actions to outline their cases. **[Recommendation 23]**

Case statements should state, in a concise, narrative and non-legalistic form:

- the facts, in chronological order, which are material to the claim or defence;
- the legal nature of the claim or defence;
- the contentions of law on which the parties intend to rely, including any statutory provisions; and
- in an Application or Cross-Application, the relief sought. **[Recommendation 26]**

All case statements should identify the principal documents on which reliance will be placed and annex copies of those documents. **[Recommendation 27]** The respondent should be required to file and serve a Notice of Intention to Respond within 14 days of delivery of the document and then file the Response within a maximum of 28 days from receipt of the Application. **[Recommendations 29-30]**

Parties should verify case statements on oath or affirmation so as to assert the:

- truth of the allegations of fact; and/or
- falsity of facts which are denied; and/or
- inability to ascertain the truth of facts not admitted despite having made all proper inquiries. **[Recommendation 32]**

Every legal practitioner responsible for the substantive preparation of a document being filed in court should certify:

- the document is correct according to instructions provided;
- the document is not presented for any improper purpose;
- the practitioner has reasonable grounds to believe that evidence will be available to sustain the factual allegations made; and
- all the issues raised in the document are, in the view of that practitioner, reasonably arguable. **[Recommendation 33]**

If a party verifies a case statement in the knowledge that 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. **[Recommendation 34]**

The requirement to disclose legal arguments and oral evidence may delay the lodgment of Applications, causing hardship if a limitation period is about to expire. The previous recommendations of this Law Reform Commission in 1997 to amend the *Limitation Act 1935* (WA) should be implemented to provide a judicial discretion to extend the limitation period. **[Recommendation 41]**

The Commission accepts that the proposed reforms place greater demands on legal practitioners to prepare fully in less time. A practitioner should decline instructions when the demands of his or her practice do not allow sufficient time and attention to be devoted to the proper and timely preparation of court documents. Where a practitioner accepts instructions to prepare and file an Application or Response, he or she undertakes that sufficient time and attention can be devoted to the case. The Commission recommends changes to the *Professional Conduct Rules* to allow sanctions for professional misconduct to be levied against a practitioner who accepts instructions and fails to prepare documents properly and in a timely manner. **[Recommendation 44]**

Case management

In recent years in Australia there has been a significant move away from wholly, or largely, lawyer/client driven litigation. The courts are now playing an active role in the management and progression of civil proceedings. The aim is to achieve a better result for litigants and more effective use of publicly funded court resources in the justice system.

In 1990, the Supreme Court of Western Australia introduced an 'expedited list' to provide a procedure for bringing urgent civil matters to trial more quickly. In 1993, case flow management was introduced and, in 1996, new procedures created a case management registrar with power to make directions at status and evaluation conferences.

While the introduction of case management systems has had an effect on the efficiency of the civil justice system, the legal profession particularly has been critical of the over-zealous application of case management principles. Indeed, there is some evidence that judicial intervention may not significantly reduce delay and may actually increase costs.

There are two basic case management models. One involves continuous control by a judge, who personally monitors each case (the 'individual list model'). The other requires the parties to report to the court at fixed milestones so that the court exercises routine and structured control (the 'master list model').

The individual list model is expensive and requires frequent appearances by the parties. It is more suited to complex cases. The master list model is effective because it tends to reduce the number of pre-trial appearances and it is relatively inexpensive. A newer case management approach recognises various types of cases may require different degrees of judicial management.

In the usual case there should only be three mandatory pre-trial conferences. **[Recommendation 76]** The failure of parties to comply with directions results in far more conferences being held in practice than the original three-conference model contemplated in the 1996 revisions to the *Supreme Court Rules*. In the Commission's view it is not appropriate for the case manager to assume the role of ensuring compliance with directions.

Registrars should conduct case management conferences, unless the parties consent to conferences being conducted by the supervising judge. **[Recommendation 79]** Usually the proposed trial judge should conduct status and listing conferences. The Commission recommends that entry for trial not be permitted until there is compliance with all directions. **[Recommendation 78]**

Cases should be automatically transferred to an 'inactive case' list if no step is taken for six months, except where delay is authorised by order of the court. After another six months, the matter should be struck out administratively for want of prosecution. Leave of the court should be obtained before proceedings can be reissued. **[Recommendation 80]**

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 the extent that professional advisers rather than clients cause delay, it is a matter best dealt with through professional disciplinary bodies. If 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.

The Commission recommends special lists be established for complex cases and those involving self-represented litigants (discussed further below).

Diversion: resolving disputes without trial

Alternative dispute resolution

Dispute resolution processes that avoid formal litigation in the courts are 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 decides which party is right. The court's ruling becomes an enforceable order. Usually the losing party is required to pay the legal costs of the winning party.

In the case of ADR, the parties meet together with a neutral person to discuss the dispute and come to an agreed resolution with the assistance of the neutral. Because the parties come to the agreement themselves, there is less likely to be a 'winner' and a 'loser'. As the underlying issues can also be resolved, there may be greater satisfaction with the process. The resolution is not enforceable unless it is sanctioned by a court order, but is effective because the parties agree to it.

ADR includes a range of processes alternative to litigation. These may be court-based or community-based and include mediation, conciliation, facilitation, early neutral evaluation, expert appraisal and arbitration. Methods of dispute resolution vary according to the degree of control in the hands of the parties. The type of dispute and the nature of the relationship between the parties dictate the different processes that should be used. There is no single model that is suitable for all types of disputes. In some cases ADR will not be suitable at all.

The Commission recommends that a system be implemented in the various civil courts to determine, after the Application and Response(s) are filed, whether ADR is suitable, and if so, which method of dispute resolution is best suited to the case. **[Recommendation 47]** Guidelines should be developed to assist in the evaluation of each dispute with regard to issues involving the dispute itself, issues involving the parties and issues involving the need for information in resolving the dispute. **[Recommendation 48]** The information to assess a case for ADR will not usually be apparent from the initial court process. A questionnaire and a confidential case management conference will generally be required. **[Recommendation 49]**

Mediation

In the purest sense of dispute mediation there can be no compulsion involved. However, where public resources are used to assist in the resolution of

private disputes, parties should be expected to seek to resolve disputes in good faith without resorting to litigation. In Western Australia, the Ministry of Justice provides funding for three community mediation centres. Infrastructure, coordination, operation, information support services, mediators, the training of staff and volunteers and promotion of the services need to be properly funded if community mediation services are to be successful. **[Recommendation 46]**

It is important in any court-based mediation that the mediator has the respect of the parties and be able to assess, fairly accurately, the likely outcome should the matter proceed to trial. Court officials who undertake ADR should have successfully completed training in an ADR course at an appropriate level. Appointed or retired judicial officials should conduct court-based mediation. **[Recommendations 57-58]**

If ADR is regarded as merely a perfunctory step, only junior legal staff members and client representatives attend ADR conferences. Often junior staff are not sufficiently in control of the litigation to be able to resolve the dispute. The Commission recommends that for ADR to be effective those with authority to settle must attend. **[Recommendation 67]**

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 or 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. A Mediation Act should be enacted which encourages mediation and provides protection similar to that in the *Evidence Act* (Cth). **[Recommendations 62-64, 69-70]**

Boards and tribunals

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 which may involve reviewing decisions by government administrators at the request of aggrieved parties or resolving issues in contention between individuals, or individuals and organisations. Their processes usually allow people whose rights may be affected by their decisions to participate in the proceedings.

The adjudicative functions of boards and tribunals can be divided into two categories: those involving decisions on review or appeal, and those involving original or first-instance decisions.

Unlike judicial review of administrative decisions (which is concerned with questions of law) boards and tribunals generally are concerned with reviewing the merits of the case. This means that the matter is fully re-heard and the board or tribunal is able to substitute its own decision for that of the original decision-maker.

Since the Commonwealth established the Administrative Appeals Tribunal in 1976, all States and Territories have considered the need for an administrative review process. In Western Australia a number of reports have recommended the establishment of an Administrative Appeals Tribunal.

The Commission specifically recommends the establishment of the Western Australian Civil and Administrative Tribunal ('WACAT') to amalgamate, as far as possible, all adjudicative functions of existing boards and tribunals except those dealing with industrial relations and Workcover.

Where tribunals have an investigative function WACAT should have a similar function. The WACAT should absorb the present Local Court divisions which are best suited to a tribunal setting due to their informal and less adversarial nature.

The WACAT should have a number of divisions to provide specialist adjudicators as required. The WACAT should also provide the appellate function for the Assessor of Criminal Injuries presently undertaken by the District Court. WACAT should be both a tribunal of first instance and deal with appeals from the first level. An appeal from WACAT should be to the Supreme Court and only permitted on a complex question of law or when in the public interest.

In other jurisdictions, the fee to lodge an application before such a tribunal varies with the subject matter. The Commission recommends that application fees for matters which are business-related be at a higher rate. **[Recommendation 388]**

No party/party costs should be allowed in administrative matters except in circumstances where one party has put the other party to expense by delay or frustration. There should, however, be a discretion for costs to be allowed where one party is put to the cost of enforcing an existing right.

Disclosure

Discovery under the present system

Discovery is the legal process used to obtain evidence relevant to any matter at issue in a civil dispute. The formal procedure begins with opposing parties creating a list of all relevant documents that are or have been in their possession, custody or power. The list must be verified by affidavit. Another means of obtaining information is through interrogatories. These are written questions one party asks another, usually only with the leave of the court, and which have to be answered on oath.

Discovery is supposed to provide the parties with access to all relevant documents before trial. It can assist with the resolution of disputes by narrowing the issues and focussing preparation for trial. Thus, in many cases discovery is necessary in order to achieve a just result in litigation. However,

in some cases the existing processes for discovery cause delay and are unnecessary.

There is no discovery in the inquisitorial legal system because all major documents relevant to the case are appended to the claim and response. Also inquisitorial judges play an active role in 'digging' for the facts. In the adversarial system, it is the parties who must do the 'digging'.

A new approach

In response to suggestions for reform of pleadings the Commission recommends parties append to case statements copies of relevant documents to make out their *own* case. Even if this proposal for disclosure is adopted, some avenues for further discovery may still be needed.

The present procedures are unsatisfactory because the range of potentially relevant, and therefore discoverable, documents is virtually unlimited. The Commission recommends a focussed form of discovery, to be called disclosure. This process should be limited to documents directly relevant to a matter in issue. There should be no disclosure of right. Any categories of documents sought to be disclosed should be put by a party to the case manager and allowed only if the case manager determines disclosure would contribute to the just resolution of the dispute. **[Recommendation 82]**

There should be no 'back door' discovery through issuing *subpoenas* which require witnesses to bring to court material documents which are in their possession. The Commission recommends that no *subpoena* be allowed to undermine disclosure limits set by the court. **[Recommendation 85**] Any *subpoena* which seeks to have a party disclose documents that would not be subject to disclosure under the recommended test should be set aside as an abuse of process. **[Recommendation 85]**

Interrogatories can be used to narrow the proof of matters raised in the pleadings at an early stage. They are useful where applicants must prove their case out of material held by the respondent or through the respondent's servants and agents. They may also be helpful in obtaining admissions and facilitating the admissibility of documents. In practice, the benefit of interrogatories is often outweighed by the costs involved. The Commission recommends that disclosed documents, including those attached to case statements, be capable of being tendered as evidence, unless their authenticity is disputed by the other party. **[Recommendation 93]**

Curb delay and cut costs

The Commission endorses litigation management by the courts and has come up with more than 60 suggestions to curb delay and cut costs. The Commission believes that procedures used in civil cases should be proportional to the value or significance of the dispute. Several specific procedural changes, some of which are set out below, may go a long way towards reducing delay and costs in the existing system.

Summary judgment, interlocutory injunctions and trials of preliminary issues

Summary judgment allows a litigant to obtain judgment without going to trial. In the higher courts the plaintiff or the defendant can apply for summary judgment, although different rules operate depending on who applies. Proceedings may be determined in a summary manner where the parties consent. A party may also apply to strike out pleadings that disclose either no reasonable cause of action or no defence.

The Commission recommends a single approach to summary judgment to replace the existing procedures. This would enable applicants and respondents to bring applications for summary judgment or to strike out case statements which disclose either no reasonable cause of action or defence. **[Recommendation 97]**

At present the test for summary judgment is that the right to judgment must be so clear that there is no real question to be tried. Summary determination of civil disputes is both exceptional and not encouraged; most summary judgment applications involve a combination of disputed fact and law and the courts are cautious about granting it. The Commission recommends the test be reformulated so that summary judgment will be entered unless the opposing party can show it has a reasonable prospect of success. **[Recommendation 98]**

Applications should not be used tactically or oppressively to force the opposing party to show a reasonable likelihood of success while the applicant's own case is not subject to such scrutiny. 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. **[Recommendation 99]**

The court should also have the power to make a final determination of any disputed fact or question of law as part of the application. **[Recommendation 100]**

Interlocutory injunctions are court orders directing a party to do something or to refrain from doing something. These may be made on a temporary basis until the matter is finally determined. Where a question of law is the only issue arising between the parties in an interlocutory injunction application, the Commission recommends the court make a final determination of the question of law and enter judgment accordingly. **[Recommendation 102]** The Commission also suggests the court 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. **[Recommendation 103]**

Various mechanisms in the *Supreme Court Rules* enable a question of law or fact in proceedings to be finally determined separately from the balance of the proceedings. The court should have the power to order a trial of a

preliminary issue at any stage in proceedings. **[Recommendation 109]** The test should be whether the resolution of the dispute would be substantially promoted by this process.

Oral and written submissions

The correct balance of written and oral submissions in civil proceedings is relevant in the search for ways to reduce delay and costs in civil litigation. The use of written submissions has increased in recent years. However, if written submissions simply add to, rather than complement oral submissions, the only result may be to increase the cost of litigation. At present the limits on written submissions contained in Practice Directions are often ignored.

The opportunity for a party to present an oral argument in open court contributes to the ideal of justice being conducted publicly. Exchange with the bench and other parties can refine issues. The reform of oral submissions should therefore be directed at making submissions more effective rather than replacing them.

The court should give consideration in every civil case to whether limits for oral and written submissions should be imposed. If imposed, time limits for oral submissions 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. **[Recommendation 112]** The same sorts of restrictions should apply to the length of written submissions. **[Recommendation 113]**

There are a number of procedures in which the need for oral argument is limited. In any civil interlocutory proceeding, the applicant should file a written outline of submissions with the application and state if he or she intends to present oral argument. The respondent must then reply within seven days. The applicant may file any additional submissions within a further seven days. Where no party intends to present oral argument, the application may be determined on the papers. **[Recommendation 114]** 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. **[Recommendation 115]**

Local court

Of all the courts in Western Australia exercising civil jurisdiction, the Local Court should be the most user-friendly. The Commission strongly urges that Local Court procedures be simplified and dispute resolution outside of court be encouraged. The Commission suggests a goal of resolving all Local Court disputes in 90 days or less from the time of filing the Application to obtaining judgment or settlement.

At present the procedure in the Local Court is adversarial and governed by the *Local Courts Act* and the *Local Court Rules*. As stated earlier, it is time to replace the many complicated and out-dated court forms with simple new

workable procedures and forms. The Commission concluded that the existing antiquated rules permit delay. New Local Court procedures should force the parties to come to terms with and understand the issues and evidence at the earliest possible time. **[Recommendation 158]**

The Local Court hears the majority of disputes involving self-represented litigants. Local Courts should operate on the presumption that most litigants will represent themselves. The procedure should be simple enough so they can do so adequately. **[Recommendation 203]** A scheme should be implemented in the Local Court whereby registry staff may refer potential litigants to a magistrate in chambers for legal information, as distinct from legal advice, prior to filing a matter, supplemented by other information services. **[Recommendation 204]**

A simple standard form Application should commence all actions in the Local Court. The Application should be in a booklet that clearly outlines the Court's procedure. **[Recommendation 160]** The application should be in plain English advising respondents that proceedings have commenced against them, how they should respond and the deadline within which to respond. **[Recommendation 161]**

Standard court forms should be accessible at simple computer terminals in public libraries and court registries. **[Recommendation 162]** The Local Court should be sensitive to the particular 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. **[Recommendation 163]**

The use of case statements should ensure that parties are aware of the nature of the case they need to answer as soon as possible. **[Recommendations 165-166]**

Default judgments in the Local Court are common. Existing procedures allow for a default judgment to be overturned where the court is not satisfied there was proper service of the initiating document. The court should arrange delivery of the Application, normally by post, and the receipt should be returned to the court. **[Recommendation 169]**

Currently upon service of a Local Court action, the defendant must file a Notice of Intention to Defend. There are a number of other processes that may accompany a defence such as Counterclaim, Set-Off and Third Party Notice. Where these matters proceed with the original claim, two actions are tried together. This should be limited to circumstances where those actions arise out of an identical transaction or the same set of circumstances. **[Recommendation 171]**

The Notice of Intention to Defend should be abolished and respondents be required to file a Response outlining whether the Application is denied in whole or part, and if liability is admitted, whether the amount is disputed.

Presently, the bulk of matters commencing in the Local Court are debt recovery matters. These are usually resolved by default judgment soon after the initiating document is delivered. Those not resolved in this way proceed to a pre-trial conference where a number are settled, but a significant number proceed to trial. 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. **[Recommendation 176]** The classes and amounts of claims 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. **[Recommendation 177]**

A case management conference to be attended by the parties personally should be held after the Response has been filed. Matters determined at the conference should include whether the matter is appropriate for ADR, the issues to be litigated, all necessary interlocutory and trial procedures and the fixing of the trial date. **[Recommendation 178]**

All evidence should be provided by affidavit unless a witness is required for cross-examination.

New procedures should allow matters to be resolved in a relatively short period of time and should be set for hearing in less than three months from the filing of a Response. The court should have the power to strike out an action if the applicant fails to attend pre-trial conferences or the trial. **[Recommendation 193]** However, judgment entered as a result should be capable of being set aside in appropriate circumstances. **[Recommendation 194]**

If attempts to streamline the procedures of the Local Court are not to be undermined, it is necessary to have appropriate sanctions to ensure compliance with rules and court orders. **[Recommendations 195-196]** Any cost order should be payable forthwith and not 'follow the event' at a later date. **[Recommendation 197]**

Costs in the civil system

The cost of litigation is beyond the means of many members of the community. The major aspect of litigation costs is legal fees. Costs agreements between a litigant and solicitor are usually based on the solicitor charging for the time spent on a case. If there is no valid cost agreement, the solicitor can only charge in accordance with the fixed rates provided in the appropriate

scale of costs. In litigation, usually the 'loser' is ordered to pay the costs of the 'winner'. Those costs (party/party costs) are based on a fixed scale, which does not necessarily cover the legal fees charged by the solicitor. Thus a party may still be liable to a solicitor for a significant proportion of costs even after winning a case.

Although the amounts in dispute in the District and Supreme Courts may vary widely, there is only one scale of costs for cases argued in those courts. The jurisdiction of the District Court itself ranges from $25,000 to $250,000. The Commission believes the government should consider expanding the jurisdiction of the Local Court in order to remove lower dollar value cases from the District Court. The District Court should be given its own scale of costs allowing for the steps particular to personal injury actions. **[Recommendation 120]**

It is extremely difficult for a litigant to estimate how much a litigation venture will cost. Currently there is no legal obligation on solicitors to provide clients with the costs implications of any proposed litigation. Clients who enter litigation without realising the full costs face a dilemma. If they withdraw the claim, they may well be liable for the costs of the other party as well as the costs they have paid their solicitor. 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. **[Recommendation 121]** If the solicitor fails in this obligation, the solicitor should be prohibited from recovering fees from the client. **[Recommendation 122]**

The 'loser pays' rule should apply in the absence of a declaration that a civil case should not attract costs. **[Recommendation 127]** This type of declaration may be appropriate in circumstances where there is public interest in the matter being litigated or where, due to the financial circumstances of one of the parties, the ability of that party to present the case or negotiate a fair settlement is limited. The 'loser pays' rule should be clearly identified at the start of proceedings and only be replaced for good reason, such as refusal of a reasonable offer.

There has always been a gap between what a successful party recovers on court assessment and what the party has to pay the solicitor. This is partly due to the failure of the costs scales to allow for a good deal of the file management work a solicitor must undertake in order to properly conduct a case. The 'paper trail' is important to protect solicitors from claims of professional negligence and to comply with the requirements of a Law Society Approved Quality Practice. However the amount allowed for this work when assessed at the conclusion of court proceedings varies with the assessor. Costs scales should be amended to recognise the fact that as between solicitor

and client file management work is done and properly charged. **[Recommendation 131]** 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. **[Recommendation 132]**

Solicitors are unable to sue for their fees until a bill of costs has been served on the client containing advice that the client has the right to have the costs assessed or 'taxed' by the courts. If the bill is for a lump sum, the client has further time to ask for an itemised account before seeking the court's assessment. The assessment by a court officer often reduces the bill significantly. Once the assessment is complete, it takes effect as a judgment and may be executed accordingly. The solicitor will not then need to sue for recovery of fees. Currently only the client can initiate the court assessment of costs. The *Legal Practitioners Act* should be amended to allow the solicitor to refer any bill for court assessment. **[Recommendation 134]** In any proceedings for recovery of legal fees, the court should have the power to direct that the question of the amount and reasonableness of the fees be determined after an assessment of solicitor/client costs before an officer of the Supreme Court. **[Recommendation 135]**

The court assessment of both party/party costs and solicitor/client costs has the potential to be time consuming and tedious. The *Supreme Court Rules* should be amended to permit estimate and provisional costs assessment procedures. **[Recommendation 136]**

Contingency fees

Contingency fees are charges for legal services that vary in some way with the success of the case. Contingency fees should only be permitted where the client is unable to conduct the litigation without resorting to such an arrangement. **[Recommendation 141]** They should be in the form of an up lift on fees rather than a percentage of the amount recovered. **[Recommendation 143]** The arrangement should be only by leave of the court, on a basis allowed by the court and should be available to both applicants and respondents. **[Recommendation 144]**

Disbursements

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

Costs in interlocutory proceedings

Under the present system, the litigation process involves a number of interlocutory skirmishes prior to trial. A common costs order made in interlocutory matters is that costs be paid to the successful party 'in any event', which means that party is entitled to the costs associated with the application whatever the outcome of the case. It often happens that matters are resolved and those orders made along the way are overlooked, resulting

in unfairness to the party who succeeds in interlocutory matters but does not succeed ultimately. An order that costs be assessed and paid forthwith would address this problem. 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 making the order would prejudice the ability of the loser to continue the litigation. **[Recommendation 146]**

Solicitors' responsibilities

Sometimes in proceedings, steps are taken in such a way that costs are needlessly and unreasonably incurred. This is not always the fault of the client although the client has to bear the burden of the costs order. In some circumstances it may clearly be the fault of the solicitor. The *Legal Practitioners Act* should be amended to require solicitors to inform their clients of all costs orders made against them and the reasons for making those orders. **[Recommendation 149]** In the event that a solicitor does not comply with this obligation, then the solicitor should be personally liable for those costs. **[Recommendation 150]** If a practitioner asserts that the reason for a default leading to a costs order to be paid immediately related 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. **[Recommendation 151]**

A Legal Costs Act

The costs rules that apply to all State courts and tribunals should be codified into a separate Legal Costs Act which should include Part VI of the *Legal Practitioners Act*. Provisions concerning barristers' fees, contingency fees and personal costs orders, should also be included. Scales of costs should be passed by way of regulations under the proposed Legal Costs Act. **[Recommendation 152]**

The Suitors' Fund

The existing Suitors' Fund was established in 1964. It 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. In practice, the Suitors' Fund does little to achieve this, as the maximum allowed to a civil litigant is $2,000. The *Suitor's Fund Act 1964* (WA) should be amended to allow an amount equal to the court assessed party/party costs recovered by the appellant. The provision, which only allows access to the fund when an appeal has been upheld on a point of law, should be deleted. **[Recommendation 153]**

Businesses should pay more

The Commission recommends that where litigants are able to make a greater contribution to the cost of accessing the civil justice system they should do so.

Fees are charged for initiating all court and most tribunal proceedings. In the Supreme Court, the filing fee for a writ is $265 and the fee for a notice of appeal is $500. These fees are modest compared to other jurisdictions. In

the Federal Court, the fees charged a corporation differ from those for a person. There are many small businesses that trade through corporations. Any distinction would be better based upon whether the litigation concerns a business. Most legal fees charged to businesses are tax deductible.

Businesses should pay higher fees to use State courts to resolve disputes because legal costs are a tax deductible business expense while individuals bear the entire cost of litigation without being able to claim a deduction. **[Recommendations 8-9]**

Private courts

The State is obliged to ensure that all citizens and lawful organisations can enforce their rights and defend their liberties in courts of law. However, the State's monopoly on the provision of justice requires substantial public funding. An alternative is to acknowledge the State's obligation to ensure civil justice, but to allow private civil courts to co-exist with State courts, with both relying on State enforcement of their orders.

Private organisations could be licensed to provide court services in certain matters up to the jurisdictional limit of the Supreme Court. Minimum standards for adjudicating officers, natural justice, confidentiality and conflicts of interest would have to be imposed. Appeals from private courts could be to the District Court or a single judge of the Supreme Court depending upon the amount involved.

The Commission recommends a pilot private courts project. Jurisdiction of the private courts should be permitted only where there is genuine consent. This means that private courts should only be open to cases between parties with equal power to present their cases effectively. In relationships where there is a significant power differential between the parties, the matter should go to the public court system. This proposal is not as radical as it may first seem; it essentially endorses the long-standing practice of private commercial arbitration of disputes. Additional fees would be charged for registration and enforcement of private court orders. **[Recommendations 445-447]**

Although this concept is not operating elsewhere in Australia, it is not that revolutionary. Parties have always been able to contract their dispute resolution out to somebody other than the court. For example, there is a long-standing practice of private commercial arbitration of disputes. In practical terms it is unlikely that anything other than commercial disputes would go to a private court because the commercial incentive to pay to resolve disputes quickly is required to enable the system to work. One would expect it to be limited to major commercial cases. Whether this proposal will, in fact, be implemented depends upon an analysis of whether demand justifies it. If commerce is content with the existing system, then there may not be the demand to justify such a system.

Self-represented litigants

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. 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.

The justice system of Western Australia operates on the premise that lawyers will represent litigants in court. The problem for people representing themselves is their lack of knowledge of court procedures and not being able to effectively represent themselves when their matter comes before the court. Generally the court administration, magistrates and judges assist self-represented litigants but this practice renders the system vulnerable to claims of bias. Because of the additional court time taken up in dealing with self-represented litigants, the costs for all court users are increased.

A manual should be developed for court staff, with specific guidelines for the judiciary and magistracy, and training programs for all court officers should be developed to assist in dealing even-handedly with self-represented litigants and other litigants. **[Recommendation 199]**

The difficulties for self-represented litigants in the higher courts are greater because the legal and evidentiary there issues are usually more complex. The Commission recommends the creation of a panel to provide free legal assistance for litigants who are otherwise unable to obtain legal assistance in higher court proceedings. **[Recommendation 200]**

In both the civil and the criminal areas, Supreme Court Registry resources already have been utilised to assist self-represented appellants in the preparation of appeal books. This approach should be extended to assist in the preparation and compilation of court documents in order to facilitate adjudication of cases on merit. **[Recommendation 201]**

A special case management track for self-represented litigants in the higher courts would ensure adequate monitoring of matters. **[Recommendation 202]**

The Commission believes, as indicated above, that the Local Court should operate on the presumption that people will represent themselves. The higher courts should make effective self-representation possible. These ideas require significant procedural changes for the courts. There are more than 40 recommendations for Local Court procedural change. **[Recommendations 156-197]**

Information and legal advice should be more readily available to self-represented litigants. Possible alternatives include duty counsel in civil courts,

an expanded Law Access scheme and the provision of information in libraries and electronically. A 'one stop shop' information service should be introduced on a trial basis at selected courts. **[Recommendations 205-212]**

In addition, there are proposals dealing specifically with facilitating self-representation by providing access to information and a more comfortable and respectful environment for all court users. **[Recommendations 397-423]**

Unreasonable and malicious litigants

In spite of the courts' inherent rights to control proceedings, there is an understandable reluctance to terminate the right to litigate. The Commission recommends new legislation for dealing with litigants who use the justice system to abuse others. Unreasonable litigants are people who litigate in a manner that may abuse opposing parties and other participants in the justice system. 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.

The Commission recommends updating the language of the existing grounds for requiring leave to file under Order 67 rule 65 of the *Supreme Court Rules* to 'groundless or malicious' in place of 'frivolous or vexatious'. **[Recommendation 213]** A registrar should be able to require the litigant to obtain leave of the court before filing proceedings on the grounds of:

- a history of issuing proceedings without cause by a would-be litigant; or
- unreasonable conduct by a litigant in a particular action. **[Recommendation 214]**

The case manager should have a discretion to order that interlocutory applications should not be filed without leave of the case manager on the grounds that a party has made frequent applications without cause. **[Recommendation 215]**

Currently a defendant (respondent) may apply for the plaintiff (applicant) to pay an amount into the court to cover the costs the defendant would be entitled to recover if the action is unsuccessful. This practice is known as 'security for costs'. The case manager handling an application for security for costs should have a discretion to order an applicant provide a sworn statement of disclosure concerning any litigation that he or she has been involved in, in any jurisdiction, including whether, and when, any judgments were satisfied. **[Recommendations 216-217]**

If an applicant is impecunious, bankrupt or has a record of failing to pay costs, the merits of the case may be dealt with through extended summary judgment procedures, a trial of preliminary issues or a summary hearing process. **[Recommendation 218]**

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.

Under the *Vexatious Proceedings Restriction Act 1930* (WA) the Attorney General makes an application to the Supreme Court for an order that a person only be permitted to commence litigation after having first obtained leave from the Supreme Court. The Act is largely ineffectual, in that applications are rarely made and are almost never successful. The Act should be amended as the present test of vexatious conduct of litigants is too narrow and fails to consider many relevant factors. The Act should be renamed the Malicious Proceedings Restriction Act. **[Recommendation 220]**

5

Evidence Issues

The law of evidence

Evidence law is a collection of principles, rules and discretions developed over many years and often in response to changing rationales. In Western Australia in the Federal Courts, the *Evidence Act 1995* (Cth) applies and in the State courts, the *Evidence Act 1906* (WA) applies. To add to the confusion, some cases are heard in either state or federal court. It is unfair that different rules apply.

The Commonwealth Act contains 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 of time may result.

The second initiative provides the court with a discretion, in appropriate circumstances, to dispense with rules of evidence altogether.

The Commonwealth Act also reduces the formal burden of proof in relation to the admission of business records that can be particularly helpful in accelerating court proceedings.

The Commission generally recommends the adoption of the *Evidence Act 1995* (Cth) so that the rules of evidence don't change between the federal and state courts. There are, however, some beneficial provisions in the existing State act that are not in the Commonwealth Act and they should be retained, including:

- provisions relating to the evidence of children and special witnesses; and
- specific protection afforded complainants in sexual assault cases. **[Recommendation 221]**

In addition the Commission recommends the new legislation provide for the production of complex evidence in summary form where it would assist in the comprehension of the evidence. **[Recommendation 223]** Procedures should also be introduced to facilitate the resolution of disputed evidentiary matters prior to trial. **[Recommendation 224]**

Expert evidence

Expert evidence has now become a major cost in civil litigation. Courts have allowed experts to act both as partisan advisers and as independent witnesses. Truly independent experts would not be able to claim a privilege from disclosing communications with lawyers involved in the proceedings because everything would be open.

The unequal ability of parties to engage appropriate experts can be seen in 'David and Goliath' type disputes such as when an individual is engaged in litigation with an insurance company.

The adversarial system discourages a cooperative approach between opposing experts. As a means of reform courts should encourage parties to agree to use a single expert. **[Recommendation 238]** In civil matters this should be reinforced by costs orders against parties who fail to cooperate. **[Recommendation 239]** Experts should, upon payment of appropriate costs, be prepared to respond to questions from all parties prior to trial. **[Recommendation 240]**

Where parties are unable to agree on a single expert, the points of conflict between the parties can be narrowed. The utility of an expert's report can be diminished if it addresses different facts to the other expert. Additionally each party's expert should be provided with the witness statement of the opponent's expert for comment and identification of points of agreement and disagreement. **[Recommendation 246]**

The expert's obligations to the court are not always understood. The Commission recommends that a formal declaration, such as that in the Federal Court practice direction, should be included at the end of each expert report. **[Recommendation 248]**

The limits of examination and cross-examination

An essential feature of our legal system is the right of a defendant to challenge the opposing party's case. However, excessive or abusive examination should be prevented if possible. Unduly protracted examination and cross-examination can be the result of lack of preparation. The Commission recommends witnesses' evidence summaries provided prior to trial may help to overcome this problem. **[Recommendations 226, 228]**

Professional, ethical and legal obligations protect witnesses who are being questioned by lawyers. But self-represented parties cross-examine witnesses,

including victims of crime, without constraint and courts are sometimes reluctant to intervene.

Protection is provided to children in sexual assault matters by giving evidence through closed circuit television. In appropriate criminal matters, witnesses, particularly victims of crime, should similarly be protected from giving evidence in unnecessarily stressful circumstances. To ensure that the jury is not prejudiced by this method, a direction from the judge should explain this procedure arises due to the defendant being self-represented. **[Recommendation 225]**

Sometimes there is reluctance to call a witness whose evidence may partially support the party but in other aspects may not. There is a similar reluctance when a witness will not provide a witness statement. In these circumstances the Court may not be provided with evidence that would be of assistance. The Commission recommends the adoption of the *Evidence Act 1995* (Cth) to allow parties to more easily cross-examine their own witnesses on unfavourable evidence before the other party has an opportunity to do so. This is with the proviso that a judge or magistrate has the discretion to allow or disallow leading questions as appropriate.

The proportionality rule should apply to examination and cross-examination in all cases at trial. **[Recommendations 233-235]** What this means, in simple terms, is that questioning should not consume more time than the issue is worth.

6

Topics of General Concern

Appeals

The right of appeal

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 for, and cost of, obtaining a final resolution to a dispute. Restriction on the right of appeal may simplify litigation and costs, but any reform also must be consistent with the maintenance of a fair and equitable judicial system.

There is no common law right of appeal. The jurisdiction to hear appeals is conferred on courts by legislation. There are several kinds of appeal. Sometimes the appeal court only considers whether the judgment appealed from was correct when given and no new evidence or changes in the law are considered (appeals in *stricto sensu)*. Other appeal courts will hear the matter afresh (appeals *de novo)*. Yet others may allow for changes in law or evidence, but otherwise rely on the evidence at the earlier hearing (appeal by rehearing).

The right of appeal can be unqualified or it can be only after permission, or leave, has been obtained. Legislation granting the right of appeal also determines the type of appeal and whether leave must be obtained. Sometimes these matters are not clear in the statute conferring the right of appeal. Laws should clearly specify the nature of the appeal, any limitations and the procedure to be followed. **[Recommendation 345]**

In the Western Australian justice system, appeals are generally to the next highest court. However, criminal appeals from the Court of Petty Sessions go to a single judge of the Supreme Court. The Full Court of the Supreme Court sits as the Court of Criminal Appeal from decisions of both District and Supreme Court judges and/or juries in criminal matters. The High Court of Australia may hear appeals from the Supreme Court of Western Australia.

Unless specifically excluded by statute, there is a right to appeal from the decision of a single judge to the Full Court of the Supreme Court. A defendant who has been convicted and sentenced, may appeal against the conviction and/or sentence. The prosecution has a more limited right of appeal and can usually only appeal against sentence.

The Commission's Final Report makes 26 recommendations dealing with appeals. **[Recommendations 345-370]** Many of these apply to both criminal and civil matters. The objective is to simplify appellate procedure, curb delay and reduce costs.

Leave to appeal

The *Justices Act* requires leave be obtained to bring an appeal. The Commission recommends that all further appeals in civil and criminal matters from a decision on an appeal by a single judge of the Supreme Court to the Full Court should be limited by a requirement to obtain leave or permission to appeal. **[Recommendation 347]** The Commission also recommends that any court of appeal should not include the judge whose decision is under review. **[Recommendation 348]**

The Commission suggests that applications for leave to appeal in civil and criminal matters should be dealt with, if possible, without oral argument. **[Recommendations 350-351]**

Appeal books

The preparation of appeal books is a major expense. Practice directions governing appeals against sentence or conviction under the *Criminal Code* allow the omission of agreed materials. However, in other appeals, much material required by the *Supreme Court Rules* to be included in appeal books is never, in practice, used. This creates needless expense and delay. Parties to complex appeals should be encouraged to confer and agree to a summary of the facts and proceedings from the court below and to identify the issues for determination on the appeal. Appeal books should only contain the agreed facts, issues and information relevant to matters in dispute. **[Recommendation 352]**

All civil and criminal appellate courts should expand the use of advances in information technology to develop electronic appeal procedures. **[Recommendation 353]**

The legal profession

A number of the Law Reform Commission's recommendations respond to public submissions concerning the legal profession. **[Recommendations 33, 44, 121-123, 134-135, 254, 437-444]** In particular the Recommendations call for greater flexibility and accountability by proposing:

- limited contingency fee arrangements **[Recommendations 141-144]**;
- mandatory continuing legal education **[Recommendation 441]**;
- ethics education for law students and for legal practitioners seeking to renew practice certificates **[Recommendation 440]**;

- enforcement mechanisms for ethical obligations **[Recommendations 442]**;
- development of best practice protocols and review of the existing professional conduct rules **[Recommendation 438]**; and
- the inclusion of non-lawyers in legal regulatory and reform organisations including the Law Reform Commission itself. **[Recommendation 443]**

The focus on ethical issues reflects a direct response by the Commission to the concerns expressed in the public submissions. The Commission concluded generally that the public does not understand what lawyers do and why the work they do costs so much.

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 law firm in accountancy, business, at a community legal centre or for 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. No matter how varied lawyers' practices are, however, all practitioners are bound by legal professional ethics.

A lawyer's experience and conduct in the resolution of disputes are also more varied than is sometimes assumed. For example, the procedures used in different courts vary and more matters are resolved in tribunals than within courts. Most tribunals have less adversarial procedures than courts.

Lawyers' ethical duties are twofold: duties to the court and duties to their clients. When these conflict, duties to the court come first.

The adversarial system of justice relies on lawyers not to mislead the court, not to actively conceal relevant information, not to make unfounded allegations about third parties, and not to commence cases without merit for the sake of some benefit to themselves or their clients. Courts also rely on lawyers' skills. For example, effective cross-examination may reveal a weakness in the other party's case. Legal ethics are supposed to ensure that the court's reliance on lawyers is not misplaced.

Most lawyers' duties are legal as well as ethical. Duties to clients are derived from statute law, common law and equity. The enforcement system to ensure appropriate practice is spread between professional and regulatory bodies and the courts. It is, however, almost always lawyers who review the conduct of other lawyers.

Individual grievances, in part, may be due to a failure by lawyers to adequately explain their conduct to their clients. Lawyers could do much to alleviate client dissatisfaction by keeping them reasonably informed of the status of their matters, explaining procedures to them, promptly complying with requests for information, and assisting clients in making informed decisions about the conduct of their litigation.

The cost of legal services can involve ethical issues. Time charging has been a feature of the legal profession since the early 1980s. The main performance criteria of solicitors are 'fees rendered to budget' and 'fees recovered to budget'. Time based cost agreements are likely to involve a conflict between the duty of solicitors to their clients and their own self-interests. Time costing may reward the inefficient and encourage practitioners to 'over-lawyer'.

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 encouraged to consider appropriate methods of billing, with a view to reducing the prominence of time-costing. **[Recommendation 437]**

The Commission recommends a task force be established to examine the adequacy of the present rules of professional conduct in the light of this Report, the Consultation Drafts and relevant submissions to the Commission as well as best practice protocols. **[Recommendation 438]**

If lawyers are to be agents of the justice system, the goals of that system need to be made clear. One way of doing this would be to enshrine the goals in relevant legislation and Rules of Court. There should be immunity from suit where a practitioner genuinely, and after communication with the client, acted to promote these goals. **[Recommendation 439]**

Legal ethics have only a relatively minor place in the initial and continuing education of lawyers. Legal ethics training should be required in order to obtain law degrees. Attendance at continuing legal education courses on ethics also should be required in order to renew practising certificates. **[Recommendation 440]** A mandatory continuing legal education program should be established in Western Australia. **[Recommendation 441]**

The mechanisms for enforcing ethical obligations should be made more effective and the range of penalties and principles on which the penalties are imposed should be developed through consultation with the profession, the courts and the public. There should be significant community representation in the membership of regulatory bodies and the Law Reform Commission itself. **[Recommendations 443-444]**

The court environment

The physical and social environment of the courts affects users of the justice system. For many, court procedures and trial processes are experienced as ordeals to be endured. Improving the environment and nature of court processes may be an essential component in improving the public perception of the justice system.

The word 'court' comes from an old French word simply meaning 'enclosed space'. The design and aesthetics of court registries, foyers, waiting areas and courtrooms may affect users' perceptions of the justice system. The layout and the management of the court building's circulation systems may also affect court users including those detained in custody while awaiting court

proceedings. The Commission urges courts to examine their facilities from an architectural psychology perspective to make them more user friendly.

The Commission recommends courts become more open by helping the public better understand court procedures and activities. This can be done by appointing media liaison officers, communicating in plain English, and providing information through display stands, information booths, self-help facilities and web-sites. **[Recommendations 397-398, 418]**

Traditional court architecture communicates an ambience of authority and exclusiveness. New and renovated courts should communicate accessibility and assure that users' safety and privacy are respected and all contributions to the process are welcomed.

Technology and justice

Technology, the law and the justice system increasingly intersect. Technology has the power to assist in some areas while it raises concerns in others. One aspect of this Review has been to explore the potential uses of technology for administrative purposes and as a means for ensuring public access. The potential impact of technology on the legal system on digital representation of documents, evidence and the court-room is dramatic.

Information throughout the Western Australian justice system should be rationalised and issues of ownership and accountability should be determined. **[Recommendation 424]** A Ministry of Justice Joint Agency Office should be established with a Board of Management representing all justice system stakeholders to establish and maintain definition of essential data structures, the processes and outputs and outcomes of the justice system. **[Recommendation 425]**

Systems should be rapidly implemented in the justice system that are based on the transfer of information within that system using Extensible Markup Language ('XML') to structure and transfer information between agencies in the whole justice system. XML can operate with a single personal computer, web browser and Internet connection as well as more complicated computing environments. **[Recommendation 431]**

All courts and other justice related jurisdictions should implement a single consistent advanced computerised system. Such a system should record details of all cases and their status as they progress through the courts, providing management information to assist in improving court operations. **[Recommendation 434]**

Legislation such as the *Acts Amendment (Video and Audio Links) Act 1998* (WA) enables a significant amount of court work to be effected by video. With increased access to video facilities there should be better access from regional locations, reduced travel costs for the State and other parties and enhanced communication between city and country personnel within the justice system.

However, 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. Typically it is more expensive to build systems for the totally inexperienced than for those using the system all the time who have extensive training. Cost constraints should not however mean the needs of self-represented parties are a low priority.

Technology can assist in the attainment of justice. It can connect the components of the justice system. It can assist in measuring the effectiveness of the justice system. These functions may allow the justice system to respond more readily to community needs. Technology should not 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 impede them.

Education and access

In addition to recommending further education for lawyers and law students, the Commission also recommends manuals and training for all court personnel. **[Recommendation 199]** The Reports sees Information Technology as a means of disseminating information. The Commission recommends all public libraries carry current commonly required legal materials and court forms, perhaps accessible by computer. **[Recommendation 210]**

To encourage the process of public education the Commission will distribute its Report and project publications widely. The total package is over 2000 pages and includes the collected Consultation Drafts and Background Information Papers circulated over the past year as well as a summary of the submissions received and a cross-referencing index.

The Commission plans to deliver the complete collection of papers and reports to every major public and senior school library in Western Australia. The collection will also be available on a CD-ROM and on the Internet. Along with all other Commission publications, the Report is on sale through the State Law Publisher.

Providing information and gathering ideas

The Report calls upon the courts to provide services to meet user needs. **[Recommendation 401]** In order to determine what users really need, the Commission suggests various detailed surveys, studies and effective data collection. **[Recommendations 3-4, 7, 198, 402, 405]** The Law Reform Commission calls for the creation of a Task Force to review the legal profession's conduct rules. **[Recommendations 438, 444]**

Topics not included

The Review of the Criminal and Civil Justice system does not deal with sentencing matters. Bail, punishment and parole are topics beyond the scope of the Commission's inquiry.

Family Court matters are also not included. The Australian Law Reform Commission is studying the Family Court generally, although not particularly as it operates in Western Australia. That report is due to be completed in January 2000.

7

The Recommendations

The Commission's recommendations are republished here for the convenience of people using the CD-Rom contained in the pocket on the inside back cover of this Project Summary. The bold numbers in square brackets refer to paragraphs of the Final Report.

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]**

Disclosure

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]**

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]**

The 'right to silence'

250. An Expert Evidence Forum should be established. **[22.23]**

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]**

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Appendix II

Acknowledgments

Commissioners

Wayne Martin QC (Chairman)
Professor Ralph Simmonds
Robert Cock QC

Project Team

Marion Brewer (Administrative Officer)
Lyn Auld
Brionie Ayling
Craig Bydder
Fiona Camarri
Jane Carr
Jennie Chauvel
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

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