Review of the Criminal and Civil Justice System

Issues Paper

INTRODUCTION

The last 20 years have seen an explosion in the number of cases coming before the Courts. This has caused enormous problems, not the least of which is a growing dissatisfaction with the system: it costs too much and it takes too long to get results.

The Law Reform Commission is examining the criminal and civil justice system in Western Australia at the request of the Attorney-General, the Hon Peter Foss QC MLC. The Commission's job is to make recommendations to provide a faster, more accessible, simplified, and less expensive justice system. The full terms of the Commission's reference from the Attorney General are set out on the back page of this Issues Paper.

THE PROBLEM

The justice system is not easily accessible to, nor well understood by, many Western Australians. Cases seem to drag on endlessly. Because the system is so complicated it is very difficult to predict the outcome of any case, the issues which may arise, how long a case will take, and what the whole process will cost. The parties differing abilities to obtain legal assistance, information and money to pay legal costs seem to make the system unfair.

After reviewing the justice system in the United Kingdom, Lord Woolf said a justice system must be:

- *Just, fair, comprehensible, certain and reasonably expeditious.*

The Commission's task is to recommend changes to the system in Western Australia which will achieve the objectives identified by Lord Woolf. Reforms which reduce expense, delay and complexity will not be acceptable if the new structure is not fundamentally fair. The challenge is to identify reforms that can be made while maintaining a just system.

HAVE YOUR SAY AT A PUBLIC MEETING

The Law Reform Commission invites citizens including members of the legal profession to comment on the issues raised in this paper during June, July and August 1998. All Public Meetings commence at 7pm and will be held:

- Monday 29 June in Karratha at the Karratha College Seminar Centre;
  Tuesday 7 July in Kalgoorlie at the WMC Conference Centre;
  Wednesday 15 July in Bunbury at the Lord Forrest Hotel;
  Tuesday 28 July in Perth at the Alexander Library Auditorium;
  Wednesday 5 August in Geraldton at the Cha Cha's Convention Centre; and
  Wednesday 12 August in Albany at the Esplanade Hotel.

To reach 3,500 other Western Australian communities, the Commission will hold a live tele-conference over the Westlink Satellite Network on Wednesday 19 August 1998 at 7pm. The Commission welcomes written submissions as well as your attendance at a Public Meeting. Information on making a written submission is on the back page of this Issues Paper.

CIVIL & CRIMINAL JUSTICE

The criminal justice system prosecutes offences ranging from traffic violations and other regulatory offences, including breach of town planning, health or environmental requirements, to the most serious crimes such as robbery and murder. The civil justice system deals with all disputes among people and entities which usually do not involve crimes or result in imprisonment. These include commercial disputes, personal injury claims, and disputes between citizens and the government.

Family Court matters are the subject of a reference to the Australian Law Reform Commission. Family Court matters concern primarily federal, not state, law and procedure and are not being considered by the WA Law Reform Commission at this time.

COURT STRUCTURE

There are three levels in the judicial hierarchy within Western Australia. Magistrates preside in the Local Courts over simpler civil cases involving money claims up to $25,000.

Magistrates or Justices of the Peace preside in the Courts Of Petty Sessions over criminal matters which can be decided without a jury.

The intermediate level is the District Court of Western Australia which deals with civil disputes involving up to $250,000 and has unlimited jurisdiction for personal injury claims. The District Court handles all indictable criminal offences other than the most serious which carry life imprisonment, such as homicides and armed robbery.

The highest level of the state system is the Supreme Court of Western Australia which has unlimited civil jurisdiction and handles the most serious criminal matters. Masters sometimes handle matters in the Supreme Court instead of Judges. Registrars handle certain aspects of cases in both the District and Supreme Courts.

Appeals from each level are to the next highest court although, in the criminal area, appeals from Courts of Petty Sessions go straight to the Supreme Court. Appeals from the Full Court or Court of Criminal Appeal of the Supreme Court of Western Australia to the High Court of Australia require a grant of special leave from the High Court. These formal Court structures are not the only means for dispute resolution. A wide variety of tribunals and other courts deal exclusively with single subject areas such as Industrial Relations or Workers Compensation. These special administrative tribunals are discussed under the topic: Keeping Cases Out Of Court.

Some contend our Court system is too fragmented and convoluted. Should the system be simplified? How? Should separate Courts handle specific subjects?

Should there be one superior Criminal Court dealing with all indictable criminal cases and one superior Civil Court dealing with all civil cases outside the Local Court's jurisdiction?

Western Australia is unusual demographically. Most of the population resides in and around Perth. The rest of the State is a vast area with relatively few regional centres. Does the present Court system make access to justice difficult for persons who reside in geographically isolated areas? What changes would improve access to justice for Western Australians who live outside the metropolitan Perth area? Can tech-nology help answer these problems? If so how?

Although the District Court Act is written in terms which might suggest the Court could be administered in various Districts around the State, there are no District Court Judges residing outside Perth. Should some Judges reside outside the metropolitan area? Should there be a system of regional District Courts?

FAIRNESS

The adversarial system involves the resolution of disputes between adversaries who advance differing propositions of fact and law to the Court. However, nothing ensures those adversaries have equal access to legal assistance, information concerning issues in the case, or funds.

Is the justice system unfair? If so, what can be done to minimise the inequalities so that justice can be done?

Is the justice system "fair" to indigenous Australians? How effectively does the justice system reconcile issues involving the application of indigenous laws?

Is it "fair" to those with intellectual disabilities or physical handicaps? Does the justice system adequately serve the needs of those who don't speak English well? Does the justice system provide adequate access to accredited interpreters at all stages?

KEEPING CASES OUT OF COURT

Civil Matters

Courts are now open to all who want a judge to determine the outcome of a civil dispute. Our Courts are the most formal and expensive means of resolving disputes. Should the system permit only those cases that generally require a formal, full scale judicial resolution to enter, or remain within, the Court system? Should there be some cases that bypass the judicial system? If so, which classes of cases should not be decided by a court? Should there be a screening process before court cases are commenced? Should a Court be able to refuse to hear trivial cases which raise inconsequential issues or which would consume public resources out of proportion to the amount in dispute?

Special Tribunals

In the existing system some cases are heard by a specialist tribunal rather than a Court. For example, the Builders' Registration Board deals with disputes between builders and their clients. The Commercial Tribunal deals with disputes between landlords of retail premises and their tenants. A right of appeal to the District Court exists from the decisions of these tribunals. Are there other subject areas in which tribunals or specialised courts should be available? Should appeals be permitted from the decisions of special tribunals? Should parties be encouraged or required to use alternative methods of dispute resolution including mediation and conciliation instead of litigation? In other words, should a law suit be the option of absolute last resort?

Appeals

Appeals from the various licensing boards and the decisions of specialist tribunals generate a significant work load for Courts at all levels. The creation of an Administrative Appeals Tribunal based on the Commonwealth model might enable appeals from state government agency decisions to be dealt with less formally and by persons other than lawyers. A recent report to the Attorney-General recommended the creation of such a body. What impact would an Administrative Appeals Tribunal have on the judicial system?

Alternative Dispute Resolution

Dispute resolution through mediation, conciliation, counselling and early neutral evaluation has been used increasingly during the past decade and already plays a significant role in the justice system in Western Australia. These procedures are generally termed "alternative dispute resolution" ("ADR"). Litigants often prefer settlements achieved through ADR because it is faster and less expensive than waiting for a decision from a judge.

ADR sometimes achieves results in pending cases. Should there be mechanisms to encourage ADR prior to the commencement of litigation? At what point should ADR be required after the commencement of litigation: earlier or later? Who should have responsibility for initiating ADR: the Court or the parties? Should ADR be performed by Judges, Registrars or specialist ADR practitioners? Does the legal profession understand the advantages of ADR well enough to recommend its use wherever appropriate? How are clients encouraged towards or discouraged from using ADR?

At present ADR is used in the civil justice system. Is there a role for it in the criminal justice system? If so, what is the nature of that role? Should there be a formal system of plea negotiation instituted?

CRIMINAL MATTERS

There are a variety of ways in which the numbers of criminal cases can be reduced. These include greater use of cautions, counselling, 'on the spot fines', and

decriminalisation of minor offences. Applications for extraordinary drivers' licences and restraining orders produce a significant percentage of cases in the lower Courts. Is a Criminal Court the best way of dealing with those issues? On the civil side, residential tenancy applications constitute a large volume of the cases coming before the Local Court. Are these cases best deal with by a Court? Are there other areas which produce a large number of cases which could be handled "out of court."

THE PROCEDURAL ISSUES

Starting A Case

There are a variety of different forms used to begin cases in Western Australia. Different rules apply to each form and different forms must be used in particular cases. The forms frequently are written in language not familiar to many Australians.

In the Federal Court there is only one form used to begin civil proceedings. Should there be a uniform procedure for commencing proceedings? Should all forms and other court documents be written in plain English?

Interlocutory Procedures

Interlocutory procedures are the various steps which take place between the commencement of a case and trial. Some of these steps are considered individually in this paper. One recurrent criticism is that the existing interlocutory procedures operate on a "one size fits all" basis. That is to say, the various procedures are generally available in all cases, irrespective of the seriousness or complexity of the issues involved, and without regard to the relevance of the particular procedure to the ultimate resolution of the case. Some assert that the delay and expense caused by the utilisation of certain interlocutory procedures should be proportional to the significance of the dispute. Should the proportionality principle govern the availability of the various procedures? Another term, "multi-tracking", describes a system with a number of "tracks" utilising different procedures by which a case can proceed from filing to trial, depending upon the nature of the case and the significance of the issues likely to arise.

Are the interlocutory procedures presently in use too elaborate, time consuming and expensive? Should interlocutory procedures be specifically tailored to suit particular cases? Should there be more multi-tracking? Should the Court be required to consider the proportionality principle?

Interlocutory Procedural Disputes

Interlocutory procedures become even more time consuming and expensive when disputes concerning those procedures erupt among the parties.

How can interlocutory disputes be discouraged? Should unsuccessful parties to interlocutory disputes be required to pay costs immediately in order to encourage reasonableness and reduce arguments over interlocutory procedures? Should members of the legal profession be personally accountable for the cost of frivolous and groundless interlocutory disputes?

CASE MANAGEMENT

"Case Management" describes systems that have been put in place in recent years whereby officers or Judges of a Court supervise the progress of cases from inception to trial. Case management varies from orders specifying a timetable for the performance of major steps in a case, to a significantly more interventionist model in which the case manager determines what steps are to be taken prior to trial and actively supervises compliance with those steps.

What is the most appropriate model for case management? Does it vary from case to case? What level of intervention by Judges is appropriate in a case management system? Should case management be left to the parties or should the Court take an active role in the process? Is case management effective? What safeguards should be put in place to ensure its efficacy? Does case management increase or decrease the parties costs? Does case management create more paper, the utility of which is questionable? Should case managers be Judges, Masters, Registrars? Or, is a different type of court officer required?

CODIFICATION AND SIMPLIFICATION

The current rules governing civil and criminal procedure differ among the various courts but all are written in language which is complicated and not easy for people other than legal practitioners to understand. Over the years various organisations including this Law Reform Commission have recommended revision of the Local Court Rules. However, the other Courts' rules may also benefit from review and simplification. Consolidation of the various Courts' rules could be possible by way of codification. The goal of codification would be to set out the rules systematically to avoid inconsistency and overlapping. Should detailed specific codes of civil and criminal procedure applicable in all Courts be established?

PLEADINGS

In civil matters pleadings are the formal documents prepared by the parties' solicitors which are intended to define precisely the matters in dispute. In the civil system various documents including a statement of claim, a defence and a reply are exchanged. Since the advent of word processing, these documents have become much longer and more complicated. Sometimes pleadings obscure the issues in dispute rather than disclose and clarify. The identification of the 'real' issues in the case is often hampered by the reluctance of either party to make any significant admissions prior to trial.

The process of preparing, filing and exchanging pleadings is time consuming and expensive. Opposing parties frequently attack each other's pleadings. Interlocutory hearings result. The time and cost of these hearings sometimes outweigh the significance of the issues involved. Should pleadings be abolished and replaced by a less formal narrative of fact and law provided by each party? Should parties be required to identify the genuine issues in dispute between them? Have other interlocutory steps, such as the exchange of written witness statements, eliminated

the need for formal pleadings? Do the cost and delay associated with formal pleadings outweigh their value?

In criminal matters the Crown must define the charges. The accused usually pleads in response to each charge: guilty or not guilty. Without formal admissions by an accused, the Crown is required to produce evidence relating to matters not really in dispute.

This requirement can consume considerable trial time at a significant cost to the state without any particular benefit to the accused.

Should a system of criminal pleading be introduced, so that an accused person is required to specifically plead to different elements of the offence, or particular facts, the proof of which might involve significant time or expense? What sanctions could be imposed for a refusal to make appropriate and sensible admissions? How, when and by whom should sanctions of this nature be imposed?

DISCOVERY

In Civil Matters

Discovery is the process whereby each party is obliged to provide others access to all documents relevant to any matter at issue in the case. In the civil area this is a formal procedure which begins with the creation of a list of documents verified on affidavit. In some cases the production of the list and affidavit can be extremely time consuming and expensive. However, the procedure is generally used in all cases and either party has the right to call on the other side to provide discovery. This is called "discovery as of right".

In civil cases should a party be entitled to discovery as of right? Should the Court have the discretion to either allow or disallow discovery after considering the real issues in dispute in the case? Are the expense and delay associated with formal discovery disproportionate to the matters in issue? Should there be a more flexible procedure permitting discovery on particular topics? Is a list of documents necessary? Given the advent of modern photocopying facilities should it be sufficient for all documents to be made accessible for review and selective copying without requiring a list? Is inspection without a list sufficient in some cases?

In Criminal Matters

In criminal cases, in the Court of Petty Sessions, there is no procedure for discovery. Sometimes a summons to produce documents is used to overcome this difficulty. In indictable cases before the District and Supreme Courts, the Crown is obliged to provide the accused with access to all relevant documents, but there is no formal mechanism whereby that is done, nor in the usual course is there any judicial supervision of the performance of that obligation. There is no corresponding obligation upon the accused to produce documents which may be relevant (the right to silence Ð later in this paper).

Should there be a more formal criminal discovery process? Should the Crown be obliged to certify that it has provided access to all relevant documents? Should the Judge presiding over a directions hearing prior to trial question the disclosure provided by the Crown? Should the Court have the power to make discovery directions?

INTERROGATORIES

Interrogatories are written questions one party may ask another which have to be answered in writing on oath before trial in civil cases. Because interrogatories can be time consuming and costly it is necessary to have permission from the Court before issuing the questions. The evidence obtained from the answers to interrogatories is often not worth the expense and delay involved, and there may be no reduction in the length of trials using interrogatory answers.

Should it be even harder to obtain leave to administer interrogatories? Should the Courts permit inter-rogatories only:

1. if the answers to the questions will significantly shorten the length of the trial, or
2. if the evidence, likely to be available, can not be readily obtained in any other way?

Would these tougher standards be impossible to meet? Should interrogatories be abolished or are they essential for providing information to disadvantaged parties?

WITNESS STATEMENTS IN CIVIL CASES

The exchange of witness statements prepared in advance for use in civil trials is comparatively recent in Western Australia. These statements serve a number of purposes, including notifying the other party of the evidence which will be given at trial and, hopefully, shortening the trial. There is, however, debate as to whether the exchange of witness statements serves these objectives, and whether the cost is justifiable. Should witness statements be prepared in advance of trial as a matter of course? Should this procedure be limited to complex cases involving significant amounts or issues? Could witness statements be used to replace pleadings? How should witness statements be used at trial? What safeguards would be required in order to ensure fairness?

ADDRESS OF COUNSEL

Different rules govern the timing and the order in which Counsel address the Court and the jury during civil and criminal trials. These, like the many other procedural rules are somewhat complicated. In general, the defence may not comment until after the close of the plaintiff's or prosecution's case. This means an opportunity for narrowing the issues is lost until a substantial part of the trial has been completed.

Should there be changes to the rules governing the order of addresses by Counsel? Should all parties have the opportunity to make an opening statement at the

beginning of trial? Should the defence in a criminal case be able to reserve or waive the right to speak at the beginning of trial?

JUDICIAL INTERVENTION

The lawyers, not the judge, conduct the questioning at trial. Although Judges may call witnesses, this right is rarely exercised. Judges generally ask very few questions. If the Judge asks a question it is for the purpose of making the record clear. Traditionally a Judge does not express any view on the merits of the parties' cases until delivering a final decision.

Does the traditional, limited role of the Judge impede the fact finding process? Should Judges be encouraged to call and question witnesses? Should Judges express provisional non-binding views early in the course of a case, in an effort to encourage settlement? Is there a role for experienced senior judges to hear outlines of evidence and summaries of arguments in order to encourage compromise prior to trial?

SUMMARY JUDGEMENT

It is possible to have a judge review pleadings and written evidence in order to enter judgment without trial. This procedure is called summary judgment. It can bring cases to an end quickly. It is only available for cases in which there is no serious question to be tried. When the parties disagree over important facts, the only way to resolve the dispute is at trial.

If the test for awarding a summary judgment were modified the procedure might be used more frequently. If the facts in dispute are limited and the case can be fairly and easily determined by looking at documents and reviewing written arguments, should summary judgment be available? Who should determine which cases are suited to a modified summary judgment procedure and what should the procedure be? Could summary judgment applications be used to narrow the issues which are tried?

TRIAL OF PRELIMINARY ISSUES

The current rules permit the separate determination of particular issues when an early decision on some matters might affect the future conduct of the trial or entirely resolve the case. Should there be greater use of the procedures relating to the trial of preliminary issues? How could this process be encouraged?

INTERLOCUTORY INJUNCTIONS

In civil cases parties commonly approach the Court for orders to preserve rights prior to trial. These proceedings can be time consuming and expensive. Moreover, the whole process may be duplicated at trial.

How can the time and expense of interlocutory injunction proceedings be reduced? Can most interlocutory injunction hearings be combined with the final determination to avoid repeated determination of the same issues?

WRITTEN AND ORAL SUBMISSIONS

Submissions are legal arguments made by counsel. In the English tradition, the arguments were made orally by a barrister speaking in Court. In recent years Western Australian Courts have accepted written submissions to supplement oral submissions. While written submissions shorten the time taken at trial, they are expensive to produce.

Should there be greater or lesser use of written submissions? Should the use of written submissions be limited to particular types of cases or cases where a particular amount is in issue? Should there be limits on the length of written submissions? Should written submissions replace oral submissions entirely? Should there be limits imposed on the length of oral submissions?

PRIVATISING PART OF THE JUSTICE SYSTEM

Should the justice system encourage litigants to contract out into a privately funded system? Commercial arbitration has not been particularly successful in diverting significant numbers of cases away from the Courts. Litigation arising out of commercial arbitration proceedings is common. Should the system encourage parties to use privately engaged "judges" on terms of their choosing, with either no right of appeal or an appeal to another privately funded appeal system? What encouragement would be most effective? Would privatisation destroy the justice system by allowing "justice" to be bought and sold?

THE LAW OF EVIDENCE

Traditionally the laws and rules governing evidence require a high degree of formal proof. These exacting standards exist so that only reliable or 'truthful' evidence is allowed in Court. The integrity of the system depends on the fact finders, be they jurors or judges, basing decisions on dependable evidence.

One example is the rule against hearsay. This rule frequently excludes evidence which people might consider relevant and reliable in everyday dealings. Unless a person who made a particular statement can be questioned during the trial Courts generally won't permit witnesses to repeat or describe what that person said out of Court if the object is to prove the truth of the statement. The same complicated rule applies to what is written or contained in documents. If the document is offered to prove the truth of its contents, the Court usually won't allow the document "in" as evidence. The rule exists so the jury or the judge, as the fact finders in every trial, can observe the witnesses and evaluate their truthfulness, the quality of their memory and their powers of perception.

Should changes be made to the law and rules of evidence? Should the rule against hearsay be modified or abolished? Should documents be admissible because of what they contain without requiring further proof of authenticity? Should documents be evidence of the facts stated in them? Do the rules relating to hostile witnesses which prevent cross-examination of one's own witness discourage parties from calling certain witnesses? Do the rules and the law of evidence inhibit the fact finding process?

THE PUBLIC COST OF THE SYSTEM

The justice system costs Western Australia approximately $300 million per year, approximately $70 million of which is spent on Court Services and Tribunals. Only $14 million per year is recovered in the form of fees from those who use the system. Should litigants who can afford it or obtain a tax deduction for legal fees be required to pay a greater portion of the cost of resolving their disputes? Could the increased revenue be used to improve access to justice for those who cannot presently afford it? Would increasing funding for legal aid and making the entire system simpler make the justice system more accessible?

OTHER ISSUES IN THE CRIMINAL JUSTICE SYSTEM

Rights Of Suspects Generally

Some people suggest that the present investigative powers of the police are too limited. They point to the doctrine of entrapment, the restricted availability of telephone surveillance, etc. Others feel the police already have enough or too much power. Does the community interest in the detection of crime require that a new balance be struck between the preservation of the rights of those suspected of criminal activity and the right of the community to detect and deter criminal conduct? If so, what changes should be made?

The Right To Counsel

The landmark decision of the High Court of Australia in Dietrich v R concluded that an accused person unable to afford legal assistance may be deprived of a fair trial if required to go to trial without Counsel. One of the consequences of the Dietrich decision has been disruption of Court schedules. This has occurred in certain cases involving fairly sophisticated individuals facing criminal charges in the commercial context who previously appeared to have access to significant resources and somehow have no money for a lawyer when it is time to go to trial. Critics of the right to Counsel point to general satisfaction with the system as it existed prior the Dietrich decision.

Should the principles governing the right to Counsel be changed? Should the procedures for providing Counsel adjust to the circumstances of individual cases? How can the right to Counsel be made affordable for the community when the alternatives are to use public funds to provide Counsel or let suspects who cannot afford legal assistance go without trial? Is there a better procedure for providing Counsel in cases in which it is held that the accused is entitled to Counsel?

Committal Hearings

At a committal hearing a Magistrate determines whether the Crown has enough evidence to put an accused to trial. Although most defendants choose not to have committal hearings, many are held and consume a significant amount of time in the Courts of Petty Sessions.

Committal hearings seldom result in the dismissal of charges laid by the police. Even when the original charges are tossed out, the Director of Public Prosecutions can still bring charges with a new "ex officio" indictment.

Sometimes defence lawyers use committal hearings for pre-trial discovery because it is an opportunity to question Crown witnesses. After the committal procedure is over, there is no further formal questioning of the Crown's evidence until trial. Moreover, the Crown is not obliged to call at the committal hearing all the witnesses it will call at trial.

Should committal hearings in the Courts of Petty Sessions be abolished? Should the power to determine if there is enough evidence to proceed to trial be given to a Judge presiding over a status conference after the indictment has been presented to the higher Court? Should Judges have power to give directions concerning the disclosure of documents and the interrogation of Crown witnesses in order to provide defendants with the information and rights presently associated with the committal procedure?

Should the Court have power to dismiss a case if there is no reasonable prospect of conviction even though there might be some evidence supporting the prosecution case? What criteria should govern the exercise of such a power? The Director of Public Prosecution's guidelines require evidence which suggests innocence to be given to the defence. Should the guidelines be broadened or included in new Criminal Procedure rules?

Witness Statements and The Right To Silence

Written statements prepared by the police detailing the evidence which the witnesses will give at trial have long been a feature of criminal procedure in countries following the English system. However, an accused has no right to obtain the statements of Crown witnesses in criminal proceedings before a Magistrate.

There is no obligation on the part of an accused to provide a witness statement at any time. Video records of interview with suspects made by police here in Western Australia are supposed to be entirely voluntary because no accused person is obliged to speak either to an investigating officer or in Court. No adverse inference or negative conclusions can be drawn from the refusal of an accused person to answer questions or give evidence. This is "the right to silence".

Some people question whether the right to silence should be maintained in the contemporary Australian context. The right to silence may conflict with the community's interest in having all relevant information available to both the investigating authorities and the Courts. Is it time to abolish the right to silence or is it a fundamental right and an essential element of our system of criminal justice?

Are there adequate safeguards to protect the rights of a person under investigation or an accused in terms of legal advice, video records of interview, etc? Will curbing the right to silence be unfair to people who can't express themselves well in Australian English? At trial an accused person has the presence of a Judge to ensure fairness. Should an independent observer be provided during the

investigation phase? Should those accused by indictment continue to have access to all witness statements? Should the right to obtain copies of witness statements be extended to all accuseds? Should an accused be obliged to notify the Crown of defence evidence as with the existing obligation to give advance notice of an alibi?

Litigants In Person

Litigants without legal representation pose special problems for the Court system. Their lack of familiarity with the Court procedures and legal principles can waste time and may result in injustice. How should the system respond to increasing numbers of people representing themselves in Court? What form of assistance should be provided, by whom, and how should it be financed? Should each Court have an officer responsible for providing advice and assistance to litigants in person? Should information packages be available with standard forms for use by people representing themselves? During trials should litigants in person be allowed assistance from someone else not legally trained? Should it be easier for Courts to stop repeated lawsuits brought by persons who refuse to accept the adverse outcomes of prior litigation?

TECHNOLOGY

Modern technology creates opportunities for time and cost saving never before available to the justice system.

Video Communication

The advent of sophisticated video and satellite communications facilities permits people to meet "face to face" without being in the same room, or even on the same continent. Some court proceedings in Western Australia are using video links. With creative planning it may be possible to save money and serve the cause of justice by making greater use of video facilities. Would it be desirable to create a "virtual" Court for use in some cases and, if so, which ones? Is there scope for greater use of video in mediation proceedings? Should the evidence of witnesses or the trial judge's address to the jury be video recorded so Courts of Appeal can observe demeanour? What are the disadvantages of greater use of video facilities and how can these be reduced?

Electronic Documentation

Other areas of technological development relevant to the Court process include electronic communication. At present all Court documents are produced on paper which is physically exchanged between the parties and filed at the Court. Document storage consumes space in court facilities and the entire system of managing Court records is costly.

Should the development of an electronic system for filing and service of documents be made a priority? What safeguards and security controls need to be built in? Will electronic systems disadvantage the litigant acting in person or the smaller law practice? Is there greater scope for "electronic appeals' and will that reduce costs? Is there a danger that technology will create information overload and encourage

needless complexity? How can technology be used to improve access for litigants in person to materials used in the justice system including forms, statutes, previously decided cases etc.? Who should be responsible for providing public access to these materials? Can standard forms be developed for use by all litigants in the various types of Court proceedings? Can relationships between the police and other agencies involved with the justice system be improved and managed more effectively with greater electronic record exchange?

THE LEGAL PROFESSION

Some critics lay responsibility for problems with the justice system solely at the feet of the legal profession. Others assert the system itself has produced the present problems. Should the legal profession have an express obligation to promote the resolution of disputes as quickly and as cost effectively as possible? Should there be a code of ethics imposing a specific ethical obligation upon all legal practitioners in Western Australia to advise every client involved in litigation as to the manner in which legal fees will be calculated, the time the case is likely to take to be resolved, the anticipated total cost, and the availability of mediation or other ADR procedures? Should there be compulsory continuing legal education with a focus on ADR, ethics, and new developments in law and procedure? Should continuing education be a requirement for maintenance of a certificate to practise? Sometimes lawyers are cautious about narrowing the issues involved in a case because of possible claims in negligence if a point is abandoned. Should the narrowing of issues be encouraged by a legislative grant of immunity from negligence if a lawyer acts in a good faith attempt to narrow the issues in a case? Should lawyers be required to certify that there are reasonable grounds for making the assertions of fact contained in any document which they issue on behalf of a client? Should lawyers themselves pay costs awarded when claims asserted or procedures undertaken in the litigation are held to be frivolous and groundless? Should wigs and gowns worn by lawyers in some courts be abandoned or restricted to particular types of cases, such as criminal cases, where greater anonymity may be desirable?

COSTS

Costs usually are based on the amount of time spent by a lawyer in providing services to a client. Critics of the present system assert it rewards inefficiency and creates a conflict of interest between a lawyer seeking to maximise revenue and the client wanting a speedy resolution of the case.

A "lump sum" system of charging for legal services could minimise the potential for conflicts of interest. The lump sum system would fix charges without regard to the number of hours spent on a particular case or at least a proportion of the charges would not alter because of the quantity of time spent. This system would ensure proportionality between the amount of legal fees and the amount in issue. It would remove the relationship between the amount of work done and the fee received.

Contingency fees, where the lawyer does not get paid if his client is unsuccessful but gets an increased fee for "winning", exist in other jurisdictions. This system is held out as one way to overcome the inability of people without money to obtain legal representation. There are different types of contingency systems in use around the

world. Should a form of contingency charging be permitted in Western Australia and, if so, what form should it take? What would be the impact of a contingency fee system on defendants? Would a contingency fee system have the undesirable consequence of promoting more lawsuits run "on spec"?

Some commentators say the availability of tax deductions for legal fees as an expense of doing business has encouraged unnecessary litigation in the past. and will continue to do so unless the deduction is removed. The present system is said to advantage corporate Australia at the expense of the individual who may not have a business income against which the expense of the legal fees can be offset. Should the Commission recommend that the federal parliament review the issue of tax deductibility of legal expenses?

Could the inability of many ordinary Western Australians to obtain legal assistance be addressed by a system of comprehensive, compulsory legal insurance similar to the various private health cover packages on offer? Although there have been some limited experiments in the field of legal insurance, the concept has not been widely promoted. Should there be further investigation into providing insurance cover for legal expenses?

Budgetary restraints have limited the amount of legal aid available in Western Australia. Should the Court have a role in the allocation of priorities as between prospective recipients of legal aid?

At present, when costs are awarded in relation to interlocutory disputes, only in exceptional cases must they be paid there and then. Does this encourage interlocutory disputes? If so, would it be better to order the costs of interlocutory disputes be paid upon determination of the issue and prior to the final resolution of the case?

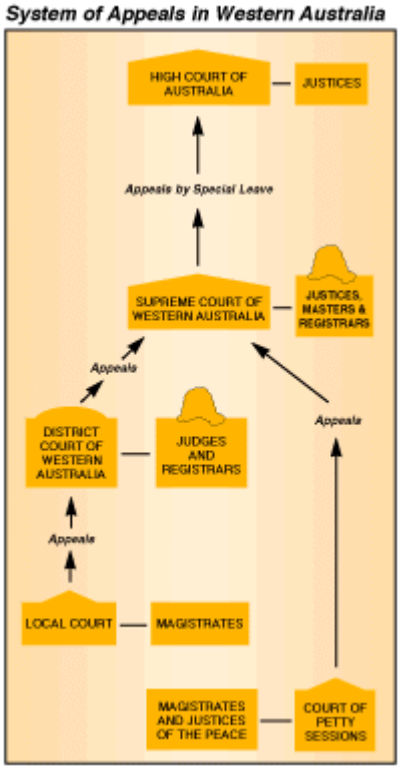
APPEALS

The right to appeal to a higher court from an adverse decision is an established feature of our justice system. Appeals, however, can significantly extend the time until there is a final resolution of a case. Some people who have not been successful at trial simply refuse to accept the result. In many cases, these individuals appeal without realistic prospects of success. There are also some types of cases in which it is necessary to have permission or "leave" from the higher Court before an appeal can be filed.

Appeals tend to be expensive, in part, because it is necessary to prepare an Appeal Book containing all the relevant documents from the original lawsuit. Many pages required to be included in Appeal Books are never referred to in the course of the appellate proceedings and seem to be unnecessary.

Should there be some classes of case in which there is no right of appeal? Should there be more classes of case in which permission to bring an appeal is required? Should the criteria for the grant of leave to appeal be tightened in those areas, including interlocutory decisions and costs, where leave is currently required and, if

so, how? Should the Appeal Courts have power to dismiss an appeal that has no significant prospect of success?



Should appeal procedures be altered to ensure that only directly relevant materials are included in Appeal Books? Alternatively, should the structure of appeals be modified, so only the decision of the Court below or the entire Lower Court file is provided in advance, with the parties tendering additional documents required by the Appellate Court as necessary during the hearing? Should Appeal Books be "electronic" with the required documents compiled on a computer disk? Should there be time limits for oral argument? Should Appellate Courts be relieved of the obligation to provide full reasons for decision when they agree with the Court below?

Appeals to the "Full Court" of the Supreme Court or the Court of Criminal Appeal are generally heard by three Judges. Although there are differences of opinion from time to time among the three judges hearing an appeal, they are not very frequent. Should Appellate Courts comprise only two Judges who, if they disagree, can then refer their disagreement to a third Judge? The disadvantage of this idea is that the third Judge will not have participated in hearing the appeal.

Should the Supreme Court serve solely as a Court of Appeal with all trials being conducted in the lower courts? Should its operation and number of judges mirror the High Court of Australia? Would an entirely restructured Court system facilitate the development of case management procedures and rules in the context of separate courts for trials and appeals? Would a trial Court system encourage decentralisation with District Court Judges residing in Districts? Would a structural change alleviate issues arising in some cases from pre-trial publicity by permitting cases to be tried more easily in different parts of the state? Would a restructure of this nature have a

significant impact on Court facilities and the allocation of resources? How would this affect plans for a new justice centre in Perth?

SUBMISSIONS

This issues paper raises many questions. Are there other major problems with the criminal and civil justice system of Western Australia which you would like the Law Reform Commission to consider?

Written submissions should be forwarded to be received no later than 25 August 1998:

Law Reform Commission
Level 16, Westralia Square
141 St George's Terrace
PERTH WA 6000
Telephone: (08) 9264 6116
Facsimile: (08) 9264 6115
Email: lrcwa@justice.wa.gov.au

There is no particular format for submissions. They may take the form of printed or legibly hand-written letters. The important part is to let the Commission know your views on the operation of the justice system and your ideas for reform.

Unless you request otherwise, the Commission assumes that all written submissions are not confidential. The Commission may quote from or refer to your submission in whole or in part and attribute the submission to you in the final report.

The process of law reform is essentially public. Copies of submissions usually will be made available to any person or organisation upon request. If you wish your submission or comment to be treated as confidential, you must indicate this in your submission. Any request for a copy of a submission marked "confidential" will be determined in accordance with the Freedom of Information Act 1992.

THE LAW REFORM COMMISSION

This paper outlines the major issues to be considered in this project. The Law Reform Commission of Western Australia is an independent government agency responsible to the Attorney General. It reviews areas of law in need of reform. The Commission makes recommendations as to how the law should be changed.

The Commission has not formulated final views in relation to any issue in this Review and welcomes submissions from any interested person.