PART I

Issues Within the Terms of Reference

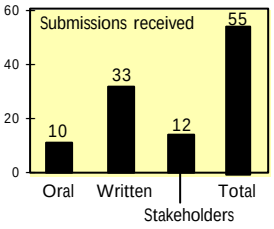
SECTION 1

The Justice System

Section 1: The Justice System

1.1

Access to Justice



Special problems arise when providing justice services in a state the size of Western Australia. The submissions identify particular concerns with high travel costs for people involved in court cases, difficulties when instructing lawyers, special problems faced by women, and a system with judges resident only in the Perth metropolitan area.

The submissions cover the following aspects:

- Geographic isolation;
- Increasing delay;
- Affordability of justice;
- Equality of access to justice;
- Particular problems for rural women;
- Transportation costs and logistics;
- Legal practitioners' high operating costs in remote areas;
- Cost of and difficulties in accessing and instructing solicitors; and
- Structural problems in the current courts system.

Limited access and increased delay

Residents of regional Western Australia told the Law Reform Commission they feel they have limited access to the justice system. They have difficulties instructing lawyers and feel they experience greater delays than Perth litigants. Generally, it is expensive for country area litigants to travel to Perth, but the alternative is unreasonable delay while waiting until the court sits in the local area to hear matters. Communication with Perth lawyers and court registries is expensive, time consuming and slow.

> The court structure should be adapted to improve the delivery of judicial services to regional areas.

During the program prepared by the Law Reform Commission and broadcast over the Westlink Satellite Network throughout Western Australia, members of the Commission shared the views expressed by people attending public meetings.

Professor Ralph Simmonds: One of the strong themes that came out of the meeting in Karratha that I attended, and again in Geraldton, was a strong interest in having local judicial officers, of having more people who did judicial work living in the community as opposed to visiting it from down south. And that seemed to be not simply a way of making justice less expensive, less remote and less forbidding but it was also a way in which people who dispensed justice might have a better sense of things operating in the community.

Interviewer: Is there an advantage to having the judge a local person?

Robert Cock QC: Well, obviously a judge must be impartial. That's the most fundamental feature of our judicial system. In fact, the country people who put forward the proposal that's been suggested — that is that there be more residential judges in the country — readily acknowledge they don't expect the judge to become partial in any respect, they didn't expect the judge to somehow develop a country slant, but they wanted to have the capacity to know that the judge was there and that they weren't overlooked. It's very much a matter of perception, they felt that because the judge would only fly up on a circuit once every month or two months, as the case may be, that they were being overlooked and that they weren't being treated with the degree of seriousness that a residential judge would treat them.

Rich v poor: inequality of access

A series of submissions see the biggest problem with the justice system as the increasing financial inability to access it for the average citizen.

> There is not Equal Access. Those with more money get more justice.
>
> The system cannot be user pays as some people have a greater ability to pay than others.
>
> The rich can afford to go to justice, the poor can't.
>
> It is difficult to see how to remove the inequality that will always exist where a wealthy litigant can afford a greater level of preparation than a poor one.
>
> Battlers do not have much of a chance.
>
> The issue of access to a court at any level should be a matter of right; fees should be waived if a person cannot afford to pay them. What justice can possibly be administered when a person has to buy the right to defend an action ?
>
> The system is failing to help small businesses.

The cost of travel to court proceedings

Travel costs associated with legal proceedings in Perth are exceedingly high, as one submission complains.

> Each time I had to travel to Perth … book into a hotel … only to find out at the hearing that the builder was not showing up and there had been another adjournment. This happened nine times.

For pensioners, even getting into Perth City from outlying areas, serviced only by bus, is 'a nightmare'.

High costs and other difficulties in dealings with lawyers

Justice in rural areas in particular comes at a high price and after a long wait. In certain situations, however, to change aspects of the present system could be disastrous. For example, one submission says the 'right to silence' in criminal matters should be maintained, particularly where the nearest solicitor might be hundreds of kilometres away.

> There would not be any justice for people here if they could not see a solicitor before answering police questions.

There are costs associated with the delay in sending and returning documents. One submission notes it costs $65,000 to run a law practice for a year in Kalgoorlie. This is more than twice the cost of operating a medical practice.

Another submission complains many people are denied access to justice simply because they do not know what to do it if they have a legal problem and, in the country, they can't get advice easily.

Women in rural and isolated areas

Rural women may not have any independent access to transportation, financial resources, or shelter when, for example, attempting to leave a violent domestic situation.

> [S]pecial attention [should] be given to the needs of women in country or remote areas where they have additional difficulties in accessing the justice system.

Judges only in the metropolitan area

A number of submissions highlight the problem of having all judges resident only in the Perth metropolitan area. One submission states this is simply unfair to country people and suggests some judges should be based outside Perth. Another submission proposes a system along the lines of the English Circuit judges, which would save time and money by dealing with matters more expeditiously. Yet another recommends providing more facilities and incentives for judges (and solicitors) to work in isolated areas.

Several submissions recommend there should be District Court judges permanently located in geographically isolated places. Each major region with a court should have judges who reside in the community.

We've had a judge, or magistrate, here for some years. Perhaps as with schools or any institution, they become too familiar with the area they're in. They get to know the client, the professions in their field too well and there is the area for bias to come in.

Several submissions see potential for bias as a particular difficulty with judges residing in smaller, remote areas. To alleviate the problem they recommend rotation at regular intervals.

> I believe that there should be a schedule set up so that there is always one judge for district and supreme court in isolated areas, however, these should change regularly, e.g. every three months. With no judge going back to the same area within 12-18 months to prevent bias and reputation, revenge attempts, etc.

There should be a judge in this area, as well as a magistrate. Those judges and magistrates should be rotated no more or less than probably two years, so that they do not become case hardened. The reason for that is that many country people feel abandoned by the judicial system, they feel they have not got access to it and they do not have access to it.

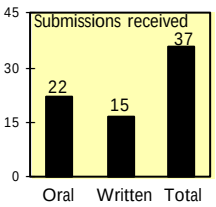
One submission suggests judges be monitored to make sure they are doing the job properly and fairly while another proposes that a single judge supervise a large area to check on the findings of others.

Suggestions

- The court structure should be reformed so it is more responsive to the needs of regional Western Australia by creating a system of Regional District Courts.
- More facilities and incentives should be provided for judges (and solicitors) to work in isolated areas.
- Particular support should be provided for women to access the justice system from isolated rural areas.
- There should be a rotating roster of trial court judges at major regional centres, and
- A schedule set up so that there is always one judge from the District and Supreme Courts available for service in isolated areas.

1.2

Delay



Many submissions express the view that delay interferes with the prompt and efficient delivery of justice to those seeking redress through the legal system. In the words of one submission: '[delay] kills passions and energy in the conduct of cases.'

Suggestions for reform of court procedure include:

- Sending 'all committal papers, i.e. handup briefs or transcript of preliminary hearings' to the DPP within one week of committal [See Recommendation 282]; and
- Extending 'the existing 'Fast-Track' pleas system' in the District Court to the Supreme Court.

The same submission notes:

> ... the current long delays (while on bail) waiting for superior court trials act as a disincentive to pleas of guilty at an early stage.... [I]f the standard time on bail is reduced to six months some may decide to plead guilty and get it over with. [See Recommendations 295, 296, 310-311]

Another submission expresses the idea that:

> ... efficiency is not in opposition to justice; it is in fact an essential element of a legal system that delivers optimum access to justice to its citizens.

The author illustrates in practical terms what occurs when court systems are not managed properly.

> Irreparable harm [may result] to the small businessman who is prevented from recovering the damages lawfully owing to him or her, the landlord (dependent for a livelihood on rent) who is prevented from ejecting a tenant who consistently fails to pay rent, the rightful heir who is prevented from enjoying his or her inheritance, the factory owner who is prevented from recovering the money owing to him or her by the insurer.

The submission suggests there should be a balance between improvements in procedure and improvements in access to justice.

> The principle of proportionality in justice recognises that the resources to administer justice are finite; the resources' cake has limited boundaries. [See Recommendation 5]

In other words, small-scale selected reforms, such as enabling summary judgment to be granted more easily, could be put in place to reduce delay without straining resources. Expensive systemic reforms, however, which would cause a reduction in funding for other areas of the justice system, could ultimately make access to justice harder for the majority of the public. [See Recommendations 97-99, 158-159]

Overuse of juries and court proceedings

Reasons offered for delay are that courts and juries are currently used for matters for which they are not necessary.

> There may be a need to design more efficient jury systems or reduce the use of juries.

> We should also consider abolishing juries for white collar crime trials and possibly replacing them with three member expert panels.

A simpler procedure where there is an endorsed plea of guilty is one suggestion.

> [S]uch matters should be dealt with by a court clerk or a tribunal, e.g. where the case and the appropriate result is clear.

These submissions reveal that some people feel the court system is not operating expeditiously. The submissions suggest that matters not essential to the judicial process should be dealt with via other means, such as the 'use of infringement notices more often.'

Social cost of delay

Apart from the effect on the day-to-day functioning of the legal system, delay is responsible for a hefty social cost.

> Delays are a problem … [F]amilies cannot put the matter to rest until the legal system has dealt with it … because of having to appear as a witness.

Hours of operation

While some suggest the reason for delay is inefficient court administration and inappropriate use of court procedures, others submit the problem is the limited hours courts are open to address cases.

> Staggering the hours the Perth Court of Petty Sessions convenes - more accessibility, less everyday 10am 'crush' and long wait.

Another complains about the summoning and remanding of all cases to 10am.

> [T]he summoning or remanding of all cases to 10 am … produces a public crowd and a mass of solicitors all waiting to be heard. [Sometimes] the wait can be until the afternoon…. A sure result is an increase in costs because someone is going to pay for the wasted time. No one complains because of the possibility of going to the back of the queue.

Delay and its effect on testimony

Several submissions address the effect of delay on the accuracy of sworn testimony, arguing that, 'delay causes fading memories on the part of witnesses'.

> My main concern here is that witnesses will be cross-examined on events many months or even years in the past, about which their memories cannot possibly be clear.

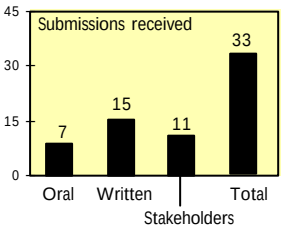
Another submission observes that 'child witnesses are more vulnerable to memory deterioration than adults'.

Suggestions

- Send all papers to the DPP within one week of committal.
- Extend the existing 'Fast-Track' pleas system to the Supreme Court.
- Limit the time on bail to six months.
- A court clerk or tribunal could deal with endorsed pleas of guilty.
- Make greater use of infringement notices.
- Abolish juries for white collar criminal trials and replace them with three member expert panels.
- Stagger the hours at which the Perth Courts convene in order to eliminate the summoning and remanding of all cases at 10am.
- Change the rules to enable summary judgment to be granted more easily. [Recommendation 98]

1.3

Fairness



Many submissions consider fairness to be related to equality and access to justice in the sense that justice equates with fairness and equality. There is also a feeling that this kind of fairness is not easily visible.

> Not only must Justice be done, but it must be seen to be done.

Another common perception is that a fair judicial system deals even-handedly with the people before it. Regardless of race, religion or wealth, all people should be treated equally before the law and no individual or interest group should receive 'preference treatment'.

In this regard, nine submissions express the view that the current system services the needs of indigenous Australians as well, if not better, than other jurisdictions' justice systems.

> Fairness is about equality. It is not about being fairer to one more than the other is.

Most submissions claim the system seems unfair because of high legal costs, extensive court delays, litigation tactics, inadequate compensation and a lack of restitution. According to four submissions, the search for justice has become irrelevant.

> Ordinary people have no access to equitable justice and cannot sue even if there is a chance of success if the other party has substantial means, delay will be used to ensure the funds will run out before any trial begins.

> People sometimes feel justice isn't done because of technicalities. Can we avoid the technicalities?

> The present system is completely unfair as it favours the strong and makes the position of the weak almost impossible. Legal aid can be discounted as it is not available to the great majority of civil litigants.

The following submission claims high costs are a significant source of unfairness.

> The immediate unfairness caused by excessively high costs speaks for itself … It is not only the less wealthy who are dissatisfied. Commercial organisations avoid using the system because legal processes are disproportionately expensive to the value they deliver.

Others offer possible solutions to the problem of costs.

> Perhaps the only way to make a fairer legal system for all is to make a fixed cost for lawyers.

> There is a need for some form of retribution. For example, a person's house is damaged, the offender is referred to a justice tribunal and the person could get no costs.

According to two submissions, special allowance should be made for litigants or witnesses at a disadvantage.

> For our system to be fair … any person under a disability, be it because of language, education or intellectual handicap must have assistance before the courts to enable them to present their case.

> People who do not speak English as their first language, should be given adequate interpreters.

This submission, however, advocates a much broader, yet simple, approach.

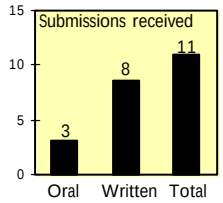
> All we should be looking at is 'fair' and 'reasonably expeditious.' We should amend the *Supreme Court Act 1935* to require all judges to apply the law in accordance with those two overriding considerations.

Suggestions

- More interpreters should be provided for those with language or intellectual disabilities.
- Lawyers should be required to provide services at a fixed cost.
- Judges should be required in every case to apply the law in terms of what is fair and decide cases in a reasonably expeditious manner.

1.4

Simplify the Law and the System



Several submissions claim that the law and the justice system are too complex, particularly in the criminal area.

> The criminal justice system has become cumbersome, dilatory, expensive and muddled.... Then there are silly distinctions drawn between strict security life imprisonment and life imprisonment. These are mere illustrations of how the law has been made more complex that it need be.

Another submission blames Parliament for the complexity of the system by continually creating new offences.

> Quite apart from the increase in the crimes such as theft and burglary the criminal justice system has to cope with scores of other offences created by the legislature every year. Small wonder that the system is creaking badly.

Common themes emerging from the submissions include:

- The law is confusing and incomprehensible:

  > There are too many rules and regulations which are often beyond the comprehension of ordinary people.
  >
  > [T]here is a need to simplify things so as to be accessible, practical.

- There are inconsistencies and a lack of uniformity among and across jurisdictions within the State courts' system:

  > Our system lacks a common thread.

One submission, while agreeing in principle with the need for simplification of the legal system, sees a need for caution.

> It is not always best to simplify the entire system because it can make it so accessible you will entice more and more people to use it for petty things which could be sorted out through other means.

By contrast, one submission perceives a danger in an overly complex system.

> [T]he more detailed the code, the easier it is for a party to be in breach of relatively insignificant portions of it.

Another submission recommends that a nation should be formed 'without boundaries with a simple legal system'.

Legal language: the need for simplicity

Eleven submissions contend it is time to simplify the law and all steps in the judicial process. The submissions propose that:

- Application forms should be capable of being filled out by hand as a means of accessing all court processes.
- The rules of procedure should be rewritten into simple, modern language.

The submissions specifically relate to the need for plain English to be used across the legal system, as the following comments suggest.

> The language of the law is technical, confusing and scary.
>
> An unclear or badly drafted statute is hopeless for ordinary people.

Two themes emerge from the submissions:

- Complex legal language makes people feel disenfranchised and powerless; and
- Legal language excludes lay people from accessing, understanding and participating in the justice system.

The submissions make the following recommendations.

> There [should] be a complete rewrite of the Acts and Rules in plain English.
>
> The Sussex Street Law Handbook, which is simple and easy to understand, should be used as a model.
>
> All court forms and documents be produced, not only in plain English, but in alternative formats such as audiotape, braille, computer disc etc. and be available in any language required by the complainant or defendant ... [at] no charge for non-English speaking persons.

Standardisation of documents

Nine submissions refer to the need for standardisation of documents used in courts. Many submissions cite inconsistency in procedure as a major problem.

> [X] applied for bond money back and obtained the necessary documents from Fair Trading. [The documents] were sent to the Court … [but the Court] required that its own documents be used.

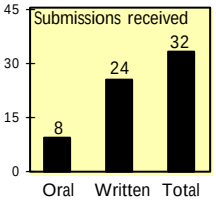
Four submissions specifically cite the need for simple court documents recommending that court documents should be standardised and a generic form should be developed for initiating court processes.

Suggestions

- There should be one, simple, legal system.
- All court forms should be able to be hand-written. [See Recommendation 160]
- All acts and rules should be re-written into plain English. [See Recommendations 2, 161 and 414]
- The Sussex Street Law Handbook should be used as a guide in amending the language of the law.
- All court forms should be available in formats such as audiotape, braille and computer disc, and in non-English languages. [See Recommendation 163]
- All court documents should be standardised; and there should be a standard form for initiating court processes. [See Recommendations 18-19 and 160-161]
- There should be a standard form for initiating court processes.
- States and territories should agree to apply consistent laws.

1.5

The Adversarial System



The submissions on this topic do not distinguish between the civil and criminal justice system. As such, many of the comments deal with broad issues:

- General grievances with the present system;
- Advantages and disadvantages of the adversarial system;
- Self-represented litigants in the adversarial system; and
- Proposals for change.

General grievances

Many of the submissions blame the legal profession. They claim lawyers prefer to win the adversarial contest rather than seek justice.

> There is a need for radical surgery to the legal system… There is a need to change the adversarial system and end the lawyers' cartel.

> The community doesn't feel safe or protected by the law. They feel like they're at the mercy of both the legal system and the criminals.… Central to the problem is the adversarial system — it is about winning the case rather than about justice.

> I'll tell you where the problem lies — with the lawyers — the Cartel. It wasn't written by me, it was written by a very famous journalist and he tells us we are the victims of the Cartel. In this country, we have something known as the adversarial system, unfortunately unless we do something about it it'll continue and my suggestion to you is don't grizzle about it, that's not going to work, you're talking about crime, that's only a symptom, a symptom that's been caused by a disgusting system that's been put out in a place called England, it's the Westminster adversarial system.

Many submissions want the justice system to seek truth. Some submissions suggest this goal is being sacrificed by lawyers for points in the legal contest.

> Moderate the adversary system to the point where lawyers cannot interfere with the search for truth, that is, eliminating cross-examination but allowing them to ask questions through the judge.

> The adversarial system of law, both criminal and civil, is a sad joke, sham and a farce … the system of trial is about winning rather than establishing the truth, and delay with increased costs is used to ensure favourable results to parties with resources at the cost of the party that has been wronged.

> While I do not believe that it would be practical to make a total changeover from the adversarial to the inquisitorial system, I recommend that our judges and magistrates in Western Australia should be given a duty to try and discover the truth….

Submissions advocate that the adversarial system be abandoned.

> Nothing hinders the timely and effective outcome of our projects more than the adversarial system. It colours the attitudes of those giving evidence. It hangs like a pall over contracts. We believe that the adversarial system is used to obscure the facts and hide the truth. It is our recommendation that it be abandoned.

Two submissions assert that the inquisitorial method should take the place of the current system.

> An inquisitorial system, with criminal investigations supervised by trained judicial officers, would minimise both the temptation and the opportunity for falsification of evidence, and would allow those judging the matter to do so on the basis of all the facts.

> [A]n inquisitorial system, which gets at the *truth* not the luck of those with more money to get more *justice*.

Not all comments on this topic are entirely critical of the present adversarial system. In fact, one submission suggests the difference between the two models is not so clear cut.

> Our system of justice is indeed adversarial in character, but it has long progressed from the basic classical adversarial system where the judge is entirely passive. By an ad hoc development of rules we now have a hybrid system based on adversarial elements.

Disadvantages of the adversarial system

While the disadvantages of the present adversarial system are voiced in the general grievances, the following submissions highlight more specific problems.

> There is a need for a Court officer to come in at a very early stage to see what is most at issue. The problem is exacerbated by the adversarial

> system which makes indicating rights financially unachievable. [See Recommendation 7]
>
> Legal procedures and tactics create enormous repetitive paperwork and costs.

Other submissions attribute responsibility for time-consuming and costly practices to the lawyers involved in the process.

> The adversarial system involves two or more lawyers who plot or collude with their colleagues for an outcome which is arranged in isolation of the judge, but communicated in concert to the judge with no regard whatsoever to the client who has usually been wronged or to any consequential outcomes. It hinders the cause of justice, fair play and the truth.

Advantages of the adversarial system

One submission recognises an advantage of the present system is that parties have the freedom to isolate certain issues of contention.

> The real advantages … are that the parties have the autonomy to define the issues in dispute between them and the court is left, subject to appropriate management of the case, to determine those issues according to law.

Another favours the adversarial system as the best method of arriving at the truth.

> [A]dvantages of the adversarial system include the facts that it respects individual autonomy, it harnesses the power of self-interest on each side to unearth the best evidence and that truth is best discovered by powerful statements on both sides of the question.

Self-represented litigants within the adversarial system

Submissions concerning the difficulties faced by self-represented litigants within the adversarial system express sympathy for their plight. While some advocate mere changes to the present system, others suggest a formal extension of judicially interventionist measures.

> A reform of the adversarial system is necessary because litigants who are unequally resourced cannot present their arguments competently in a way that produces a just outcome.
>
> As inquisitorial procedures are already used to settle disputes it is not revolutionary to extend an inquisitorial role in the court system. Judicial intervention rather than passive umpiring would assist litigants in person to present their case, facilitating a fairer outcome than at present in the adversarial system.

Proposals for change

There is some resistance to the idea that all legislation regulating civil justice should include an objects clause — a phrase stating the objects or aims of a particular piece of legislation.

> We think it unnecessary.... Repetitive statements of object clauses are likely only to cause confusion. [See Recommendation 6]

Similarly, support is not forthcoming for a suggestion that 'litigants should pay a significant amount in order to gain access to the courts. This can lead to a denial of justice.'

One submission welcomes the idea of random audits.

> The idea of random auditing of cases settled prior to judgment is appealing in order to explicate these cases, to obtain data on costs, the reasons for settlement, and the types of dispute resolution options used.

Another submission vehemently rejects this proposal.

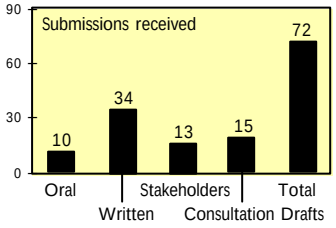
> The idea that the Court should act as a policeman and investigate files of cases that have already been settled will be anathema to the public. It is not part of the court's judicial function.... The proposal is a recipe for more litigation, additional costs and an increased budget for the courts.

Suggestions

- Court officers should be involved at a very early stage in proceedings to ascertain what matters really are in dispute in order to narrow the issues.
- Cases settled prior to judgment should be randomly audited to explicate these cases, to obtain data on costs, to ascertain reasons for settlement, and the types of dispute resolution options used.
- The adversarial system of litigation should be abolished.
- The inquisitorial system should replace the current adversarial system.
- Judges and magistrates in Western Australia should have a duty to try to discover the truth.

1.6

The Legal Profession



A low regard for the legal system in general and a lack of respect for legal practitioners in particular underpin a significant number of submissions.

To some extent however, the submissions indicate that the legal profession and what is involved in the practice of law are misunderstood. As one submission reveals, a lottery approach to obtaining legal advice is seen as a way to make the system more fair.

> Appoint lawyers on a public draw basis to give everyone a fair chance at accessing quality lawyers.

Public perception of the legal profession

The majority of submissions suggest the legal profession is held in low regard. Submissions from both lawyers and non-lawyers express the view that lawyers are generally self-serving and do not have the best interests of clients at heart.

> The community perception of lawyers is that they are lacking integrity and are primarily motivated by greed.

> 'Bashing' of any segment of the community occurs because the community's perception is that that segment does not serve the people. The legal system … [does] not serve the people. [It] serves itself, and generously.

> The justice system is a utility. The personnel are public servants and it is high time they in fact served.

Even a lawyers' service organisation receives criticism.

> No intelligent Australian would trust the Law Society. It serves lawyers.

One submission observes that the reputation of lawyers is formed by the unethical behaviour of some in the profession.

> It is unfortunate when unethical and biased people slip through the net.... The expectation that the majority of honest people and ethical lawyers have the highest standards of behaviour and integrity is diminished as a result.

A large number of participants report negative experiences and express anger at treatment received during their involvement with the legal system. The complaints concern inappropriate and unnecessary delay, overcharging, intimidation, untruthfulness, harassment, and inappropriate advice designed to lengthen rather than expedite legal processes.

> It will take a long time to stamp out … delinquency, neglect, undue delay, overcharging, bullying and intimidation in the legal industry.

One submission goes so far as to make the following suggestion.

> Lawyers [should be] removed from controlling information, fact gathering and driving the outcomes of ANY court proceeding.

Another submission is critical of the lenient treatment given to lawyers facing charges.

> [M]embers of the legal profession charged with offences receive preferential treatment and reduced sentences through the courts.

The Westlink broadcast produced by the Law Reform Commission discussed the criticism of the legal profession which was voiced during the public meetings.

Interviewer: Robert, now you've been to many of these meetings. Why do you think lawyers come in for so much criticism?

Robert Cock QC: Well, I'm not saying it's necessarily the case Kathy, but the community seem to think the lawyers have hijacked their criminal justice system. The complaints we've received, by and large are that the community and the people at our public meetings have held the lawyers responsible for delays they've found in the system. They hold the lawyers responsible for the increasing costs they're finding in the system and often hold lawyers responsible when they've failed in their case. And because I think the lawyer is the face of the judicial system the particular client sees it's inevitably the lawyer who receives most of the responsibility as far as the community is concerned when they're not happy with the outcome.

One speaker at a public meeting discussed a dispute over an estate.

Now the beneficiaries, in order to have some redress, have to take the case to court. And you know what that means, lawyers will get a nice lot of money on both sides and the beneficiaries will probably end up with nothing.

Judges and magistrates

Some submissions focus on the judiciary and highlight the perceived remoteness and untouchability of judicial officers who seem to stand outside or above the community.

> [The judiciary] are not worthy of the reverence imparted to them by society. They spring from a long tradition of corrupt, confused, self-interested, money grabbing, power hungry irrational rogues.
>
> Judges regard themselves as a deity.

One submission states that judges and magistrates are not perceived as being part of the community because of the lack of public participation in the trial process.

> The judiciary and magistracy are in danger of creating the notion that they are isolated, remote, out of touch and arrogant. It is not a question of whether this public hostility is justified or not. There are signs that the public want a bigger say in the trial process even if they do not have any idea as to how this should come about.

Selection process for judges

Other submissions assert the process of selecting judges from the body of the legal profession — particularly from the Bar — is neither objective nor impartial.

Several submissions argue that judicial positions should not be tenured. One submission notes that life tenure for judges is inconsistent with employment conditions of other professionals within the labour market.

Other submissions concern the degree of specialisation required of judges.

> Perhaps we should appoint judges as specialists rather than generalists, as we do now.
>
> It is essential that legal processes involve judgments which are provided from learned people with extensive specialist experience in order to maximise the potential for a correct judgment and allow for justice to prevail at the trial.
>
> There should still be some 'General Judges' just as we have general practitioners. This would help streamline the system and help save time … as the Judge will be familiar on the latest and with other various situations.

Another submission makes the following suggestion.

> If a member of the judiciary is found to be inefficient then they should be automatically removed to other duties.

One submission considers that judges need to be the ones to enforce procedural reform.

> The fact is that without judges taking a firm line, the culture will not be changed; if the rules and orders for directions are not strictly enforced, and if excessive latitude is given to practitioners, reform will come to nought. The existence of rules that do not have the wholehearted support of the judiciary will achieve very little.
>
> The idea that one need simply to throw money at the system, create new judges, new courts and new infrastructure is not a solution. Statistics

> have shown that … [this] seldom has any lasting beneficial effect. Moreover, any significant increase in judicial numbers will result in a reduction in standards and a downgrading of the judiciary.

Fees, delay, conflict of interest

One submission expresses the view that, in the main, legal fees are not commensurate with legal skills or competence. Several submissions cite examples of stalling and delay tactics that are perceived to serve the lawyer's, not the client's interest.

> Overcharging should be made a criminal offence to discourage this rampant, incestuous and cruel practice within the profession that has always been known as 'a law unto itself'.

One submission expresses the view that court delays are largely a result of legal incompetence while another suggests that the aspects of the legal system most vulnerable to adversarial excesses — namely costs, delays and unrealistic expectations — are responsible for bringing the system into disrepute.

Submissions generally agree that the legal profession has an express obligation to promote the resolution of disputes as quickly and as cost effectively as possible. There is also a consensus that the narrowing of issues at an early stage should be encouraged by legislative action.

According to one submission, lawyers should be protected by appropriate legislation 'should they behave with greater cooperation and with greater regard to public interest'. [See Recommendation 439]

Other submissions disagree.

> Lawyers don't need grants of immunity. They seem immune enough to change.

In support of the legal profession, one submission claims that criticism of the profession is unfair because the profession has accepted procedural change over the last few years and has shown a willingness to embark on new methods.

Disempowerment

A considerable number of submissions are of the view that the legal process disempowers people. The legal process appears to remove control of cases from the clients and place control with legal practitioners. Some submissions express the view that litigants' ownership of claims had been lost.

One submission notes that the syntax of legal language disempowers and manipulates those unfamiliar with its use. For example: 'I put it to you that…' constitutes an accusation rather than a question. Thus, witnesses are asked to respond to accusations rather than to answer questions although this is not made explicit.

Another submission observes that the legal profession has disproportionate power.

> The legal profession makes up two per cent of the population but exert power and control over the lives of every lay person who comes into contact with the legal system.

Self-regulatory nature of the legal profession

A number of submissions express anger and concern about the 'closed shop' nature of the legal profession 'investigating its own'.

> It is like leaving Dracula in charge of the Blood Bank.

> The law seems to be made by lawyers for lawyers.

Some submissions claim it is difficult to lodge complaints against members of the legal profession when an independent body does not adjudicate the complaint. [See Recommendation 443]

Need for change

Many submissions view a substantial part of the legal profession as being resistant to reform. Other submissions express concern that there is a lack of reliable data on which decisions about the need for change can be made.

> Current proposals for change are substantially made on anecdotal evidence and subjective experience.

One submission claims that 'judicial policing is at best only a limited means of changing attitudes within the legal profession'.

Penalties

A number of submissions suggest that legal practitioners should be accountable for costs in legal disputes. Other submissions, however, note that sanctions against legal practitioners are unpopular.

Several submissions claim that penalties should be imposed on legal practitioners who waste court resources or undertake frivolous or groundless litigation.

> Heavy financial penalties should be imposed on lawyers who settle at the court door.

Authority to act for clients

One submission highlights a perceived discrepancy whereby estate agents are required to have written authority to act for clients but legal practitioners are not.

> Why, when we're required to have an authority in writing before we can act under law, the statutes, why it is not the case with legal practitioners, why the rules have not been that they have to have an authority? Ours is in triplicate, with a pink and yellow copy which goes to a vendor and a purchaser before we can act at law under the statute. It should be exactly the same with a legal practitioner. On the back of these forms is the total summary of our costs, so the people know exactly where they stand.

Legal education

Thirteen submissions concern legal education. Several cite the need for greater emphasis on legal education in schools and in the community: 'Teach law at all levels of children's education.'

Submissions recommend that community education incorporate critical analysis of the legal system, with a 'bottom up' change process being implemented to support any changes that may occur as a result of the law reform processes.

Ten submissions recommend ongoing education for legal practitioners. A recurring theme throughout the submissions is that: '…continuing education should be a requirement for a certificate to practise'. [See Recommendation 440]

Another submission is critical of the qualifications, experience and scholarship of judges and lawyers. One submission questions their ability to adjudicate on social matters.

> Values education for lawyers should include self-respect and love.

Code of ethical conduct

Most of the 16 submissions dealing with standards of ethical conduct cite the need for a Code of Ethical Conduct for the legal profession in Western Australia.

A significant number of submissions on this topic claim that the absence of a conduct code provides scope for unethical conduct to occur.

One asserts that access to legal representation is being denied because of misuse of funds, while another claims public monies are being wasted and there are insufficient accountability processes in place to monitor the use of public funds.

With regard to the management of Legal Aid funds, the submission suggests that Western Australia follow the example set by New South Wales in its Legal Aid Practice Management Standards and impose specific ethical duties on practitioners undertaking Legal Aid assignment. Failure to meet practice standards should attract penalties and disqualify the practitioner from further aid grants.

Several submissions note that the conduct rules currently in place such as the Law Society of Western Australia Professional Conduct Rules do not go far enough.

> The *Legal Practitioners Act* … as amended is an extremely thin and grossly inadequate Act — in metric terms, a meagre 5mm — and offers far too little to expect fair and reasonable obedience from practitioners.

A number of submissions cite models that could form the basis of the development of a Code of Ethical Conduct for the legal profession in Western

Australia. These suggestions include the following proposal.

> The Public Sector Code of Ethics (Public Sector Standards) be incorporated into the *Professional Conduct Rules* and the *Legal Practitioners Act*.

Self regulation

A number of submissions express the view that the legal system is insular and exclusive and therefore not in a position to objectively self-regulate. Of these submissions, most consider self-regulation inappropriate and unacceptable considering that other public and private sector agencies and professions have codes, standards and structures in place to regulate conduct and encourage ethical behaviour.

> The [legal] profession has … always displayed - above and beyond all other professions … a very serious lacking in ability to unmask and discipline its own kind.
>
> It is totally unacceptable for [legal] practitioners … to examine the shortfalls of their own profession.

Several submissions note that the legal profession has a responsibility, as do other professions across the public and private sectors, to be accountable to the community they serve. One submission, particularly, asserts that accountability processes should include accountability for the expenditure of public monies including legal aid funding.

Several submissions claim that the legal profession is insular and is not in a position to critically analyse and objectively examine its own problems.

> [F]or many leaders of the [legal] profession, the kind of law they practice is close to perfection. Resources are unlimited, the issues are fascinating, the technology is superb, the back-up team is highly skilled and the opponents are top drawer. But this is a separated and isolated world that does not reflect the reality of the broad mass of legal practice. Working within it tends to induce a degree of self-satisfaction that obscures critical analysis and objective examination of the problems.
>
> There is little incentive to leave the familiar paths and undertake a struggle with new problems.

One submission suggests that the Western Australian Professional Conduct Rules be amended to include the following rule under Chapter 3 on the topic of Maintaining Professional Integrity:

> A practitioner shall not, in the performance of professional duties, by words or conduct, knowingly, or with callous indifference, disparage, humiliate or discriminate against parties, witnesses, counsel or others on account of race, gender, ethnicity, religion, national origin, disability, marital status, sexual orientation, or age.

This submission also makes these observations.

This does not preclude legitimate advocacy when race, gender, ethnicity, religion, national origin, disability, marital status, sexual orientation, or age or other similar factors are issues in proceedings.

The legal profession should separate its professional and industrial activities and keep them separate. The spectacle of the Chief Justice arguing for greater legal aid is not an edifying one.

Effective reform cannot be imposed from above. Research into law reform indicates that for change to be successful it should not be 'done' to the profession; rather it is something the profession should participate in, experience and help to share.

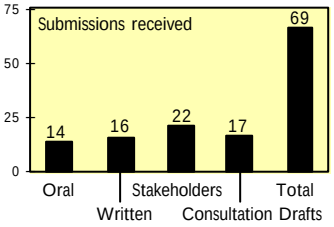
Suggestions

- The roles and responsibilities of lawyers in litigation procedures should be reviewed.
- Lawyers should be required to advise on the prospect of success of a legal action on an on-going basis. [See Recommendation 121 which states legal practitioners should advise regularly on likely cost of the dispute.]
- The Law Society should be given the power to recommend to clients the names of legal practitioners specialising in particular aspects of the law.
- Lawyers should have access to indemnity or exemptions if they act in good faith. [See Recommendation 439]
- Continuing education should be a prerequisite for a practising certificate. [See Recommendation 441]
- An objective non-legal body with disciplinary and fiduciary powers should be established for aggrieved clients. [See Recommendations 442-443]
- The legal community must be persuaded of the benefits of change through a close examination of issues, education regarding proposed changes and unemotional debate.
- The legal profession in Western Australia should adopt a code of ethics similar to that governing the public service.
- There should be a greater focus on legal ethics with specific pre-service and on going in-service training in ethics for lawyers.
- An Ethics Committee should be established to develop a Code of Ethical Conduct for the legal profession. [See Recommendation 438]
- A Code of Conduct (similar to that of Real Estate and Business Agents) should be developed whereby lawyers cannot act without lawful written authority which incorporates information on costs.
- The Legal Practice Board and the Legal Practitioners' Disciplinary Board should comprise non-legal representation. [See Recommendation 443]

1.7

Cost of Litigation and Contingency Fees

1.7.1 COSTS



> In the public mind 'cost' is the cost of lawyers not the cost of the state in providing the courts. The difficulty is in determining what procedures currently required of lawyers can be eliminated or provided more cheaply. It is difficult to see how to dictate to a lawyer the extent to which he should prepare for the presentation of a case.

The issue of how much it costs to use a lawyer to access the courts dominates the submissions on costs. Several submissions claim the price of legal advice is over the top.

> [T]he fact that in the high court a litigant is to be represented by counsel and the fact of the hourly rate for such service being in excess of $1 000 per hour plus the prohibitive court fees — i.e., the court is open only to the rich and powerful.

> [T]he requirement to pay fees for defending actions must be abolished. The decision as to whether the fees should be waived should not include the criterion that refers to determining whether an action/defence has a reasonable chance of success.

> The success of a matter is an issue for the judge to decide after a fair trial. If a matter may be regarded as frivolous opportunity exists for an application to that effect before the matter goes to trial.

One family writes of their inability to complete a negligence claim following their son's death in a mining accident due to the exorbitant costs of legal representation 'whereas the employers' interests are very well preserved by the law as it stands.'

Rising costs

Lawyers' fees are regarded by many as one of the major culprits for escalating legal costs.

> There are admittedly problems with the time costing system which would appear to reward the slow and penalise the fast.

The majority of submissions express the view that the system is far too expensive and that high cost prevents most people from pursuing legitimate claims.

> These days, it doesn't matter who is right, but rather who has the most money and the best lawyer.

Several submissions complain that justice is accessible only to particular sections of society.

> Legal aid is only available to a certain part of the community, while the wealthy can afford the costs of professional legal assistance. The middle majority of the community is left uncatered for.

Most of the 25 submissions on this topic equate access to justice with affordability. Parties are denied justice if they cannot afford to pursue their claim, or retain quality lawyers.

> [The Courts] are not an option for the poor or the modest income earner.

> It all comes down to dollars. The rich can afford to go to court, the poor can't.

Funding and possible solutions

One submission suggests 'we need alternatives to bridge the gap' between the need for legal assistance and the ability to pay, and others put forward the following suggestions.

- A need to look at assistance for clients who are poorly resourced but have a genuine case;
- Legal aid as being harder to get; and
- A need for Legal Aid for Civil Litigants.

One submission claims that when courts have control over their own budgets, judges are put in the position of managers. This shift causes a conflict of interest between judges' judicial and administrative roles.

Higher court fees

Several submissions suggest wealthy litigants should pay higher court fees because their financial capacity does not discourage them from initiating court proceedings. One submision disagrees.

> The rich cannot be seen as a mere piggy bank for everyone.

According to one submission there is 'no nexus between higher fees and distribution of fees to areas of need', because court fees go to consolidated revenue. Another claims higher fees are not re-distributed to the poor because once fees go to consolidated revenue they are not identifiable.

Lawyers' charging practices

One submission claims lawyers receive unfair criticism.

> It is not the lawyers who are at fault — it is the system.

> We as lawyers are very frustrated at not being able to say to you what our costs are going to be at the outset of a claim. And the reason we can't do that is because we can't charge you a percentage or a set fee. It is governed by old scales or hourly rates that mean nothing to anyone but lawyers. It is very confusing and very frustrating for us. If you had a no win no fee situation you could insure yourselves against the loss you might incur if you lost the case, you'd pay nothing to your lawyer until the end of the claim. You'd only pay him if he won, so he'd have to back up his mouth with performance, which is what you should be expecting of your lawyer.

According to 17 submissions, the way in which lawyers' charge is an area of essential reform. Because lawyers' charges are based on time, there is no incentive for efficiency.

> Lawyers have few, if any, incentives to develop and implement skills of brevity. As long as costs are defined by the length of time spent on the case, delay, ineptitude and obstructionism will be rewarded.

> It is desirable that costs operate as an incentive in a different direction. However, whether there is a will to make the necessary changes is doubtful. The several government inquiries on this issue have not led to any alteration in the basis of charging and the profession [is] unalterably opposed to change.

> The costing system currently used by most of the legal profession must cost a fortune to manage.... I have received bills which actually itemise every phone call, fax, photocopy, envelope, letter, etc. The amount of paper and time is absolutely ridiculous.

One submission maintains that lawyers' charging practices are a major cause for the failure of our legal system. As a result, 'every effort should be used to bypass …[lawyers] and use a mediation system'.

A degree of cynicism also accompanies submissions on costs as the following illustrates.

> There is far too much money involved for any member of the justice system to genuinely want to reduce crime in our country.

Two submissions defend the legal profession, one saying that excessive lawyers' fees are due to their 'tremendous overheads' the other noting that

this excuse would not apply to all lawyers. Other submissions see a correlation between quality of service and the price lawyers charge.

> If you pay peanuts, you get monkeys.

Two other submissions make comparisons between lawyers and doctors, noting that doctors charge less on an hourly basis even though they are required to complete more years of study. One submission points out it costs substantially less to operate a rural medical practice than a law office.

> I'm angry. Would it be presumptuous of me to suggest that a sliding scale downwards of lawyers fees be introduced when adjournments are carried on month after month. This may encourage lawyers to bring an early conclusion to their brief and so unclog the courts.

> I think a levy should be made on all lawyers, similar to the Medicare levy. That can be used to fund some part of the legal system. I mean, if they benefit from it, surely they should put something back into it.

> There are admittedly problems with the time costing system which would appear to reward the slow and penalise the fast.

Lawyers' fees or government charges?

One submission observes that high government service charges are to blame for increasingly high litigation costs.

> The cost for small businesses to recover debts is excessive. Government should be told that problems with access to justice aren't solely caused by lawyers' fees, but also Government fees. While the user pays system is meritorious, it bars people from the courts who the Commission's public meetings are designed to help express their views.

Another submission suggests that the 'winner' should pay to help cover the operational costs of the justice system.

> The amount parties pay to conduct proceedings always seems very little compared with what each side pays in legal fees or the amount in issue. Charging greater fees would no doubt be regarded as making the justice system less accessible. Perhaps there should be a percentage of the amount of the judgment paid by the successful party. The alternative is to accept the courts as a necessary expense and for the current system of small fees to be maintained. I do not think that a distinction based on whether or not the costs are tax deductible is appropriate.

Tax deductibility of legal expenses

Three submissions say litigants who can afford legal fees or obtain a tax deduction for legal costs should be required to pay greater fees. One states there should be a judicial discretion in this regard.

Four submissions claim legal expenses should not be tax deductible. Five others disagree, with two supporting a deduction in specified cases. One submission doubts that eliminating the tax deductibility of legal expenses would help curb litigation.

> I have difficulty in accepting that the tax deductibility of legal costs contributes to unnecessary litigation to any great extent. The money must still be paid and although deductibility may ease the burden, it is hardly an incentive to incur unnecessary expense. If it were no longer tax deductible then one can envisage that litigation accounts would go down but 'general advice' accounts, which would presumably remain deductible would go up.

Recovery of costs

Five submissions suggest successful litigants ought to recover the total amount expended on their cases. As a result, most of the five view taxed costs as being grossly unfair as not all costs are reimbursed by the unsuccessful party. In any event, reimbursement can only be financial, as there is no way to compensate for the social costs of stress and frustration a litigant may experience.

> The legal process has an extreme impact on people from which they may not recover. But there is no compensatory redress for a person trying to uphold a principle of justice.

Public legal insurance

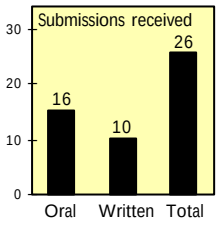
Two submissions support insurance cover for legal expenses. Another does not believe insurance to be a viable option as it would be abused by lawyers.

> The legal profession would, as an industry, have to be far more productive, predictable and professional for insurance to be an option for general use.

Suggestions

- Legal fees should be at a level affordable to the general public.
- A downward sliding schedule of legal fees should be introduced to penalise lawyers who continually delay cases.
- Legal expenses should not be tax deductible. [See Recommendation 443]
- All lawyers should be required to provide free legal services at some time. [See Recommendations 200 & 208]
- The existence of written agreements should be compulsory before a lawyer may act on a client's behalf. The written authority to act must describe the legal services to be provided and lawyers' fees.
- There should be time limits on cases to prevent lawyers from prolonging matters.
- Western Australia should introduce public legal insurance, similar to Medicare.
- The loser should be reimbursed all payments made to lawyers in order to use the reimbursement to pay the winner's costs.
- Winning litigants should be able to recover the total amount of costs in their cases.
- Given the high cost of litigation, clients should initially make use of the mediation system.

1.7.2 CONTINGENCY FEES



A contingency fee agreement provides that lawyers will receive a percentage of their clients' awards in court. It transfers the financial risk of cases to lawyers, providing an economic incentive to succeed and resolve cases quickly. This submission supports the use of contingency fee agreements.

> Lawyers, like most service and goods providers, should be paid for work after they have done the work, not before, and they should be paid on a success basis, from proceeds of the success, but not excessively.

Several submissions suggest contingency fees would make justice more affordable and improve access to justice — but only for those using lawyers. Contingency fees would not help the self-represented litigant.

One submission suggests contingency fees would encourage more litigation.

> Many civil wrongs don't get to court because parties can't afford to go to court. If contingency fees were introduced, there would be an increase in litigation and powerful defendants would be discouraged from delaying matters (by preventing wearing down of opponent).

Another articulates a major worry common to many submissions.

> The biggest concern with the system is access. More and more people can't access the system and the law should be reformed to allow solicitors and clients to make such costs arrangements as they like.

A submission notes lawyers would be less likely to take on 'bad' cases due to the risk of failure. Overall, however, litigation would still increase. Yet, one submission queries whether there are sufficient court resources to cope with an increase in cases as a result of greater accessibility.

Other submissions oppose contingency fees on the grounds they would introduce an unhealthy litigious culture and result in abuse of the court system by those who seek money not justice. One points out the potential for contingency fees to create conflicts of interest between lawyers and their clients.

> I would be concerned that any form of contingency charging would give lawyers a vested interest in the outcome of litigation that could place them in conflict with their client and act as a hindrance to the settlement of matters.

Another offers this suggestion.

> Perhaps the only way to make a fairer legal system for all is to make a fixed cost for lawyers.

Suggestions

- Contingency fee arrangements should be allowed. [Recommendations 141-144]
- The maximum percentage payable on contingency fees should be fixed.
- Settlements involving contingency fee arrangements should be court approved. This will protect the litigants against any conflict of interest the lawyers may have in the outcome of the cases.

SECTION

2

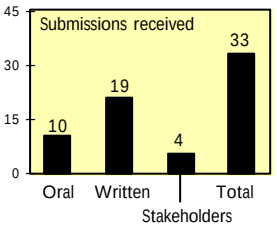
Courts

Section 2: Courts

2.1

Courts in Western Australia

2.1.1 COURTS



Most submissions assume that regardless of what system operates, 'government has a duty to fund the justice system.' One submission, however, observes the following.

> The stark reality is that there … is no likelihood of the problems inherent in the system being cured by the creation of new judges and courts. The resources available are finite. Government funds for the administration of justice will not be increased and, indeed, the probabilities are that they will be reduced…. Practically speaking, if the problems are to be alleviated, there will have to be change which will cost relatively little or nothing, and better still, which will reduce administrative expenditure. Litigation will have to be made cheaper and quicker by reforms which do not require more personnel or services or accommodation.

Another submission questions whether the cost of the justice system should be the focus of debate.

> Government is too concerned with costs and not with the services that are actually provided. Justice is an area which you can't judge on costs.

Better allocation of resources

One submission suggests formally encouraging court staff to identify new ways of improving the system. Another proposes the idea of a listings magistrate. The objective is to ensure existing resources are used efficiently and effectively.

Other submissions recommend judges be assigned cases based not only on their ability and skill, but also on previous experience in the area. This has the potential of reducing the amount of time necessary to hear a case, according to three submissions. One submission believes the need for appeals

would be reduced as judges are more likely to deliver 'correct' decisions if they are experienced in a particular area of law.

> If the initial trials were presided over by specialists, I am sure that the appeals court would be less pressured and frankly the legal processes would produce a fairer and more relevant result.

Flexibility in operation

Two submissions encourage courts to be flexible in their hours of operation, and even to investigate the possibility of working outside standard court hours to clear backlogs of cases. Another submission suggests courts be convened at different times of the day, rather than just at 10am. This would reduce both costs and exceedingly long waiting periods. [See also Delay]

Bureaucratic procedures

Many submissions indicate those outside the legal profession sometimes find court procedures illogical and difficult to understand. One submission claims the Supreme Court refused to allow an appeal to be lodged because the cover page did not meet court guidelines. According to the submission, even when the litigant offered to amend the document by hand, the court officer again refused to lodge the appeal.

> The rules for format and the language and presentation of submissions belong … to a bygone era.

One submission attributes the inaccessibility of courts to their archaic, formal and bureaucratic process and procedures.

> It has its origins in the quill era and Messrs Dodson and Fogg would feel quite at home in it with its motions, originating summons and writs, some of which were first developed in England (like juries) in the 12th century or earlier.

Bureaucracy, according to one submission, makes the court system 'inefficient and cumbersome.' Even the simplest claim can become complex.

The language and formalities used in court are complicated, adding to the bureaucratic image. Witnesses are given little support by way of legal information or advice and many find the experience of court intimidating. Two submissions suggest it should be possible to give witnesses limited advice or support 'without impairing the integrity of the process.'

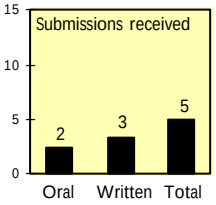
There appears to be widespread concern amongst the general community that the justice system is not keeping abreast of changing times. The submissions urge court procedures to move forward, instead of adhering to old traditions.

> [I]s it possible for the Judiciary to leap into the 21st century or perhaps even the 19th century? I do not think revolution will come from within but it must surely come from without.

Suggestions

- Encourage court staff to identify ways to improve the system.
- Introduce a new position of 'listings magistrate' to co-ordinate the listing of matters in the lower courts.
- Assign cases to judges with experience in particular areas.
- Allow a judge to try a case with two other decision makers, who need not necessarily be members of the legal profession.
- Operate courts on a flexible working day and set start times throughout the day rather than all at 10am.
- Provide advice to, and a support mechanism for, witnesses.

2.1.2 LOCAL COURTS



The two main issues emerging from submissions on the Local Court concern self-represented litigants and problems with complicated rules and procedures.

> It seems unnecessary for the Local Court to have separate rules governing the commencement of a matter if the Supreme Court Rules are adequate. There needs to be recognition that matters dealt with under these rules normally require legal assistance and the rules may be complex. On the other hand, there should be special simple rules for such matters as the small disputes division where people are expected to appear in person.

One submission called for a complete re-draft of Local Court legislation into plain English and most of the 200 odd Local Court forms to be replaced with some suitable simple generic forms. [See Recommendations 160-163]

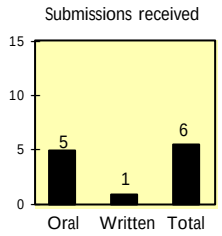
A submission urges the extension of Part VI A of the *Local Courts Act* concerning actions for small debts to all causes of action and increasing the $3,000 upper limit for making claims under Part VI A *Local Courts Act*.

The same submission suggests implementing alternative dispute resolution mechanisms before Local Court judicial proceedings are used and proposes that there be an express power in Local Court magistrates to provide interim relief without the need to initiate proceedings.

Suggestions

- Develop guidelines for dealing with complaints against magistrates.
- Increase the financial limit for Local Court cases.
- Re-draft Local Court legislation in plain English.
- Extend the provisions of the *Local Courts Act* Part VI A dealing with actions for small debts to all causes of actions.
- Express power should be given to the Local Court to grant interim relief without having to initiate court action.
- Replace the hundreds of court forms with several generic documents.

2.1.3 COMMUNITY COURTS



The majority of submissions support the establishment of community courts. The submissions express the view that community courts would provide a quicker, simpler and more economical way of dealing with disputes. According to several submissions, community courts could improve efficiency by diverting cases from the overloaded existing courts system.

One submission, however, expresses concern that community courts may affect the quality of our legal system. For example, decisions made may 'have no relation to the law'. In other cases, the objectivity of the decision maker may be questioned.

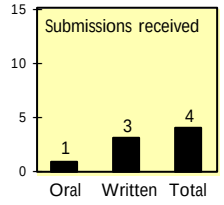
> In small communities, where disputes have gone on for ages and everyone has formed a view in the community, who will be available to be fair and objective?

Several different structures were proposed including creating a new lower court and extending the small claims tribunal. One submission suggests a Residents' Judicial Council set up according to suburban boundaries. The Council would deal with offenders in their area and make decisions on punishment and restitution.

Suggestions

- A new lower court, called the Community Court should be established below the Court of Petty Sessions.
- Expand the functions of the Small Claims Tribunal.
- Establish a Residents' Judicial Council to deal with disputes and petty crimes arising within specific suburban boundaries.

2.1.4 COURT TRANSCRIPTS



Errors in court transcripts are the focus of concern in two submissions which express the view that the aggrieved party should be entitled to a new hearing if the transcript error relates to a material part of the case. In addition, parties involved in the case, including the judge and counsel, should be required to review transcripts to ensure their accuracy, according to one submission. Another submission reports that after paying $160 for a transcript of a hearing a litigant found that certain statements supporting his case were not included in the transcript.

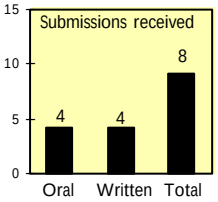
A fourth submission suggests there is little need for transcripts of court proceedings given the ability of technology to store large amounts of data safely and inexpensively. Computerised records are also less time consuming when it comes time to distributing the information to interested parties. The submission suggests it is more economical, both in terms of time and effort, for a judge to view audio-visual information than to read a transcript.

Suggestions

- Judges and counsel should be required to review and sign transcripts as being accurate.
- Replace written court transcripts with audio-visual recordings of proceedings.

2.2

Court Facilities



The structure of court buildings as well as their interior design have an important role in the legal process. Pleasant surroundings may help court users ease some of the stress and emotion which legal proceedings can generate.

Many submissions draw attention to the impact of room shortage and building design.

> [I]t is very difficult for us to get our clients into our office without coming face to face often with the offender sitting on the bench outside the court room.

One submission highlights the vulnerability people feel in a court where all participants in the courthouse drama are exposed to passers by in the town.

> [P]eople sit on the verandah in full view of everyone and exposed to the weather.

Another points out a difficulty for women seeking restraining orders.

> [T]here is only one entrance to the Court, so women are constantly looking out for the perpetrator and can bump into them in Court.

Other submission focus on the court experience.

> Courts should be seen as high and above, and very important. '[I]ntimidating courts' are not a problem.

> [T]he accused in a criminal trial be allowed to sit beside his counsel at the bar table as in the USA, as opposed to being in the dock.

According to the submission, this would enhance the possibility of a fair trial and also improve communication between the accused and his or her counsel.

A lengthy submission expresses support for 'the existing efforts to arrange separate waiting room facilities for victims of crime', recognising that this was 'of particular concern in the country'.

One submission asserts that civil and criminal matters should be heard in separate buildings or 'at least [in] a sectioned-off part of the Supreme Court'.

> Possibly dangerous criminals should not be mixing with (people engaged in) general civil matters.

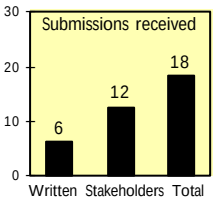
Professor Ralph Simmonds: There undoubtedly are some smart reforms. They may be as simple as the possibility that the small scale re-design of courtrooms will make them more approachable places to be in. People described a feeling of alienation in the courtroom environment; that this was a place that, whether this was the intention or not, made them feel disconnected from the world and their control of it. And that's unfortunate if the system is trying to enable people to tell their story, the fair go approach, and that they were conscientiously listened to by someone who hadn't pre-judged them.

Suggestions

- Courts should be seen as intimidating.
- The accused in a criminal trial should be allowed to sit beside his or her counsel at the bar table, as opposed to being in the dock.
- Civil and criminal matters should be heard in separate buildings or alternatively, criminal proceedings should be heard in a sectioned-off part of the Supreme Court.
- Alleged criminals should not be in the vicinity of civil litigants.
- There should be several public entrances to court buildings.
- Court waiting areas should be secure and permit a degree of privacy.

2.3

Tribunals



One mechanism for solving the problem of delay in the justice system may be to develop special tribunals to handle specific types of legal disputes. However, one submission contends that the official courtroom is far more effective and authoritative.

> [Litigants] never feel as if they have been dealt with properly if they are dealt with by a tribunal, in an informal sense. Socially, the court appearance is a very important aspect.

Private tribunals

Two submissions recommend the implementation of a private system of justice. One feels that frivolous time-wasting exercises in the courts by the wealthy should be met out of their own pockets because 'these people can and should pay for their own extravagances.' Another submission recommends a 'judge for hire' arrangement in the form of a private tribunal. The submission suggests the government should encourage fee-earning activities within the justice system.

Private courts

On the issue of whether private courts should be formed to alleviate some of the burden on the existing public system, some submissions are 'fundamentally opposed' to the idea.

> Any collateral system of private courts will be a basic departure from our system of government and will degrade the administration of justice.

Others see the risk as being in the potential reaction from the general community.

> [I]t may be difficult to convince the general public of the wisdom of any move in the direction of private courts. Australians are accustomed to

> living in a private enterprise system and are, therefore, fully aware of its drawbacks.

According to another submission, notwithstanding existing legal barriers, the transition to private courts is worth considering, if it can be done well. While the submission 'support(s) the development of further options for dispute resolution, including alternative forms of adjudication of disputes'.

> [T]here are significant constitutional issues associated with developing 'courts' in the private sector … the idea of developing structured adjudication alternatives is worthy of further consideration. [See Recommendations 445-447]

Administrative Appeals Tribunal

Five submissions support the creation of an Administrative Appeals Tribunal. One makes the following suggestion.

> This could be a type of centralising of the specialist tribunals. One AAT with different areas of specialty, common procedure and applying the same law of natural justice.

An equal number of submissions either oppose the idea or are unconvinced that it would be beneficial. However, one suggests the alternative proposed by the Law Reform Commission nearly 20 years ago.

> [I] would prefer an Administrative Appeals Division of the Supreme Court … (as canvassed by the Law Reform Committee in the early 1980s).

Another submission identifies some advantage in the proposal, and gives reasons.

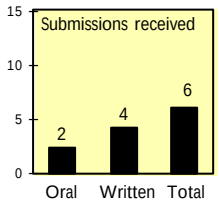
> [A] benefit in having a uniform appeal process from specialist tribunals. But whether this should be by way of a further separate body or merely as a separate division of an existing court I cannot say. It will also depend on the nature of the appeals allowed as to whether it will be realistic for them to be conducted in person.

Suggestions

- The wealthy should pay for use of the court in cases where they are clearly engaged in a time-wasting exercise.
- Further consideration should be given to the idea of developing structured adjudication alternatives via private courts.
- There should be an Administrative Appeals Tribunal in Western Australia, or at least an Administrative Appeals Division of the Supreme Court.

2.4

Justices of the Peace



> The office of the Justice of the Peace has been in existence for over 800 years during which it has built up an enviable record of service to the community.... The community generally trusts and respects the office of JP and often turns to the Justice in times of distress or need.

Several submissions describe the relationship between Justices of the Peace and the community within which they work as one which provides a service to, and strengthens, the community. In turn, Justices of the Peace are considered generally to be an important part of that community.

> Justices of the Peace have served Western Australia well. The changes in their appointment [proposed in the submissions] … will greatly increase the value of their services to the community.

Another factor seen by some as enhancing the value of Justices of the Peace is that they are members of the community they are servicing.

> Justices of the peace are essential in Western Australia, especially given that some people prefer to be judged by a member of their own community.

Role of the Justice of the Peace

All the submissions acknowledge the role Justices of the Peace play in resolving local disputes. However, views about the nature of that role and the powers and duties to be exercised by Justices of the Peace vary.

One submission sees Justices of the Peace as having a relatively minor judicial role.

> Justices of the peace have a role in simple matters, acting either by themselves or with a magistrate.

Two submissions favour a greater role for Justices of the Peace. These submissions seek to expand Justices' duties to include representation of disadvantaged persons and the provision of an informal forum for alternative dispute resolution. Approaching the Justice of the Peace is seen as a precursor to reaching a solution, not commencing an action.

> Justices are often called upon to represent the rights and interests of disadvantaged members of the community in dealings with the bureaucracy … the function should be officially recognised. Mediation, for similar reasons, is a duty that the Justice is called upon to perform. Generally however this is done in an informal manner and often results in the resolution of disputes before the matter deteriorates into a full blown legal dispute.

Two submissions propose that Justices of the Peace have the ability to resolve disputes that presently are dealt with by the lower courts, thus alleviating some of the pressure on those courts.

> Many matters presently dealt with in the Courts do not require the expertise of a Judge or Magistrate. Such matters could be quite adequately dealt with by Justices of the Peace ... I believe the policy should be that Justices should preside wherever possible.

Another submission advocates an additional role for Justices of the Peace.

> Community Policing, including the sort of activity that Neighbourhood Watch engages in [which] could have a component where Justices of the Peace operate relatively informal sessions for dispute resolution. In the event that the session did not resolve the matter at hand, more legal processes could be initiated.

Two submissions express concern that the office of Justice of the Peace is under threat.

> Previous law reform efforts have attacked justices of the peace.

Another submission expresses concern about increasing restrictions on the duties of Justices of the Peace and the attendant lack of respect for the office.

> [T]he erosion of duties that has occurred over time … has had the effect of restricting the office of JP to exercising only the menial duties associated with administration of justice in society. The more prestigious or financially rewarding duties previously performed by Justices of the Peace have been stripped away from the office and claimed by other professions. Combined with this erosion of duties have been the dilution of the integrity of duties performed by Justices brought about by the expansion of categories of persons deemed eligible to perform functions previously reserved for Justices.

Another submission suggests an accreditation system would encourage support for Justices of the Peace.

> Following on from that recognition … the office can be best enhanced by the creation of a national standard of duties, qualifications, registration and appointment for Justices, together with reciprocal recognition of the office by the States and Territories.

Suggestions

- The functions, powers and duties of Justices of the Peace should be expanded to include a community policing role.
- Justices of the Peace should act as mediators using alternative dispute resolution techniques to resolve local disputes.
- The restrictions as to which cases a Justice of the Peace can hear and how long Justices can preside should be removed.
- Justices of the Peace should preside whenever possible.

SECTION

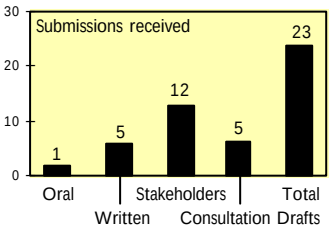
3

The Civil System

Section 3: The Civil System

3.1

Commencing Civil Procedure



Members of the Commission posed the following question at several of the public meetings.

> Should there be a uniform procedure for commencing proceedings?

The majority of submissions respond affirmatively. There is, however, scepticism as to whether it can be achieved.

> The Supreme and District Courts have for some time been examining the possibility of creating a single form of process to institute proceedings. No answer has yet been found.

Other submissions want proof that a new system will be more efficient than the current scheme.

> The procedure for commencing proceedings should be easy to understand and use. A uniform procedure should be adopted only if it makes the system easier and more effective. (Sometimes however, uniform procedures can result in less flexibility and unnecessary detail or insufficient information being provided.)

According to the submission, problems with procedure may allow certain litigants to abuse the system.

> [T]here is an urgent need to clarify application procedures to ensure that the correct court is used in civil matters. At the moment there is nothing to stop one party in a dispute making an application for a hearing in a court that has a higher financial jurisdiction than required.

The following submission outlines a simple format for the new process.

> There should be one initiating process which is then 'streamed' procedurally, e.g. to a chambers hearing or towards a trial in open court. But in any case the initial procedure should be towards mediation.

One submission asserts that a single form of originating process would be welcomed by the wider community.

> The proposal to simplify proceedings by proposing one form of originating process in Western Australia is supported. Advocating the adoption of the same approach as that of the Federal Court will at the same time assist in unifying the legal system of the nation. It is believed that this simplification will be appreciated by the general public.

Another dismisses the proposal as unachievable.

> The phrase 'single form of initiating process' is in fact a misnomer. It could never be achieved. It would be more accurate to refer to a single type or name for an initiating process which may take a limited number of forms depending on the type of action.

Other submissions claim the current use of various forms to begin litigation is not problematic.

> The fact that different forms are used does not appear to be an issue. Indeed a specific form that requests the required information assists the parties.… What is essential is that the various forms are readily available and that they are in plain English so that they can be properly completed.

Another submission warns of potential difficulties with a single form of originating process.

> It is relatively easy to resolve to move to a single form of initiating process but it has an impact on many other rules. Examples are counter claims, third party proceedings, default judgments, summary judgment, pleadings and amendment.

Aside from the issue of whether or not there should be a single form, there is the question of whether there should be a single name for the originating process.

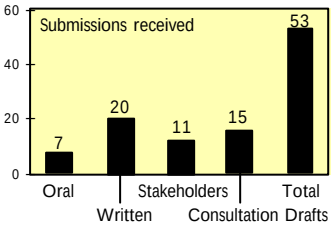
> One would have thought that rather than introduce yet another term … the term 'Application' as used in the Federal Court and in a number of other Australian jurisdictions is preferable. Legal practitioners commonly advise their clients that they will be making an 'application' to the court and that expression is common parlance in the community. [See Recommendations 18-19]

Suggestions

- The term 'Application' should be used as the name for a single form of originating process, as used in the Federal Court and in a number of other Australian jurisdictions.
- There should be one form of initiating process which is then streamed procedurally, e.g. to a chambers hearing or towards a trial in open court.

3.2

Alternative Dispute Resolution in Civil Matters



Submissions concerning alternative dispute resolution (ADR) in civil matters address a variety of issues. Some suggest that ADR is a useful concept.

> I am a retired public accountant. I have observed in civil litigation that legal procedures and tactics create enormous repetitive paperwork and costs, at variance with the procedures of arbitration.

Another submission expresses the view that the justice system is 'basically set up to protect the guilty parties' and claims that agreements reached under ADR cannot be adequately enforced. The submissions assert that litigants must still initiate civil action in the courts if the defendant fails to make the agreed payments. A dishonest defendant, familiar with court rules and procedures, can use the system to delay and frustrate the plaintiff. The result is that many plaintiffs simply give up.

> It is my belief that the system is failing to help small businesses like me, and protecting dishonest operators because it is too complicated and expensive.

Others submissions are also critical of ADR.

> ADR is a poor alternative to decent justice. Especially if one party is in the wrong and wealthy. The counsel for such individuals uses his voodoo tactics whereby he refuses to accede to the decision of the mediator, or worse still refuses to share the costs of such theatrics, but insists on full participation.

Four submissions support limiting access to court to those cases that actually require judicial resolution, although, according to one submission, to 'determine which matters will be settled or redirected at the outset' will be

difficult. The remainder of cases should be channelled towards ADR with fixed fees for each segment of work completed. This would create 'certainty of expense and avoid over-servicing lawyers' Three submissions oppose limiting access as it would isolate the courts even more from the general community.

One of two submissions opposing mediation or alternative dispute resolution claims it is merely a cheap alternative to the 'legal occupation of making money'.

Another describes a bad experience.

> [W]e have personal experience of industrial arbitration where unsworn evidence was admitted. There was little examination of the facts by the magistrate and the proceedings degenerated into repetitious and demeaning set point arguments about socio-political arguments unrelated to the disputes.

Who should conduct ADR?

One issue is whether ADR should be conducted by the courts, lawyers or the litigants themselves. One submission suggests having specialist tribunals conduct ADR proceedings; another advocates specialist practitioners; while another prefers an independent mediator.

The following two submissions advocate ADR as a means of preventing congestion in the court system.

> In certain specified types of cases legislation should require alternative dispute resolution as the initial process in dispute resolution. In those cases specialist tribunals should perform the alternative dispute resolution. Where cases are of a general type it may be difficult for parties to accept alternative dispute resolution external to the court process. In those cases the alternative dispute resolution should be undertaken by Registrars or court administrators, leaving Judges (and perhaps Magistrates) to undertake their duties at the higher appropriate court level.

> Professional mediators [should] be used, before lawyers become involved. This would reduce the cost, and reduce the pressure on the court system.

Another submission asserts that ADR should be performed by 'specialist ADR practitioners.'

According to the following submission, courts should not concern themselves with administering ADR.

> It is not for the court to become involved in these issues as it simply sheds the court's responsibility. To develop a court-driven solution is merely to increase the costs to the State. [See Recommendations 57-58]

Yet, one submission asserts that legal practitioners should be under an ethical duty to keep ADR in mind.

> It may be appropriate to have legal practitioners certify that they have attempted alternative dispute resolution. [See Recommendations 51–54 & 72]

What model of ADR should be put in place?

Moreover, another submission makes the following suggestion.

> There should be legislative protection for legal practitioners who attempt to settle a case sooner than later.

This submission gives a detailed account of a proposed model for ADR:

> An arbitration type procedure should be the main dispute resolving process. A well run arbitration, where the arbitrator uses fully his powers under the present Act, (before recent amendments) and is not fearful of court appeals, provides a good model of what the system should be. The arbitrator can:
>
> - determine the procedure;
> - make his own investigations, subject to natural justice considerations;
> - not be bound by the 'rules of evidence';
> - make binding orders, including as to costs, which would be enforceable in a registry. [See Recommendations 47-49]

Another submission recommends that ADR should be clear, simple and contain an appropriate solution.

> [A]ny such approach must be undertaken in a formal, procedurally structured, professional manner that is simple in its concepts but accountable in terms of its outcomes. For such a system to maintain credibility there needs to be a remedy for those aggrieved. A formalised appeal process where an error of law has occurred is the most suitable remedy.

One submission suggests an informal system of consultation with Justices of the Peace.

> I refer you to the system, that I believe existed in New Zealand … the role of a Justice of the Peace was to … act as a mediator in disputes … I am not aware that the solutions were legally binding, but more an informal, friendly way of trying to resolve disputes. [See Recommendations 57-58]

Should ADR be compulsory

As to whether ADR should be made compulsory, responses vary.

> [M]ost reluctant to make this [ADR] coercive. There are historical and present day philosophical considerations that I believe make it necessary to ensure that all have the right to access the courts.

> ADR should be encouraged at all stages once litigation is commenced. It should occur at least twice; once immediately after it is clear the matter is contested and again before the matter can be listed for trial. [See Recommendations 55-56]
>
> Given the modest fee levels of private mediators, their specialisation, availability and effectiveness, court-connected mediation using private mediators is surely an attraction to parties who are properly informed. [See Recommendations 60- 64]

What is the value of ADR?

Other submissions explain the benefits of ADR to the justice system.

> I think that an increased opportunity to resolve civil disputes through conciliation and/or mediation would:
>
> - make dispute resolution more accessible;
> - be prompt and inexpensive;
> - remove some of the impediments which presently cause delay in access to the legal system, and which may be instrumental in the abuse of the system through frivolous or vexatious litigation.

The following submission recognises that to avoid litigation there is a need for ADR in the community.

> Dialogue needs to be put in place between litigants more often than not, with an adjudicator available to keep the peace between the litigants when matters break down. This would be especially useful between neighbours.

Another submission gives reasons for encouraging mediation.

> ADR methods should be attempted at all times where satisfactory results can be achieved and where any subsequent litigation is not prejudiced. As commented above, judicial officers should have the power, and be expected, to play a prominent role in diverting litigation to ADR.

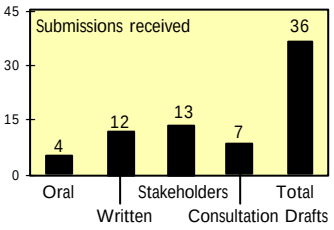
Suggestions

- Legislation should require that, in specific cases, ADR should be the initial process in dispute resolution.
- ADR should be performed in a specialist tribunal.
- In the usual case, ADR should be undertaken by registrars or court administrators, leaving judges (and perhaps magistrates) to exercise their duties at the court level.
- Professional mediators should be used before lawyers become involved, thus reducing the cost and pressure on the court system.
- Legal practitioners should certify that they have attempted alternative dispute resolution.

- There should be legislative protection for legal practitioners who attempt to settle a matter earlier rather than later.
- An arbitration type procedure should be the main dispute resolving process.
- There should be a remedy available to parties, such as a formalised appeal process, where an error of law has occurred in an ADR proceeding.
- A system should be established in which a Justice of the Peace can be approached informally to resolve disputes.
- ADR should be encouraged at all stages once litigation has commenced. It should occur at least twice; once immediately after it is clear the matter is contested and again before the matter can be listed for trial.
- ADR methods should always be attempted where agreeable results can be achieved and where any ensuing litigation is not prejudiced.
- Only 'full scale' cases to go to court, with the remainder to be resolved under ADR.
- Fix the amount of legal fees allowed for each segment of work.
- Conciliation conferences should be established to reduce costs of court actions.
- Alternative dispute resolution process should be implemented prior to charges being laid.

3.3

Pleadings



For the most part, the submissions on pleadings are from members of the profession who understand the way the court system is run and have an interest in the way that it is changed.

> No case should be prejudiced because it has been badly pleaded. [See Recommendation 45]

These words summarise the general position in all the submissions on pleadings. Throughout the debate over whether reform should take place, the common aim expressed by all is to ensure the fair administration of justice.

Should the system change?

According to one submission, the proposals for pleadings reform are not revolutionary.

> [The proposals were] reflected in the evolutionary changes to the Supreme Court and District Court Rules evident at present.
>
> There is a general view that perceived difficulties within the current system of pleadings, their complexity and their lack of utility, is quite over-stated … and not sufficiently based on practical experience. Pleadings continue to particularise the precise issue in dispute and which must be determined by a court at trial.…
>
> The difficulty with the current system of pleading may be that pleadings are not skilfully drafted and not enough attention is given in the training of lawyers to the skill required.
>
> Pleadings are often ignored entirely by the parties during the course of a trial, only to be resorted to at the last moment by a party who thinks he

> or she is unlikely to succeed, in an attempt to demonstrate that an issue, dealt with by both parties, was not squarely or appropriately raised on the pleadings.
>
> [T]here are many cases in which formal written pleadings serve the useful purpose that they are intended to serve. [H]owever … there are many cases where pleadings are simply unnecessary or add very little to the adjudicative process [and] much time is wasted on striking out and objecting to pleadings which are matters of law.

Some submissions, however, acknowledge a distinction in the value of pleadings for particular types of cases.

> There are some classes of case (for example personal injuries) in which pleadings are generally recited by rote and are of little utility. In other areas, complex commercial disputes being one, they perform a vital role in identifying the essential matters of contention with clarity.
>
> We suggest that the need for pleadings be determined at the first status conference in the Case Management regime. [See Recommendations 35-37]

Another submission claims the pleadings reform proposals are one-dimensional and do not contemplate a wide range of case types.

> One criticism … is that it [the proposals] have been written with a particular case type in mind (a common law claim, such as a personal injury case.)

Should the term 'pleadings' be abolished?

Regarding the proposal to abolish the term 'pleadings,' one submission argues against this.

> [T]he term 'pleadings' should [not] be abolished. 'Pleadings' is a term of art, with a well-defined and understood meaning, and there should be no change to the terminology. [See Recommendation 23]

Should pleadings be replaced with a less formal system?

Those who favour change welcome the proposal to simplify procedure but emphasise the need to identify the issues in contention.

> There is room for less formal pleadings so long as the objective of defining the issues is achieved.
>
> Abolish pleadings as we know them and replace them with a Statement of Facts for both the plaintiff and the defendant. How often have we heard a judge saying after a trial 'such and such a matter was not pleaded — therefore the plaintiff must fail. [See Recommendations 24 & 26]

Nevertheless, not all submissions are in favour of abolishing formal pleadings. Some are of the view that 'refinement and compliance with the existing

rules' is preferable to 'radical reform,' others are sceptical of the legal profession's ability to adapt to a new procedure.

> In civil litigation I would be inclined to stay with pleadings. Many lawyers do not know how to plead properly so one often sees a rather rambling novel type approach masquerading as a pleading. I suspect any change as proposed would exacerbate this practice.

> It is true that the preparation, filing and exchanging of pleadings is time consuming and expensive. That is a tautology. One can equally say that a modern passenger aircraft is expensive. The introduction of what is called a less formal narrative of fact and law, would in any event, very quickly become pleadings.

Others recognise an inherent value in the role of pleadings.

> It had been remarked in the past by a senior judge that well drafted pleadings are of much greater value than all of the huge boxes of materials which are often wheeled into the civil courts, and indeed the criminal courts.

Case statements

As for the Commission's suggestion that parties state the nature of their case together with the law to be relied upon and the remedies sought, the following assertion is made by one submission.

> [C]ompelling a party to provide an accurate formulation of the legal principles and statutory provisions to be relied upon forces that party to focus more accurately on the nature and strength of its case and would substantially increase the prospects of earlier compromises of an action.

This would mean that lawyers would not be so concerned with 'striking out and objecting to pleadings which are matters of law,' and would focus more on refining the legal propositions that are the basis of cases. [See Recommendations 26- 28]

> Pleadings are too structured.... There is also a need for less specific pleadings at first and for the solicitor to verify by oath the pleadings to knock out any nonsense. [See Recommendations 32-34]

The importance of plain English in court documents is reiterated in the following submission.

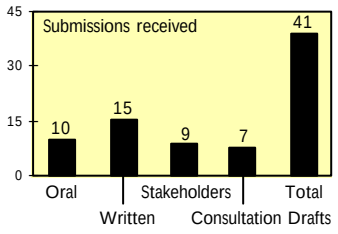
> I think there is a lot to be said for the alternatives of either using pleading or affidavits, depending upon the complexity of the case. In my view plain English in court documents is essential.

Suggestions

- Solicitors should verify pleadings on oath.
- Parties should provide an accurate formulation of the legal principles and statutory provisions to be relied upon.
- Abolish pleadings and replace them with Statements of Facts for both the plaintiff and the defendant.
- Various standard form court documents should be readily available and in plain English so that they can be properly completed.
- Determine the need for pleadings at the first status conference in the Case Management regime.

3.4

Case Management



Theories of civil case management are based on achieving efficiency in the court process through structured judicial supervision. One submission summarises the efficacy of the process.

> There can be no doubt that certain litigants use, or rather abuse, the Court System by using it for purposes other than obtaining a judicial resolution of a dispute. These cases of abuse can be frustrated by a speedy resolution of issues that does not disproportionately devour the resources of both the court system and the other parties.

What is the most appropriate model for case management?

While most submissions agree that courts need to take a more active role in case management, one notes that:

> … the court has no personnel at present to take a more active role.

One submission, however, feels that the best model for case management is the current one.

> There have been no complaints regarding the Case Management System, so there is no need for further major changes at this time.

As to whether case management should be left to the parties, one submission makes these points.

> Case management being left to parties is a dead issue today.
>
> Judges should case manage complicated commercial cases following close of pleadings.

Another submission identifies the benefits of administration of pre-trial civil litigation as follows.

- Reduction in time involved in pre-trial demands;
- Reduction in money expended in convening court for pre-trial matters;
- Increase in the number of pre-trial demands that can be dealt with out of court;
- Redirection of pre-trial responsibilities to other officers of the court so judges only deal with matters appropriate to their expertise;
- Greater accessibility to court officers and court administration; and
- Flexibility in the approach to adjudication and case management.

The submission also states that effective court administration of pre-trial civil litigation can be achieved by the following.

- Allowing court officers below the status of a judge to make pre-trial decisions and manage cases;
- Diverting applications requiring convening court to less formal attendances before court officers; and
- Creating a 'team structure' whereby each master and registrar is accountable to either one judge or a pool of judges and each matter is dealt with by the same team.

One submission makes the following suggestions about uniform case management procedures.

> [T]he preferred view is for the Supreme Court and District Court Rules to be uniform, but for the Rules of those courts to be revised and, as close as possible, modelled upon the Rules of the Federal Court of Australia. [See paragraph 12.13 of the Final Report]

Another offers this assertion.

> … impractical for there to be uniform case management procedures for both the Supreme and District Courts. The jurisdictions are different, the staffing is different and therefore the procedures have developed differently.

Should an Inactive Case List be established?

> The establishment of an Inactive Case List for those in which no move is made, with the removal six months later if inaction continues, will also clear the way to greater efficiency without penalising the client with costs. [See Recommendation 80]

However, other submissions reject the idea of an Inactive Case List, on teh grounds of unfairness as such a list could cause injustice to parties with a legitimate complaint who had not yet been able to get it to trial.

> [T]he injustice likely to flow from such summary dismissal for want of prosecution would far outweigh any benefits the introduction of such a proposal may bring. [See Recommendation 81]

Who should manage the cases?

While most submissions acknowledge that cases need to be managed to ensure that they run smoothly and without delay, there are differing views as to who should do this. One submission sees the Registrar as somewhat ineffectual.

> The Case Management Registrar is a bit of a toothless dog. We have been before them on many occasions over the last few years but they all seem to bow to the large firms.

Another submission points to the potential for delay through case management.

> [I]f the case management system is not controlled by the resolution body or court there may be advantages or benefits for one or more of the parties to delay the process.

The need for continuity in case management is important, according to one submission.

> The judge who will preside over the case must manage this I feel. It should be encouraged to use the same judge for each appearance from inception to the end. This should save time and money in regards to a Judge having to study the case up until now for maybe only one sitting. [See Recommendation 79]

Another submission finds flaws in the case management system.

> Case loads are so heavy that case managers are prevented from dealing with disputed questions. The case load is heavy because of the relisting of status conferences due to non-compliance by solicitors.

One submission blames the 'existing limits to Government funding', and calls on the Commission to:

> … challenge those limits and recommend the maintenance of the status quo or a winding back of case management.

Suggestions

- Case management must be controlled so one or more of the parties cannot obtain an advantage by delaying the process.
- Judges should case manage complicated commercial cases following the close of pleadings.
- The Supreme Court and District Court Rules need to be revised and, as closely as possible, be modelled on the Rules of the Federal Court of Australia.
- An Inactive Case List should be established for those cases in which no move is made, with the removal six months later if inaction continues.

- Court officers below the status of a judge should be allowed to make pre-trial decisions and manage cases.
- Applications requiring convening the court should be diverted to less formal attendances before court officers.
- A 'team structure' should be created whereby each master and registrar is accountable to either one judge or a pool of judges and each matter is to be dealt with by the same team.

3.5

Discovery and Interrogatories

The nature the adversarial system requires parties to proceedings have access to all relevant evidence, favourable and unfavourable, so that the contest is fair. Discovery is the formal procedure used for obtaining other parties' documentary evidence. Interrogatories are the written questions parties issue to obtain sworn answers which can be used as evidence at trial.

The nature of discovery

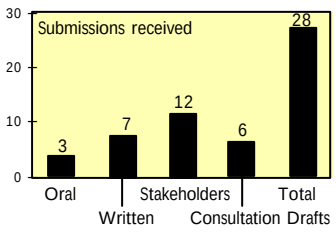
The submissions raise the following questions.

- What is the value of discovery?
- Should discovery be as of right?
- Should interrogatories be retained?
- If so, should the number of interrogatories be limited?

The value of discovery

Submissions concerning the value of discovery were mixed. Those who found fault with the procedure drew on personal experience, as this statement attests.

> In my own defamation case … I spent many hours making up a complete file of all relevant documents with explanatory notes and index. These comprised five volumes. My lawyer chose to refer to only one of these documents in 'List of Documents' with disastrous results. I complained about it several times and was simply told 'we can always amend it later'.



The Courts' perspective on discovery is stated in the following submission.

> [I]n most matters discovery is not a major issue. There are, however, cases in which discovery should be confined to documents that are directly relevant to the issues in dispute.

Not all submissions are critical of the discovery procedure.

> Discovery of documents and the ascertainment of material facts by sworn answers to interrogatories are arguably the two most important interlocutory steps of an adversarial system of justice.

Discovery as a right

A number of submissions express the view that discovery should be readily available.

> Discovery should be a matter of right. After a judge has heard the basics of the case it should be a relatively simple matter to order discovery. In my case after six years we are basically still at the pleadings as the opposition just keep bringing more and more legal waffle upon which to waste my time and money and the courts.

This concern about 'legal waffle' is reflected in the following submission which also reveals something about the extent to which discovery procedures are used to serve tactical ends.

> [D]iscovery is best achieved by supplying extra copies of everything you believe the opponent already has along with vast quantities of irrelevant bumf. This ties him up with extraneous detail that costs a fortune to read and catalogue. Above all it gives the impression of cooperation and openness. This obscures the fact that the vital evidence has been withheld.

Two submissions emphasise the discretion of the court to grant discovery.

> Discovery should not be as of right. The court should have a discretion.

> Discovery should be a right. The court should have wide discretion to do anything that will assist resolution of the case.

However, one submission makes the following observation.

> My limited experience with discovery has been that a court is simply not in a position to determine whether discovery should or should not be allowed without extensive argument and detailed examination of the issues. [See Recommendation 82]

Another submission highlights the need to qualify discovery as of right with some specific requirements.

> There should be discovery as of right but it should be accompanied by a request for specific discovery at the same time. A list of discovery should also be as of right and should be provided within a specific time frame of the issuing of proceedings. [See Recommendations 82 & 84]

A submission in response to the Commission's Consultation Draft proposal on the topic agrees.

> [T]he test which the parties are required to satisfy in order to obtain further and better discovery ought to be relaxed. [See Recommendation 86]

The value of interrogatories

The following submission recognises the value of interrogatories while identifying some suggestions for change.

> Realising the necessity of interrogatories in the passing on of statements unavailable to one party from another party, it seems reasonable to retain them but to limit their use, without reference to a witness and in the hands of the judge who would only grant leave for them to avoid unfair disadvantage. [See Recommendation 91]

Should interrogatories be limited?

Limiting the number of interrogatories may reduce delay and abuse of process, according to two submissions. It was met with resistance by one submission.

> An arbitrary restriction on the number of interrogatories. Whether a specified number of interrogatories is reasonable will vary from case to case. [See Recommendation 92]

As for the Commission's Consultation Draft proposal that an 'answer to an interrogatory must be given directly and without evasion or resort to technicality,' two agree while another objects.

One notes that the mechanism for dealing with an 'answer to an interrogatory which is evasive is presently inadequate'. The submission expressed reservations about requiring a party to answer questions which are flawed.

> [a]ny abolition of a party's right to answer an interrogatory by providing no information beyond that which is necessary in order to respond to the question asked, or to object to the same by reason of the application of rules of evidence. [See Recommendation 95-96]

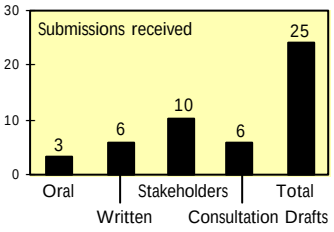
Suggestions

- Discovery should not be as of right. The court should have a discretion.
- Discovery should be a right. The court should have wide discretion to do anything that will assist resolution of the case.
- The cost involved in encouraging the court to exercise discretion will very often at least equal the cost involved in getting discovery.
- Retain interrogatories but limit their use without reference to a particular witness. Judges should only grant leave for interrogatories to avoid unfair disadvantage.

- There should be no arbitrary restrictions on the number of interrogatories. Whether a specified number of interrogatories is reasonable will vary from case to case.
- There should be no abolition of a party's right to answer an interrogatory by providing no information beyond that which is necessary in order to respond to the question asked, or to object to the same by reason of the application of rules of evidence.

3.6

Summary Judgment



> The proposition is that it is preferable to dispense justice - albeit of lesser accuracy — to a wider segment of society, than to offer high quality justice to a few. One of the ways in which this could be done is by changing the rules so that summary judgment could be granted more easily.

The majority of the submissions on this topic suggest summary judgment should be more readily available. Parties should have their cases resolved quickly to avoid delay tactics, especially where opponents have little or no defence.

According to the following submission, judges would be able to hear more cases thereby easing the backlog in courts and allowing more people better access to justice.

> Summary judgments should be available. It would help bring small cases to an end quickly and therefore more cases could be heard in a day. The judge should determine which cases are suited to be modified to summary judgment procedure.

Another submission supports increased availability of summary judgment.

> [It] would result in speedy resolution of cases such as mine where no defence has been put forward in over six years, basically because they do not have any.

As to whether summary judgment should be granted, one submission suggests the judge should determine whether the case has 'a reasonable prospect of success'.

Four submissions are opposed to a change to the test for summary judgment.

> Given that this process denies a party the right to fully argue their case at trial there should be no change to the test applied. However where an application is unsuccessful the serious issue identified by the court should be the only issue for trial unless special leave is obtained to broaden them.
>
> It is vital that there are no summary judgments handed down unless the *judge* or his lay assistant has investigated the situation surrounding such requests very carefully.
>
> I am more inclined to think that summary judgment should not be available at all but that there should be scope for application for expedited trial on informal pleadings.

Another submission seeks abolition of summary judgment as it is open to abuse by unscrupulous litigants. Although 'it is rare … for summary judgment not to be set aside', it means the innocent defendant has to spend more money defending his case.

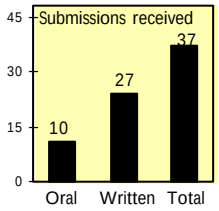
Suggestions

- Summary judgment should be more readily available.
- The judge should have the power to decide which cases should be dealt with under summary judgment procedure.
- Judges should be required to personally investigate all circumstances surrounding requests for summary judgment before making their decision.
- Where an application is unsuccessful, the issue identified by the court should be the only issue to be considered at trial, unless special leave is obtained to consider other areas.
- Summary judgment should be abolished.
- There should be an opportunity to apply for an expedited trial on informal pleadings.

3.7

Civil Procedural Issues

3.7.1 SIMPLIFY CIVIL PROCEDURE



The majority of submissions support simplifying procedures for handling civil matters. A number express the view that litigants should be able to represent themselves without the need for legal representation. Everyone, regardless of financial ability, should be able to access the courts.

> The steps … deemed necessary to be undertaken before trial is heard are nothing short of ludicrous and grossly unnecessary.

This submission concludes that lengthy procedural requirements exacerbate already excessive costs.

Adults with decision making disabilities

Adults with decision-making disabilities are capable of accessing legal services, although according to one submission, the justice system is not always responsive to their unique requirements. Their numbers may be small, however 'the impact on their rights and well-being … is great'.

One submission advises that lawyers need to take greater care when assessing the mental capacity of their clients. In addition, it is also important that adults with decision making disabilities have access to a capable adult to support and guide them through the justice system.

Codification of procedures

The majority of submissions on this topic support the codification of civil and criminal procedure. Simplified and consistent rules should apply to all courts with special rules for complex matters in superior courts. One submission says that codified rules should not apply to tribunals.

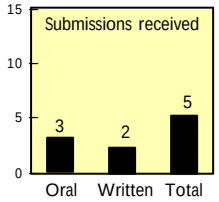
Three submissions oppose codification, stating that detailed rules already

exist. In addition, codification could result in further disputes based on 'procedural irregularity'.

Suggestions

- Allow people to be represented by persons other than a legal practitioner.
- Impose a time limit by which parties are to complete all matters to be dealt with before trial.
- All actions involving common parties should be heard by the same judge.
- Vary Order 59A of the *Supreme Court Rules* to prevent people from issuing proceedings without warning.
- Amend Western Australia's third party motor vehicle claims legislation to allow common law actions.

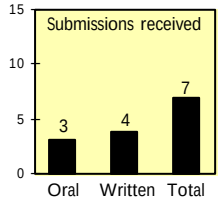
3.7.2 JUDGMENTS — REASONS FOR DECISIONS



Two submissions oppose lengthy written decisions, particularly for interlocutory matters.

One submission says judges should dispense with the time-consuming need to conduct extensive research and 'quote from ancient decisions'. Another disagrees with this view, saying that it 'would hinder the development of the law'.

3.7.3 PRE-TRIAL PROCEDURES



The justice system should utilise pre-trial procedures to 'narrow material issues' to be heard at trial according to one submission which suggests qualified pre-trial court officers should hear such matters in informal settings. One submission proposes a 'new court' established solely for this purpose. This would leave judges with more time to attend to trials, thereby reducing the current backlog. Pre-trial court officers would discourage tactical litigation, and manage cases with an emphasis towards mediation and settlement. These changes would result in savings in time and money, according to one submission.

Suggestions

- Court officers should deal with pre-trial procedures.
- Replace Masters and Registrars with Auxiliary Judge and Legal Administrative Officer.

- Empower court officers to achieve resolution and settlement outcomes through informal means.
- A team of court officers should work together and be accountable to one judge or pool of judges.
- Court administration should be more flexible and accessible to lawyers.
- Objections on admissibility of evidence should be dealt with at pre-trial hearings.

SECTION

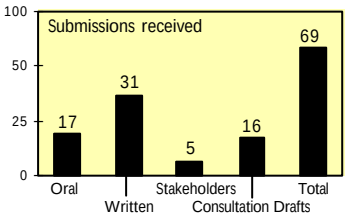
4

The Criminal System

Section 4: The Criminal System

4.1

Right to Silence



It's called the right to silence, and it's basically a common law rule and its very useful to be used by any suspects who are interrogated by police or prosecutors, particularly if they're illiterate, or unaware of their own rights, or under pressure at the time they are arrested, or potentially going to be arrested and it's an issue the Law Reform Commission's actually looking at and my point is that it is very important to our own civil liberties that this right of silence rule is maintained in its very present essences as it is now.

Some of the most vehement submissions received by the Commission concern the right to silence. A total of 69 submissions consider whether to retain, modify or abolish the right.

The right to silence incorporates a suspect's right not to say anything incriminating at the police station, as well as a limit on what is disclosed by both the defence and the prosecution before the trial. The accused also enjoys a right of silence at trial. This all-encompassing right is based on the adversarial principle that one is presumed innocent until proved guilty.

The Westlink broadcast produced by the Law Reform Commission discusses the significance of the right to silence.

Interviewer: Now Ralph, what is so fundamental about the right to silence?

Professor Ralph Simmonds: Well, I think as one of the presenters in Kalgoorlie pointed out, it's associated by us (by us, I mean Australians generally) with the measure of protection we have from the state. The state has very considerable powers over our lives and particularly when people are caught up in the legal system; again, there is a lot of evidence that whether people are guilty or not, it's' surprising what they'll admit

> to. The kinds of concerns that an official investigation arouses is enough to make them feel that if they're not quite guilty of what they've been charged with they're guilty of something else and they ought to probably admit to it. And perhaps admit to what's been put to them.

Should the right to silence be retained?

Two submissions emphasise the importance of retaining the right to silence to protect citizens and preserve the rule of law.

> [R]etention of the right to silence in Western Australia is crucial if we are to pay more than mere lip service to the idea that the rule of law is to be accorded to all our citizens, including those suspected of committing criminal offences and those against whom criminal charges are levelled.

By contrast, one submission claims the right to silence should be abolished in favour of victims' rights and justice.

> Abolish the right to silence - the victim feels like he is on trial because he is the one who is cross-examined.

Five submissions support the retention of the right on the basis that it is central to maintaining a balance between the power and interests of the individual and the power and interests of the state. Two of these point to the vast resources of the state compared with the limited resources of an individual accused and how the right to silence addresses this imbalance.

> [T]he assertion of the right to silence is a claim about how we identify our individual interests as separate from and in contradiction to the interests of the state.

> The vast bulk of criminal defence work is carried out with very limited resources. Those who are legally aided are confined to the relatively small amounts allocated for preparation and trial… By contrast the resources of the State are invariably substantial. A well-resourced and trained police force and prosecution service is capable of presenting a comprehensive case against an accused.

Right to silence in the police station

Two submissions argue the right should be retained, especially at the police station, to protect minority group members and other disadvantaged people.

> Abolition (or dilution) of the right to silence is likely to have consequences which are fraught with danger for certain groups in society; groups already deemed hostile to the police and thus to society.

> The law is a complicated matter at best, and any individual who is untrained in law can be at quite a disadvantage in a police interview - even in the best of these circumstances. In all instances, a genuinely innocent individual may, quite correctly, decide that the best way to protect his interests in the moment is to remain silent.

People with intellectual disabilities are particularly vulnerable and may not understand the police caution or the right to silence. One submission claims

they are more likely to respond to police questioning by confessing, maintaining silence or reacting inappropriately, for example, with unwarranted aggression.

> [P]olice rarely recognise that the person they are dealing with has an intellectual disability.... P]olice have limited training and direction to respond appropriately and limited access to specialised assistance. People with intellectual disability may also not understand the importance of proper legal advice.... [They may] have minimal financial resources to access a private lawyer and, along with the general public, have limited access to Legal Aid assistance.... [P]roposed safeguards may offer little protection for an already vulnerable group.

Intimidation and corruption

Some submissions favour the removal of the right to silence on the basis that if the right were removed it would tend to enforce cooperation which would ultimately make the system fairer and more open.

However, five submissions express concern that removal of the right would give more power to the police and lead to corruption in the force as well as intimidation of suspects.

> There may be incentives to cut corners by using intimidatory tactics, threats and/or entreaties; they may also attempt to keep the suspect incommunicado for a period of time.... Any dilution of the right to silence will increase the incentive on the part of the police to suppress an explanation.

> The right to silence is useful for suspects being interrogated, especially where the suspect is illiterate, unaware of his or her rights or under pressure. It is important that this right be retained.

Other submissions claim the right to silence operates as a check on law enforcement and helps ensure accountability. One implies the right to silence provides the police with an incentive to seek other evidence and build up a solid case from objective facts.

> [T]he right bolsters the credibility of what the accused says in that what is said is asserted voluntarily, without fear of the consequences of remaining silent.

Another submission makes a similar point.

> [A]brogating the right to silence in such circumstances would call into question the whole matter of whether or not an incriminating admission was truly of a voluntary nature, and thus admissible in evidence.

One submission also asserts that retaining the right to silence protects people in situations where legal counsel is not readily available because of distance. (See Access to Justice). Nor does legal advice necessarily protect the interests of an accused person.

> [The] provision of legal advice at the police station is not a panacea that automatically cures the ills of the criminal justice system. In many cases the police will only partially reveal their case to the suspect and the suspect's solicitor. Consequently, even the most blameless suspect might fare better and escape wrongful conviction by saying nothing, than by answering questions about a case to which she is not fully privy.

The right to silence applies only to certain evidence, as these two submissions point out.

> The right to silence … principally focuses on the right of a suspect or an accused person to not supply information except in a very limited number of cases (for example alibi evidence).… [T]his term generally applies only to verbal information that may be requested.
>
> The right to silence relates only to incriminating testimony — not to non-testimonial evidence. Hence we can be compelled to take a breath test, provide non-invasive tissue samples, fingerprints and the like, all of which can be used in evidence against us. There are many statutes that compel us to turn over documentary evidence to investigators, irrespective of whether they suspect a crime has been committed or not. Thus, even at its broadest, the privilege against self-incrimination (the right to silence) is limited to incriminating oral admissions relevant to specific criminal charges.

Furthermore, as one submission points out, the right to silence only operates effectively when the individual refuses to answer any questions.

> [If] that individual elects to exercise the right selectively (thus to answer some of the questions put by an investigating officer, and not others) the whole of the interview can, in some circumstances, be put before the jury. The jury is entitled to use that interview to assess the credibility of the individual - so-called 'demeanour evidence'.… Accordingly, spoken language may not incriminate, but 'body language' together with selective reliance on the right to silence, can.
>
> A trial is not fairer if a person's rights are removed for no good reason. A criminal trial is not a contest between victim (if there is one) and accused. It is between the State and the accused. The State has an obligation to ensure that the protection of the rule of law is afforded to all.

This submission also states there is nothing that requires police officers to stop questioning an accused after the person has been charged even if the accused refuses to answer questions. Under current Australian law, both the court and the jury may already draw some adverse inferences from silence.

One submission acknowledges there is a precedent to modifying the right to silence in Corporations and Securities legislation.

> [S]ignificant intrusions have already been made into the right to silence by statute. Various Corporations and Securities legislation allow for intrusions into the right to silence by providing for person[s] to incriminate themselves, with the safeguard that the evidence will not be used against

> them. Section 11 of the Evidence Act 1906 (WA) provides for a similar process. So it is clear that statutory intrusions into the right to silence already exist.

However, another submission points to the negative effects of intrusion into the right to silence upon drug offenders.

> The right to silence is taken away by the Misuse of Drugs Act, so the choice for a youth is to stay silent and be convicted, to lie and face perjury charges, or to tell the truth and destroy confidentiality and the network.

Role of government and the public perception

One submission suggests the motivation behind reviewing the right to silence is political and motivated by a genuine need for reform of the justice system.

> In Australia, on a State as well as Federal level, the right to silence is in review. Crime generally is on the increase and Attorney Generals are being pressured to make prosecutions easier and more successful. Police Ministers and Police Commissioners are heavy handed and single minded in their attitude to civil liberties. They see losing the right to silence as a small price to pay for the increase in convictions though the courts.

Yet another observes there is not a general state of lawlessness and, on the whole, people cooperate with the police, both up to the point of being given the standard caution and beyond.

> A move toward increasing cooperation with police in the investigation of crime should not … be at the expense of well entrenched personal liberties, including … the right against self-incrimination. Most people do cooperate with police officers … out of respect for the rule of law and the role of police officers.... The removal or dilution of individual rights will not serve to achieve that end.

The presumption of innocence

Four submissions contend the right to silence is inextricably bound up with the concept of 'innocent until proven guilty'.

> [P]roposed changes limiting an accused person's right to remain silent will produce a totalitarian abrogation of the Presumption of Innocence and will severely compromise the right of an accused to assert privilege in respect of self incrimination, legal representation, or qualified privilege in the public interest.

In contrast, four submissions assert that if a person is innocent, then there is no harm in forcing that person to speak.

> There should be no right to silence, … if the defendant has nothing to fear they should be prepared to speak.

> Police already can convince most people accused of offences to cooperate in an interview. It is only the professional criminal or the guilty who refuse.

One submission observes it is unfair to presume guilt from silence without conviction or good reason. However, another argues the right to silence contributes to understanding the complexity of guilt and innocence.

> Protection of the right to silence accords recognition to the fact that issues of guilt and innocence are not invariably as straightforward as finding the person who pulled the trigger.

Three submissions point out that there are many reasons why a person may exercise the right to silence.

> There are, and can be, a multitude of reasons for people not disclosing all they know which has nothing to do with convicting a criminal but the protection of themselves or others.

The burden or onus of proof

Three submissions claim that limiting the right to silence will shift the burden or onus of proof from the prosecution to the accused, and that such a shift would be undesirable and unjust.

This submission, however, supports the change.

> The adoption of this approach will have a two-fold advantage and is in the public interest. Firstly, it may be that the suspected person does in fact have a lawful excuse in relation to their actions. In such cases the public interest is served by the investigator being in a position to discontinue the inquiry at an early stage and concentrate on other inquiries. This would give rise to a saving of resources, less expenditure and greater efficiency of the investigating agency. Secondly, it will amount to fewer trials of issues as persons would not then go to trial only to raise an already known lawful excuse and be acquitted.

One submission demonstrates that in some circumstances the onus of proof is already reversed.

> [S]ome police powers of arrest actually deny the right to silence and reverse the usual burden of proof. Section 43 of the Police Act 1892 (WA), for example, actually makes it an arrestible offence to be found loitering and 'unable to give a satisfactory account'. One does not have to have been doing anything which is of itself an offence, simply be unwilling or unable to 'give a satisfactory account' of one's reasons for being somewhere! Thus a reliance upon silence - by itself - is an element of the offence.

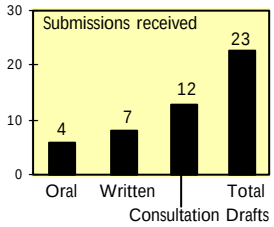
Another argues that reversing the onus of proof by requiring a suspect to provide particulars of a defence under the threat of adverse inference of silence is a fusion of the police investigative function and the judicial function presently reserved to the judge and jury.

Suggestions

- The right to silence should be abolished.
- The State needs to ensure that every individual is protected by his or her rights under the law.
- The onus of proof should be reversed so the burden is placed on the accused.

4.2

Alternative Dispute Resolution in Criminal Matters



Seven submissions support the concept of alternative dispute resolution (ADR) in criminal proceedings on the grounds that it 'would seem to be something which should be encouraged and promoted'.

One submission objects to the idea.

> Doesn't work in criminal matters; victims shouldn't be encouraged to face offenders, in part because they may be too merciful. The state has an interest in ensuring crime is appropriately dealt with.

Three submissions support alternative dispute resolution in minor or petty criminal proceedings but claim it would be inappropriate in serious matters. Another submission gives the example of a pilot program adopted by the police in Fremantle for people with disabilities who commit minor offences. The submission observes that this successful program has been extended past its initial period.

> The management philosophy of the project has a focus on the participatory role of the offender, the victim and the community.

ADR could be a valuable process to alleviate the problem of lengthy custodial periods between denial of bail and the court appearance, according to one submission. Another submission explains that in domestic violence matters involving members of the Aboriginal community people can be gaoled for months before the matter is heard. The submission suggests that this situation could be alleviated with some form of criminal charge mediation.

Four submissions raise the issue of victims and the role they should play in alternative dispute resolution. As noted above, one submission opposes victim involvement because 'they may be too merciful.' The others support victim involvement. [See Recommendation 263]

Suggestions

- There should be automatic ADR except in serious criminal cases. ADR should be used to increase access to the legal system without denying the person's problem. [See Recommendations 257-270]

4.3

Preliminary Hearings

The preliminary hearing which is sometimes used in the 'committal' process has been identified as a cause of delay in the criminal justice system. Various submissions examine the usefulness of the preliminary hearing and made proposals for alternatives.

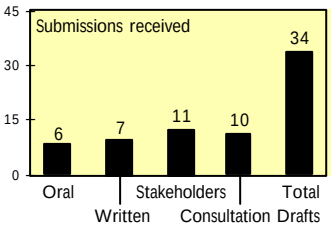
Purpose of preliminary hearings

In considering whether preliminary hearings serve a useful purpose, five submissions assert that they contribute to the proper administration of justice by narrowing issues. Another makes the following suggestion.

> Preliminary Trials, although time consuming, are worthwhile as they sort out whether a full trial is warranted. The preliminary trials help the justice system from becoming congested.

One submission claims that having the Crown case undergo preliminary evaluation by a magistrate is a fundamental right. However, an opponent of the preliminary hearing procedure expresses this view.

> My experience is that all the preliminary hearings conducted before me were purely fishing expeditions and were not conducted to determine whether there was sufficient evidence for the matter to go to trial. They should be abolished as serving no useful purpose.



Three submissions conclude that preliminary hearings are no longer necessary. One submission categorises preliminary hearings as a waste of time and calls for faith to be placed in the Crown to make the correct decision whether to prosecute.

> As [the DPP] takes responsibility for all criminal prosecutions it must be relied upon to make a rational and sensible decision whether or not to

> prosecute. It can assess with a greater measure of expertise than a magistrate presiding over a preliminary hearing whether there is sufficient evidence to prosecute. The prosecution service is not going to waste its time instituting futile proceedings.

Delay

Several submissions argue preliminary hearings cause unnecessary delay. However, one asserts preliminary hearings do not consume a significant amount of time, 'especially when considered as a proportion of all indictable charges.'

In practice, no more than a small number of cases go to preliminary hearing because only the defendant can elect to have a preliminary hearing — the prosecution cannot. The following submission illustrates this fact.

> In Western Australia statistically far more cases are terminated by the prosecution after committal on the basis of the [DPP's] Prosecution Policy, including no prima facie case and no reasonable prospects of conviction, than are terminated by magistrates as a discharge following a preliminary hearing.
>
> Furthermore, the decision by a magistrate whether to commit or discharge a defendant is always subject to review by the prosecuting authority. The prosecuting authority can take into account a greater range of factors and materials than a Magistrate.

Another submission argues that preliminary hearings are no longer important to assist defendants, because in practice, they already know the cases against them by virtue of police and prosecution disclosure and the hand-up brief procedure.

As one submission asserts, defendants rarely give evidence at preliminary hearings and there is no reason to require this preliminary opportunity to cross-examine the Crown witnesses.

> Changes should be brought about here to have these hearings part of the pre-trial determination, controlled by the judge seeking the facts and the truth. Such a practice would limit the defence lawyers cross-examination as at this stage witness statements should be taken by the judge only.

Abolish preliminary hearings

Nine submissions claim preliminary hearings are an unnecessary procedure. One supports abolition as long as the 'fast track' procedure is retained — that is, the opportunity for a defendant to make an early guilty plea. Another suggests abolition for a different reason.

> Committals perhaps should be abolished, as the victim goes through the trauma of giving evidence twice.

However, eight submissions defend the use of preliminary hearings. One submission claims that if preliminary hearings remain there should be a mechanism to provide for an accused or the DPP to seek leave to go straight to trial immediately after the hearing.

Preliminary hearing alternatives

If preliminary hearings in the Court of Petty Sessions are abolished, four submissions advocate an alternative system be implemented, with these suggestions.

- Hand-up briefs should be used from the Magistrate's Court to a reformed Supreme Court;
- An independent, qualified person should review the original decision to charge at an early stage; and
- An inquisitorial system should be implemented.

Changes to preliminary procedures

Six submissions suggest significant changes to current preliminary hearing procedure in the Court of Petty Sessions, instead of abolition. One advocates that Magistrates act as watchdogs.

> There is a need for a greater role for Magistrates to make sure defendants are dinkum about wanting a preliminary hearing.

Other include the following suggestions.

> The use of preliminary hearings should be limited to exceptional cases.

> The preliminary hearing should be made part of a pre-trial determination, with the Magistrate controlling the proceedings and taking statements from defendants.

> The defendant should be allowed to elect whether to have a preliminary hearing or whether to go directly to trial.

Test for preliminary hearings

Several submissions concern the test applied in preliminary proceedings.

> The test whether or not there is a case to answer should be statutorily confirmed as being whether or not a jury could be satisfied on the prosecution evidence beyond reasonable doubt (see Malcolm CJ in *Morrison v Kiwi Electrix Pty Ltd and Rettay* (Unreported, FC (WA) Lib No 980440, 14, 17-18). [The] present statutory requirements for the provision to the defence of the prosecution preliminary brief should be altered to reflect this simplified procedure, but still to require early and full disclosure to the defence.

> I see no reason why the court should not apply public interest and reasonable prospect of conviction tests, i.e. similar to those applied by the DPP, perhaps subject to the existing right of the DPP to indict notwithstanding a decision not to commit for trial.

One submission expresses concern about the tests.

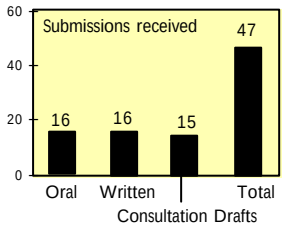
> [T]here is considerable inconsistency with the tests applied on the decisions to charge, the decision to prosecute and the decision whether or not to commit. These inconsistencies can result in grave injustice and prejudice to persons. I see no reason why the court should not apply public interest and reasonable prospect of conviction tests.

Suggestions

- Preliminary hearings in the Court of Petty Sessions should be abolished as long as the 'fast track' procedure is maintained. [See Recommendation 302]
- The accused or the Director of Public Prosecutions should be able to seek leave to go to trial immediately after the preliminary hearing.
- Hand-up briefs should be used universally from the Court of Petty Sessions to the Supreme Court.
- The defendant should be able to choose whether to have a preliminary hearing or go to trial.
- Only certain cases should be allowed to have a preliminary hearing.
- The statutory test of whether there is a case to answer should be based on whether a jury would be able to make a decision beyond reasonable doubt.
- The test of whether there is a case to answer should be based on whether the prosecution would have a reasonable prospect of success.

4.4

Trial by Judge Alone or Jury



Trial by jury is considered by some to be a fundamental aspect of our system of justice. Trial by judge alone is viewed as more efficient. The submissions on this topic distinguish between trials for serious offences and those for minor offences. In the case of serious offences, most submissions recognise that trial by jury is the entrenched method of trial. For minor offences, the submissions seem to accept that trial by judge alone is sufficient. Moreover, the following submission seems to suggest that judges acting alone will do so more effectively than juries.

> In the present time when attacks on the elderly are front-page news, there may be good reason for trial by judge alone.

One submission argues in favour of trial by judge.

> The role of the Justice must be that of a finder of fact who can question any witness. The witness must supply the full and accurate truth as they know it to court:

Another submission, however, appears to view trial by judge alone with suspicion when the accused is a lawyer.

> When a member of the legal profession is charged, he should be judged by a jury.

Right to elect trial by judge alone

Five submissions support the theoretical right of the accused to elect a trial by judge alone. The submissions seem to acknowledge that it is a fundamental right for the accused to either accept or waive the right to a trial by jury.

> The view that trial without a jury should remain an option in appropriate cases is supported, as is the view that all trials must be fair to the accused and also to the community.

Several submissions specifically mention types of cases that would warrant a mandatory trial by judge alone, such as trials exceeding three weeks' duration. One submission supports mandatory trial by judge alone for cases where the only matter in contention is a legal issue, or where there are complex issues of fact and/or law which a jury may find difficult to understand or where the jury may be inflamed by the evidence and would respond with prejudice.

Openness and accountability

Three submissions discuss the need for public scrutiny and accountability concerning the decision whether or not to conduct a trial by judge alone.

> There should be a requirement for the Crown to state the reasons for supporting or opposing an election for trial by judge alone because the community has a right to know why specific defendants are being dealt with in a particular way.

The following is claimed by another submission.

> The requirements of a fair trial require that the reasons for seeking trial by Judge alone and any objections thereto be available for scrutiny. Whether or not trial by judge alone is ordered must be the result of proper consideration of such reasons.

Arguments for trial by judge alone

One submission expresses doubt as to a jury's ability to make an impartial verdict.

> Whether or not there is any substance in the view that judges do influence juries to a significant extent cannot be established. It is, however, a factor that tends to undermine the notion that juries are the best forum for deciding the guilt of an accused.

Another questions the jury's capacity to understand the trial judge's warnings concerning evidence.

> A weakness of the warning system is that there is no means of checking whether the jurors have understood the warnings and whether they have heeded them ... it must be doubtful whether juries have the capacity to absorb, digest, analyse and come up with a verdict, which has carefully weighed up every warning that has been given to them during the hearing.

The submissions ranged in opinion from a call for 'abolishment of trial by jury' to concerns about the effectiveness of the current system of jury selection.

Eight submissions suggest jury trials be abolished for cases that are expected to extend beyond a certain length of time, or which are particularly

complicated. One suggests that expert panels are better equipped to understand cases which are technical or very complex.

Jury selection

Several submissions concern jury selection and call for the system to be overhauled. These submissions express dismay at the waste of time resulting from lengthy challenges by counsel to jurors. One submission is troubled by the tactics used to select the 'right' jury.

> A substantial amount of community resources both human and monetary are wasted by our present system of peremptory challenges ... the interests of justice would be best served if the first 12 called sat on the jury, subject only to challenges to the array or for the cause.

Another submission expresses concern about balance in the composition of the jury.

> It should be mandatory for juries to consist of six men and six women, with one man and one woman from each decade beginning from 18-27 years old.

Argument for trial by jury

One submission strongly advocates the use of juries.

> Juries exercise common sense and are the bulwark between the state and the subject.

> Juries do give unexpected decisions. But then, so do judges!... Juries cannot of course compare the facts of one case with another. May be argued that there will be greater consistency if judges determine guilt. This commentator is not persuaded that this is a sound reason for preferring trial by judges alone in preference to trial by jury.

> Trial by jury is the preferred and entrenched method of trial for serious offences in all States of Australia, New Zealand, Canada, the United States and the United Kingdom. The right ...is accepted by the community as a fundamental right.

Complex, technical and lengthy trials

One submission claims that juries may not be up to the task of formulating verdicts in complicated trials, citing the opinion of someone with experience.

> Justice Howard Nathan (McKew, 1997 ABC television) ... a retired judge, a reserve on the Victorian Supreme Court ... observed juries could be bedazzled by evidence, exhausted by weeks of trial, and were unrepresentative of the community. They had difficulty understanding complex frauds or questions of law, especially when the crime was carried out with advice from highly paid Lawyers and Accountants as to the limit of the law and how to create an auditing trail that was complex and difficult to unravel.

Another suggests juries be replaced in certain circumstances.

> In very long and technical cases, such as fraud, most jurors are not able

> to understand the many technical aspects .... a special panel or tribunal be set up to replace a jury in these sort of cases.

The following submission offers a model for deciding whether to have trial by judge or jury:

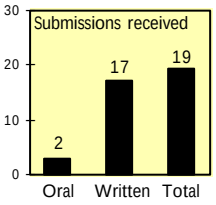
> [O]ne possibility would be for judges to decide after a preliminary hearing whether or not the case in question is an appropriate case to go before a jury or if an alternative method of trial is more appropriate. Legislative guidance could be given to judges as to the kinds of matters they should take into account in making this decision.

Suggestions

- Juries should consist of six men and six women, with one man and one woman representing each decade of the age groups eligible for jury duty.
- A special panel or tribunal should be set up to replace a jury in technical cases.
- Challenges to jurors by counsel should not be permitted or should be severely limited to eliminate peremptory challenges.
- There should be trial by judge alone for well-publicised matters.
- There should be trial by jury, not trial by a single judge, when a member of the legal profession is charged.
- There should be a judicial discretion to decide whether cases are tried by judge alone or by jury.
- The Crown should give reasons as to why it supports or objects to an election for trial by judge alone.

4.5

Criminal Procedure



The submissions on criminal procedure deal mostly with tactical issues such as pre-trial disclosure and plea bargaining, expressing the general concern that certain courtroom strategies are being valued more than justice.

In the interests of fair play, one submission calls for a limited time period to be set between charge and trial so that prosecution evidence does not become stale.

> The wails and lamentations of the legal profession at such unseemly haste will be loud and prolonged. But the interests of justice require that prosecution evidence should be heard while it is still reasonably fresh.
>
> The purpose is to determine the extent of the dispute at an early stage ... a clarification of the issues, establishing which are challenged.... Note that an early appearance is envisaged.

Pre-trial disclosure by the defence

Five submissions generally support the defence being required to make pre-trial disclosure. Three favour disclosure, with one calling specifically for the defence to disclose expert evidence.

> The prosecution should not be ambushed by the unheralded calling of an expert to give evidence in a defence case where the prosecution are in no position to deal with that evidence either by conducting a proper cross-examination or calling expert evidence in rebuttal if need be. Jury trials can not be readily adjourned (as a civil trial can). There is a clear public interest in jury trials being conducted fairly and in matters of expert evidence being properly tested in the trial process.

Another submission believes defence disclosure will help reduce fabricated defences.

> Moreover, the risk of proceedings being terminated or interrupted because of unexpected developments would be reduced. The present system can, at times, facilitate the presentation of fabricated defences. The likelihood of such a defence succeeding is much less if the prosecution has had the opportunity to test it effectively prior to the trial.

Two submissions also argue that such disclosure will clarify the elements of the offence that are in issue and reduce the need to call all witnesses. This would result in quicker, more efficiently conducted trials as well as less disruption to the lives of witnesses and those already traumatised by the incident.

In contrast, one submission states that ambush defences are neither common nor a significant problem.

> [The] 'problem of ambush defences' is more anecdotal than actual, and indeed does not pose any significant disadvantage to the prosecution nor assistance to the defendant.

Another submission points out the advantages to an accused of pre-trial disclosure by the defence:

> Finally pre-trial disclosure by the defence can also be advantageous to the defence. For example, in circumstances where the evidence is compelling, the prosecution may abandon the proceedings at an early stage or reduce the charges. Furthermore, if the matter proceeds to trial, it is less likely that the defence case will be criticised for being recently invented or fabricated in response to the prosecution case.

One submission states that, in practice, the defence already advises the prosecution informally of the issues or matters that are said not to be in issue. It also claims that trials are conducted expeditiously and all parties do indeed concentrate on the central issues.

Another objects to any changes in preliminary procedure.

> This seems to be an attempt to fuse civil court practice and procedure with that traditionally used in criminal trials. The danger here is that the system may lose sight of the fact that criminal trials are by their nature, more serious than civil trials, in that they have the capacity to interfere with the freedom and person of the accused.

Pleas to charges and plea bargaining

Plea bargaining is the process of negotiating criminal charges between the prosecution and defence in order to secure a conviction without proof at trial. Two submissions deal with whether plea bargaining is necessary or desirable. One submission supports the introduction of plea negotiation,

arguing that it is in the public interest to have an accused plead guilty to lesser charges and avoid the trial process. The submission comments that the disadvantage of the present system is that it offers no benefit for an early plea of 'guilty'.

Another submission expresses reservations about introducing plea bargaining, categorising it as an unfair and corrupting process.

> We should proceed with extreme caution and always be ready to turn back.

One submission envisages the establishment of a new type of criminal court to accept guilty pleas and sentence promptly.

> Where the defendant pleads guilty to the charge, the criminal court presided over by a judge and two lay members will either impose the appropriate penalty after hearing both the prosecution and the defendant, or will assign the case to another court on a day about two weeks ahead for the appropriate sentence to be imposed.

The same submission also makes the following suggestion.

> Where the charge is serious, that is, the defendant is likely to be imprisoned, the court should have the discretion to decide whether to accept a plea or not.

In all cases, the defendant should be able to change:

- the plea of guilty prior to sentencing; and
- the plea of not guilty prior to the hearing.

One submission calls for flexibility, suggesting the court should interact directly with an accused to obtain pleadings and statements of issues.

Pleas

Another submission calls for a radical change, stating that our pleading system should be based on that of Zimbabwe and South Africa, which uses methods of inquisition to ascertain an appropriate pleading.

One submission argues that a defendant's plea should be based on the honest belief of the solicitor.

> [If] the solicitor doesn't believe the offender is not guilty, the plea should not be not guilty.

False pleas

Another submission asserts that a defendant ought to enter a plea under oath. Consequently, if the defendant is proved guilty after a 'not guilty' plea and the judge considers the defendant was aware of his or her own guilt, the defendant could be charged with perjury.

One submission states that an accused should be punished for making a false plea. The submission suggests counselling and advice regarding the consequences of true and false pleas should be provided when the accused is considering a guilty plea.

Another submission expresses concern that some accused may be misinformed about the consequences of their pleas. It alleges innocent people accused of child abuse may plead guilty in the belief that by so doing they will avoid a custodial sentence.

Plea negotiation: a way of reducing delay

One submission favours plea negotiation, arguing the public interest is better served through the agreement to plead to a lesser charge than a full trial. The submission also argues that plea negotiation provides a definite conviction as opposed to an acquittal.

> The current system does not offer any benefit to those that plead guilty early in the proceedings. Plea bargaining rewards this, reducing court time and saving the courts, therefore the public purse money. It can, in a semi inquisitorial system ... ensure that offenders are punished.

The following suggestions are made by other submissions.

> Plea negotiation should be allowed in cases where both the prosecution and defence advise the Judge in writing as to why plea negotiation is appropriate. The Judge must then explain in writing the reasons why plea negotiation should be accepted.

> The Scottish system of plea negotiation should be adopted which, in an early informal meeting, allows for charge reduction, alternative charges and deletion of some charges.

Case management

Although case management is seen to improve court efficiency, one submission makes this observation.

> The current system does not serve community needs, or the aims of justice or efficiency. Tinkering at the edges with case-flow management in civil cases is a positive initiative that must be adopted in the criminal jurisdiction.

One submission proposes a model for case management in criminal matters.

> The case managers, however, feel that the best model for case management is the current one.

Other concerns

Some topics were raised infrequently, for example, those which deal with minor criminal offences. One submission suggests a method for reducing the number of false names given to police. Another submission expresses disgruntlement with cyclists.

With infringement notices, sometimes people who get them give a false name. The enforcement of that notice can then be made against the wrong person. So there is a need for proof of identity.

I also strongly suggest the cyclists have a road licence if they are going to use our roads and pay for the use of them, otherwise to make them only use cycle paths.

Suggestions

- The time between filing of charges and the date of trial should be confined to a set period so that the evidence is still fresh at the time of trial.
- The defence should be required to disclose to the prosecution the substance of defence evidence before the trial begins. [See Recommendation 253]
- Sentencing should be conducted by a judge and two lay persons when an accused pleads guilty to a charge.
- The court should liaise with the accused to reach the most appropriate and truthful plea and statement of issues. [Cf Recommendations 295 and 310]
- The criminal pleading system should be modelled on that of Zimbabwe or South Africa.
- The accused's solicitor should have full faith in the honesty of the accused's plea. If not, the solicitor should decline to represent the accused.
- The accused should be required to swear under oath that his or her plea is truthful.
- The accused should be offered counselling and advice on the likely consequences of pleading guilty or not guilty. [See Recommendation 269]
- There should be a system of plea negotiation. [See Recommendations 257-262]
- The Judge should be advised in writing by the two parties as to why plea negotiation is appropriate in the circumstances, with the Judge supplying his reasons for permitting plea negotiation.
- The Scottish system of plea negotiation should be established.
- The case managers of criminal matters should be able to direct police to investigate when extra information is required.

SECTION

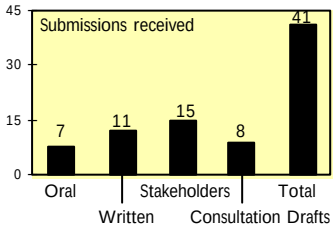
5

Other Issues

Section 5: Other Issues

5.1

Appeals



Those making submissions concerning appeals complain that the appellate process prolongs proceedings and increases costs. The delay in bringing legal proceedings to a conclusion prompted those making submissions to conclude that appeals 'shouldn't go on indefinitely', 'tend to be a waste of time' and 'should happen quickly'.

Other submissions observe that, '[T]imeliness is critical,' and '[there is] unacceptable delay between appealing and the appeal being heard'.

The right of appeal

A number of submissions recognise the importance of a right to appeal.

> An appeals system is vital.

Other submissions expressed the following.

> [Appeal should be] a matter of right, rather than by leave, to minimise the obstructions that courts put in the way of justice.
>
> I do not think the right to appeal should be fully limited.
>
> There must always be a right of appeal from a first instance decision of a Court.
>
> The appeal court should not be entitled to refuse any person who wishes to pursue an appeal.

Proposals to limit appeal rights

Several submissions propose limitations on the right of appeal. One suggestion is that there should be no right to appeal from procedural decisions in the middle of a case.

> Only appeals from interlocutory decisions with leave, except for summary judgments and striking outs.

Another suggestion is in the same vein.

> [There] should not be a right of appeal in respect of interlocutory decisions, save for those in which the rights of the parties are effectively determined.... Also Judges do not have the expertise to review the decisions of taxing officers [so] some other mechanism should be devised for this purpose.

Although several other submissions suggest certain classes of cases require leave to appeal, they also express reservations about the consequences of severely restricting appeals.

> There is a good argument to limit administrative and industrial appeals to being conditional on leave being granted. I would also broaden the category of appeals that require leave. However in this regard it should be remembered that the WA Court of Appeal is becoming more and more the only and last appeal court for appeals from state courts, so appeals to it should not be made too restrictive.

> In many matters there is much to be said for limiting appeals to questions of law.... It may be that some matters are regarded as so serious that such appeals should be permitted but these could be strictly limited. Where jury trials are replaced by trial before judge alone there should be no appeal from his findings of fact.

However, the following submission rejects the proposal that certain appeals be limited to those who obtain leave.

> Requiring permission to appeal does not appear ... an attractive alternative. If, for example, one had criteria akin to those in special leave cases, the result would be that many decisions of importance to litigants would simply be unreviewable, e.g., many decisions as to quantum in personal injuries cases ... these cases are tedious to appeal courts ... but the rights involved are important nor is the rate of error so low that an appeal ought not to be permitted.... If one does not have such a broad limitation, then it appears to me that a substantial amount of time and money will be wasted in applications for permission which must in any event succeed.

A need for judicial review

Although there is strong consensus that there should be a right of appeal, a number of submissions are highly critical of the appellate process and see it as being 'fraught with problems.'

Some submissions view the ability to appeal as a right, while others see it as a necessity due to the frequency of judicial error.

> Far too many judgments are being successfully overturned because the judge erred in law. This is becoming a joke. … The point is that if judges continue to err in law, why are they there? Appeals are often successful. There is a need for a quick and final decision.

> If the judiciary were better at their job, (an event which is not foreseeable) the option for some cases to not have the right of appeal could prevail… Judges usually get it wrong, not sometimes, not seldom, but usually!!!

The appeal process

Many submissions grapple with the dilemma of how to make the appeals system more efficient while still preserving the right to appeal.

Two submissions complain about abuse of the appeals process.

> [An opposing party] used the services of the nations largest law firm to lodge frivolous appeal after frivolous appeal.

> [A]ppeals seem to be granted mainly because large law firms want them. I have not yet heard any logical or common sense reason for the majority of the appeals that have been granted in my case. In fact one was granted after what my barrister described, outside court, as 'the biggest load of rubbish I have ever heard in the Supreme Court.' It was absolute waffle and had no bearing on any matter at hand.

Appeal books

While only a few submissions deal with the issue of appeal books, they are unanimous in regarding them as a wasteful exercise.

> The abject stupidity of having to prepare an Appeal Book when all the relevant papers from both sides of the argument are already on court files [is just] another ruse for lawyers to make money out of their clients.

> Appeal procedures ought to be altered to ensure that only directly relevant materials are included in appeal books. Appeal books ought to be in electronic form.

> Appeals books should not need to be prepared. Lawyers are taught how to file, judges are lawyers and presumably understand filing, court cases are filed. The appeal submission should only be required to reference when the item was previously used and to provide the new information.

> Order 63A was a disaster! Documents were all over the place, although less than 20 per cent of documents get examined. Perhaps there should be costs orders for wasted paper in appeal books.

Technological improvements

Several submissions suggest the use of electronic appeals warrants further consideration because technology may ultimately help resolve the apparent problems with appeal books.

> When all transcript was available electronically — judges thought it worked well. All instructing solicitors used laptops, but not members of the Bar. Difficulties were that you can't flag or mark anything — although the computer programme has improved. It can be helpful to have one person pulling up transcript for all.

> Digital storage makes accessing of referenced documents much quicker and easier.

> [I]t is well worth looking at electronic appeals.

Oral and written submissions

Submissions concerning the process of presenting appellate arguments focus on proposals to limit the time allowed for making oral submissions.

> Time limits for oral argument ought to be imposed only in exceptional cases.
>
> Written argument for appeals would be extremely helpful but not in lieu of oral argument … the interaction of four or five minds is valuable.
>
> The time limits on oral argument are very successful.
>
> The time limit should not be 30 minutes but one hour and that time allocated is now much less regulated. Once people are allocated time they finish within the limits. [See Recommendation 356]

Reasons for decisions

Appellate courts customarily provide full reasons for decisions. One submission takes the follwoing view.

> This practice should remain as the appellate court may make findings in the course of the decision that could impact on future cases, which findings could be adverse to the decision from which appeal is made, but not sufficiently to overturn the decision, but may be sufficiently significant to change the outcome of a future case.

Another submission, however, suggests the practice of providing full reasons for decisions should be curtailed when the decision of the court below is approved or affirmed. [Recommendation 362]

Criminal appeals

A number of submissions focus on criminal appeals.

> Appeal benches should not be as pedantic as they are. Juries wouldn't even understand the fine distinctions made. There are too many appeals because too many are upheld on the slightest grounds.
>
> [Abolish] appeals from committal. [See Recommendation 302 which would abolish committals so there would be no appeals.]
>
> [M]uch of the overly refined and very difficult to apply criminal law stems from the rulings of Judges who do not themselves have to conduct criminal trials … one of the weaknesses with our system of criminal law is that Judges do not themselves have to apply the 'gibberish' which they recite to juries. The problem is magnified if those Judges laying down rules relating to the manner of guidance of juries do not themselves have to provide that guidance.

Composition of appellate courts

Other submissions call for new approaches to the composition of review or appeal panels.

> [T]here should be a right to apply immediately to review the situation to a body of three judges who should be able and encouraged to discuss the decision with the person originally making it.

> Apart from that which is presently provided for, appellate Courts ought not to comprise only two Judges. [See generally Recommendation 366]

One submission suggests two Judges should handle sentencing appeals, workers' compensation appeals and appeals of damages awards from the District Court.

Another submission notes that two-judge courts have worked well and cut the time for interlocutory appeal hearings. The following submission takes a contrary view.

> There has been a problem with two member Full Benches which are evenly split. Interlocutory appeals should be capable of being heard by one Judge.

A major problem, according to one submission, is appeals on questions of fact in cases where there is little or no evidence or where the trial judge has clearly ignored facts or abused discretion.

Accountability of appellate judges

Several submissions call for a method of reviewing judges' actions outside the courts' appellate schemes.

> We need to have the ability to have the actions of judges reviewed without going to the legal system, i.e. Appeal.

> It is imperative to have an alternative mechanism which is outside the control of State Judges. There is distinct and evident bias in this State's Judges. People who wish to have a fair hearing need access to such outside this exclusive little fiefdom.

A group of submissions suggest judges should be made accountable, preferably to a non-lawyer panel. In this way, judges who nod off during hearings or simply 'agree with the Chief Justice', will be held accountable.

> If judgments by a member of the judiciary continue to cause concern then these cases should be reviewed by an independent person. If the judgments appear to be wrong then the victims should be given the opportunity of an automatic appeal.

> Appeals of any sort should be dealt with by non- lawyers. The removal of judges and lawyers from the Appeals system will aid the dispensing of better justice.

One submission claims this would provide a mechanism for rectifying the decisions of judges who frequently erred, as well as a means of disciplining those judges.

> Put in a mechanism whereby judgments are checked prior to them being handed down.

Another submission simply advocates a more straightforward system.

> Simplify the appeals procedure. [Recommendations 354-370]

Suggestions for a major structural change

While a few submissions oppose the idea of a separate Court of Appeal, the majority of submissions endorse the idea as the following selection of comments illustrates.

> [E]stablish … a Court of Appeal for Western Australia comprising the more senior and experienced Judges of the Supreme Court supplemented where appropriate by members from the Bar. If that were done it does seem to me that we have reached the stage in Western Australia where there is no need to continue to have both a Supreme and a District Court. [It] would simplify the roles of the courts and ultimately allow for better utilisation of resources than is presently possible with the two trial courts.
>
> There should be a separate Court of Appeal in the Supreme Court.
>
> Definitely an Appellate Court and one superior trial court.
>
> I would favour a Court of Appeal with four or five permanent members and with at least one other member of the Supreme Court sitting with two members with the Permanent Court when it sits as a CCA. I would have a Criminal Division to hear serious homicide and drug trials. I would also have a Commercial Division for all equity and serious commercial causes. The Court of Appeal could also deal with all administrative appeals as well as industrial appeals.
>
> The Supreme Court should act only as an appeal court with all trials conducted by the courts below.... Decentralisation of the District Court should be avoided and the current system of circuits maintained, supplemented by video links.
>
> As to the role of the Supreme Court … it ought not to function 'solely' as a Court of Appeal. There are categories of cases in which, unless an appeal can be brought very swiftly, the initial decision effectively determines the rights of parties, e.g. Interlocutory Injunctions.
>
> As to the desirability of having a court which is principally an appellate court, there are a variety of considerations.… [It would be] possible to select judges better suited to appellate decision making. It would be more efficient in respect of appeals in procedural matters (if these are retained) and in any cases where credibility is particularly in issue, there is something to be said for an appellate court which consists of Judges who themselves have to deal with these issues in a very practical way.

One submission objects to amalgamating the Supreme and District Courts trial jurisdiction because standards would be at risk. If the Supreme Court were to be solely a Court of Appeal and not a trial court 'there would be horrific consequences for the existing Supreme Court and District Court Judges.' However, there is no objection to a separate criminal court facility.

Although a number of submissions recommend the establishment of a Court of Appeal for Western Australia, the Law Reform Commission did not make any recommendation on this topic because it is presently under consideration by others.

High Court appeals

In the view of one submission, access to the High Court:

> … [s]hould be available to all — not just the black, poor, criminal and constitution oriented.

This, however, is outside the terms of reference as it raises issues of federal jurisdiction which cannot be changed by State parliamentary action.

Suggestions

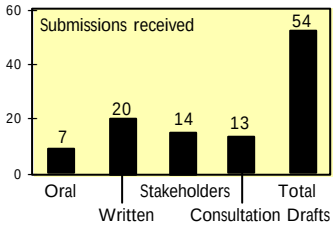
- There should be a right of appeal from a first instance decision of a court.
- There should not be a right of appeal from interlocutory decisions.
- The category of cases requiring leave to appeal should be broadened. [Recommendations 363-365]
- The appellate process should be altered to guarantee that appeal books only contain items which are directly relevant.
- Appeal books should also be in electronic form. [Recommendation 352]
- There should be a time limit for oral submissions made in appeals. [Recommendations 350, 356 and 358]
- The practice of providing full reasons for decisions in appeal cases should remain.
- The practice of providing full reasons for decisions should be curtailed where the appellate court agrees with the decision of the judge in the original matter.
- A panel of non-lawyers should be established to supervise the actions and decisions of judges to ensure they remain accountable.
- The appeals procedure should be simplified.
- There should be a Court of Appeal separate from the Supreme Court.
- The Supreme Court should exist only as an appellate court.
- Anyone should be able to access the High Court.

5.2

Evidence

5.2.1 LAW OF EVIDENCE

> The rules of evidence as they are practised today were invented by high profile, powerful, corrupt miscreants to keep themselves and their associates out of jail. The uses of these laws have not changed.



According to this submission, there is not much to be said for the laws of evidence. However, most of the submissions are not as critical, choosing instead to highlight how particular problems should be addressed. For example, some submissions express concern regarding the status of hearsay evidence claiming the exclusion of hearsay prevents the truth from being exposed.

> Hearsay evidence should be allowed. It would be regarded as circumstantial evidence so it is relevant in its own right even though it is not proof absolute — hearsay evidence is always a piece of the jigsaw and so should be admitted to court.

> I believe the law of evidence should be modified to allow some hearsay evidence into the courts. [To not do so] hinders the search for justice.

> Any procedural rules that allow a trial to be aborted and the accused declared officially not guilty without any of the evidence having been examined by the Court are ludicrous and grossly unfair to the community … only the guilty need fear the truth.

Others are concerned with the jury's ability to make a decision on the evidence available:

> A jury must be allowed to instruct the Judge to request additional evidence where it considers that anomalies or gaps exist in the evidence presented.

Delay is also a concern.

> The originals of all relevant documents should be produced to the court at an early stage. This would save delay.

One submission notes many litigants complain that they cannot 'tell their story' in their own words or explain their actions because the information they want to give is not relevant or admissible in evidence.

> Very often, litigants wish to include in a response to a question, material which while irrelevant (generally going to their motivation or reasoning or observation) is in no way harmful to the case of the other side.... It would have done no harm to allow him to give this evidence, and an inordinate amount of time was taken up in objections and in attempting to explain to the witness the way in which he should confine his evidence.

However, the submission is also careful to point out that encouraging the submission of irrelevant material as evidence should be avoided.

Should changes be made to the law and the rules of evidence?

> I think that there is greater room for reform of the laws of evidence, such as the rule against hearsay, if jury trials were abolished or limited. It is much easier for a judge to understand what must be proved and to what standard and so to give all that he hears such weight as he considers appropriate. More concern must exist where a jury is concerned.

> I think there [are] a number of candidates for alteration here.... Particularly in relation to witness statements, it is not uncommon to be served with lengthy objections which complain that these documents contain matters of opinion or submission which should be deleted.

Another submission emphasises the value of scientific evidence, stressing the need for formal legislative recognition.

> [S]hort of educating judges as to the intricacies of scientific evaluation, legislative reform [should] be put in place which recognises the degree of certainty associated with scientific evidence. This is not to be confused with the notion of the types of evidence which will become admissible.

Others suggest there should be a uniform law of evidence.

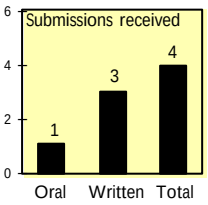
> Having two sets of laws of evidence is unnecessary. There is a need, as the Australian Law Reform Commission says, for uniform legislation. The Commonwealth and New South Wales model should be adapted.

> The *Evidence Act 1906* (WA) should be repealed and replaced by an Act containing provisions of the *Evidence Act 1995* (Cth).

Suggestions

- Hearsay evidence should be allowed.
- A jury should be allowed to instruct the judge to request additional evidence where jurors consider anomalies or gaps exist in the evidence presented.
- The originals of all relevant documents should be produced to the court at an early stage.
- Jury trials should be abolished or limited.
- The practice relating to witness statements should be altered so there is no debate over whether the statement contains an opinion or a submission.
- The value of scientific evidence should be formally recognised.
- There should be a uniform law of evidence.

5.2.2 CHILDREN'S EVIDENCE



Most submissions regarding child witnesses are very emotional.

> We have vulnerable people in our community, the elderly and children. Little children are being sexually abused. There is no justice for little children. When they get into a court system, it is just a nightmare. The criminal court is not set up for little children, they are expected to give evidence as an adult would give evidence. And if they're not up to giving that evidence, they don't go to court and the offender walks free.
>
> [T]he court room looks more like a boxing ring where an experienced boxer (the defence counsel) using all the well-proven 'techniques' and 'suggestive methods' viciously attacks a helpless child with the aim of winning the case for his/her client at all costs.

The submissions can be split into two categories — those which advocate procedures for minimising harassment of child witnesses and those which suggest technology be used for such a purpose.

Child witnesses have special needs as the following submission demonstrates.

> The fact that evidence, other than verbal, is not admissible in criminal trial proceedings is problematic in cases where a child witness is unable or reluctant to talk. There may be evidence of a non-verbal kind such as drawings.

The following submission illustrates the problems of obtaining child evidence.

> A child who is isolated from his mother or other supportive relative has to spend hours with an investigating police officer. The child is embarrassed, often scared, inarticulate and cannot always render an event or events in a correct verbal form. It is often the case that the verbal description of an incident produced by the police officer and put

> into the statement does not exactly correspond or only partly corresponds to the child's mental picture, and the child is too tired to make the corrections.
>
> An incorrectly described event (which is not the child's fault) becomes the main source for the defence counsel's attacks on the child's credibility in the Court room.

The submission suggests a solution to this problem — interviews should be video-taped for use in court as evidence.

Another submission recommends the pre-recording of the video statement should occur as soon as the child makes a complaint, and that all relevant authorities (Police, Family and Childrens' Services and the examining doctor) should be gathered on that occasion to save the child the trauma of numerous interviews. The child should only be questioned by a trained 'child examiner' with all other parties behind a one-way mirror. Those parties could telephone any questions they have to the child examiner.

One submission recommends the following.

> [G]uidelines be developed to require judges to better control the conduct of cross-examination in sexual assault and domestic violence cases.

Another submission notes that child defendants in Western Australia are not given an opportunity to participate in criminal proceedings, and advocates the implementation of Article 12 of the *Convention on the Rights of the Child*.

> A child who is capable of forming his or her own views shall have the right to express those views freely in all matters affecting the child … in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child.

Greater use of existing technologies

All four submissions on this topic support greater use of technology.

> It is much easier to be multitasking when visual and audio is the means of absorbing information.

Other submissions made the following assertions.

> Videotape technology should be used to protect emotionally vulnerable witnesses like children from having to appear in Court, e.g. video evidence.
>
> Children's evidence should be videotaped … and there should be no cross-examination of children.

Courtroom procedure (victims of sexual abuse)

Several guidelines are offered by one submission to assist judges in preventing the harassment of child witnesses.

There should be maximum periods of time in which a child witness may be examined or cross-examined.

A child witness should be allowed breaks within specified periods of time.

Aggressive or confusing examination tactics should be prevented.

Questions should be stated in language that is appropriate to the age and comprehension of the child witness.

Training requirements for judicial officers should be set in the areas of child development and language skills.

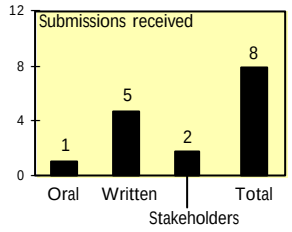
Judges and prosecutors at the trial of cases dealing with sexual abuse should be educated with thorough memoranda and evidence on the special problems involved in child abuse cases.

The Law Society of Western Australia's Professional Conduct Rules or Code of Ethics should contain provisions on the treatment of children in courts and preventing the abuse of child witnesses.

Suggestions

- All children's evidence should be video-taped.
- Existing rules should be modified to allow courts to use technology.
- Article 12 of the *Convention on the Rights of the Child* should be implemented in court procedure.
- There should be limits to the length of time a child is examined or cross-examined.
- There should be a time-out period for child witnesses after a certain length of time.
- The court should prevent hostile examination of children.
- Questions directed at children should be phrased in language they can understand.
- Judges and other judicial officers should be trained in the subject of child development and language skills, with judges having access to more detailed memoranda on the mechanisms for avoiding child abuse.
- The legal profession's *Professional Conduct Rules* should contain provisions penalising the abuse of child witnesses in court.

5.2.3 BURDEN OF PROOF



Eight submissions address the issue of burden of proof in criminal trials. For many, it seems the test does 'more harm than good' because criminals are easily acquitted. Several submissions observe that the concept 'beyond reasonable doubt' is difficult and often causes confusion for juries.

> Jurors often interpret this [test] as beyond a shadow of a doubt.

One submission even suggests judges themselves have trouble defining it.

> This is a concept that seems to be indefinable and often when the judge is asked to elaborate, it only adds to the doubt and confusion.

Another proposes the standard of proof 'beyond reasonable doubt' be abolished, replacing it with the less difficult 'balance of probabilities.'

However, another submission advocates that, regardless of what test is used, it is important the rights of the victim are recognised.

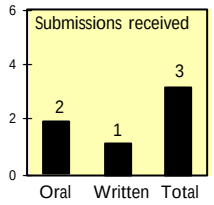
> Perhaps the judge in a criminal trial could have the power after an acquittal to hold that the offence has been proved on the balance of probabilities.

One submission supports reform but not if it means moving away from the current presumption of innocence and the criminal standard of proof.

Suggestions

- A judge should be able to find an offender guilty on the balance of probabilities following an acquittal by the jury.
- The 'reasonable doubt' standard of proof should be abolished and replaced with 'proof on the balance of probabilities' as in civil cases.
- The onus of proof should be reversed in complex commercial and conspiracy cases.
- There should be no presumption of innocence. The courts should adopt a neutral position towards the defendant and then move to a finding of guilt or innocence.

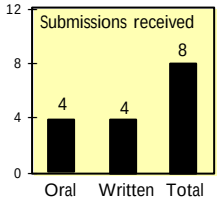
5.2.4 CRIMINAL RECORD: ADMISSION IN EVIDENCE



The submissions on this subject indicate that defendants should be under an obligation to reveal any prior convictions before a judge or jury makes the finding of guilt or innocence.

> If a person is on trial for burglary or assault, the fact that they have numerous previous convictions for burglary or assault is relevant. The fact that they have no prior record is also relevant.

5.2.5 EXPERT EVIDENCE



A number of submissions express concern that justice can be bought through the hiring of the most effective expert witness.

> There is … a perception that there are experts 'for hire.'

Another suggests that the use of expert witnesses can lead to an imbalance of power in the courtroom.

> They should not be partisan. If they are, the case will come down to which side can hire the bigger gun, or to which expert can stand up better to the bullying and denigrating of opposing counsel, both of which are unfair.

One submission questions the necessity of retaining an expert.

> As an expert witness, I was flown to Perth and called upon to give my name, address and experience only. On one occasion it was to recover $700. This seems unnecessary and adds to the backlog.

Two submissions support the admissibility of expert documentation, such as published journal articles.

> In the fields of science and medicine, articles must be rigorously reviewed by boards of professionals; yet journal articles are inadmissible as evidence at the moment. They should be. Evidence in articles is better than ordinary expert evidence because it is reviewed by a board of experts. It would save time.

> Expert witnesses are to be less relied upon as opposed to expert documentation, i.e. journal and published information.

One submission suggests the term, 'expert' be redefined to include those without formal academic qualifications, but who have substantial experience in a particular area.

> This would ensure a more balanced and realistic view being presented to the court.

Panel of experts

One submission feels there is a lack of specialist knowledge in some experts. The implications for wrong advice to courts may be damaging and the submission expresses concern that the courts' ability to test the experience of witnesses is inadequate.

Three submissions propose creating a panel or board of proven professionals to provide objective, impartial evidence to the court. The creation of a panel would also overcome negative public perceptions that you can 'buy' justice by retaining the right expert.

> Expert witnesses should be impartial 'friends of the Court', providing specialist information to help those judging the case to understand and consider all the facts.

Suggestions

- Expert witnesses should not be biased.
- Both prosecution and defence should exchange expert reports.
- A register should be developed of appropriately qualified and experienced professionals to be expert witnesses.
- A greater emphasis should be placed on the use of expert documentation such as journals.
- The term expert should be redefined to include those without academic qualifications, but who have substantial experience in a particular area.

5.3

Litigants

5.3.1 SELF-REPRESENTED LITIGANTS

The majority of submissions express the view that self-represented litigants are problematic.

> Litigants in person present a great problem to the efficient running of the court.

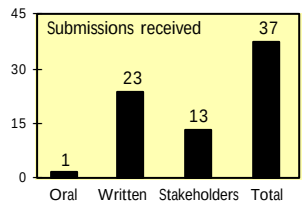
Several submissions suggest that the justice system is biased in favour of people who use their position as a self-represented litigant to gain an unfair advantage.

> [T]he Judicial System operates to allow the litigant in person to exhaust all legal processes (at no actual cost) as a means of ensuring that the litigant in person is not disadvantaged through lack of legal representation.

By contrast, other submissions assert that self-represented litigants are viewed with contempt and treated less favourably than litigants with legal representation.

> [T]here is a terrible bias against self-litigants.

> Litigants in person … are classed as the 'feral public', despised by the judiciary and legal profession alike.



One submission defends the plight of self-represented litigants.

> Litigants in person do not pose problems for the courts. What they tend to do is demonstrate the idiocy of antiquated and inefficient practices, coupled with unnecessary pomp and an egotistical superiority that should have been buried 200 years ago.

Inadequacies of the current system

Most submissions indicate that current levels of support for self-represented litigants are inadequate, with many indicating that appropriate information about court processes, procedures and protocol is lacking.

> Information packages should be available for persons representing themselves, as has been the case for some years in matrimonial disputes.

The common view is that access to information occurs only through legal representation, with the result that the self-represented litigant is discriminated against and disadvantaged.

One submission argues that the law should be changed to allow 'pursuant to section 77A of the *Legal Practitioners Act 1893* — persons to be represented by other than a legal practitioner'.

There were other recommendations for asssiting self-represented litigants.

> Video machines at Court showing how a trial works. Litigants should be compelled to watch these videos.

> Codify[ing] Judge's obligations regarding litigants in person. The system should be bent to help them.

Legal aid

Several submissions express the view that the current legal aid system is under-funded and unworkable.

Some suggest the increase in the number of self-represented litigants is a direct result of funding cuts to Legal Aid and a subsequent reduction in the capacity of the Legal Aid system to cope with demand. One submission specifically recommends 'expanding the legal aid schemes'.

Suggestions

- Self-represented litigants should have access to information packages for assistance. [See Recommendation 201]
- Non-lawyers should be allowed to represent litigants in court.
- There should be video consoles set up demonstrating how the courts operate. [See Recommendations 210-212]
- Judges should be bound by a Code which sets out their obligation to assist self-represented litigants. [See Recommendation 199]
- There should be greater funding to Legal Aid and growth in its programs. [See Recommendations 205-208]

5.3.2 VEXATIOUS LITIGANTS

A number of submissions concern repeated lawsuits brought by people refusing to accept unfavourable results in their court proceedings. Some claim the court system is manipulated by these unsuccessful litigants.

> Notable litigants in person have, at the core, a real grievance. It is gone by the time they get to court and yet they keep going. They are totally obsessive people.

> Courts should be able to stop repeated lawsuits brought by persons who refuse to accept the adverse outcome of prior litigation.

> They have used the services of the nation's largest law firm to lodge frivolous appeal after frivolous appeal and even now we still have not had discovery of documents.

A judgment may not automatically protect successful litigants from continued litigation. Several submissions note there is always a threat of unending litigation when litigants abuse the court process.

> [L]itigants should be subjected to a 'three (or four or five) strikes and you are out' rule in relation to any one set of facts.

As one submission asserts, for many it is an emotional state of affairs.

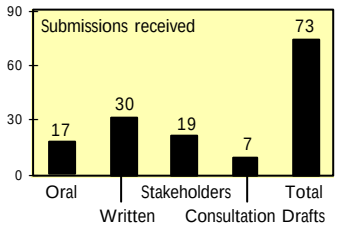
> I have been forced into the situation of defending my rights over and over again at an almost unbearable cost to my health; my family, my career and my financial well-being.

Suggestions

- Litigants should not be allowed to litigate on the same set of facts if they have been unsuccessful three or four times.
- Courts should have the power to prevent frivolous litigation.

5.4

Technology



Are the courts taking full advantage of technology in the delivery of justice? For the most part, the public submissions express the view that greater use of information and video technology would improve the system. The submissions concern:

- Technology's capacity to improve court efficiency,
- Electronic documentation,
- Video communication,
- Access to justice in regional areas, and
- The role of technology in the provision of children's evidence.

Technology's capacity to improve court efficiency

The question of whether technology would achieve greater efficiency produces varying responses. Some people advocate the use of video evidence in the belief that more offenders would be brought to justice.

> Video evidence should be able to be taken by police without the accused's consent after the accused has taken legal advice.

Others feel there is danger in relying solely on the use of electronic documents.

> The scope for distortion of photographic evidence pales into insignificance when compared with opportunities to alter, destroy, hide and confuse electronic documents and to expand the verbiage to a point that will hide deception.
>
> At all points in the process, the litigants and their counsel should retain the recognised authentic records in hard copy.

Electronic documentation

The advantages of using electronic documentation are recommended in one submission which notes that it takes up 'much less storage space,' is 'easier and faster', 'saves paper (trees)' and is 'much easier to file.'

The submission, however, acknowledges that security may be a problem.

> The proper procedures must be taken to ensure the safety of the evidence. With a power shortage or millennium bug, things may get erased. So back up power and back up copies will be essential. [See Recommendation 430]

When the stakeholder's survey asked whether the development of an electronic system for filing and service of documents should be made a priority, six out of nine submissions favoured the proposal The general response is expressed succinctly like below.

> More electronic with paper always being an alternative.

Of the remaining submissions, one claims simply that the development of such a project 'doesn't matter,' while another insists that an electronic system is 'not a priority. In the end paperwork is necessary.'

Video communication

Most submissions welcome the idea of video communication because of its potential to relieve witnesses of the stress of being in a courtroom.

> Video should be available if the victim can show that appearing in person would cause distress.

Access to justice in regional areas through technology

Teleconferencing in particular is considered a valuable tool for improving court services in regional areas, as is illustrated in one submission.

> If one person wants to go to court in Kununurra and another wants to go to court in Bunbury, how do you get them together?

One submission offers the following solution.

> Using video technology it is possible to have district court judges in Perth to hear cases in geographically isolated places.

Another submission acknowledgs that it 'may be useful to solve problems of distance', but observes that video communication may 'tend to hamper effective communication at an interpersonal level' for mediation proceedings.

Moreover, teleconferencing could make courts more accessible to clients where it is otherwise too expensive and time-consuming to seek justice.

> There is too much reliance on judges coming up from Perth; those trips are too infrequent and it is too costly to go to Perth for litigants.

Facilitation of children's evidence through technology

A number of submissions emphasise the importance of using technology to protect children during court proceedings.

> Children's evidence should be videotaped and then go to court and there should be no cross-examination of children.

Technology in perspective

All in all, the submissions encourage the application of technological developments to improve court services.

> [It is] essential that the latest technology is incorporated into legal system — modernisation [is] a necessity.
>
> Virtual courts would save money in building more court houses.

However, one submission sounds a note of caution.

> The use of this technology requires the determination of sound jurisprudential theory or principle generally and a proper forensic base in the particular case. Relevant considerations would include ensuring:
>
> 1) the effectiveness of the supervisory role and control of the courts over persons in custody pending trial;
>
> 2) effective control of the courts over witnesses (and their environment and circumstances) giving evidence by video [See Recommendations 432-433]; and
>
> 3) the ability of trial judges and juries to properly assess the demeanour of witnesses and their dynamic interaction with other persons in the court situation is satisfactorily maintained. [See Recommendation 435]

Suggestions

- At all points in the process, litigants and their counsel should retain the recognised authentic records in hard copy.
- The development of an electronic system for filing and service of documents should be made a priority.
- Video evidence should be available if appearing in person in court would cause the victim distress.
- Children's evidence should be videotaped.
- The effective control of the courts over witnesses (and their environment and circumstances) giving evidence by video should be ensured.
- The ability of trial judges and juries to properly assess the demeanour of witnesses and their interaction with other persons in the court situation must be satisfactorily maintained.
- Video evidence should be able to be taken by police without the accused's consent after the accused has had the opportunity to take legal advice.

PART II

Issues Outside the Terms of Reference

Of the many submissions received by the Commission, a number fell outside the Terms of Reference. The Commission believes this Summary is an appropriate forum in which to air some of the many issues expressed, even if the limits of this Review prevent such concerns from being formally addressed.

The submissions cover a wide range of subject areas from defamation to assault. Many submissions indicate a general lack of understanding about the legal system, confusion about court processes, lack of access to legal education and the need for self-representing litigants to access legal information. Given their diversity, the submissions have been sorted into these main categories: Criminal and other issues.

6.1

Indigenous Australians

The Issues Paper raised the question of whether the justice system is 'fair to indigenous Australians (and others)' and broached the subject of reconciling issues involving the application of indigenous laws. The public submissions focus primarily on crime and the disproportionate number of Aboriginal offenders.

Maintain the present system, create a separate one, or ?

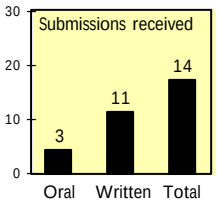
Three common themes emerge when considering the adequacy of the justice system when dealing with indigenous Australians. One view is that:

> … [f]airness requires that there be one system of justice for all.

One submission expresses concern that if the justice system places more emphasis on indigenous laws,

> … [it] may shift attention away from the concern for fairness for all Australians.

Conversely, other submissions suggest it may be better to have separate systems to accommodate indigenous Australians given the difficulties Aboriginal elders face in asserting discipline. However, one submission highlights the trauma Aboriginal people (and others not from common law traditional backgrounds) may experience when dealing with the authority of the British legal system.



> It hit me like an express train. Peculiarly from where I sat, the coat of arms behind the bench — the imperial lion and unicorn — was caught in my line of sight above his head, his black head. The picture of imperial domination was complete.

Another submission seeks to eliminate what is described as 'this excuse mentality' considered by some to be at the heart of the perceived contempt for authority and the law, for property and the rights of others.

> Decent and responsible Aboriginal leaders are drowned out by apologists for this unacceptable behaviour. We are all the losers. Aboriginal youth more so than anyone due to the warped influence of this excuse mentality, this lack of personal responsibility.

Consider a culturally sensitive system for indigenous Australian offenders

A third approach calls for a single system with culturally sensitive variants. One submission sees hope in 'working together on the problem'.

> [A] process … which can be administered by elders/leaders of indigenous people in a way which satisfies those who have been victims of indigenous offenders [yet permits offenders to be] controlled by their own law....

Another draws attention to Australia's obligations under international agreements.

> In circumstances where Aboriginal people are over-represented at each stage of the criminal justice system, it is also relevant to note that … in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.
>
> In the 'Declaration on the Elimination of Violence against Women' the [UN] General Assembly expressly noted that some groups of women, such as women belonging to minority groups and indigenous women are especially vulnerable to violence and urged States to take steps to ensure that legal systems were responsive to that fact.

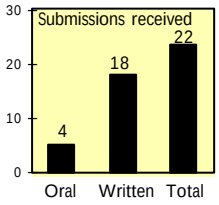
One submission strongly suggests that Western Australia should 'incorporate Aboriginal law, culture and history into our judicial system'.

A new reference

The Commission found that the issues arising out of the complex relationship between indigenous Western Australians and the justice system could not be addressed within the context of the current review because of the need for specific consultation and further research. While these issues have been examined by various organisations in the past, it seems that now may be the appropriate time to take a fresh look. The Commission has requested a new reference from the Attorney General in order to focus on Aboriginal punishment and other legal issues.

6.2

Poignant Personal Grievances



A number of submissions could only be categorised as expressions of deep personal angst. While these submissions are not within the Commission's Terms of Reference, they illustrate genuine grievances held by people who have had contact with the Western Australian legal system.

> This year 1998, has been one of trial and tribulation for our family, who were forced to enter the legal arena with a simple problem that should have been solved around the kitchen table.

This submission is one of many received by the Law Reform Commission detailing trauma, anguish, psychological damage, financial hardship or relationship breakdown. The submissions indicate that the parties' original problems were made worse as a direct consequence of involvement with the legal system.

The submissions raise a number of disturbing complaints against the legal system in general and against legal practitioners in particular.

> It is a crying shame that this problem was not resolved by negotiation, but all our attempts failed. Thus the unnecessary legal cost and emotional burden which we must bear. This has taken its toll on our happiness, health and divided a family, so recently tom by grief. How much longer, must we play the 'lawyer game'?

Other submissions allege that the progress of claims through the legal process is slow and expensive regardless of the simplicity or complexity of the complaint.

One submission describes a defendant's experience of having an action filed against him, knowing he was not liable.

> But once it got into the legal system, [I] had no control over the case. The attitude of magistrates was that the claim wasn't substantiated and shouldn't have gone so far. Is it possible to put a brake on these sort of cases before the matter is listed?

Another submission expresses frustration at the delay and trouble their legal experience has caused.

> I have now for $3^1/_2$ years patiently borne the brunt of this litigation. For my patience the legal system has penalised my health, distracted me from pursuing my career and has consumed my finances.

Most submissions blame lawyers.

> I had a lawyer handle my case for six years then he told me to get another lawyer as he wasn't going to handle it any more! Now I am told that I cannot do anything about him until the present case is finalised. But the opposition won't let me in court to finish the case. Catch 22!

Another submission claims that even if litigants are successful, they may not be able to obtain a remedy.

The submission describes a case which has involved 26 court appearances over the last four years, including three in Perth courts. The litigant won the case and was awarded damages of $17,500 but has yet to see the money because the losing party claims to be unable to pay. On nine occasions the losing party's appeal was adjourned because the litigant failed to appear.

> Each time I had to travel to Perth for the court cases, book into a hotel and stay the night. Only to find out at the hearing the builder was not showing up, and there had been another adjournment. This happened nine times after I had won my case.

Another submission describes a case where a person has, for eight years, been fighting an unfair dismissal claim against his employer. The employer has substantial resources and the litigant feels the employer is using those resources to obstruct proceedings.

> The amount of court time and money wasted (including mine, as in trying to get a hearing I have had to sell my family home, insurances etc.) is absolutely horrendous and all because a big multi national company does not want to be caught out for forcing me to resign under false allegations.

Three submissions address the need for a right of redress for the damaging consequences of accusations which later prove false, criminal hearings which result in acquittal, or civil matters which are dismissed.

> There was a case a few months ago where a prominent businessman had allegations made against him. The matter lasted 18 months, cost him a fortune and left his family in tatters. He was acquitted, but had no right of redress against his accuser.

One submission complains of the high cost of defending a matter before the Industrial Relations Commission for unfair dismissal.

> It will cost a lot to defend himself which he can't recover in that forum, although he could recover it in a civil court.

Another submission notes the size of the community in which the allegation is made is a factor that can affect the amount of damage suffered - the smaller the community the greater the damage.

> There are very limited opportunities for redress. Perhaps it is best to deal with the matter speedily and get a result rather than the best result (especially as there is no perfect result). Especially in a small community, allegations can be devastating. What redress is there?

Suggestion

Most of the submissions which could not be classified in any other way fell into the category of poignant personal grievances. The frustration with the justice system expressed in these submissions did not generally give rise to specific suggestions for change. One submission, however, seeks a simpler system in which the litigant can retain control.

> What I would like to propose is a system where everybody, regardless of financial status, can obtain access to a court system of some sort where the facts can be put forward in a plain simple manner and adjudicated on without the need for multi thousand dollar per hour barristers.

6.3

Criminal Issues

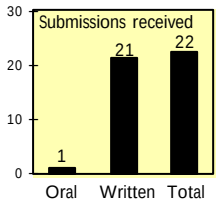
Some submissions assert there is an absence of fairness and justice in the criminal legal system, and that radical change is needed to rectify this situation.

> People have had enough and if the laws are not radically reformed, I can see people taking the law into their own hands because they are fed up with a law that looks after criminals and does nothing for the poor honest law-abiding citizens of Australia.

Causes of crime

Six submissions suggest the increasing volume of criminal matters is caused by changes in society, not the failure of the justice system. One blames the breakdown of traditional family structures caused by sole parenthood, female employment, ex-nuptial birth, and divorce. Another complains that the United Nations treaties, ratified by Australia, take control of children away from parents. The result is that families fail to socialise children properly or instil correct moral values and behaviour.

> Whatever the failing of the *police* and the *courts*, they would *not* be facing the difficulties they are, were it *not* for failings in socialisation.… [While] there is *no* single 'cause' of crime, changes to family functioning and structure have almost certainly had a large and negative effect on the socialisation of children … if Family does not perform well, no amount of Government intervention (Law, Police and activities of the 'caring professionals'), can make up for it.



The solutions to the problem of crime in our society, according to various submissions, are:

- Redistribution of societal wealth,
- Education,

- Prevention strategies in the community,
- More serious efforts to reduce unemployment, and
- Development of better family policies.

One submission suggests the problem is not the volume of criminal cases in the courts, but the system's leniency in sentencing offenders.

There's a general feeling that at the moment we are at the mercy of not only the perpetrators, but also of the legal system. Now I find this, as a person from a non Anglo-Saxon background, ironic that a mere 200 years ago the same British legal system could send someone out for seven years for stealing the basic necessities of life to support your family and now here we are 200 years later, I'm not suggesting we export them back, but clearly we've got a problem where the system has swung too far against the perpetrators 200 years ago, who were in some cases genuinely innocent of serious crime and now its swung too far in favour of the perpetrators and we've got to restore a balance somehow.

Law and order

Issues of law and order as well as those relating to criminal prosecution are voiced in this submission.

> I think that some drastic changes are needed in the Law and Order of Western Australia … I am afraid that corporal and capital punishment needs to be brought back into a society that has no respect for themselves or other people. They have become desensitized to violence and killing or maiming other people and also stealing hard-earned property belonging to others to feed their dirty habits.

Reducing crime

Other submissions suggest ways of reducing crime.

> Asset forfeiture and imprisonment would make serious crime uneconomic and restrict the activity to fools only.

Assault

Another submission asserts that the law, with respect to assault offences, needs to be changed.

> The law should be amended to ensure that the aggressor, the one who strikes the first blow, should always be the one to be charged.

Self-defence

Another submission suggests the law regarding self-defence also needs to be reconsidered.

> The concept that a person only has a right to defend himself when attacked using a weapon of no greater offensive power than that with which he is attacked is patently absurd, and no credit to the common sense of the Judge who was first responsible for the dictum.

Sexual offences

Issues regarding sexual offences prompted intensely personal and emotional submissions.

One submission is concerned with the need for greater public awareness of activities defined as sexual offences.

> [P]eople [should be] … educated in what constitutes an offence — particularly sexual offences.

Another submission recommends the implementation of pre-trial diversion treatment programmes for intra-familial sexual abuse offenders as an alternative to imprisonment.

Two other submissions recommend that where the victim of a sexual assault is an adult, the victim should be able to refuse identification protection and be able to publicly identify the perpetrator in the media. One observes that naming the perpetrator is particularly important for recovery from abuse where the victim and perpetrator are related.

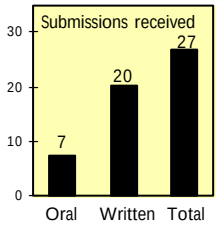
Race crimes

Some submissions identify the need for certain crimes to be formally recognised.

> Racially motivated crimes should be prosecuted and sentenced according to the severity they deserve. I refer to the recommendations of the Human Rights and Equal Opportunity Commission … and also the recommendations of the Australian Law Reform Commission. In particular, the ALRC recommended that a specific crime of racist violence be created federally, and HREOC urged amendment of Federal and State Crimes Act to enable courts to impose higher penalties where there is a racial motivation or element in the commission of an offence.

6.4

Role of the Police



Level of police investigating power

The police are in the difficult position of having to balance the rights of the individual, who may not have been proved guilty nor even charged with an offence, and the public's need to feel that crime is under control. The central theme identified in the submissions is one of power — whether the police need more investigative authority to bring criminals to justice, or whether more power would create oppression and unjustified intimidation.

The view of several submissions is that the current powers held by police are inadequate. Five submissions advocate an increase in investigative powers to bring criminals to justice.

> Investigative powers of Police are far too limited and the Police Force far too small to cope with the swiftly rising wave of crime in Western Australia.

Another submission even suggests that police discretion should be restricted by a duty to 'investigate offences via the Criminal Code'. On this reasoning, it would be a breach of duty if the police did not investigate all potential offences.

While one submission asserts that greater power would 'enable the police to crack down on more crime or drug deals,' another feels the level of the offence should determine the degree of police authority.

> When a life is at risk they should have almost unlimited power. For other crimes the seriousness of the offence should determine the ability of the police to pry into other people's lives. For example, they should not be able to search someone's house for petty theft and they should clean up and replace any damaged property.

Others believe any increase in powers given to police would be unwise and could infringe individual rights.

> [T]he State Government's proposal to broaden the range of powers available to police to permit random drug checks and to force submission to internal body searches, to confiscate assets, and to restrict the freedom of movement and association of persons merely suspected of engaging in illegal activities, is oppressive and unjust in that it preempts judicial determination on the question and unfairly prejudices its outcome.

Zero tolerance

In addressing the perceived crime rate, one submission proposes a zero tolerance policy should be adopted, 'with police permitting no lenience even for minor offences and police permitted to conduct searches after seeing minor offences.'

Conversely, another submission claims zero tolerance is not the solution as it merely exacerbates a much wider social problem.

> Zero tolerance of youth isolation and pain and lack of back up for parents is wrong.

Scrutiny of police performance

Apart from the issue of police power, the other major area of concern for those making submissions is the manner in which police duties are performed.

One submission articulates concern about internal decay in the police service.

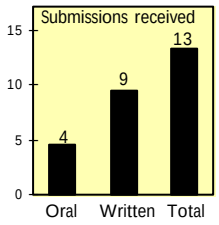
> Serious investigation into corruption within the Police Force of Western Australia.

Another submission suggests relations between the police and the public could be improved.

> [P]olice [should] undergo thorough reviews of their behaviour and treatment to the public (their customers) and that their behaviour [should] be scrutinised closely by a group of peers.

6.5

Bail



While this topic is outside the Terms of Reference, the *Bail Act 1982* (WA) has been under review for a number of years. As revision of the statute may be considered in the future, it seems appropriate to detail the submissions in this area.

The submissions on bail focus on delay between arrest and trial; bias in and abuse of the bail process; and the role and responsibilities of the 'players' in the bail process including Justices of the Peace, magistrates, judges, legal practitioners, the police and sureties. The entire process for granting bail draws comment, with bail conditions evoking more submissions than any issue other than delay. The submissions consider the setting of, compliance with and consequences of breach of bail conditions and, in particular, further offending while on bail. Remand custody facilities also come under review in the comments on bail.

Delay

Six submissions complain that the delay between arrest and trial is inappropriate and unjust. Delay causes serious problems for an accused including:

(a) sentencing difficulty, i.e. the circumstances of an accused often change during that period and rehab efforts are often frustrated by a final (at times inevitable) sentence of imprisonment, [and]

(b) offences whilst on bail occur and some of these offences may be dealt with out of sequence or deferred simply because of the view that all summary charges should be dealt with after the superior court matters are finalised.

However, according to one submission, releasing alleged offenders on bail for an extended period makes them reluctant to plead guilty at an early stage, which may be unfair to the community and/or the victim.

> [C]urrent long delays [while on bail] waiting for superior court trials act as a disincentive to pleas of guilty at an early stage i.e. a Defendant expecting a prison sentence is likely to plead not guilty and stretch it out to preserve his or her liberty as long as he can.

Two submissions highlight the need to limit the time spent on bail by setting a maximum time between arrest and trial. The suggestions for limits range from a maximum of six months to a minimum of 30 days. Another suggests alternative methods of determining criminal sentences (or what the Law Reform Commission calls ACCR 'Alternative Criminal Charge Resolution' in its Final Report).

> There should be some form of alternative dispute resolution before charges are laid if an appropriate solution can be achieved without resort being had to the courts.

Remand custody

Five submissions express concern over holding an accused in remand custody until trial. One submission suggests 55 percent of accused persons detained in remand custody receive a fine or other non-custodial sentence.

> [It is] a flawed judicial system that can endorse or justify the practice of placing unconvicted persons in custody awaiting trial for relatively non-serious offences for which he/she then receives a non-custodial sentence.

Another issue is lack of compensation for those held in remand custody and for a long period of time before being found not guilty or released with a non-custodial sentence.

> [T]here is no readily accessible means to compensation or to other palliatives to the inconveniences and anguish the person has suffered.

The following submission sees remand custody as a way of imprisoning prior to conviction.

> [M]agistrates use remand custody to deter offending ... a 'short sharp shock' to give offenders a taste of imprisonment ... the remand custody facility was never intended to punish individuals but was to be used as 'safe custody' and to ensure the course of justice takes place.

Yet another submission sees remand custody as a form of conviction without a hearing.

> [T]he way suspects are treated is far from fair; for them to be treated like convicted criminals prior to the court hearing is both cruel and immoral.

Bias and discrimination in bail determinations

Two submissions observe that people end up in remand custody because they can not meet bail due to lack of assets. This is a particular issue for some Aboriginal persons and may, in the view of one submission, reflect discrimination inherent in the bail process and by those making bail determinations.

> Those who … apply the bail legislation are in reality setting onerous and unrealistic bail conditions with the intention to detain in custody … it indicates that systemic discrimination against Aboriginal defendants and offenders, apparent in other sections of the criminal justice system, is also practiced within the sphere of the remand custody facility whereby magistrates are knowingly applying the legislation to wrongly imprison people.

The same submission claims that the existing legislation enables or facilitates discriminatory decisions.

> Section 39c of the *Bail Act 1980* (WA) can create barriers to bail release because of the subjectivity of the hardship clause which allows refusal of a surety application if forfeiture of assets will cause 'hardship'. The subjectivity… allows … judicial officers to justify any refusal … to cover any bias or prejudice toward a surety or defendant and the alleged offences.

Another submission complains police interfere with the bail release process by pre-judging the defendant or surety and/or intimidating the surety applicant.

> It was not uncommon for the police to use their local knowledge to pre-judge the defendant or the surety. This was usually a negative reaction, particularly in the case of Aboriginal sureties.

Should Justices of the Peace make bail determinations?

One submission questions the suitability of having Justices of the Peace determine bail matters.

> One must question the role of JP's in the bail process. They are in the main retired citizens, and appointed because of their standing in the community.… [B]ail is but a small part of their voluntary/civic duties…. [T]heir judicial services are valuable, particularly in outlying areas of West Australia … however … the Law Reform [Commission should] critically examine the role of volunteer workers in a process that determines liberty or custody for unconvicted, presumed innocent, individuals.

Lack of remand custody facilities in outlying areas

Another submission contends people living outside the metropolitan area suffer due to the location of remand custody facilities.

> People remain on remand for long periods. There is no remand facility in Albany for juveniles and women. They must be transported to Perth and brought back for hearing.

Remand custody facilities as high risk environments

Two submissions categorise remand custody facilities as high-risk environments because of their isolated nature.

> Those … suspected of a crime should be able to have immediate access to either close friends or family, especially in the case of being intoxicated. A friend or member of the family should be able to stay with them in custody.

Surety

One submission criticises Justices of the Peace for only accepting fixed assets as surety. The writer suggests that Justices of the Peace use incorrect criteria to judge the person offering the surety.

> It is not uncommon for a bail condition to read '$2 000 x $1 000 magistrate approved surety'…. The negative impacts on sureties and remandees of this obstructive bail condition are:
>
> - Sureties 'on trial' in a formal court setting;
> - Traditionally Aboriginal sureties resist 'going before the court';
> - A long wait between court cases to have surety application processed by a magistrate;
> - A surety requirement of fixed assets (contrary to the spirit of the bail legislation);
> - Negative attitude to sureties at the court;
> - Surety applications restricted to court hours, Mon - Fri;
> - Remandees are kept in custody unnecessarily overnight, on weekends and holiday periods.

One submission points out the difficulty in appealing a surety application refusal as a flaw within the bail process and another example of injustice towards an accused.

> JP's are not accountable to anyone when they refuse a surety application…. [A] JP can cover any racism or bias he/she may have against the applicant or defendant…. [M]ost JP's had a negative attitude toward sureties and saw them as associates of a criminal; they were also judged by their appearance, literacy levels and social status. A 'watchdog' or a surety appeal system is required to ensure fair and equitable surety applications.

Legal practitioners and the bail process

Submissions also complain of a lack of counsel for bail proceedings or inappropriate actions by an accused's legal representative. According to one submission, defendants are often detained in remand custody because:

- they did not have legal representation;
- the duty lawyer advised they would be better off to delay the bail application until they had their own lawyer; and
- the lawyer did not keep the court appointment for the bail application.

Injustices towards the victims and community

Five submissions address the issue of safeguarding the community and victim against the threat of further injury and injustice when an accused is released on bail. One outlines the need for strict bail conditions where further violence is possible.

> Bail conditions [should] be set that the perpetrator not be allowed to return home or have contact with the victim if there is any likelihood of violence re-occurring.

One recommends that accused people be made accountable for their actions if they breach bail.

Compliance with bail conditions

Three submissions deal with bail condition compliance. One questions the rationality of granting bail to an accused after the person is apprehended for a violent offence while on bail. Two submissions stress the need for bail conditions to be enforced and complied with and, if breached, for the accused to receive a suitable punishment. Protection of the person against whom the bail conditions were breached is also stressed in two submissions. Another highlights the importance of clearly explaining bail conditions to both the accused and the surety.

> [T]he person whom the conditions were breached against can not always approach Police due to fear and intimidation of the defendant. As it stands now both children and others who are intimidated by the defendant will not call the police and the police do not always interview the victim immediately upon complaint.

Cost

Two submissions complain about the high cost of repeated bail hearings while others point to remand custody costs. Several noted the well-publicised case involving 'the three American sailors held 14 months in remand at $500 per week' only to be found not guilty.

Accountability of judiciary

One submission draws attention to the decisions made by the judiciary with regard to bail and remand custody.

> It is hard to see the rationality of the system where a violent offender is bailed, re-offends violently while on bail, and then is bailed again.

Another recommends education of the judiciary as part of a long-term solution, although there is a feeling that education may have only a minimal effect on entrenched beliefs and attitudes.

The Bail Act itself

It is also felt that piecemeal changes, as with previous amendments to the Bail Act 1982, often cause more problems than they solve.

> The bail legislation urgently needs to be reformed from scratch.... [B]ail reform requires innovative and creative input from those who work the bail system and those who are ultimately affected by the application of it.

Specific concerns

- The time delay between arrest and trial is inappropriate.
- People are detained in remand custody unnecessarily.
- People spend time in remand custody prior to being released with an acquittal or non-custodial sentence.
- Remand custody is used as a form of imprisonment to circumvent the Sentencing Act's restriction on custodial sentences of less than three months.
- There is an over-representation of Aboriginal prisoners in remand custody.
- Bail is being set at an unreasonably high level thus discriminating against those with low incomes and few assets.
- Remand custody facilities are high-risk environments.
- The community and victim should be protected when an accused is granted bail (especially if the accused is violent).
- Repeated bail hearings and remand custody facilities are costly.

Suggestions

- Address the problem of excessive delay between arrest and trial by prompt alternative dispute resolution and/or limiting the time between arrest and trial to six months or less.
- Require written reasons when denying bail for non-indictable offences.
- Penalise lawyers with a fine or make them liable for court costs when they miss bail hearings. This penalty should apply to lawyers from Legal Aid and the Aboriginal Legal Service as well as private practitioners.
- Create a Bail Court to deal only with bail matters.
- Grant bail only to those who have not served a custodial sentence.
- Create a surety appeal system or a surety review body (i.e. a 'watchdog') to review bail decisions for bias.
- People who breach bail conditions should have bail revoked and be held in custody.
- People who offend whilst on bail should be ineligible to be released on bail in the future.
- Improve remand centres so they are more comfortable and have constant police surveillance and protection.
- Allow friends or family to accompany an accused whilst in remand custody.
- Review and/or rewrite the *Bail Act* soliciting the views of those who have experience working with it. In particular, review section 39 of the *Bail Act*.

6.6

Juveniles, Crime and the Justice System

Causes of youth crime

Most of the submissions on juvenile crime express anger and indignation that young offenders are not being brought to justice. Others claim that social and environmental factors are not considered in the development of juvenile crime policy.

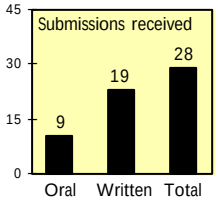
One submission recommends that any attempt to tackle juvenile crime issues should be directed at the nature of young people themselves.

> Juveniles are of that age when it's instant gratification. Most of the people, when I was working with offenders, never ever thought they'd live to be 30. It's an instant, has to be now, phase in life. The punishment and the judiciary should deal with that instantly. By the time the kids get to court the crime is six, eight months old, they've forgotten which one it was.

Other submissions state that the youth of today have low moral standards. One submission claims that many young people lack a sense of right and wrong, self-discipline and social responsibility.

> Many young offenders seem now to place little value on their own lives, let alone the lives and well-being of their victims.

Conversely, another submission expresses the view that youth behaviour is less a result of innate character, and more the product of developmental environment.



> Children are born with instincts for survival but with no concepts of right and wrong. In their early development they acquire such concepts from their parents and/or their environment. At some later stage they are

> able to form their own opinions but the early impressions have strong lasting effects. Children born into unsatisfactory family circumstances and/or growing up in unsatisfactory environments suffer great disadvantages.

Juvenile crime is exacerbated by sentencing policy according to some submissions.

> [S]ome evil young people can commit serious offences with the knowledge that they are immune from punishment, and are able to taunt the police and the public, with this knowledge.

> I have a suggestion. The first offence that a child is brought to court for should be punished because it's generally not the first time he's done something, it's the first time he's been to court. And you'd be doing him a favour if you punished him then instead of waiting until he kills someone at age 18.

Others attribute the problem of juvenile crime to the shifting of responsibility from society and the family to the justice system.

> [S]ociety should not produce generations of law breakers and then, in effect, say to the justice system, ' we have bred them but we cannot handle them — you sort them out.

One submission blames the structure of the education system for promoting destructive behaviour.

> The education system does not properly cater for children who, because of poor home environments or lack of mental capacity, cannot keep up with their peers. They are promoted from year to year without proper recognition of the problems they face because they are out of the main education stream — this must be damaging to their self-esteem and to their future expectations.

Harsher penalties

Several submissions favour the re-introduction of corporal punishment in schools and at home. One questions the relationship between a young offender's actual maturity and the legal definition of a juvenile, arguing that where young people commit drug-related crimes, they should be subject to adult penalties.

> Where a juvenile has the cunning, the strength, the motivation … to commit adult crimes, he/she should bear full responsibility for those crimes as an adult, without consideration for his age.

One submission claims soft penalties encourage an "excuse mentality" which sees children blaming family circumstances and social misfortunes for their behaviour. The submission argues that children must accept responsibility for their own actions.

> Certainly we do need parole officers and social workers and to be given a second chance. But we also need to ram home the message that your problems have arisen from your actions and that you are responsible. It is not someone else's fault (95 per cent of the time). The only way things are going to get better for you, is if you want that to happen with aggressive determination.

By contrast, another submission suggests that young offenders do not benefit from detention, stating that the justice system should look more at prevention rather than hasty punishment.

> I find it quite incongruous to hear a 10 year old telling me that he has to go and see his lawyer. Yes, of course he should have a spokesman, but a system of responsibility should be developed, starting with the child himself, next their parents or guardians, next the wider circle of their community. Prison and the law should be a last resort, not a first option.

The following submission deplores the criminal behaviour of some juveniles while rejecting some of the reactionary solutions offered by some members of the community.

> It is unacceptable that law-abiding citizens should have to live in fear for their personal safety and for the security of their property. But some of the more draconian remedies put forward are not properly thought out, give little consideration to the causes and would be counter-productive.

Who is responsible: parents or government?

Many submissions suggest parents should be held responsible and personally liable for the actions of their children.

> Parents must be held accountable for the actions of their children and pay for the damage they incur [both] private and public.

> Parents and guardians of offenders up to the age of 18, should be made responsible for all their charges selfish, anti-social actions.

There is a line, however, between discipline and abuse. Most submissions agree that child abuse should not be tolerated.

> I think it should be clearly understood that discipline is one thing abuse is another, I do not support any form of abuse at all.

Children's court and alternative sentencing

One submission criticises juvenile offender case management in Perth for its lack of continuity, noting, in comparison, that repeat juvenile offenders in rural areas become well known to the local magistrate. The submission advocates having localised Justices of the Peace in Perth to establish the sense of continuity currently lacking in the city's Children's Court.

Several submissions also suggest the creation of a juvenile court as an intermediate tier between the Children's Court and the adult courts.

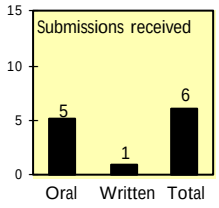
> There is a need for two tier juvenile Courts — juvenile (8 to 12 year olds) and young adults (13 years +).

Suggestions

- Juvenile offenders should be punished for the first offence.
- Juvenile offenders should be brought to court swiftly following the offence.
- The education system should be reformed to deal with potential juvenile offenders.
- Corporal punishment should be re-introduced for juveniles.
- Juveniles who commit 'adult' offences should be punished with adult prison sentences.
- A widespread policy should be developed, aimed at potential offenders, their families and the general community, to promote crime prevention.
- Parents of juvenile offenders should be responsible and personally liable for the actions of their children.
- There should be more Justices of the Peace in the Children's Court who become familiar with offenders.
- There should be a Children's Court and a new separate branch called a Juveniles' Court to deal with adolescent offenders (13-18 years).

6.7

Public Defenders' Office



Most of the submissions on this topic advocate the establishment of a Public Defenders' Office to facilitate access to justice for people charged with criminal offences.

> There needs to be equal access. At the moment there is not, due to lack of funds and representation. The system cannot be user pays, because some people have a greater ability to pay than others.

Another echoes this common sentiment.

> Battlers do not have much of a chance. It all comes down to dollars. The rich can afford to go to justice, the poor can't. Legal aid seems to be harder to get. There is a need to listen to people.

This submission takes the point a little further.

> High profile people hire the best silver tongued lawyers. There should be a Public Defender's Office with no choice for the defendant in selecting counsel. The Public Defender's Office should be paid for by a levy on lawyers as they benefit from the legal system.

At the public meeting in which these comments were shared, one member of the Commission asked whether preventing people from engaging the best lawyer possible is an extreme measure. The response was clear from this submission.

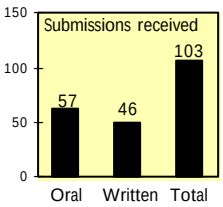
> It is fairer if the quality of your lawyer is based on the luck of the draw.

Suggestions

- A Public Defenders' Office should be established.
- There should be no choice for a defendant in selecting counsel from the Public Defenders' Office.
- The Public Defenders' Office should be financed by a levy on lawyers who benefit from the legal system.

6.8

Sentencing, Punishment and Parole



The submissions generally reveal a common perception that there is a rising level of crime, particularly in relation to home robberies, attacks on the elderly, bag-snatching and car theft. A number of submissions express frustration that not enough is being done to prevent crime.

Many people at the public meetings in June, July and August of 1998 questioned why these issues were not part of the Law Reform Commission's Terms of Reference. Speakers at the meetings and those who wrote submissions want a clear message brought to government that these issues are important and should remain high on the legislative agenda.

As these topics are outside the scope of the Review of the Justice System, the Commission was unable to devote resources and research time to investigate the suggestions made. However, the serious concerns presented are briefly summarised here.

The main issues are:

- criminal accountability,
- the imposition of harsher penalties, and
- limitations on parole for convicted offenders.

Criminal accountability

Many submissions express concern that the judicial system is not doing enough to hold criminals responsible for their actions.

> We do a great disservice to youth if we don't hold them accountable. Youth must be shown what is right and wrong and be held to it.

> The public generally are fed-up with the 'slap-on-the-wrist-with-a-wet-tram-ticket' approach to dealing with juvenile/teenage offenders.

Several submissions suggest 'do-gooders', including psychologists and social workers, are responsible for the increase in crime because they are concerned more with the welfare of criminals than victims. The submissions suggest that excusing criminal behaviour and attributing it to other causes harms both the perpetrator and the already injured victim.

> Too much is made of mitigating circumstances and not enough is made of victim impact statements.

As one asserts, the role of the court should be to impose 'punishment', not to enforce the moral and social values of a limited few.

Four submissions disagree with that perception, one stating that 'though people have a right to be angry, we mustn't go from one extreme to another'. Another submission phrases the point differently.

> Certainly we need an efficient justice system, but we need a healthy society for the justice system to preside over. Who is looking at young people to ensure that they remain in a healthy state?

Yet, two submissions recognise that although "do-gooders" are doing necessary work, it is also important to balance these considerations with the rights of the community in general, including senior citizens and other vulnerable members of society.

Restore corporal and capital punishment

Many submissions express dissatisfaction with the sentences imposed, claiming the penalty is often inappropriate or insufficient.

Twenty-three submissions call for harsher penalties including corporal and capital punishment, expressing the view that the threat of physical pain and public humiliation would be effective in deterring would-be criminals. Several suggest having a referendum on the issue. Two submissions query whether international law would prevent the re-introduction of these penalties.

> What we should have is a minimum sentence, not a maximum sentence, so if anyone gets five years do five years, no parole, no nothing. And I'd like right now, for the people here, to listen to this, should we bring back corporal punishment. (Yes, from audience) I'd like a show of hands, should we bring back corporal punishment.
>
> Being a victim and becoming a criminal yourself is not going to solve the problem. That's where the problem is. What we have to do is get some sense and perspective of what's really happening in our society. Justice as you wanted it is not going to come (why won't it- audience). It won't come because, you can never reform the system by capital punishment. Look at America. America has capital punishment and the crime rate in America is the highest in the world.

Interviewer: Capital punishment in countries like America - is there any connection between that and their crime rate?

> *Robert Cock QC:* There doesn't seem to be any empirical data to establish it and that's one of the problems. In fact it's quite interesting that many of the people in our country forums haven't been calling for capital punishment, but for corporal punishment. There was very little demand in the sessions I attended for capital punishment even as an issue. They were very much more interested in exploring more moderate approaches. That is, truth in sentencing so that when someone is sentenced to six years, they serve six years. Truth in sentencing is a very, very important issue and corporal punishment - that is, some physical punishment to the person which doesn't in any way deprive them of their life, was an issue. But capital punishment, I didn't find at least, was an issue at all.

Impose harsher penalties

Nine submissions claim convicted offenders should be required to serve the stipulated sentences, while three other submissions favour cumulative sentencing. Several submissions suggest no allowances should be given for mitigating circumstances or for parole. Another calls for change to the system so that offenders 'suffer the full consequences of their actions'.

Alternatively, one submission proposes that legislation be passed to strengthen individuals' rights to defend themselves and their property if government is not prepared to take a hard line on sentencing. Other submissions suggest that offenders should lose some of their civil rights if they engage in criminal activities.

Despite the support for harsher penalties, one submission makes this assertion.

> [T]here is virtually no evidence to support the proposition that punishment through the criminal justice system is a deterrent.

Parole

Nine submissions favour abolition of the parole system. Two claim there would be a noticeable reduction in crime when 'the criminal element is removed from society, and society is protected'.

According to the submissions on parole, offenders commit crimes because the gain from the criminal activity is greater than the risk of getting caught. Parole is seen merely as a euphemism for 'early release'.

The submissions suggest that if parole is abolished, offenders should be required to serve the full term of their sentences. The prospect of imprisonment without parole should discourage offenders from committing crimes.

One submission says the purpose of parole is 'to decrease the likelihood of re-offence' by assessing how a person is likely to act while on parole, of which good behaviour is just one factor.

However, others disagree and express the opinion that good behaviour should be an irrelevant consideration. The sentence to be served should relate to the crime for which the offender has been convicted.

> It should have nothing to do with how good they can be. Early parole allows them to get out only to re-offend sooner.

Another submission proposes positive rewards be given within the prison system, but not early release.

Parole Board membership

In order to reflect community views on parole, some submissions suggest lay people representing the community should be appointed to serve on the Parole Board.

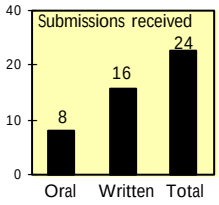
Suggestions

- Instead of announcing maximum penalties, there should be a requirement that minimum penalties be served.
- A referendum should be held to decide whether corporal and/or capital punishment should be re-instated.
- The parole system should be abolished.
- Individuals' rights to protect themselves and their property against criminal offenders should be secured by legislation.
- Lay people should serve on the Parole Board to represent community views.

6.9

Victims and Criminal Injuries Compensation

6.9.1 VICTIMS



Many submissions seek a re-evaluation of priorities giving greater recognition to the rights of, and the suffering endured by, victims of crime.

> There is no focus on the victim.

Another submission claims many criminal offenders use violence intentionally to create fear amongst law-abiding citizens. Many people are discouraged from identifying suspects or being witnesses for fear of violent retaliation. Many submissions highlight the fear people have of offenders breaking into private homes and committing violent crimes.

The submissions question whether the authorities are taking note of public opinion. Several suggest the use of the armed forces is warranted to 'retaliate' against offenders in this 'state of war.' One submission describes how a vigilante street patrol successfully discouraged offenders in an area known to be dangerous and urged the police to follow this course of action.

Legal support for victims

The submissions focus on the legal support (or lack of it) for victims. Nine submissions mention delay, the lack of legal assistance, and the perceived imbalance between the rights of the offender and the victim.

The following submission illustrates the common sentiment that victims feel further disadvantaged by the justice system.

> When [the man] went to court (as a victim of crime), he was treated like a criminal and given no legal aid. He was denied justice by delay, among other things.

According to some submissions, there appears to be a discrepancy between the assistance provided for offenders and that provided for victims. Whereas criminals are helped to rehabilitate, victims are not.

> Let compassion for the victim be greater than the compassion for the offender.

Other submissions identify the reason for this difference in treatment.

> As we see it most of the issues for victims of crime, stem from the fact that there are really only two parties to criminal proceedings — the alleged offender and the Crown — and the victim's role is only that of witness for the Crown, albeit often, but not always, a primary witness.
>
> I am aware that when a crime is committed it is committed against the Queen not the person, this is a very outdated idea.
>
> The essence lies in the *processes* leading up to restitution and sentences, and the idea that it is the victim, rather than the more impersonal 'State', who has been offended against.

Alleged deficiencies in the police prosecution system

One submission considers alleged deficiencies in the police prosecution system, claiming the prosecutor is not adequately informed of the victim's version of the facts and thus the victim's interests are not effectively represented. The submission makes the following recommendations.

> The [police prosecutor or DPP] should have procedures changed so all victims of crime, witnesses, be given the opportunity to discuss the facts of the case with the prosecutor handling the case prior to the actual hearing. This will ensure that all parties are on a level playing field.
>
> Police prosecutors should have sufficient legal qualifications and experience before they are assigned a case.
>
> Victims of crime should be given the right to have their own legal representation during the trial.

The examination of victims in the lower courts can be quite traumatic, as this submission states.

> Because there is no jury present, the defence counsel is not restricted by fears of alienating the jury if he/she treats the witness harshly.... In addition, the prosecutors in Courts of Petty Sessions tend to be junior lawyers or police prosecutors who have less experience in preventing (or less 'presence' to prevent) unfair cross-examination. [See Recommendations 225, 236-237]

Suggestions

- Changes should be made to the Police Prosecution procedure so that victims are interviewed and the police are informed of the victims' views prior to the actual hearing.
- Police prosecutors should have sufficient legal qualifications and experience before they are assigned a case.

6.9.2 VICTIM IMPACT STATEMENTS

Currently, victims may provide the court with impact statements which are to be considered at sentencing.

> Now, more account should be taken of victim impact statements. I've heard them read out and some Judges don't even bother referring to them. I sat in on a case where a gentleman was beaten over the head with a brick. The judge mentioned his victim impact statement and that was about it.

> Victim impact statements — one of the issues that come up for people who are victims of crime is that when they get to court they may or may not be required to give evidence and they may only answer the questions put to them. There is no opportunity within our Justice System for them to stand up and say, 'This is my story.' The only opportunity available to them is through their victim impact statements and that may or may not get read, heard. It's certainly at the discretion of the judiciary to deal with it.

For victims of criminal offences and civil wrongs, legal redress is not simply a means of going to court and winning the case. Many feel threatened, intimidated and emotionally distraught by the prospect of re-living their ordeal through the court procedure, as well as the distress of being cross-examined by defence counsel.

The role of victim impact statements

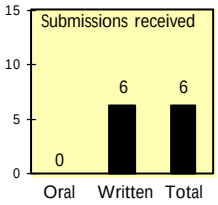
Victim impact statements provide a voice for the victim at the time of sentencing. They serve as a means of linking the harm inflicted to the punishment imposed. While many of the submissions emphasise the value of these documents, they express concern that not enough of the victim's perspective is being vocalised.

> Victim impact statements are used in Western Australia but don't carry enough weight — they are practically ignored. This is reflected in sentencing.

Furthermore, one submission proposes that victim impact statements should not be the only formal means of demonstrating the effect on the victim. Given that the victim has to live with the trauma of the offence even when the offender is acquitted, it was felt that the court process owes a little more respect to the rights of victims.

> [T]he fact that the court can only take VISs into consideration at the point of sentencing, still has the effect of the court ignoring the victim, except as a witness, in cases where the offender is acquitted. Just because an alleged offender has been deemed by the court not to have committed the offence doesn't mean the victim has not suffered as a result of the offence. However, that becomes totally irrelevant to the court and leaves a victim feeling unheard and discounted.

6.9.3 CRIMINAL INJURIES COMPENSATION



Submissions concerning Criminal Injuries Compensation focus on the victim's personal injuries resulting from crimes including:

- the nature of the injury suffered (eg severity, time frame for treatment, impact on own life); and
- the effect of the victim's injury on family and friends.

One submission expresses particular concern that the elderly, the vulnerable and those who have suffered bad injuries due to a criminal act are not being compensated.

Procedural and statutory issues arising under the *Criminal Injuries Compensation Act* prompt one submission to suggest this Act be amended so that:

1. Applications are allowed for compensation to be made even though the crime has not been proved beyond reasonable doubt;
2. The maximum amount payable to victims is increased; and
3. The time period for applying for compensation commences from the date of conviction, not from the date of the offence.

Even if the criminal activity is not proved, the injury has been inflicted and the victim still suffers, as this submission illustrates.

> While the court may be satisfied that the Prosecution did not prove their case beyond a reasonable doubt and the offender is therefore deemed not to have committed the offence, the victim, nevertheless has been hurt in some way by the crime, [and] is unlikely to be able to pursue compensation due to legal limitations and/or financial considerations and is left convinced that justice has not been done.

Two submissions outline the many complex factors associated with criminal injuries. These include personal trauma, its impact on associates, and the time and cost involved in treating injuries. The stress caused by trial proceedings, the extent of the injury and the cost to treat it, may not be fully realised nor recoverable through the compensation system.

Several submissions also note that it is difficult to be awarded compensation and argue that the maximum compensation payout is not enough. One submits that criminal injuries compensation is low when compared to compensation payouts in other areas.

> Changes must be made to the Act to update and bring in a more realistic amount payable to victims and their families for the mental trauma and physical injuries associated with the crime as it is far too low for this day and age.

Two submissions claim that it takes too long to get compensation. While one submission points out that receiving compensation in taxed instalments

is inappropriate, another argues that each compensation case should be judged on its merits. Both submissions indicate that the compensation awarded is often not appropriate.

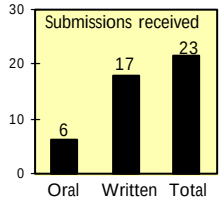
Suggestions

- *The Criminal Injuries Compensation Act* should be amended to allow compensation for the victim without conviction of the perpetrator, to increase the amount of compensation payable, and to extend the time frame for applying for compensation.

6.10

Other Concerns

6.10.1 DRUG POLICY



Submissions concerning this broad and largely contentious issue can be split into two categories.

- Criminal responsibility while under the influence of alcohol or drugs; and
- Decriminalisation of drugs.

Fifteen submissions were received with regard to drugs and decriminalisation. Four submissions suggest there is a need for decriminalisation of drugs and that the drugs should be treated as a health issue. Several submissions note concerns regarding drug-related crime statistics. One submission suggests there is a need to find ways and means of directing 'the criminal law to what is truly criminal.'

A number of submissions also note the right of choice is a significant issue in the drug decriminalisation debate.

> People are sick of laws regulating substance abuse.

Several submissions suggest the need for research and/or trials related to drug use or decriminalisation, while another submission claims the following.

> [S]tudies are often promising in the early stages but prove to be inconclusive in the end.

Other submissions cite the need to decriminalise users but to continue to treat the supply of drugs as a criminal offence.

> Drug users are decriminalized while the unlicensed supply of drugs continues to attract penalties under the Criminal Code.

Criminal responsibility when intoxicated or impaired by drugs

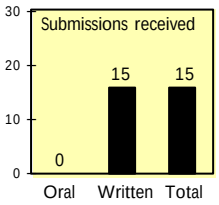
Two submissions address the issue of whether a person should be held responsible for crimes committed while intoxicated. One submission expresses reservation as to whether intoxicated offenders should be blamed entirely for their actions, while another argues that the intent to commit a crime is still present.

> If a person has an intention to commit a crime and take drugs, he may still be in control of his senses.

Another submission also expresses concern that people who commit serious crimes while intoxicated are not being convicted.

6.10.2 EDUCATION

Education is emphasised in a number of submissions.



> With education: how would you do it? By lawyers or teachers? And would parents attend given they are also ignorant about it?

While not included in the terms of reference, education holds particular relevance for members of the community as a means of preventing crime, as well as a source of empowerment for litigants. Moreover, education is playing a greater role in addressing drug issues in the community.

More than half of the 15 submissions which discuss education call for a greater focus on legal education with particular reference to self-represented litigants.

> Much more information should be presented to the public so they might act for themselves as litigants in person. The shroud of complexity and mysticism should be lifted.

> The legal system and an individual's basic legal rights should be part of the national school curriculum.

Suggestions

Suggestions relating to education include:

- A stronger focus [should] be placed on the teaching of law education in schools, particularly in relation to human rights, citizenship and court procedures.
- Citizens should be provided with standard procedural advice prior to court appearances.
- Community legal centres should advertise their services to the community;
- Information regarding alternative dispute resolution should be made available prior to the involvement of legal practitioners.
- Section 21(1)(b) of the *Occupational Health and Safety Act* should be used in relation to public safety and the links with civil liability.

6.10.3 THE MEDIA

Four submissions deal with media-related issues. These submissions advocate better reporting of cases, a possible penalty for misrepresentation, and the issue of defamation.

This submission indicates concern about media involvement in reporting legal cases.

> Educate politicians and media involved in reporting and commenting on [legal] issues. The better English newspapers used to employ barristers to write their stories. This way one would get a better informed public and a more coherent debate.
>
> The courts should have the power to convict for contempt or misrepresentation those responsible for selective reporting.

Defamation

While defamation issues may not be strictly media-related, there is a common link in that both concern the dissemination of information. One submission advocates that the court's focus should be on whether the statement is true rather than on its capacity to inflict harm.

> Defamation laws must be changed. Ordinary people cannot speak out about corruption. The test must be the accuracy of the statement not how much damage the complainant suffers.
>
> The defamation law needs urgent review with the test being that the truth was told.

6.10.4 CORPORATE ISSUES

Another submission expresses discontent with the ability of corporate regulators to adequately protect consumer interests.

> In Australia another area of concern in both the criminal and civil system is the superannuation industry (Fowler, 1997 ABC Video).…The legislation in this area is so complex that the regulators have a limited understanding of it, hundreds of millions of dollars of investors funds is being lost every year through mismanagement, negligence and fraud.

It also issues this warning.

> Dishonest operators of Superannuation schemes can transfer millions of dollars with a few strokes at a keyboard.

Strata Titles

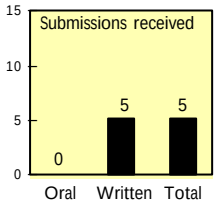
One submission expresses concern regarding strata companies' power to make by-laws which are enforceable in court and recommends the following.

- Strategies be put in place so that the legal profession and the public can take advantage of the Strata Titles Reference Office;
- The *Transfer of Land Act* and the *Property Law Act* be reconstituted; and
- The Community of Titles Bill be scrapped.

6.10.5 FAMILY ISSUES

Issues concerning the family are important to many people. The submissions on this topic involve alleged problems with the Family Court and the Department of Family and Childrens' Services. One submission constructs this proposal.

Reforms to Family and Children's Services



> [T]hat Family and Childrens' Services' Powers be reviewed. They take advantage of vulnerable people and make illogical and prejudicial decisions against the well-being of some children.

Others make these assertions.

> It is recognised that children are traumatised not only by violence, neglect or harassment. Abuse can be perpetrated or exacerbated by insensitive, neglectful or exploitative practices of government agencies set up to assist the child.
>
> We request that…. A law be made that calls on the Government to establish an independent Case Review Board, not departmental.

6.10.6 GENDER ISSUES

Several submissions express concern that women, in particular, lack knowledge of their legal rights and the protection of those rights in Western Australia.

Women's concerns

> A community legal education system be developed to deal with the vast lack of knowledge by women in relation to their legal rights and the protection of them.

Other suggestions which specifically relate to women include:

- Court personnel — including court services, judges, lawyers and court staff should receive ongoing training in issues related to bender bias, cross-cultural awareness, disabilities, sexual assault and domestic violence;
- A feminist legal scholarship be established 'within all compulsory introductory subjects in law programs':
    - University law schools [should] incorporate … specific units to address domestic violence and sexual assault;
    - The Law Society of Western Australia [should] provide continuing legal education programs and professional outreach [programs] [to] educate lawyers on the special needs of victims of domestic violence and sexual assault.
- Professional Conduct Rules should contain a provision that sexual harassment is unprofessional conduct.

Other gender issues

One submission calls for men and women to be required to dress with comparable formality.

> Surely, in these times, when the sexes are supposed to be getting nearer to equality, if men are required to wear suits, including ties, in court, then so also, should the same standard apply to women. Of the lawyers that I have seen at the various federal and state court levels, all the males have been wearing suits, with ties, and the women have been generally wearing open-necked blouses.

Another submission believes the extensive use of sexist language throughout the Criminal Code discriminates against males and favours females by indicating only men commit offences under the Code. The writer asserts that use of male gender specific pronouns:

- is sexist;
- is in contravention of the Equal Opportunity Act WA (1984); and
- contravenes Australia's international human rights treaties and obligations because the use of 'he' discriminates against males and favours females.

The submission claims sexist language in the Criminal Code also:

> ... affects the impartiality and objectivity of the administration of this Act at every level of Government, including the Anti Corruption Commission, and even the Courts, who are obliged by such sexist terminology to show sex bias and discrimination, without even being conscious of it.

Suggestions

- Implement gender neutral dress codes for court appearances.
- Review the language used in the Criminal Code to eliminate sexism, bias and discrimination against males.

6.10.7 FAMILY COURT MATTERS

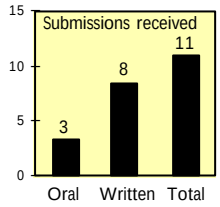
Four submissions express general discontent with the Family Court.

> The Family Court has got out of hand.
>
> [The Family Court] is top heavy judges, officials and complicated procedures.

The submissions raise other issues including:

- costs,
- domestic violence in Aboriginal communities,
- cumbersome processes and structures in the Family Court, and
- inconsistencies in custody and guardianship laws across states and territories with respect to de facto relationships.

6.10.8 WIGS AND GOWNS



> Get rid of wigs worn by judges; the wool is being pulled over their eyes.

This submission sums up the views of the majority of those concerned enough to make submissions on the subject.

The following submission sees robing as having a negative effect.

> The wearing of wigs and gowns in the Supreme and District Court only adds to the ivory tower images of judges. It's high time all uniforms were abolished.

Another submission suggests wigs are an anachronism which keeps the legal system from entering the 21st century but the submission does endorse the retention of black robes. One submission describes the legal system as being 'clothed in mystique and tradition' and makes the following suggestion.

> [It is time to] break down the traditional, intimidating persona of the law which adversely affects people.

Another submission puts it even more forcefully.

> For God's sake, scrap the ridiculous, antiquated, 17th century drag that Judges are forced to wear, for it is inappropriate, meaningless and I'm sure panders only to the vanity of the wearer. The remoteness and fantasy character of the costumes are often reflected in the decisions handed down. Please, let's get real and modernise our system!

'Fancy dress should be abolished — period!' declares other submissions.

> [T]he wearing of strange costumes, such as the wigs, and the robes by lawyers, and the coloured robes by judges, should be eliminated. These costumes merely give the impression that judges, and lawyers, are strange, inhuman beings, with no grasp of reality, and no knowledge of conditions in the real world, outside their courtrooms.

One submission declares that anachronistic dress, as part of pomp and ritual, is favoured by those opposed to change who are 'doing all in their power to maintain the 'quo ante'.'

A place for wigs and gowns

Opposition to the wearing of wigs and gowns is not universal. One submission thinks people should continue to wear wigs and gowns at all times in the court room as a means of imbuing respect for the system.

> If there was more respect in the courtroom there would be less crime outside the courtroom.

Another submission expresses the view that wigs and gowns should be reserved for:

> [S]pecial occasions such as graduation ceremonies, opening of law year, in church services and opening of the Parliament.

The compromise position: off with the wigs but keep the gowns

One submission notes that the High Court of Australia and the Federal Court have 'done away' with wigs, as have the speakers and clerks in the Federal Parliament, and suggests that judges in the State courts should follow the federal precedent.

Another offers this suggestion.

> It would be much more human and respectable, for parties to an action and their lawyers to be formally dressed, such as in formal suits and for judges to wear simple black robes , as I believe is done in the United States of America.

According to another submission the black robes for judges are internationally accepted dress. The submission mentions that the International Court of Justice and judges in the USA wear robes.

Unfairness as a result of courtroom attire and design?

One submission illustrates the impact of the wigs and gowns at the bar table on the accused with the following example. A witness may be asked: 'Is that person in the Court?' With all the wigs and gowns at the Bar table, the accused stands out like a sore thumb. The witness simply points to the person 'in the dock where the accused is exposed to humiliation and stress.'

REVIEW OF THE CRIMINAL AND CIVIL JUSTICE SYSTEM — SUBMISSIONS SUMMARY

Appendices

Appendix 1

Acknowledgments

The following individuals and organisations contributed to Project 92 by making submissions or attending a public meeting during the Review of the Criminal and Civil Justice System. Others who wish not to be named also contributed to this report.

Philip Achurch
Richard Agar
Ailsa Allen
Commissioner M Allen, Ombudsman (WA)
Sue Allen, WA Child Protection Council
Catherine Allett
Sheila C Amsden, Legal Aid (WA)
Marcus J Anderson
D Anderson
Murray Anderson
Ross Annear
H Anstey
Belle Arnell
Claire Arnell
Sarah Arnell
Reverend Attila Balla
Carol Bahemia
Austin Bailey
Jo-Anne Bailey
Mila Bake
George Baker
Di Baker
Den Baker
Rob Banks
Nigel Barker
Maeve Barry
Paul Bartholomew, Disability Services Commission
Ted Barton
Peter A Bass
Ken Bates, Office of the DPP (WA)
Marion Beauyear
Mary Bell
Yvonne Bell
GI Bellamy, Attorney General's Dept (ACT)
Brian Bennett
ES Bew
Emilia Biemmi
David Bird
Robert Black, Stipendiary Magistrate
Lani Blackman, ALRC
HTJ Blakeley
BH Boeyboer
KM Boothman, Stipendiary Magistrate
Lisa Boston, Criminal Lawyers Assoc (WA)
Lawrence Boulle, National ADR Advisory Council
Christopher Boyle
Ivan Bozac
Robert Bradshaw, Northern Territory LRC

Denise Brayley
Master TR Bredmeyer CBE, Supreme Court of WA
Kathleen Brennan
Maureen Briggs
Kathleen Bronson
Charles Brookes
Douglas Brown
Clive Brown
Michael Brown
Ron Brown
Keith MCM Brown
Ivan G Brown, Stipendiary Magistrate
Joseph Buch
Jan Burgess
Chris Burke
D Burns
A Burrough
Amanda Burrows, Criminal Lawyers Assoc (WA)
RH Burton, Stipendiary Magistrate
David Burton-Woods
Bret Busby
K Butler
CL Caine
Margaret Calabrese
GN Calder, Stipendiary Magistrates' Society
Manuel Calzada
G Campbell, House of Representatives
D Candeloro
Robyn Carroll,
Stephen Carson
R Cavanagh
Adrian Chadwick
Paul Chadwick
John Chaney
Adam Chappell
Arthur Chappell
Narelle Chappell
Rosemary Charsely
Lisa Chighine
Patti Chong, Office of the DPP (WA)
Paul Chong
Laura Christian
Bobby Chudziak
Fernando Chugnak
AE Clark
J Clayton
ME Clayton
Frances Clogham
Peter Cock
Peter Cockson
RT Cole
Debora Colvin
Edgar Connor
Dr Elizabeth Constable, Legislative Assembly
Frank Cooper
John Cope
Marlene Cowan
Nathan Cox
Peter J Cox
Hon Ross Cranston, Office of the Solicitor General WA (England)
JS Cream
Mark Criddle
Helen Croasdale
Dr Kathryn Cronin, ALRC
Fiona Cross
F Crowley
Paul Crown
Christine Cuccaro
Dee-Anne Cuccaro
Jennifer Cuccaro
Michelle Cuccaro
Tony Cuccaro
Maureen Cuddy
Sean Cuddy
Brian Cunningham
Peter Daniel
Reverend George Davies
Dr Martin JS Davies
John Dawson
Christine Dawson
John Dean
Lyn Dias
I Dibden
G Difrancesco
Tom Dillon
Effie Dimopoulos
NE Dixon
Simon Dixon, Supreme Court of WA
Shawn Doherty
Don Douglas
John Down
Michael Drowns
Jim Duffield
EP Duffy, False Memory Association
FJ Dunstar
John Durey
Helen Dyer
P R Eaton, WA Bar Association (Inc)
Philip Eaton

James Edelman
Jim Edmondson
PM Edward
Anne Edwards
Kerry Edwards
Jean Edwards
John Edwards
Gabrielle Egan
Ken Ellis
Allan Ellis
Vic Evans, Insurance Comm (WA)
Jeanette Evans
Robin Faceuts
RA Fagents
Mal Fairclough
Scott Farris
Antoinette Fedele
Sheena Ferguson
Ray M Finlayson
Robert Fisher, Disability Services Commission
Dave Fitch
Dr Robert E Fitzgerald, Policy and Legislation, Ministry of Justice(WA)
Susan Flett
Martin Flynn,
Joe Forrest MA
Richard Foster, Court Services, Ministry of Justice (WA)
John Foster, Association of Consulting Engineers Australia
Kay Fraser
Neville Friedman
Joanna Fung
Anna Furina
Donna Furina
Elia Furina
John Furina
Alison Gaines, Law Society of WA
Michael Garbin
Norma Garbin
M Garnett
David Garnsworthy
Jennie Gausten
John Gerry
Hans Gersch
Michael Gething
RJ Gething, Stipendiary Magistrate
Guy Gibson
Natalie Gibson
Ralph Gielow
Anne Gisborne
JA Gleeson
Lindsey Glenn
Robert Glynn, Stipendiary Magistrate
J Gordon
Commissioner John Gotjamanos
Anne Grasser
HR Green, WA Police Service
Annette Green
Aroha Greenwood
Hannah Greig, Lord Chancellor's Department (London)
Bob Griffith
Desmond Grimmer
ZJ Gulish
Hon Judge IR Gunning, District Court of WA
BV Haddon
Alison Hagan
Robert D Hall
Hon Judge KJ Hammond, Chief Judge, District Court of WA
Franklyn C Hamsher
Brian Handcock
MJ Harding
Julia Harrison, Attorney General's Dept (NSW)
Laurie Hatch
Barbara Hatch
Richard Hatchett
Sonia Hawes
Todd Hawes
Julie Hawkins
Karen Hayne
Fred Haynes
Paul Healy
SA Heath, Stipendiary Magistrate
Hon Justice DC Heenan, Supreme Court of WA
Professor Laurie W Hegvold
Glen Helgelend
Dr Arthur J Hempel
Helen Henderson
Kevin R Herbert
M Herron
Caroline Hickling
S Hicks
Lizzie Hill
Giselle Hobbs
R Hobson
Kirsten Hoeft
Mr Hollander
Jack Holmes

Janice Hoover
Charles AO Horner
Jill Howieson
Shane Howlett
Brad Hucker
KP Hutchinson
David Imlah, Aboriginal Legal Service
JF Ingvarson
C Iozzelli
E Iozzelli
Hon Justice DA Ipp, Supreme Court of WA
Doug Irvine
Deenie Jacka
Hon Judge HH Jackson, District Court of WA
HA Jaensch
Rob Jago
Bridget James
Colin James
L James
T James
Lee Jarman
Chantelle Jeans
Simon Jelly
P Jenkins
Joy Jesnoewski
J Johansen
Paul Johnson
Ben Johnston
Clayton Johnston
Michael Johnston
Margaret Jordan
Murray J Joyce
Rebecca Jury
Vic Justice
Helen Justice
Carol Kagi, Women's Policy Development Office
Maxine Keeffe
Hannah Kendall
Paul Kennard
Hon Justice G Kennedy, Supreme Court of WA
Richard Kessell
Michelle Keys
Peta Kierath
John King
Steve King
George Kingsley, Registrar, District Court of WA
EG Kirk
D Kitching
Brad Kneebone
Peter Knight
John Knowles, Disability Services Commission
Kathy Krajcak
S Krysiak
T Krysiak
M Lakin
Megan Lam
J Langford
Wyn Langouland
Peter Law
Geoff Lawrence
Paul Le Fort
E Leech
Alastair Leonard, Helena College
Karen Lewis
John Ley, Law Society of WA
R Lindsay, Legal Aid Comm (WA)
Merinda Logie
Jo Lohrey
R Lovat
Steve Lowe
GJ Luke
Max Luscombe
Elisabeth Lynn, National ADR Advisory Council (ACT)
Ian MacFarlane
John Maguire
M Maguire
Steven P Mailey
Ian Main
Hon Justice DK Malcolm AC, Chief Justice, Supreme Court of WA
Kath Mallott
Jody Mancini
V Markovich
S Marks
Barry Marlow
Archie Marshall
Peter Marshall
Sarah E Marshal
Lloyd Martin
Rita Martin
Ian Martindale
David Martinu
John Robert Mascarenhas
Ian May
Joy McAloon
Kevin McAloon
Ann-Marie McCann
Frank McCarthy

Graham McCorry
Michelle McDiarmid, Sussex Street Community Law Service Inc
Karen McDonald, Helping All Little Ones
Hannah McGlade
Annette McGready
Greg McIntyre
John McKechnie QC, former DPP
Peter McKerrow
Kevin McMahon
Gregg McMichan
Carol McPherson
Richard McPherson
Owen Meeks
Peter Mellor
Paul Mendelow
Bruce Menzies
Gavin Meraden
Julie Mercer
Leon Michaels
Tom Miller
Robyn Millett
Pippa Minchim
David PA Moen
Josephine Moir
Peter Money
RE Monger
Adam Moore
M Moore
Mavis Moore
Warren Moore
K Moore, Stipendiary Magistrate
Kevin Moran
Alexa Morcombe
Margaret Morgan
Steve Morgan
SL Moss
Adam Mucjanko
DF Muir
Mark Mullins, Attorney General's Dept (ACT)
Nick Murfett
G Murphy
Hon Justice M J Murray, Supreme Court of WA
Lyndy Murray, Office of the DPP (WA)
Rochelle Mutton
Dieter Nack
Sue Nack
Tatiana Naumova
Shannon Naylor
Trevor Newman
Beverley Newton
Hon Justice RD Nicholson, Federal Court of Australia (WA)
Elizabeth Nicholson
Medalla Nicklin
Marnie Noonan
AL Nottage
EA Nottage
Baron Nourish
Melanie Nye
L Nyman
Kate O'Brien, former President, Law Society of WA
J O'Dea
Paul O'Halloran
Margie O'Halloran
Patrick O'Neal
Hon Judge MDF O'Sullivan, District Court of WA
E Oakley
Shane Odea
Noel Olive
Dick Oliver
D Oliver
Mitch Orman
Kerry Ottobrino
Justice NJ Owen, Supreme Court of WA
Robin Parkes
Karen Joy Patterson
L Pavlinovich
J Pease
Steven Penglis, Law Society of WA
Shane Peterson
Angela Petros
Pauline Phillips, Victim Support Service
Lyn Phillips
AD Phillipson
The Hon Justice WP Pidgeon, Supreme Court of WA
Clare Pike
Catherine Pine
Martin Pinnell
Trevor Pinnell
Alan Piper, Director General, Ministry of Justice (WA)
D Pirie
Leonie Plant
HO Platel
Plowman
Joe Poland

Loretta Poland
Kyriacos (Kary) Politakis
KJ Porter, WA Police Service
Tony Power
C Roger Pratt
Helen Prince, Criminal Lawyers Assoc (WA)
Sheena Prince
Hon AKR Prince, Legislative Assembly
John Prior, Criminal Lawyers Assoc (WA)
Deane Prosser
Julia Prynne
Joel Puddey
S Purvis
P Quinlan
Margaret Quirk, National Crime Authority
France Radford
Shaun Ramsden
J Rando
Lynda Reavell
John Redgment
Barbara Reeves
Richard Reynolds
W Richards
James Richardson, Community Action Legislation Lobby
Margaret Richardson
David Roberts, Attorney General's Dept (ACT)
Julie Roberts
Lionel S Roberts
Len Roberts-Smith
Maureen Robinson-Dickes
Lisa Roche
Shane Rooney
Dean Ross
Rob Rowe
Hon BW Rowland QC, Parole Board (WA)
Hon Judge GT Sadleir, District Court of WA
Michael Said
Robert E Sammells
Anthony M Sampson
Wayne Michael Saunders
Rachel Schairer-Vertannes
Jeff Scholz, Office of the Cth DPP (WA)
John Schulz
Sandra Scott
Ron Scott
CL Searle
John Secker
Jim Shannon
EW Shannon
Ross Sharland
Noel Sharp
Dr Ruth Shean, Disability Services Comm
Mr Shenton
E Sheppard
H Sheppard
Julian Sher
G Sherwood
Sally Shine
Brenton Siviour, Forensic Accounting Special Interest Group
C Slater
Christine Slattery
Clive Small
Gordon Smith
Graeme Smith
John Smith
Karry Smith
Kevin Smith
Lorraine Smith
Peter Smith, Metropolitan & Country Bailiffs' Assoc
Rosemary Smith
Wayne Smyth
David Standen
Ian Steele, Institution of Engineers Aust
Greg Steinepreis, LEADR (WA)
Brooke Stephens
Justin Stephenson
Scott Stevens
Mark Stevenson
Hon Justice CD Steytler, Supreme Court of WA
Rodney F Stone
David Strang
Faye Strang
George Strang
Oliver Strang
Murray Stubbs
S Suba
Tracey Summerfield
Milos Supljegla
A Sutherland
Matthew Swainston
Margaret Swaving
Lou Swaving
Max Szulc
Alex Tag

Carol Talbot
Carolyn Tan
Andrew Taylor, ASIC
B Taylor
EV Taylor
Geoff Taylor
R Taylor
Deborah Templeman
Brian Tennant Australian False Memory Association
Jan Ter Horst
J Tevake
S Tevake
Anita Thick
Ray Thompson
Dorothy Thompson
Katheryn Thomson
Joshua Thomson
Tlipe Tlic
W Trevor Tobin
Rosa Tognela, County Women's Assoc
Lyn Tolliday
Carolyn Tomich
Joanne Tomkins
Joan Torr
Arthur Torr
Ron Troughton
John Tully
Glenn Turner
Haylie Turner
Jenny Turner
Stella Turner
A Turner
J Twiss
D Ullrich
Richard Usher, Institution of Engineers Aust
J Verkerk
Mike Vernem
Rose Vernem
Nick Vickery
Jim Vondeling
John Vulcovich
Helen Vulcovich
Julie Wager
Ben Walker
M Wallace
Kristen Wallwork
June Walmsley
Dr KC Wan
Janine Ward, Attorney General's Dept (ACT)
CM Ward
Jamie Ward
J Warrick
R Washing
Anna Wasylkewycz
MJ Watson
Judy Watson
Michael J Watson
P Watson
Bev Watterson
Michael Watterston
Kevin Waycott
Lucy Webb, Occupational Therapy Services
Professor David Weisbrot, ALRC
Dallas Weller
BJ West
Willie Westlake
Peter Weygers, President, Council of Civil Liberties (WA)
Hon Justice CA Wheeler, Supreme Court of WA
Mr Whitbridge
Evan Whitton
Leon Wilken
Christopher Williams, Sussex Street Community Law Service Inc
Mark Willia
Daryl Willis
William P Wilson
Bruce Wilson
Stephen Wilson
William P Wilson
Doug Wise
Margaret Wise
CJ Worthington
Robert Wright
RW Wylde
Lisa Wyman
Hon Judge MA Yeats, District Court of WA
Grahame Young
B Zimmermann

Appendix 1I

Issues Paper

The Law Reform Commission's Issues Paper dealing with the Review of the Criminal and Civil Justice System in Western Australia is the most widely circulated paper of its kind in the history of this Commission. More than 16,000 printed copies were circulated and additional copies were downloaded from the Commission's Internet website during 1998.

The Issues Paper attempts to explain in plain English the issues arising for review under the Terms of Reference which the Commission received from the Attorney General. The Terms of Reference are found on the last page of the Issues Paper.

A number of school and university classes throughout Western Australia had the opportunity to review the Issues Paper as part of courses dealing with law and the justice system.

Most submissions, except those relating directly to the Consultation Drafts' proposals, came to the Commission in response to the Issues Paper. For this reason, the majority of the topics presented in this Submissions Summary relate to matters discussed in the Issues Paper.