THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 55 – Part II

Courts of Petty Sessions
Constitution, Powers and Procedure

REPORT

NOVEMBER 1986

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972-1985*.

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To: **THE HON J M BERINSON MLC**
ATTORNEY GENERAL

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972-1985*, I am pleased to present the Commission's report on *Courts of Petty Sessions: Constitution Powers and Procedure.*

P W Johnston
Chairman

11 November 1986

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Abbreviations

Ordinance (ACT)	*Magistrates Court Ordinance 1930-1985* (ACT)
Allen	W K A Allen, *The Justices Acts of Queensland* (3rd ed, 1956)
Magistrates' Courts Act (Eng)	*Magistrates' Courts Act 1980-1984* (Eng)
Discussion Paper	Law Reform Commission of Western Australia, *Courts of Petty Sessions: Constitution, Powers and Procedure* (Project No 55, Part II, 1984)
Dixon Report	*Report of the Committee of Inquiry into the Rate of Imprisonment* (1981)
Local Courts Working Paper	Law Reform Commission of Western Australia, *The Local Courts Act, 1904-1982 and Rules: Jurisdiction, Procedures and Administration* (Project No 16, Part I, 1983)
March 1984 Survey	A survey conducted for the Commission of charges finalised in Courts of Petty Sessions (other than those dealt with at Perth and East Perth) during March 1984
Murray Report	M J Murray QC, *The Criminal Code: A General Review* (1983)
Newby and Martin	H E Newby and M Martin, *Aborigines and the Criminal Law: A Study of Summary Criminal Courts in Two Country Towns in S W Australia*, 53rd ANZAAS Congress (Perth, 1983)
Justices Act (NSW)	*Justices Act 1902-1986* (NSW)
Justices Act (NT)	*Justices Act 1928-1985* (NT)
Summary Proceedings (NZ)	*Summary Proceedings Act 1957 - 1985* (NZ)
Provincial Offences (Ont)	*The Provincial Offences Act 1979* (Ont)
Philips Commission	*Royal Commission on Criminal Procedure* (UK) (Cmnd 8092, 1981)
Justices Act (Qld)	*Justices Act 1886-1985* (Qld)
Justices Act (SA)	*Justices Act 1921-1985* (SA)
Justices Act (Tas)	*Justices Act 1959-1986* (Tas)
Magistrates' Courts Act (Vic)	*Magistrates' Courts Act 1971-1986* (Vic)

Summary Proceedings Act (Vic)	*Magistrates (Summary Proceedings) Act 1975-1986* (Vic)

Chapter 1

INTRODUCTION

1. TERMS OF REFERENCE

1.1 The Commission has been asked to review the *Justices Act 1902-1985*.

2. STAGES OF THE PROJECT

1.2 The *Justices Act 1902-1985* ("the *Justices Act*") regulates a number of matters relating to justices of the peace and Courts of Petty Sessions. Those matters considered in this report are -

(a) justices of the peace;
(b) the constitution, composition and jurisdiction of a new court, a Magistrates' Court, merging Courts of Petty Sessions and Local Courts;
(c) the procedure for dealing with complaints of simple offences and indictable offences being tried summarily;
(d) preliminary proceedings for indictable offences;
(e) the preventive jurisdiction of the Magistrates' Court; and
(f) unrepresented defendants.

The Commission has already reported on a number of other aspects of the *Justices Act*, namely appeals from decisions of Courts of Petty Sessions and justices, bail and the retention of court records.[1]

1.3 The Discussion Paper contained a chapter on summary proceedings and mentally disordered persons.[2] The Commission has decided to report on the issues raised in that chapter in its report on the *Criminal Process and Persons Suffering from Mental Disorder* (Project No 69), because it is more appropriate to consider them in the context of the other issues which will be considered in that report.

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1 *Review of the Justices Act 1902: Part I - Appeals* (1979); *Bail* (1979) and *Retention of Court Records* (1980).

2 Ch 8.

1.4 Only one other aspect of the project has yet to be addressed, namely the enforcement of orders under the *Justices Act*, including the reciprocal enforcement of fines against bodies corporate. This matter has been deferred to enable the Commission to take into account decisions by the Government on the recommendations as to the enforcement of orders contained in section VI of the Dixon Report. The Commission will report on this matter in due course.

3. CONSULTATIONS

1.5 In order to seek public comment on various issues considered in this report, the Commission published the Discussion Paper and a questionnaire in 1984.[3] A large number of people and organisations responded and their names are listed in Appendix I. The Commission wishes to express its appreciation for the time and trouble they took. All views expressed have been taken into account in the preparation of this report.

1.6 Since the publication of the Discussion Paper representatives of the Commission have held consultations with the Council and branches of the Royal Association of Justices of Western Australia. For this purpose visits were made to Albany, Geraldton, Gnowangerup, Narrogin and Pinjarra.

4. THE COMMISSION'S APPROACH

1.7 Although the Commission sees a need for some formal restructuring, it does not see a need for fundamental changes to the present procedures. Changes are recommended where the Commission is satisfied that change is necessary to promote greater fairness, simplicity or efficiency. Circumstances can arise where there may be a conflict between these goals. Although simplicity and efficiency are desirable, the Commission does not consider that they should be pursued at the expense of fairness. Fairness in criminal proceedings not only involves elements such as uniformity, clarity and certainty in rules and practice but, most importantly, "some sense of balance between the State and the individual."[4]

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3 Prior to the publication of the Discussion Paper the Commission through public advertisements obtained preliminary submissions from interested persons. It also consulted a number of people with expertise in the area. The responses helped the Commission to focus on questions of practical importance.

4 P Sallman and J Willis, *Criminal Justice in Australia* (1984), 10.

1.8 In deciding what recommendations to make the Commission has carried out a study of the relevant law elsewhere in Australia, in New Zealand, England and a number of other jurisdictions. The provisions in most of these jurisdictions are based on or developed from the *Jervis Acts*[5] of 1848 and consequently have many common features. They are referred to below when they may provide a basis for reforming the law in Western Australia.

5. IMPLEMENTATION

1.9 The existing *Justices Act* is the result of the consolidation in 1902 of a number of earlier Acts, together with 37 amending Acts, some substantial, made in the 84 years since then. Irrespective of the extent to which the Commission's specific recommendations are adopted, it considers that many of the provisions should be redrafted to ensure that they are expressed in contemporary terms. Some legislative reorganisation would also be necessary if the Commission's recommendations in chapter 3 below are adopted. The following matters could be dealt with in separate enactments -

(i) the constitution and jurisdiction of the court;
(ii) the procedure of the court; and
(iii) matters relating to the appointment, termination of appointment and protection of justices of the peace.

Another matter that will require attention is the removal of provisions which are either obsolete or duplicated in other statutes.[6]

1.10 It is not intended that the procedural reforms recommended in this report should lead to the development of a comprehensive code of procedure. The court should continue to have inherent power to control its procedure where there is no relevant statutory provision.[7]

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5 See Discussion Paper, 13 footnote 1.

6 For example, s 40 of the *Justices Act* is substantially the same as s 74 of the *Police Act 1892-1985*. S 39 of the *Justices Act*, which provides a simple procedure for seeking an order in lieu of mandamus could be repealed if the simplified procedure for obtaining relief in the nature of mandamus recommended by the Commission in its report *Judicial Review of Administrative Decisions: Procedural Aspects And The Right To Reasons* (1986) is adopted.

7 See *Sparks v Bellotti* [1981] WAR 65, 69.

6. THE ROLE OF COURTS OF PETTY SESSIONS

1.11 In order to place the specific recommendations in the following chapters in context it is necessary to outline the role of Courts of Petty Sessions in Western Australia. These courts deal with charges of simple offences against adults,[8] such as traffic offences, drunkenness, disorderly behaviour or common assault. They also deal with indictable offences triable summarily, such as serious assaults and stealing, and conduct preliminary proceedings relating to indictable offences which are not tried summarily. Apart from these criminal matters, Courts of Petty Sessions also have jurisdiction under various statutes to deal with a range of administrative and licensing matters.

1.12 Courts of Petty Sessions are held in a large number of towns throughout Western Australia, including those as remote and as small as Eucla and Halls Creek. The wide availability of these courts enables charges for minor offences to be disposed of more speedily and conveniently for those involved than if they had to be dealt with at a regional centre.

1.13 Courts of Petty Sessions deal with the great bulk of charges disposed of by courts in Western Australia. In 1983-1984, 80,338 charges were dealt with by Courts of Petty Sessions other than those at Perth and East Perth.[9] Although detailed statistics are not available for Perth and East Perth it is estimated that 70,000 charges were dealt with in those courts in the same period. By comparison, during that period the Supreme and District Courts together dealt with 2,881 charges.[10] Courts of Petty Sessions are able to cope with the large number of cases before them because most defendants plead guilty.[11] In most instances, therefore, the judicial officer's major responsibility is to impose the appropriate penalty.

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8 Children's Courts in addition to having jurisdiction to hear and determine a complaint of an offence (other than wilful murder, murder, manslaughter or treason) alleged to have been committed by a person under the age of 18 years (*Child Welfare Act 1947-1985*, s 20) also have jurisdiction to deal with certain offences against children: id, ss 20, 20B and 20C. Unless otherwise specified, the provisions of the *Justices Act* apply to hearings in Children's Courts: id, s 143.

9 Australian Bureau of Statistics (Western Australia), *Court Statistics: Courts of Petty Sessions Western Australia 1983-84*.

10 Australian Bureau of Statistics (Western Australia), *Court Statistics: Higher Criminal Courts Western Australia 1983-84.* A further 26,361 charges were dealt with by Children's Courts: Australian Bureau of Statistics (Western Australia) *Court Statistics: Children's Courts Western Australia 1983-84*.

11 In the March 1984 Survey, pleas of not guilty accounted for only 4.36% of cases in which a plea was entered.

1.14 Courts of Petty Sessions may be constituted by a stipendiary magistrate or by two or more justices of the peace or, in certain circumstances, by a single justice. The only survey[12] covering the whole State which provides information on the respective roles of these judicial officers indicates that stipendiary magistrates deal with the bulk of charges. According to the survey they were responsible for 82.35% of convictions recorded during September 1979. A lesser role is played by two or more justices (13.85% of such convictions) and single justices (3.80% of such convictions).[13] According to the March 1984 Survey (which did not include the courts held at Perth and East Perth), stipendiary magistrates heard 68% of charges, two or more justices heard 22% of charges and a single justice heard 10% of charges.

1.15 Justices today rarely hear defended cases. Where a defendant pleads not guilty before justices, they will generally adjourn the case so that the trial can be conducted by a stipendiary magistrate. Although stipendiary magistrates also deal with the bulk of charges where the defendant pleads guilty, they tend to deal with a greater proportion of guilty pleas in the Perth metropolitan region and in the country centres in which they reside.[14] Though magistrates visit other towns, [15] there is a greater likelihood that guilty pleas in these towns will be dealt with by justices.[16]

12 This survey was conducted for the purposes of the Dixon Report.
13 Discussion Paper, 28.
14 Albany, Broome, Bunbury, Carnarvon, Geraldton, Kalgoorlie, Northam and Port Hedland.
15 At present 81 other towns are visited by stipendiary magistrates on a periodic basis.
16 Newby and Martin, 10.

Chapter 2

JUSTICES OF THE PEACE

1. INTRODUCTION

2.1 This chapter contains recommendations relating to the appointment, jurisdiction and protection of justices and some ancillary matters. Though in the past justices of the peace played a wider role in the administration of government and justice in this State,[1] their main functions at the present time are -

(1) **Taking affidavits**: A number of Acts provide that an affidavit may be sworn before a justice of the peace.[2]

(2) **Taking statutory declarations**: Justices of the peace, together with a large number of other people (including commissioners for declarations, town or shire clerks, State and Commonwealth public servants, school teachers and police officers) are authorised to take statutory declarations.[3]

(3) **Receiving complaints, issuing summonses and warrants and granting bail**: Justices of the peace have authority under the *Justices Act* to receive complaints and issue summonses and warrants of arrest. They also have authority to issue warrants under a number of other Acts including the *Criminal Code* (a search warrant)[4] the *Police Act 1892-1985* (a search warrant)[5] and the *Restraint of Debtors Act 1984* (a warrant of arrest).[6]

Where a person has been arrested and the police have refused to grant bail or have no authority to grant bail, the defendant may ask to see a justice who may

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1 Discussion Paper, para 2.1.
2 For example, *Supreme Court Act 1935-1986*, s 176; *Bills of Sale Act 1899-1986*, s 9.
3 *Declarations and Attestations Act 1913-1972*, s 2.
4 S 711.
5 S 70.
6 s 5.

grant bail.[7] At the Central Police Lock-up in Perth justices are in attendance on roster for this purpose.[8]

(4) **Conducting hearings under the *Justices Act***: Justices of the peace have power under the *Justices Act* to conduct summary trials where defendants plead not guilty and to conduct preliminary hearings in respect of indictable offences.[9] In fact, it is rare for justices to exercise these powers.

At the Central Law Courts in Perth justices deal with minor traffic offences and parking offences where the defendant pleads guilty (whether or not the defendant appears in person) or where the complaint can be dealt with on affidavit evidence.[10] In other courts in the metropolitan area justices sit from time to time. For example at Midland they sit on Saturday mornings or public holidays (if necessary) or if the stipendiary magistrate based at that court is unavailable. At these sittings they deal with people who are being held in custody and who plead guilty.[11] If a plea of not guilty is entered, the matter is almost always adjourned so that it can be heard by a stipendiary magistrate.

In country towns in which a stipendiary magistrate resides justices sit when the magistrate is on circuit and deal with pleas of guilty and impose penalties.

In other country towns justices sit as a matter of course to deal with pleas of guilty unless a stipendiary magistrate is visiting the town on circuit. Matters in which pleas of not guilty are entered are usually adjourned to be dealt with by a stipendiary magistrate.

(5) **Other functions**: Justices of the peace also have responsibilities under other Acts. Under the *Restraint of Debtors Act 1984* Courts of Petty Sessions constituted by justices are authorised to conduct a hearing to determine whether a debtor should be required to remain in the State until the debt is

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7 The police may also of their own volition take the defendant before a justice for the purposes of bail.

8 In other areas there is an informal arrangement whereby justices attend the lock-up for this purpose on being requested to do so.

9 Ch 8 below.

10 Para 6.27 below.

11 They may also deal with people who have been on bail.

paid. The *Criminal Code* places an obligation on them to make a proclamation ordering any twelve or more persons who have riotously assembled together to disperse.[12] They may also appoint special constables to deal with any "tumult, riot, felony, or civil emergency".[13] They can also be appointed as visiting justices in prisons.[14]

2. SELECTION AND APPOINTMENT

(a) Method of selection

2.2 The *Justices Act* does not specify any qualifications for appointment as a justice. In response to a question in Parliament in 1983, the Minister representing the Attorney General in the Legislative Assembly said that the criteria for appointment were as follows:[15]

> "(1) Australian citizenship, and a minimum of 12 months' residence in Western Australia.[16]
>
> (2) A willingness and capacity to fulfil the full duties of a justice of the peace if called upon.
>
> (3) Good character, record and reputation, including preferably a record of community service.
>
> (4) A perceived need for additional justices in the area of the applicant's residence or work."

The Minister said that the following persons were excluded from appointment -

> (a) those not resident in the State;[17]
>
> (b) those with a record of criminal or serious traffic convictions;
>
> (c) those whose appointment would result in a conflict of interests; and
>
> (d) those over 65 or under 25 years of age.

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12 s 65.

13 *Police Act 1892-1985*, s 34(1).

14 *Prisons Act 1981-1985*, ss 54 and 56.

15 Western Australian *Parliamentary Debates* (1983) Vol 245, 5155.

16 The Minister was referring to persons appointed as justices in Western Australia. Some persons outside Western Australia are appointed as justices to facilitate the execution of documents: para 2.13 below.

17 Subject to the appointment of justices outside the State for special purposes: para 2.13 below.

2.3 In September 1986 there were 2,869 justices in Western Australia.[18] This is far in excess of the number required to perform the judicial duties of justices, that is, sitting in court, determining bail applications and issuing summonses and warrants.[19] Moreover, the distribution of justices throughout the State is disproportionate. While the overwhelming majority of justices are in Perth where their involvement in judicial matters is limited, there appear to be inadequate numbers of justices in some country towns, taking into account the fact that not all justices in the towns concerned are available to sit in court.

2.4 The Commission considers that justices should be selected on the basis that their primary function is to perform judicial duties as above defined.[20] The Commission believes that the total number of justices should, over time, be reduced and that their judicial competence can be enhanced by ensuring that only those persons who are willing, and needed, to perform judicial duties are appointed as justices. With fewer justices, greater emphasis could be placed on their training for the judicial role.[21] Difficulties have sometimes been encountered in obtaining support from justices for training courses.[22] This is probably understandable in that many justices may feel that because they are not regularly called upon to sit in court there is little need for them to undertake training. There may also be administrative difficulties in providing courses for large numbers of justices in differing locations and circumstances. To overcome any inconvenience caused by the reduction in the number of justices in relation to the taking of affidavits or statutory declarations, more commissioners for affidavits and commissioners for declarations could be appointed.[23]

2.5 In order to provide a more effective means of controlling the selection, distribution, training and performance of justices, the Commission recommends that a statutory committee (perhaps called the "Justices of the Peace Council") be established to -

(a) develop criteria for the appointment of justices bearing in mind that their primary function is to perform judicial duties;
(b) recommend individual appointments to the Governor in accordance with those criteria;

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18 Of this number only 12% were female.

19 There are at present about 600 justices who are aged 70 years and over. If the Commission's recommendation in para 2.17 below is adopted these persons would no longer be justices. Even so the Commission believes that the remaining number, about 2,200, is more than is required to exercise judicial duties.

20 The Commission notes that this was the view of the (UK) Royal Commission on Justices of the Peace (1948, Cmnd 7463), 11-12.

21 For an account of their present training see Discussion Paper, para 2.7.

22 Recently one course had to be cancelled due to lack of support: (1986) 29 The *JP WA Journal* 63.

23 For the power to appoint such persons, see *Supreme Court Act 1935-1986*, s 175 and *Declarations and Attestations Act 1913-1972*, s 3.

(c) develop a course of training and instruction for justices and ensure that they are kept informed of developments in the law relevant to their duties and, in particular, the sentencing principles laid down by appellate courts;[24]

(d) ensure that justices perform their duties competently;

(e) receive and investigate complaints respecting misbehaviour or neglect of duty by individual justices;

(f) recommend to the Governor the removal from office of justices who do not perform their duties competently or who are otherwise unfit to continue as a justice, for example, because of misbehaviour or mental or physical ill health.

So far as the development of criteria for the appointment of justices is concerned, the existing criteria would provide a satisfactory starting point.[25] A further criterion should be that all persons be required to complete a prescribed course of training either before appointment or within 12 months of appointment.

2.6 The Commission makes no specific recommendation as to the composition of the Council but suggests that its president be a judge either of the Supreme Court or District Court. Other members could be appointed from the magistracy, members of the Council of the Royal Association of Justices of Western Australia and the Law Society.

(b) Method of appointment

2.7 Justices of the peace are appointed by the Governor who may appoint so many justices as may be deemed necessary to keep the peace in the State or in any magisterial district.[26] Justices may be appointed either by a General Commission of the Peace[27] or by special appointment of the Governor notified in the *Government Gazette*.[28] The latter mode of appointment is the usual one. Persons appointed by a special appointment are deemed to be included in the then existing General Commission of the Peace for the State or for a magisterial district, as the case may be, from the time of their appointment. A General

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24 In a submission to the Commission, the Commonwealth Statistician suggested that statistical data about the types and severity of penalties imposed by Courts of Petty Sessions throughout the State be collected and made available to justices and stipendiary magistrates, The Commission endorses the suggestion.

25 Para 2.2 above.

26 *Justices Act*, s 6.

27 The form of the Commission (which is contained in the Second Schedule of the *Justices Act*) is reproduced in Appendix II to this report.

28 *Justices Act*, s 6.

Commission of the Peace, which is issued periodically, supersedes all previous Commissions and lists all justices of the peace at that time.[29]

2.8 Apart from providing a means of appointing justices, the General Commission of the Peace also confers some jurisdiction on justices. However, the jurisdiction so conferred is in very general and vague terms and, in the Commission's view, is unsatisfactory as a source of authority. In any case it is unnecessary for this purpose, since the powers of justices are specifically conferred by various statutes.[30] Accordingly the Commission recommends that the General Commission of the Peace be abolished, and that the sole method of appointing justices be by a special or general warrant under the hand of the Governor notified in the *Government Gazette*.[31] The Commission further recommends that justices should be appointed for the whole State and not for a magisterial district. This is in fact the existing practice. As is the case with the existing Commission of the Peace, a general warrant should be issued periodically, perhaps triennially, superseding all previous warrants. Before such a warrant is issued the Justices of the Peace Council should review the needs of all locations for justices. The review would provide an opportunity to remove justices who were no longer interested in serving as a justice or who were not fulfilling the obligation of performing judicial duties.[32]

(c) Ex officio appointments

2.9 At present the following office holders are, while acting as such, justices of the peace for the State, without any further commission or authority: a member of the Executive Council of the State, a judge of the Supreme Court, a judge of the District Court of Western Australia, a judge of the Family Court of Western Australia, a magistrate and a coroner.[33] While it may be desirable for judicial officers to be justices in order to enable them to exercise any jurisdiction expressly conferred upon justices, for example, to grant bail, the same cannot be said of members of the Executive Council. Accordingly, the Commission recommends that members of the Executive Council should no longer be justices ex officio.[34]

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29 The last General Commission of the Peace was issued in August 1985. The previous General Commission was issued in August 1983.

30 See paras 2.1 above and 9.1 below.

31 Cf *Justices of the Peace Act 1957-1979* (NZ), s 3.

32 See para 2.15 below.

33 *Justices Act*, s 12.

34 See also paras 2.4 above and 2.12 below.

2.10 The mayors of a city or town or the presidents of a shire are, by virtue of their office and without any further commission or authority of the *Justices Act*, justices for the magisterial district or districts in which the municipal district of the city, town or shire is situated.[35] Apart from the judicial officers referred to in the previous paragraph, the Commission is of the view that people should be justices only if they are recommended for appointment by the proposed Justices of the Peace Council. Accordingly it recommends that the mayors of cities or towns or the presidents of shires should no longer be justices ex officio.

(d) Appointment of members of Parliament

2.11 The Discussion Paper sought comment on whether or not it should be possible for members of Parliament to be appointed justices of the peace.[36] The overwhelming majority of those who commented on this issue submitted that they should not, most giving as their reason the desirability, on constitutional grounds, of keeping law-making and judicial functions separate. Some suggested that allegations of partiality would inevitably arise if a member of Parliament sat on the bench.

2.12 The Commission has recommended above that justices should be appointed on the basis that their primary function is to perform judicial duties and that appointments be limited to the number necessary to carry out those duties. The Attorney General has indicated that he would not expect members of Parliament to serve on the bench and, indeed, would prefer them not to do so.[37] The Commission endorses the Attorney General's approach. Accordingly if the Commission's view as to the proper role of justices is adopted, it would seem that there would be little scope for members of Parliament to act as justices and that they should not be so appointed.[38] If the purpose of the present policy is to enable members of Parliament to witness the execution of various documents it would be preferable to authorise them to do so

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35 *Justices Act*, s 9(1).

36 The question arose in the context of the Government's announcement that it had decided to allow members of Parliament, should they so wish, to be appointed as justices without the usual formalities (Western Australian *Parliamentary Debates* (1983) Vol 242, 349), thus reversing the previous Government's policy of refusing to appoint members of Parliament as justices: ibid.

37 The Attorney General indicated that there should be no ban on them issuing search warrants: id, 686. However, the Commission considers that allegations of partiality could arise in this situation also.

38 Para 2.4 above.

directly. They are already expressly authorised to attest statutory declarations or instruments which shall or may be attested by a justice of the peace.[39]

(e) Appointment of justices resident outside Western Australia

2.13 There is power in the *Justices Act* to appoint persons to the office of justice even though they are not resident in this State.[40] The purpose of this provision is to facilitate the execution of documents (for example, transfers of land) which are to be used within the State.[41] The General Commission of the Peace published in 1985 contains a list of persons appointed as justices who reside in the other Australian States and Territories, England, Pakistan and Sri Lanka. Consistent with the Commission's recommendation that justices should be appointed on the basis that their primary function is to perform judicial duties, the Commission recommends that the provision for the appointment of people who are not resident in Western Australia as justices be repealed. Statutes which contain provisions for the execution of documents outside the State (such as the *Transfer of Land Act 1893-1982*) and the provision as to making of statutory declarations in the *Interpretation Act 1984-1985*[42] should be reviewed with a view to providing that the people who may witness the documents include commissioners for declarations. Consideration could be given to appointing those who are presently justices resident outside Western Australia as such commissioners.

3. TERMINATION OF APPOINTMENT

(a) Resignation

2.14 Justices may tender their resignation in writing to the Attorney General. The office is vacated once the resignation is accepted by the Governor and notified in the *Government Gazette*.[43] The Commission recommends that this method of termination of appointment be retained.

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39 *Declarations and Attestations Act 1913-1972*, s 2(b)(iii).
40 *Justices Act*, s 13.
41 Western Australian *Parliamentary Debates* (1902) Vol 21, 621.
42 s 5.
43 *Justices Act*, s 8.

(b) Removal or discharge from office

2.15 Justices may be removed or discharged from office either by the issue of a new General Commission of the Peace for the State, or for a magisterial district, as the case may be, omitting their name, or by an order of the Governor notified in the *Government Gazette*.[44] The Commission recommends that the issue of a general warrant, which it has recommended above should replace the General Commission of the Peace,[45] should have the same effect as to removal or discharge of justices as the General Commission now has.

(c) Age limit

2.16 At present there is no statutory limit on the age at which justices may perform their duties. However, the Attorney General of Western Australia has determined that justices should not preside in court[46] after reaching 70 years of age.[47]

2.17 One reason for the imposition of an age limit on judicial officers is that some officers may through physical or mental infirmity find it more difficult to perform their duties. The fixing of an age limit is necessarily arbitrary but avoids the need for the ongoing review of the fitness of office holders. While the Justices of the Peace Council could perform such a review, it would place a considerable burden on it. The Commission considers that it is appropriate to impose an age limit at which persons should cease to hold the office of justice of the peace. It recommends accordingly. That age should be fixed at 70 years.

4. THE ROLE OF JUSTICES IN COURT

2.18 Justices generally have the same jurisdiction as stipendiary magistrates with regard to summary trials and preliminary hearings of indictable offences.[48] In practice, justices rarely conduct trials and are largely confined to imposing sentences where a defendant pleads guilty. Where justices conduct trials they do so in minor cases and usually only in remote areas to

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44 Id, s 7.

45 Para 2.8.

46 Such justices could still perform the other duties referred to in para 2.1 above.

47 Western Australian *Parliamentary Debates* (1983) Vol 243, 1880. This is the age at which judges of the Supreme and District Courts must retire from office: *Judges' Retirement Act 1937-1950*, s 3 and *District Court of Western Australia Act 1969-1985*, s 16. Stipendiary magistrates must, in general, retire at the age of 65 years: *Stipendiary Magistrates Act 1957-1982*, s 5B(1).

48 For circumstances in which the jurisdiction may only be exercised by a stipendiary magistrate see footnote 22 to ch 3.

avoid the inconvenience to the defendant if a matter had to be adjourned until it could be dealt with by a stipendiary magistrate. In practice justices do not conduct preliminary hearings of indictable offences.[49]

2.19 The present practice in relation to trials recognises that there are limits as to the matters with which justices can deal confidently. Their lack of legal qualifications means that generally they do not have acknowledge of the rules of evidence and the procedures required in conducting trials and preliminary hearings as a matter of course. Where defendants are unrepresented (as is often the case) the presiding justices may not be able to give them advice necessary to ensure that they have a fair trial.[50] Nevertheless the Commission acknowledges that justices of the peace make a significant contribution to the administration of justice in dealing with guilty pleas, especially in country areas. It would not be desirable to exclude them from the court system altogether unless there were sufficient stipendiary magistrates to deal with cases expeditiously and so avoid the delays and inconvenience to defendants (possibly involving lengthy remands in custody) that would otherwise occur. Accordingly, the Commission recommends that there should be no change in the jurisdiction of justices.[51] This assumes that, in relation to that jurisdiction, they continue to follow the existing practice.[52]

2.20 It was suggested to the Commission that the sentencing powers of justices should be restricted so that they may not impose a term of imprisonment. This suggestion arose from concern that justices appeared to be more punitive than stipendiary magistrates. The Dixon Report concluded that in some areas of the State justices used short terms of imprisonment more than was necessary.[53]

2.21 Support for this concern is provided by the March 1984 Survey[54] which indicates that the sentencing practices of justices are different from those of stipendiary magistrates. The

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49 The Commission is not aware of justices having conducted such a hearing since 1970.

50 Para 10.8 below.

51 See however the Commission's recommendation in para 2.22 below as to the maximum term of imprisonment or fine that justices should be permitted to impose and its recommendation in paras 3.18 and 3.23 below as to the jurisdiction of a single justice.

52 For the present practice see para 2.1(4) above. Justices should be made aware of that practice during their training courses. In para 5.4 below the Commission recommends that provision be made for pre-trial hearings. It is the Commission's view that, in practice, justices should not in general conduct these hearings or deal with applications for such hearings. These matters should be reserved for a stipendiary magistrate.

53 At 118-119. See also Discussion Paper, 29-30, footnote 4.

54 This survey included all Courts of Petty Sessions except those at Perth and East Perth.

percentage of convictions in which a term of imprisonment was imposed according to court composition was as follows -

Court Composition	Imp Rate
1 JP	18.46%
2 JsP	10.01%
SM	4.69%

The imprisonment rates for convictions for offensive behaviour and other offences against good order according to court composition were as follows -

OFFENSIVE BEHAVIOUR[55] **OTHER OFFENCES AGAINST GOOD ORDER** [56]

Court Composition	Imp Rate	Court Composition	Imp Rate
1 JP	20.00%[57]	1 JP	18.18%
2 JsP	14.79%	2 JsP	11.83%
SM	6.20%	SM	3.92%

The March 1984 Survey also indicates a degree of disparity in the length of imprisonment imposed for at least one category of offences, namely, offensive behaviour. In the case of other categories of offence, the sample is too small or the range of offences included in the category too broad to examine sentencing practices in terms of the length of the term of imprisonment imposed. So far as the offensive behaviour category is concerned, the following table indicates that there is a tendency for justices to impose a more severe sentence than stipendiary magistrates -

LENGTH OF IMPRISONMENT FOR OFFENSIVE BEHAVIOUR

Length of Imprisonment

Court Composition	Less than 7 days	7 days-1 month	1 month-2 months	2 months-3 months
1 JP	26 (37.14%)	43 (61.43%)	-	1 (1.43%)
2 JsP	24 (57.14%)	17 (40.48%)	-	1 (2.38%)
SM	18 (78.26%)	4 (17.39%)	-	1 (4.35%)
	68	64	-	3

55 This category includes drunkenness and disorderly conduct.

56 This category includes vagrancy, prostitution and gaming offences.

57 Of the terms of imprisonment imposed by a single justice court, 39 (38.61%) were imposed in Halls Creek, including 28 for offensive behaviour and 5 for other offences against good order. If the figures for Halls Creek for offensive behaviour are excluded, the imprisonment rate for a single justice falls from 20.00% to 14.69%, about the same as that for two justices.

2.22 The Commission does not consider that these disparities are so great as to warrant a total prohibition on justices imposing terms of imprisonment. In any case severe practical difficulties[58] would be created if this were done. However, the Commission is of the view that it is desirable to place a statutory limitation on the term of imprisonment[59] or on the amount of a fine[60] that justices may impose. To this end the Commission recommends that a court constituted by justices should not be able to impose a sentence of imprisonment exceeding one month or a fine of more than $500 on anyone occasion.[61]

2.23 If a court constituted by justices concludes that a term of imprisonment in excess of one month or a fine of more than $500 is or may be justified it should be required to remand the convicted person in custody or on bail to appear for sentence before a court constituted by a stipendiary magistrate.[62] Where a person is remanded in custody, he or she should be taken before such a court as soon as reasonably practicable and, in any event, not more than eight days later.

5. THE POWER OF JUSTICES TO ISSUE W ARRANTS

2.24 Another matter which the Commission considered was whether the power of justices to issue warrants should be removed or limited. It had been submitted to the Commission that search warrants and warrants of arrest should only be issued by stipendiary magistrates and judges. It was suggested that many justices do not appreciate the seriousness of a decision to issue a warrant, or give adequate consideration to whether or not the particular circumstances justify its issue. Whether or not this is true, implementation of the Commission's recommendations for a reduction in the number of justices and an improvement in their selection and training should help overcome this concern. In any case, judges and stipendiary

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58 See para 2.19 above.

59 There have been a number of recent cases where the Supreme Court has held that the sentence of imprisonment imposed by justices was substantially greater than the circumstances warranted.

60 The imposition of a substantial fine could lead to a lengthy period of imprisonment if the defendant defaulted in payment.

61 The intention is to limit justices to imposing a sentence of one month's imprisonment or a fine of $500 in the aggregate where a number of charges are dealt with on the one occasion.
The Commission appreciates that the proposed limitation would prevent justices from passing sentence where the legislature has provided a minimum fine of more than $500, for example, a second or subsequent offence under s 63 of the *Road Traffic Act 1974-1985* (driving under the influence of drugs or alcohol) or a minimum term of imprisonment of more than one month, for example a second or subsequent offence under s 89 of that Act (unauthorised use of a motor vehicle). Nevertheless the Commission considers that the appropriate sentence in these cases should be left to be determined by a stipendiary magistrate.

62 Cf *Justices Act* (SA), s 5(6)-(8).

magistrates are not as widely and readily available as justices (even with a reduction in their number) and the suggested change would place a significant burden on them.[63] Accordingly the Commission recommends that there should be no change in the existing power of justices to issue warrants. However, it is desirable in principle that the participation of justices in this activity should be rotated uniformly and the Commission suggests the Justices of the Peace Council should ensure that appropriate rosters are prepared.

6. EXPENSES AND ALLOWANCES

2.25 In the Discussion Paper the Commission considered whether justices should be reimbursed for expenses incurred in attending court or be paid an allowance for doing so. The Commission has been informed that at present "out of pocket" expenses may be recouped in special circumstances. However no allowance is paid. While most commentators favoured the reimbursement of out of pocket expenses, few were in favour of the payment of an allowance.

2.26 The Crown Law Department has informed the Commission that it is its practice to meet the expenses of justices in attending training courses, including air fares, accommodation and meals where appropriate. The Commission endorses this approach and recommends that it be extended to expenses involved in attending a court sitting. Reimbursement of expenses of this nature serves to encourage people to undertake judicial duties, thus increasing the pool of available justices, particularly in the more sparsely populated areas of the State. So that justices know where they stand, the Commission recommends that payment of such expenses be put on a statutory footing by empowering the Governor to make regulations for this purpose.

2.27 As to the payment of an attendance allowance, the Commission agrees with the majority of commentators that no such allowance should be paid. While an allowance may encourage persons to accept appointment who would otherwise be financially unable to do so, the Commission considers that it is important to preserve the present tradition of honorary service. As the United Kingdom Royal Commission on Justices of the Peace pointed out,[64] critics would inevitably attribute the diligence of justices in attending court to the desire for payment, rather than the desire to perform a public duty.

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63 For example, in 1984-1985, justices on duty at the Central Police Lock-up, East Perth issued 8,340 search warrants and 709 arrest warrants: (1985) 28 *The JP WA Journal* 113.

64 (1948) Cmnd 7468, 53.

7. CIVIL ACTIONS AGAINST JUSTICES

2.28 Sections 222-232 of the *Justices Act* contain provisions relating to civil actions against justices. The Commission has not been made aware of any difficulties with these provisions and accordingly recommends that there be no amendment in substance.

8. IMPERIAL STATUTES RELATING TO JUSTICES OF THE PEACE AND OTHER MATTERS

2.29 Appendices III and IV of this report contain a list of Imperial statutes relating to justices of the peace and associated matters which may be in force in Western Australia, together with a brief account of their purpose. The Commission recommends that they should be repealed.

9. SUMMARY OF RECOMMENDATIONS

2.30 The Commission recommends that –

Selection of justices

1. A Justices of the Peace Council should be statutorily established to -

   (a) develop criteria for the appointment of justices;
   (b) recommend individual appointments to the Governor in accordance with those criteria;
   (c) develop a course of training and instruction for justices and ensure that they are kept informed of developments in the law relevant to their duties and, in particular, the sentencing principles laid down by appellate courts;
   (d) ensure that justices perform their duties competently;
   (e) receive and investigate complaints respecting misbehaviour or neglect of duty by individual justices;

(f) recommend to the Governor the removal from office of justices who do not perform their duties competently or who are otherwise unfit to continue as a justice.

Paragraph 2.5

Appointment of justices

2. Justices should be appointed for the whole State by a special or general warrant under the hand of the Governor notified in the *Government Gazette.* A general warrant should be issued periodically having regard to the need for justices in various locations.

Paragraph 2.8

The General Commission of the Peace

3. The General Commission of the Peace should be abolished.

Paragraph 2.8

Ex officio appointments

4. Members of the Executive Council should not be justices ex officio.

Paragraph 2.9

5. Mayors of cities or towns or the presidents of shires should not be justices ex officio.

Paragraph 2.10

Members of Parliament

6. As justices should be selected on the basis that their primary function is to perform judicial duties, members of Parliament should no longer be appointed justices of the peace.

Paragraph 2.12

Justices resident outside Western Australia

7. The provision for the appointment of justices resident outside Western Australia should be repealed.

Paragraph 2.13

Resignation of justices

8. A justice should continue to able to resign his or her office.

Paragraph 2.14

Removal or discharge from office

9. It should continue to be possible to remove or discharge a justice from office by an order of the Governor or by the omission of the name of a person from a general warrant, as is presently the case with a General Commission of the Peace.

Paragraph 2.15

Age limit

10. Persons should cease to hold the office of justice of the peace at the age of 70 years.

Paragraph 2.17

Jurisdiction and powers of justices

11. There should be no change in the jurisdiction of justices of the peace.[65] However, they should no longer be able to impose a sentence of imprisonment exceeding one month or a fine of more than $500 on anyone occasion.

Paragraphs 2.19. 2.22 and 2.24

Expenses and allowances

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65 This recommendation is made on the assumption that justices continue to follow the existing practice in relation to their jurisdiction: para 2.18 above.

12. Justices should be entitled to the payment of expenses involved in attending court sittings and training courses. However they should not be entitled to the payment of an attendance allowance for attending to sit in court.

Paragraphs 2.26 and 2.27

Civil actions against justices

13. Sections 222-232 of the *Justices Act* relating to civil actions against justices should not be amended in substance.

Paragraph 2.28

Imperial statutes

14. The Imperial statutes relating to justices and other matters referred to in Appendices III and IV of this report should be repealed.

Paragraph 2.29

Chapter 3

A MAGISTRATES' COURT

1. THE STRUCTURE OF THE COURT

(a) Formally constituting a court

3.1 Although the *Justices Act* assumes the existence of Courts of Petty Sessions in a number of sections (for example, section 24(1) provides that the Governor may appoint magisterial districts for the purpose of Courts of Petty Sessions) the Act does not expressly establish such courts and invest them with criminal jurisdiction. Instead, the Act bestows jurisdiction on two or more justices, or a stipendiary magistrate, to try certain offences "in a summary manner". Thus the Act provides that:

> "Whenever by any Act past or future, or by [the *Justices Act*], any person is made liable to a penalty or punishment, or to pay a sum of money -
>
> (a) for any offence made punishable on summary conviction; or
>
> (b) for any offence, act, or omission, and such offence, act, or omission is not by the Act declared to be treason, felony, a crime, or a misdemeanour, and no other provision is made for the trial of such person,
>
> the matter may...be heard and determined by two or more justices [or by a stipendiary magistrate[1]] in a summary manner under the provisions of [the *Justices Act*]."[2]

Justices or a stipendiary magistrate exercising the jurisdiction so bestowed on them sit as a Court of Petty Sessions.[3]

3.2 In order to be consistent with the manner in which other courts in this State have been formed, the Commission recommends that legislation be enacted expressly to establish a court of summary jurisdiction. This approach has also been adopted in a number of other jurisdictions.[4] Legislation can then proceed in a logical order to provide for the court's

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1 *Justices Act*, s 33(1).

2 Id, s 20(1).

3 The term "petty sessions" originated in England where it was used to refer to the jurisdiction of justices of the peace to deal summarily with offences outside the normal quarterly meetings of justices of a county (Quarter Sessions) which heard charges for certain indictable offences: W J V Windeyer, *Lectures on Legal History* (2nd ed, 1957), 133. The term was adopted in this State, as it had been in England, to refer to the summary jurisdiction of justices.

4 See, for example -

jurisdiction, the judicial officers who may exercise that jurisdiction and the procedure to be followed.

(b) Merging Courts of Petty Sessions and Local Courts

3.3 Assuming that the recommendation in the previous paragraph is adopted, the question arises as to whether Courts of Petty Sessions and Local Courts should be merged so as to create a court of general inferior jurisdiction. Such a court exists in a number of Australian jurisdictions.[5]

3.4 Local Courts and Courts of Petty Sessions already largely share judicial officers, staff, administrative facilities and court rooms. In country and suburban areas the same staff, administrative facilities and court rooms are used for both Local Courts and Courts of Petty Sessions. In Perth, both courts are now housed in the Central Law Courts Building where there has been rationalisation of staff and facilities.

3.5 The Commission's proposal[6] for a statutory merger of the two courts was widely supported[7] both in principle and because further economies could be expected from formal amalgamation. Some considered that the enhanced status of an integrated court would help discourage the creation of administrative tribunals outside the ordinary court system.[8]

3.6 A number of those who did not support the proposal[9] suggested that parties and others might fail to distinguish between the different procedures and standard of proof between criminal and civil cases (which of course would be unaffected by the merger). However this argument has not noticeably been raised against the existing Supreme and District Court

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NSW: *Local Courts Act 1982-1984*, s 6 which establishes Local Courts.
QLD: *Justices Act*, s 22 which establishes Magistrates Courts.
ACT: *Ordinance* (ACT), s 18(1) which establishes a Magistrates Court.
NT: *Justices Act*, s 41A which establishes the Court of Summary Jurisdiction.

5 Victoria, New South Wales, Queensland and the Australian Capital Territory.

6 This proposal was made in the Discussion Paper and the Local Courts Working Paper.

7 The supporters included stipendiary magistrates, the Crown Law Department, the Deputy Director of Legal Aid, the Criminal Law Association, solicitors, his Hon Judge Sadlier and the Department of Prisons.

8 The Commission's report on *Review of Administrative Decisions: Appeals* (1982) sets out the present position as regards administrative tribunals.

9 Those who did not support the proposal included the former Attorney General, the Hon I G Medcalf QC, and a number of magistrates and justices of the peace.

systems throughout Australia, nor, as far as the Commission is aware, in those places where an integrated court of inferior jurisdiction exists.

3.7 Others were sceptical that any savings or increased efficiency would be achieved thereby. The Commission recognises that the savings or increased efficiency may not be substantial, largely because of the degree of administrative merging which has already taken place. However, these aspects should not be considered solely from the standpoint of the Executive. Helping to overcome public misunderstandings would itself be of value. The fact that there are two courts, but with shared judicial officers, staff, administrative facilities and court rooms creates public confusion.[10] The creation of a court of general inferior jurisdiction would provide an opportunity to publicise its jurisdiction and help overcome misunderstanding.

3.8 Having considered the comments, the Commission confirms its provisional proposal and recommends that legislation be introduced to merge Courts of Petty Sessions and Local Courts.

3.9 If this recommendation is adopted, the further question arises as to whether there should be a single court exercising jurisdiction throughout the State,[11] or whether courts of combined civil and criminal jurisdiction should be established at specified places. The Commission favours the first alternative because of its conceptual simplicity and recommends accordingly. There would then be no need to provide for the territorial jurisdiction of each court or, alternatively, to provide for each territorially located court to have jurisdiction throughout the State. [12]

(c) Divisions

3.10 The Commission recommends that the merger be achieved by the establishment of a court with the following divisions -

(1) an Offences Division;

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10 Clarity is not assisted by the various names by which Courts of Petty Sessions are referred to in the media and elsewhere, such as Police Courts or Magistrates' Courts.

11 This was the approach adopted in establishing the District Court of Western Australia: *District Court of Western Australia Act 1969-1985*, s 7(1). It is also the position in regard to the Supreme Court.

12 As is presently the case in regard to Local Courts: *Local Courts Act 1904-1985*, s 36.

(2) a Civil Division;
(3) a Small Debts Division;[13]
(4) an Administrative Law Division;[14] and
(5) a Family Law Division.[15]

Matters such as procedure, the judicial officers who may sit in the division, the places where the division would sit, costs, appeal rights and procedures could be dealt with separately in accordance with the requirements of each division.

2. NAMING THE COURT

3.11 A court of general inferior jurisdiction would require an appropriate name. The name given elsewhere to these courts varies. In Queensland, Victoria and the Australian Capital Territory the title is "Magistrates' Court"[16] and in New South Wales it is "Local Court".[17]

3.12 Some magistrates suggested to the Commission that, as they exercise judicial functions, the office of stipendiary magistrate should be renamed judge and accordingly that the proposed integrated court should be named the Local Court and not, as the Commission suggested, the Magistrates' Court. The Commission considers that it would not be appropriate for it to make any recommendation as to the possible renaming of the office of magistrate. That decision could only be made after taking into account the names of other officers in the State's judicial system, who would no doubt require to be consulted. If, however, the name "stipendiary magistrate" is retained the Commission recommends that the new court should be called "the Magistrates' Court".

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13 A Small Debts Division of the Local Court already exists: *Local Courts Act 1904-1985*, s 106D.

14 The establishment of an Administrative Law Division of the Local Court was recommended in the Commission's report, *Review of Administrative Decisions: Appeals* (1982) paras 4.2, 4.9 and 4.10.

15 The recommendation for the creation of a Family Law Division of the integrated court is made as a consequence of the fact that Courts of Petty Sessions constituted by a stipendiary magistrate have jurisdiction in respect of certain family law matters: Discussion Paper, para 3.18. For the purpose of exercising this jurisdiction, s 24(2) of the *Justices Act* enables the Governor by proclamation to order that Courts of Petty Sessions constituted by a stipendiary magistrate only be held at such places as the Governor thinks fit. A large number of places have been so proclaimed: [1977] *Government Gazette* 4193-4194; [1979] *Government Gazette* 3770; [1981] *Government Gazette* 607. If different arrangements are to be made for the hearing of family law matters the need for a Family Law Division would need to be reassessed.

16 In Victoria Courts of Petty Sessions were renamed Magistrates' Courts many years ago. In the Australian Capital Territory, the name of the court was changed to Magistrates' Court from Court of Petty Sessions on 1 February 1986.

17 In that State Courts of Petty Sessions which exercised both civil and criminal jurisdiction were abolished and replaced by Local Courts by the *Local Courts Act 1982-1984* which came into force in January 1985.

3. MATTERS TO BE ASSIGNED TO THE OFFENCES DIVISION

3.13 So far as the Offences Division of the proposed Magistrates' Court is concerned, the Commission recommends that the following matters be assigned to that Division -

(a) hearing and determining of complaints of a simple offence;[18]

(b) hearing and determining of complaints of an indictable offence which may be tried summarily;

(c) conducting preliminary proceedings in relation to indictable offences;

(d) hearing and determining applications for orders to keep the peace.[19]

These are matters which at present may be dealt with under the *Justices Act*. Other matters which may presently be dealt with by a justice or justices, a stipendiary magistrate, court of petty sessions or court of summary jurisdiction will need to be examined to determine whether it is appropriate to assign them to the Offences Division or some other division.[20] In some cases[21] it may be appropriate to assign matters to more than one division.

4. CONSTITUTION OF THE COURT IN DEALING WITH MATTERS ASSIGNED TO THE OFFENCES DIVISION

(a) General

3.14 Subject to any provision in any other Act,[22] the manner in which the court should be constituted in order to deal with the matters assigned to the Offences Division would then require to be addressed. In view of the Commission's recommendations with regard to the role

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18 See *Criminal Code*. ss 2 and 3.

19 Paras 9.1 to 9.4 below.

20 There are a number of matters in the administrative law field which are dealt with by a Court of Petty Sessions. Examples are appeals against a decision of the Commissioner of Public Health in relation to the manufacture or sale of a poison or a prohibited plant (*Poisons Act 1964-1984* s 29(1)); appeals against decisions of the Road Traffic Authority (now the Traffic Board) in regard to various vehicle licences: *Road Traffic Act 1974-1985*. s 25(1). The Commission in its report, *Review of Administrative Decisions: Appeal* (1982) suggested that such appeals should be dealt with by the proposed Administrative Law Division of the Local Court. If the recommendation in this report for the creation of a general court of inferior jurisdiction is adopted, these appeals should be assigned to the Administrative Law Division of that general court.

21 See for example the *Restraint of Debtors Act 1984*.

22 Such as a statute which provides that a complaint for an offence must be heard by a stipendiary magistrate: see *Police Act 1892-1985*, s 76A (possession of gold suspected of being stolen), *Misuse of Drugs Act 1981*, s 9(2) (some drug offences) and *Judiciary Act 1903-1985* (Cth), s 68(3) (Commonwealth offences).

of justices,[23] the general rule should be that it should be constituted by a stipendiary magistrate or two or more justices.[24] A number of incidental matters, including the jurisdiction of a single justice, remain to be considered. These are discussed below.

(b) Stipendiary magistrates

3.15 It was suggested to the Commission that there may be cases in which it would be desirable to have a case heard by more than one stipendiary magistrate, for example, where a complaint raised unusually complex issues, particularly issues of fact. The majority of commentators, including nearly all stipendiary magistrates who commented on this issue, were opposed to the suggestion. The Commission agrees with them. If implemented it would be necessary to have at least three stipendiary magistrates constituting the court. This could be difficult to arrange, particularly in country areas and could lead to delays in hearings. In any case a court constituted by two or more stipendiary magistrates would not necessarily be in a better position than a single stipendiary magistrate to deal with complex issues.

(c) The jurisdiction of a single justice

3.16 The creation of a Magistrates' Court would make it necessary to set out the circumstances in which the court may be constituted by a single justice in criminal proceedings. At present, one justice may exercise the jurisdiction of two justices under the *Justices Act* or any other Act whenever "no other justice usually residing in the district can be found at the time within a distance of sixteen kilometres" provided that, on any conviction, the justice certifies in writing that no other justice could be found within 16 kilometres.[25] Such a certificate is conclusive evidence of the fact stated.[26] A complaint for a simple offence, an indictable offence or other matter may also be heard by one justice with the consent of all parties concerned.[27] A memorandum of such consent must be made and signed by the justice.

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23 Paras 2.18 to 2.23 above.

24 Subject to the limitation on the sentencing powers of justices: para 2.22 above.

25 *Justices Act*, s 32.

26 Ibid. It has been held that if there is no certificate any conviction cannot stand, even though no other justice could in fact be so found: *Taylor v Johnson* [1977] WAR 95, per Jackson CJ. S 743 of the *Criminal Code* is to the same effect as s 32. It was recommended in the Murray Report at 520 that s 743 should be repealed so that the position would be governed solely by the *Justices Act*.

27 *Justices Act*, s 29. The powers of adjournment in ss 79 and 86 of the *Justices Act* may also be exercised by one justice if only one justice is present.

3.17 The above provisions were enacted because of the difficulty in remote and sparsely populated areas of the State of constituting a court with two or more justices. However, according to the Dixon Report,[28] there was "a tendency for a Justice sitting alone to impose penalties which are sometimes inconsistent with those imposed by two Justices or by a Magistrate". This tendency was also reflected in the March 1984 Survey.[29] Notwithstanding this tendency, the Commission is of the opinion that the difficulty of remoteness referred to above requires as a practical matter that it should continue to be possible for a single justice to sit alone, though the circumstances should be narrowly circumscribed.

3.18 Accordingly the Commission recommends that a single justice should only be able to constitute the court to determine a complaint where no other justice usually residing within a distance of 50 kilometres of the site of the court can be found within that distance[30] at the time of the hearing **and** all the parties concerned consent.[31] It is desirable that the consent of defendants be an informed one. Accordingly the Commission recommends that, before consenting, defendants should be informed by the justice that they may have the complaint heard by a stipendiary magistrate or two justices if they wish, and the hearing adjourned for that purpose. Since this will involve delay, defendants should also be told whether or not bail will be granted on such an adjournment and the conditions of the bail. The Commission further recommends that a certificate as to the non-availability of another justice should be required to be completed as a condition of the justice having jurisdiction to hear the complaint.[32]

3.19 At present the certificate which is required under section 32 of the *Justices Act* must be completed by the justice. In practice it is usually the clerk of petty sessions who endeavours to find another justice and the justice relies on the clerk's search. The Commission

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28 At 119.

29 Para 2.21 above.

30 The present distance of 16 kilometres has remained unchanged since 1902. Modern modes of travel would justify the increase.

31 This formulation omits any reference to "district". The use of this term in the existing formulation is ambiguous. It could, for example, refer to a "Magisterial District" or the relevant local authority district.

32 In *Taylor v Johnson* [1977] WAR 95 it was held that the jurisdiction of a single justice under s S2 depended on completion of the certificate. Doubt was cast on the correctness of this decision during the hearing of an application for special leave to appeal to the High Court in *Anderson v Galton-Fenzi* (9 of 1979, Western Australian Registry). Barwick CJ suggested that the requirement of a certificate was regulatory only and that a single justice may have jurisdiction notwithstanding its non-completion if in fact no other justice could then be found within the prescribed distance. However, the application was disposed of on other grounds and the High Court did not determine the issue. The recommendation above is intended to clarify the matter by providing that the provision of the certificate is required to found the jurisdiction of a single justice. It is important that the justice give his or her mind to the jurisdictional question at the outset.

considers that it would be preferable for whoever endeavoured to find another justice, whether that person is the clerk or the justice who conducts the hearing, to complete the certificate. Where the clerk completes the certificate, the justice should be required to sign it by way of acknowledgment that he or she has seen it. The Commission recommends accordingly.

3.20 In view of the general undesirability of single justices sitting alone the Commission recommends that the situation be closely monitored to ensure that, wherever practicable, there are sufficient justices in the area so that two justices are always available for court hearings.[33]

(d) Indictable offences

3.21 The Commission considers that the provisions governing the way in which a Court of Petty Sessions must be constituted as regards indictable offences should be clarified. The *Criminal Code*[34] provides that where an indictable offence may be punished summarily,[35] the Court of Petty Sessions -

(a) before which the defendant is charged,
(b) which deals with the charge,
(c) which examines the defendant, or
(d) which commits the defendant for trial

must be constituted by a stipendiary magistrate alone if one is available. If there is no stipendiary magistrate available, and the defendant consents, the court may be constituted by two justices. However, section 20(2) of the *Justices Act*, which also deals with the situations referred to in (a) to (d) above, appears to imply that the court can be constituted by justices if the defendant consents even though a stipendiary magistrate is available. Further, by the operation of sections 29 and 32 of the *Justices Act*, it appears that the court can be constituted

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33 The Commission suggests that a study be made in the first instance of areas where it is common for a single justice to sit. The March 1984 Survey showed that this was common in Eucla, Fitzroy Crossing, Halls Creek, Nullagine, Roebourne and Wiluna.

34 S 3.

35 Such as a serious assault: *Criminal Code*, s 318. S 574(1) of the *Criminal Code* provides that the procedure upon the prosecution of such offences and for enforcing orders in respect of such offences is set forth in the laws relating to justices of the peace, their powers and authorities.

by one justice if all the parties concerned consent (s 29) or if no other justice usually residing in the district can be found at the time within a distance of 16 kilometres (s 32).[36]

3.22 In the case of an indictable offence not triable summarily, it appears that preliminary proceedings[37] may be conducted by a court constituted by two justices whether or not a stipendiary magistrate is available and whether or not the defendant consents.[38] Further, if the circumstances referred to in sections 29 and 32 of the *Justices Act* exist, the court can apparently be constituted by a single justice.

3.23 The Commission considers that the uncertainty as regards the constitution of the court in respect of indictable offences triable summarily should be removed and the position as regards indictable offences generally should be rationalised. The Commission accordingly recommends that as regards indictable offences the court -

(a) before which the defendant is charged;
(b) which deals with the charge (that is, in the case of an indictable offence triable summarily, where the defendant has elected to be dealt with summarily);
(c) which examines the defendant;[39] or
(d) which commits the defendant for trial

should be constituted by a stipendiary magistrate alone, unless there is no stipendiary magistrate available and the defendant consents to be dealt with by justices, In the latter case, the court should be constituted by at least two justices.[40] Before the defendant consents, he or she must be advised -

(i) that he or she is entitled to have the matter dealt with by a court constituted by a stipendiary magistrate;

(ii) that the matter can be adjourned to be dealt with by such a court; and

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36 The reference to the justices in s 3 of the *Criminal Code* appears to be required to be read subject to ss 29 and 32 of the *Justices Act*: see the wording of those sections.

37 That is (a), (c) and (d) in para 3.21 above, (b) is of course inapplicable since it refers to the actual determination of the charge.

38 *Justices Act*, s 29.

39 That is, conducts a preliminary hearing. In practice, justices do not conduct preliminary hearings: para 2.18 above.

40 Accordingly the provision recommended above as to the jurisdiction of a single justice would not apply to indictable offences.

(iii) whether or not bail would be granted on the adjournment and the conditions of any bail which would be granted.

(e) Incidental powers of a single justice

3.24 The recommendation above [41] as to the circumstances in which a single justice should be able to constitute the court is concerned only with the hearing of complaints. The Commission does not intend to limit the circumstances in which a single justice may at present exercise various incidental powers, such as receiving a complaint and issuing a summons,[42] adjourning hearings[43] and powers expressly conferred on a single justice by any enactment, for example, issuing a search warrant.[44]

5. ADMINISTRATIVE ARRANGEMENTS FOR THE OFFENCES DIVISION

(a) Places at which the Offences Division may sit

3.25 At present a hearing under the *Justices Act* can theoretically be held in any place at which the judicial officers necessary to exercise the jurisdiction are present. In practice, however, hearings are conducted at towns where clerks of petty sessions have been appointed and where court facilities are available.

3.26 The Commission considers that it is desirable for the places where the Offences Division may sit to be fixed by regulation[45] because it would help ensure that these places became common knowledge and so contribute to the openness of justice. It should, however, be possible for the court to sit elsewhere, for example, if the building is required for another purpose such as a sitting of the District Court. Where the court is held at a place other than a prescribed place, a notice should be posted on a public notice board at the prescribed place advising of the location and time where the proceedings are to take place. This would give members of the public an opportunity to be present. The Commission recommends accordingly.

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41 Para 3.18.
42 *Justices Act*, s 26.
43 Id, ss 79 and 86.
44 *Criminal Code*, s 711.
45 The regulation should fix both the town and the building in the town.

3.27 In its submission, the Aboriginal Legal Service said that in some towns it was the practice for Courts of Petty Sessions to be convened after business hours, leading in some instances to unnecessarily long periods of detention for defendants who were not released on bail. The Commission considered whether the court should be required to sit at a particular time of the day, for example 10 am, but concluded that this would be impracticable. Some flexibility is needed because in some areas visited by a stipendiary magistrate it is necessary for the court to convene in the morning in one town and the afternoon of the same day in another. Instead, the Commission recommends that the training course for justices stress the importance of the court being convened at fixed times of the day (in order to promote the openness of justice) but so that people are not detained in custody unduly before appearing in court.

(b) Venue

3.28 In a number of towns hearings take place in the local police station, often with both the prosecutor and the clerk of petty sessions being a police officer. Sometimes the same officer fulfils both roles.[46] The Commission does not favour the practice of holding hearings in police stations since it may cause confusion as to the roles of prosecution and court and thereby reduce confidence in the administration of justice. It also runs counter to the principle that hearings are required to be in "open court", that is, a place to which members of the public have a right of access. The Commission is however sensible of the fact that to require hearings to be conducted in a separate place could increase security problems or entail considerable expense in hiring or erecting a suitable building. The Commission accordingly recommends that the Government review the present arrangements throughout the State to ensure that wherever possible the proceedings do not take place in a police station.[47]

(c) Clerks of court

3.29 Under the *Justices Act* each person appointed to the office of clerk of petty sessions must be appointed for a magisterial district. Such number of clerks of petty sessions as may be considered necessary for the due administration of the Act may be appointed for each

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46 Para 3.31 below.

47 The Commission suggests that all new court houses be designed so that the court facilities are not contiguous to police and lock-up facilities.

magisterial district.[48] One consequence of the appointment of clerks for a magisterial district is that they may not be able to exercise any of the functions assigned to clerks with regard to matters occurring in another district. For example, where an offence is alleged to have occurred in another magisterial district the clerk may not be able to issue a summons in respect of the offence.[49] As such a territorial limitation does not appear to serve any purpose the Commission recommends that clerks of court should be appointed without being confined to a particular magisterial district. If the recommendation above that a court of general inferior jurisdiction be created is adopted, the officers concerned would be appointed as clerks[50] of that court and placing a territorial limit on them would be inappropriate.

3.30 One incidental issue which the Commission considered was whether or not clerks of petty sessions should have power to issue warrants of execution or commitment.[51] There were conflicting views amongst the commentators on this matter. The Commission has concluded that it would be undesirable for clerks of petty sessions to have such powers and recommends that there should be no change in the existing law.

(d) Police officers who are appointed clerks of court

3.31 In practice not all clerks of petty sessions are public servants. In Perth and 37 country towns the clerks are either officers of the Crown Law Department or mining registrars but in 82 towns they are police officers. The Commission considers that it is undesirable in principle for police officers to act as clerks of court but acknowledges that there seems to be no practical alternative at least in remote areas. Accordingly, in conformity with the present position, where police officers are appointed as clerks of petty sessions they should be appointed as clerks for the Offences Division.

3.32 Clerks of court are primarily responsible for carrying out administrative duties in relation to the operation of the court. However, a complaint may also be made to a clerk who may sign and issue a summons. A clerk who is a police officer may therefore issue a summons. In order to avoid the possibility of a conflict of interest, the Commission recommends that a police officer who is a clerk should not have power to do so. Where a

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48 *Justices Act*, s 25A.

49 Id, s 53.

50 Or one clerk and an appropriate number of assistant clerks if that arrangement is more administratively convenient.

51 Discussion Paper, para 3.14.

clerk who is a police officer would otherwise have issued a summons it would be necessary to apply to a justice.

6. REVIEW OF DECISIONS OF JUSTICES BY A STIPENDIARY MAGISTRATE

(a) Appeal

3.33 The Discussion Paper sought views on the proposal that there should be a right of appeal from decisions of justices to a stipendiary magistrate. At present appeals from decisions of justices (and magistrates) lie to the Supreme Court.[52] A majority of those who commented on this issue opposed the proposal. Those who supported it did so on the assumption that it would involve less cost than an appeal to the Supreme Court and that, in country areas at least, it would be more convenient and speedy. However, it is not clear that these advantages would in fact be realised. Even though the appeal would in general relate only to the sentence imposed (since justices rarely try defended cases), it would still be necessary to prescribe rules of procedure so that the parties know with reasonable certainty how to proceed and that the magistrate, and the parties, know the grounds of the appeal and the basis on which the justices' decision was made. The costs involved in complying with these procedural requirements and appearing before the appellate body may be the same whether that body is a stipendiary magistrate or the Supreme Court.[53]

3.34 An appeal to a stipendiary magistrate is only likely to be a more convenient alternative if the defendant resides in a town in which a stipendiary magistrate is based and if legal representation is available in that town. Otherwise, the difficulties caused by remoteness may be similar whether the appeal is to a stipendiary magistrate or to the Supreme Court. The greatest difficulty at present in respect of many appeals from justices seems to be in obtaining legal advice. Once that is obtained and the decision to appeal is made, it is possible to commence and have appeals heard quickly through an agent in Perth or the Perth office of the Aboriginal Legal Service or the Legal Aid Commission, as the case may be. [54]

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52 *Justices Act*, ss 183 and 197.

53 An additional cost for a person who is being represented by a legal practitioner in a country town is the fee charged by that practitioner's Perth agent.

54 It is possible to have appeals to the Supreme Court heard in circuit towns if that course is more convenient to the appellant.

3.35 There is another factor. The criminal law, and sentencing policy in particular, is more likely to be developed in a consistent and coherent manner by a small group of judges than by stipendiary magistrates spread throughout Western Australia. It would, of course, be possible to allow a further right of appeal from the magistrate's decision, but to do so would not only add substantially to the costs should the disaffected party choose to take advantage of it, but would also add complexity. Appeals from magistrates in their original jurisdiction would lie to the Supreme Court, but appeals from justices would be to magistrates with a further right of appeal to the Supreme Court. For these reasons the Commission does not recommend that a right of appeal from decisions of justices to a stipendiary magistrate should be introduced.

(b) Review

3.36 Another possible approach raised in the Discussion Paper is to provide for all sentences of imprisonment imposed by justices to be reviewed by a stipendiary magistrate.

3.37 The overwhelming majority of those who commented on this issue opposed providing such a review. A number pointed to the seeming incongruity of judicial decisions being reviewed on an administrative basis. Others pointed to the issues which would need to be addressed in structuring such a review procedure, such as whether stipendiary magistrates could substitute the sentence they considered appropriate for that imposed by the justices or whether the justices' decision would be affirmed unless they were satisfied that it was clearly wrong. In any case, there would not be the same need for any review if justices were not permitted to impose sentences in excess of one month or a fine of more than $500 as recommended by the Commission.[55] Accordingly the Commission recommends that a review procedure should not be introduced.

7. CONTEMPT OF COURT

3.38 At present there are different provisions relating to contempt of court in Courts of Petty Sessions and Local Courts. Section 41 of the *Justices Act* provides that -

> (a) any person who insults any justices sitting in the exercise of their jurisdiction under the *Justices Act* or any other Act; or
> (b) wilfully interrupts the proceedings of justices so sitting,

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55 Para 2.22 above.

may "be summarily convicted by the justices on view, and on conviction shall be liable to a penalty not exceeding ten dollars, and in default of payment to be imprisoned for a period not exceeding seven days". The offender may also be excluded from the court.

3.39 Section 156 of the *Local Courts Act 1904-1985* provides that the court may order that any person who -

(a) wilfully insults, interferes with, or obstructs a magistrate, or a clerk, bailiff, or other officer of a Local Court, or any party to a cause or matter, or any witness lawfully summoned to attend a Local Court, during his or her sitting or attendance in court, or in going to or returning from the court;

(b) wilfully interrupts the proceedings of the court; or

(c) otherwise misbehaves him or her self in court,

be taken into custody and detained until the rising of the court.[56] The offender may also be imprisoned for a period not exceeding 14 days or fined a sum not exceeding $20.

3.40 If Courts of Petty Sessions and Local Courts are merged[57] it will be necessary to provide a single contempt provision for the new court. The Commission recommends that the present provision in respect of Local Courts should apply to the new court since, unlike that in the *Justices Act*, it also applies to witnesses, parties and officers of the court going to or from the court.

3.41 The maximum fine of $20 provided for by section 156 of the *Local Courts Act* was fixed in 1904 and has remained unchanged. In the Commission's view the maximum fine should be one that is a realistic figure in today's terms and it accordingly recommends that it be increased to $500. The court should, however, have power to remit the penalty imposed, in whole or part, if the offender apologises before the rising of the court.[58]

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56 Where other contempts are committed out of court, the Supreme Court has power to punish for contempt: *John Fairfax and Sons Pty Ltd v McRae* (1955) 93 CLR 351. Such proceedings are commenced by motion on notice to the contemnor: *Rules of the Supreme Court 1971-1986*, O 55 r 4.

57 Para 3.8 above.

58 Cf *Justices Act* (SA), s 46(5).

8. SUMMARY OF RECOMMENDATIONS

3.42 The Commission recommends that -

A Magistrates' Court

1. A new court, to be named the Magistrates' Court,[59] should be established merging Courts of Petty Sessions and Local Courts.

Paragraphs 3.2, 3.8 and 3.12

2. The Court should have the following divisions -
    1. an Offences Division;
    2. a Civil Division;
    3. a Small Debts Division;
    4. an Administrative Law Division; and
    5. a Family Law Division.

Paragraph 3.10

3. The places at which the Offences Division may sit should be prescribed and publicly announced.

Paragraph 3.26

4. The Government should review present arrangements throughout the State with the aim of ensuring that, wherever possible, the proceedings of the Offences Division are not conducted in a police station.

Paragraph 3.28

Jurisdiction of the Offences Division

5. The following matters should be assigned to the Offences Division -

    (a) hearing and determining any complaint of a simple offence;
    (b) hearing and determining complaints of an indictable offence which may be tried summarily;
    (c) conducting preliminary proceedings in relation to indictable offences;
    (d) hearing and determining applications for orders to keep the peace.

Paragraph 3.13

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[59] The recommendation as to the name is on the assumption that the term "stipendiary magistrate" is retained.

Constitution of the Court in dealing with matters assigned to the Offences Division

6. In dealing with matters assigned to the Offences Division, the Court should be constituted by a stipendiary magistrate or two or more justices.

Paragraph 3.14

7. A single justice should only be empowered to determine a complaint if no other justice usually residing within a distance of 50 kilometres of the site of the court can be found within that distance at the time of the hearing **and** all the parties concerned consent. In the case of the defendant, the consent should be an informed consent.

Paragraph 3.18

8. The certificate as to the non-availability of another justice should be required to be completed as a condition of a single justice having the jurisdiction to hear the complaint.

Paragraph 3.18

9. The clerk or justice who made the inquiry as to the availability of another justice should complete the necessary certificate. Where the clerk completes the certificate, the justice should sign it by way of acknowledgment that he or she has seen it.

Paragraph 3.19

10. As regards indictable offences the court should be constituted by a stipendiary magistrate, unless no magistrate is available and the defendant gives an informed consent to the matter being dealt with by two or more justices.

Paragraph 3.23

Clerks of court

11. The appointment of clerks of court should not be confined to particular magisterial districts.

Paragraph 3.29

12. In places where a police officer is appointed as a clerk of petty sessions at present, the officer should be appointed as a clerk of the proposed Offences Division. Police officers who are clerks should not have power to issue a summons.

Paragraphs 3.31 and 3.32

13. Clerks should not be given power to issue warrants of execution or commitment.

Paragraph 3.30

Appeals from decisions of justices

14. A right of appeal from decisions of justices to a stipendiary magistrate should not be introduced.

Paragraph 3.35

Review of sentences of imprisonment imposed by justices

15. A provision for the review by a stipendiary magistrate of sentences of imprisonment imposed by justices should not be introduced.

Paragraph 3.37

Contempt of court

16. If a court of general inferior jurisdiction is established, the provision in respect of contempt in Local Courts should apply to the new court.

Paragraph 3.40

17. The punishment available for contempt should be a fine of $500 or imprisonment not exceeding 14 days.

Paragraph 3.41

18. The court should have power to remit the penalty imposed, in whole or part, if the offender apologises before the rising of the court.

Paragraph 3.41

Chapter 4

COMMENCEMENT OF PROCEEDINGS

1. INTRODUCTION

4.1 Proceedings for offences may be commenced by a complaint or, in the case of some offences (mainly of a regulatory nature), by an infringement notice. Where a complaint is laid the matter is dealt with by a Court of Petty Sessions. The infringement notice procedure enables a matter to be disposed of without a court hearing or conviction. Both these procedures are discussed in this chapter.

2. COMPLAINTS

(a) General

4.2 Proceedings before a Court of Petty Sessions must be commenced by a complaint.[1] The complaint need not be in writing unless a warrant is being sought to ensure the attendance of the defendant in court.[2] In order to provide a basis for a record of proceedings, the Commission recommends that all complaints should be in writing.

4.3 In those cases in which a summons was issued on a complaint, the Commission recommends that the complainant should file the complaint in the office of the court at the place where the defendant is required to appear by the summons as soon as practicable after the summons is served. Similarly, where the defendant has been arrested, either with or without a warrant, the Commission recommends that the complaint be filed in the office of the court where the defendant is first to appear as soon as practicable after the arrest has been made. Such a requirement would enable the clerk of court to assess the number of defendants due to appear on a particular day and the types of charges involved. It would help in the making of arrangements for the convening of judicial officers and facilitate the efficient disposal of court business.

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1 *Justices Act*, s 42. This must be read subject to the provisions of the *Justices Act* or any other Act. For example, s 17(3) of the *Restraint of Debtors Act 1984* provides for a form to be prescribed for applications for the restraint of the transfer or removal of property from the State.

2 In this case the complaint must also be on oath: *Justices Act*, s 49.

(b) Particulars of the offence

4.4 The *Justices Act* contains some guidance as to the information which should be included in the complaint and summons. One section[3] provides that such description of persons or things as would be sufficient in an indictment is sufficient in a complaint.[4] Another section[5] provides that it is sufficient in law to describe the offence in the words of the Act, order, by-law, regulation or other instrument creating the offence. Finally, it is required that a summons issued under the Act should "state shortly the matter of the complaint as a result of which it was issued."[6] Accordingly, the complaint and summons form introduced by the *Justices (Forms) Regulations 1982* provides for the defendant to be given the following information -

(i) the date on which and the place at which the offence is alleged to have been committed;
(ii) the nature of the offence or subject matter alleged; and
(iii) the statutory provision under which the offence was alleged to have been committed.

4.5 The defendant therefore receives certain particulars of the alleged offence. However, the information referred to above may not be sufficient in all cases. It may be necessary for the defendant to know the approximate time at which the offence is alleged to have been committed in order to know with sufficient particularity the act or omission alleged as the foundation of the charge. For example where a publican is charged with the unlawful supply of liquor in prohibited hours, it will be necessary to know the approximate time of the alleged supply and the person alleged to have been supplied with the liquor.

4.6 Apart from these statutory provisions, at common law a defendant is entitled to be:

> "…apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge."[7]

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3 s 44.
4 See, for example, *Criminal Code*, s 583(1) and (2).
5 S 45.
6 *Justices Act*, s 54(b).
7 *Johnson v Miller* (1937) 59 CLR 467, 489 per Dixon J.

Although there is no statutory provision which would enable a Court of Petty Sessions to enforce this common law requirement it has inherent power to do so if "the interests of justice make it necessary."[8]

4.7 The Commission has been informed by the Police Department that police prosecutors supply written particulars of an offence at the written request of the defence.[9] They also supply the defence on request with a copy of any signed statement by the defendant to the police or a signed record of interview of the defendant. They do not provide the defence with the prosecution's witness statements.[10]

4.8 In the Discussion Paper,[11] the Commission considered whether the complaint and summons form should contain, or be accompanied by, a summary of the facts upon which the allegation that an offence was committed is based, or should state that the defendant may apply to the complainant for such a summary before a plea is entered. Most of those who commented on this issue were in favour of a requirement that the form contain or be accompanied by a summary of the facts. A small number favoured including a notice that the defendant may apply to the complainant for a summary.

4.9 The Commission is in favour of more information being required to be made available to the defendant on a statutory basis. However, a requirement that a "summary of facts" be provided in every case would have the disadvantage that it would generate a considerable amount of paperwork for the Police Department and other prosecutors.[12] In many cases it would be unnecessary to do so because the defendant would already be aware of the relevant facts. Further, whether or not the required information were to be made available in every case, or only on application, it would be undesirable to do so in terms of a "summary of facts" because of the uncertain extent of the obligation.[13]

4.10 The Commission accordingly considers that it would be preferable to confirm by statute the present common law requirements as to the provision of particulars. Putting the

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8 Id, 490.

9 They will, in circumstances of urgency, supply particulars over the telephone to a defendant's solicitor.

10 See para 8.10 below as to the position in the case of indictable offences.

11 Para 4.4.

12 As indicated in para 1.13 above, about 150,000 charges are dealt with in Courts of Petty Sessions each year.

13 Consideration would also have to be given to the legal effect of errors in the summary, such as whether the complainant would be bound by the errors.

requirements in statutory form would alert complainants to the need for compliance and defendants of the opportunity to demand the information. The Commission accordingly recommends that the complaint should be required to contain the particulars that are necessary for giving reasonable information as to the nature of the charge.[14] This should include the information presently prescribed under the *Justices (Forms) Regulations 1982*,[15] together with whatever further information is necessary to enable the defendant to know with reasonable particularity the act or omission alleged against him or her. This requirement should be supplemented by a provision similar to that contained in the *Criminal Code* [16] in respect of trials on indictment enabling the defendant to apply[17] to the court for an order that the complainant deliver to the defendant particulars or further and better particulars of any matter alleged in the complaint. The court would thereby be expressly empowered to give such directions for further disclosure as it considered appropriate in the particular case.

(c) Joinder of offences

4.11 Subject to the matters referred to in the following paragraph, a complaint must be for only one matter.[18] This rule is designed to ensure that -

(a) the defendant is precisely acquainted with the offence charged;
(b) a court is not placed in the position of having to separate the evidence applicable to a number of unconnected matters; and
(c) there is no uncertainty or ambiguity as to the final order of the court, thus avoiding the difficulty of resolving a plea of autrefois acquit or autrefois convict on a subsequent complaint.[19]

4.12 The *Justices Act* contains two provisos to the rule that a complaint must be for only one matter. First, a number of matters may be joined in the same complaint where -

(a) in the case of indictable offences, the matters of complaint are such that they may be charged in one indictment;[20]

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14 Cf *Justices Act* (SA), s 22a. As to the right of an arrested defendant to receive a copy of the complaint see para 4.21 below.
15 Para 4.4 above.
16 S 592.
17 Para 7.17 below. This matter could also be dealt with at a pre-trial hearing: para 5.4 below.
18 *Justices Act*, s 43.
19 For examples see W Paul, *Duplicity in Indictments and Informations* (1935) 8 ALJ 430, 433.

(b) in other cases, the matters of complaint are substantially of the same act or omission on the part of the defendant.[21]

Secondly, where several simple offences are alleged to be constituted by the same acts or omissions or by a series of acts done or omitted to be done in the prosecution of a single purpose, the charges for the offences may be joined in the same complaint against the same person. If it appears to the court that the defendant is likely to be prejudiced by the joinder, it may require the complainant to elect upon which of the charges he or she will proceed and may direct that the defendant be tried separately on each or any of the charges.[22]

4.13 The *Criminal Code* enables charges for distinct offences to be joined in the same indictment when "...several distinct indictable offences form or are a part of a series of offences of the same or a similar character".[23] This permits, for example, three counts of false pretences to be joined in the one indictment.[24] If it appears to the court that the defendant is likely to be prejudiced by such joinder, the court may require the prosecutor to elect to proceed on one of the charges or may direct that the trial of each or any of the charges be held separately. This provision also applies to complaints of indictable offences tried summarily.[25]

4.14 In the Commission's view it is undesirable that there should be different rules for the matters which may be included in the one complaint, depending on whether the offence is an indictable offence triable summarily or a simple offence. In order to remove this inconsistency, the Commission recommends that section 43 of the *Justices Act* be redrafted in terms similar to section 585 of the *Criminal Code* and, in particular, so that the circumstances in which more than one matter may be joined in a complaint are the same as those in the second paragraph of the latter section. Where more than one matter is charged in a complaint, each charge should be set out in a separate paragraph. Of course, where there is a joint hearing of separate (but similar) charges great care is required to ensure that there is no confusion of issues or any misapplication of the evidence admissible on only one charge to another or other charges. A safeguard would be provided for the defendant by the provision that the court may

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20 See *Criminal Code*, ss 585 and 586.

21 In s 43 of the *Justices Act* "matter" appears to have its ordinary meaning and not the meaning it is given by s 4 of the Act.

22 *Justices Act*, s 43.

23 *Criminal Code*, s 585.

24 *Seiler v R* [1978] WAR 27.

25 *Criminal Code*, s 593 and the first proviso to s 43 of the *Justices Act*.

require the prosecutor to elect to proceed on one of the charges or direct that the trial of each or any of the charges be held separately.

(d) Charging more than one defendant in a complaint

4.15 The *Justices Act* contains no provision as to whether or not more than one defendant may be charged in a complaint. It has been held by the Full Court of Western Australia that this may be done in the case of persons alleged to have joined in committing the same offence, for example, cultivating a prohibited plant.[26] In England it has been held that such a trial may be conducted if the facts are sufficiently connected to justify a joint trial.[27] In the case of trials on indictment and summary trials of indictable offences triable summarily,[28] any number of defendants may be charged in the same indictment or complaint with committing different or separate offences if the offences arise substantially out of the same or closely related facts.

4.16 The Commission can see no reason for differing rules in the case of trials of simple offences and the summary trial of indictable offences triable summarily. The Commission accordingly recommends that express provision be made in the legislation for more than one defendant to be charged in a complaint in terms of the provision applicable to indictable offences.[29] However, to avoid prejudice to one or more of the defendants which may arise with a joint trial the court should have a discretion to direct that separate trials be conducted.[30]

(e) The summons

4.17 A justice, a stipendiary magistrate or clerk of petty sessions is empowered to issue a summons when a complaint is made before him or her that any person is guilty of, is suspected of having committed or is liable to be dealt with in respect of any indictable offence, simple offence or other matter. [31]

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26 *Kucera v Fotia* [1979] WAR 130, 131.
27 *Chief Constable of Norfolk v Clayton* [1983] 2 AC 473
28 *Criminal Code*, s 593.
29 Cf *Criminal Code*, s 586(7).
30 Cf *Criminal Code*, s 624.
31 *Justices Act*, ss 52 and 53.

4.18 The summons can only be issued by the person who received the complaint.[32] This can cause difficulty if it becomes necessary to extend the time for attendance where the summons was not served on the defendant before the date set down for his or her appearance in court and the person who issued it has died, been transferred or retired. In order to overcome this difficulty, the Commission recommends that any other person authorised to issue a summons should have power to extend the time for attendance, or to issue a fresh summons in respect of the complaint, if there is good cause for doing so.

4.19 At present a summons may be served by delivering a duplicate to the defendant personally, or, if the defendant cannot be found, by leaving it with some person for him or her at the defendant's last known place of abode.[33] A summons may also be served by prepaid registered post in some circumstances.[34] The Commission proposes two changes to the provisions for service of a summons -

(1) It recommends that if a person attempts to serve a summons on the defendant personally and the defendant attempts to avoid service by refusing to accept it, it should be possible to serve the summons by bringing it to his or her notice.[35]

(2) The provision allowing a summons to be left at the defendant's last known place of abode if the defendant cannot be found so as to effect personal service should be tightened so as to increase the likelihood of the summons actually coming to the defendant's attention. The Commission accordingly recommends that it be provided instead that a summons may be served on a defendant, if he or she cannot be found, by leaving it at the defendant's usual place of residence with a person who appears to be not less than 16 years of age. However, where the defendant's usual residence is a hotel or boarding house or similar establishment the summons should be required to be left with a person not less than 16 years of age who is apparently in charge of the establishment or employed in its office.

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32 Allen, 152.
33 *Justices Act*, s 56. For service on a company see *Companies (Western Australia) Code*, s 528.
34 Discussion Paper, paras 4.16 and 4.17.
35 Cf *Summary Proceedings Act* (NZ), s 24.

(f) Arrest with or without a warrant

4.20 When a complaint of an offence is made before a justice, the justice may issue a warrant to apprehend the defendant and cause him or her to be brought before a court to be dealt with according to law. The justice may, however, instead of issuing a warrant issue a summons.[36]

4.21 As the summons form contains, and should continue to contain, a copy of the complaint, the defendant receives a copy of the complaint when the summons is served. Where, however, a defendant is arrested, either with or without a warrant, the defendant does not receive a copy of the complaint as a matter of course. In the Commission's view it is desirable that defendants be given an opportunity to receive a copy of the complaint before they first appear in court so that they know what the complainant is alleging. The fact that the complaint is read to a defendant in court before being required to plead is not always sufficient. Many defendants face numerous charges and cannot be expected to appreciate then and there the details of each one. Obtaining a copy of the complaint would also, of course, assist their legal representatives in the preparation of their case. Accordingly, the Commission recommends that defendants should be given a statutory right to receive, on application to the relevant clerk of court,[37] without charge, a copy of the complaint.[38]

4.22 At present it is the practice to revoke warrants in certain circumstances, for example, where a defendant appears before the court voluntarily. There would also be cause to withdraw a warrant where it was discovered that it had been wrongly issued due to a mistake of law or fact. The revocation of the warrant in these circumstances means that the defendant will not be subject to arrest unnecessarily. Some doubt, however, has been expressed as to whether a warrant may be revoked.[39] In order to remove this doubt, the Commission recommends that the court, the justice who issued the warrant, or another justice if that justice is dead, has ceased to hold office or is unavailable, should have power to revoke the warrant for cause shown.[40] A similar rule should also apply to a summons.

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36 *Justices Act*, ss 58 and 59.

37 Para 4.3 above.

38 The Commission has been informed that in practice the defendant can obtain a copy of the complaint from the relevant clerk. The recommendation merely statutorily confirms, and makes public, this position.

39 Allen, 173.

40 Cf *Summary Proceedings Act (*Vic), s 15(2) and *Summary Proceedings Act* (NZ), s 23. In Queensland provision has been made for the disposal of unexecuted warrants: *Disposal of Unexecuted Warrants Act 1985*.

3. INFRINGEMENT NOTICES

(a) Introduction

4.23 A number of Acts provide for proceedings relating to certain simple offences to be commenced by an "infringement notice". One such Act is the *Road Traffic Act 1974-1985*. Section 102(1) of that Act provides that where a member of the police force or a warden has "reason to believe" that a person has committed a prescribed offence[41] against the Act, the officer or warden may serve a "traffic infringement notice" on the person.

4.24 A traffic infringement notice may be served personally or by post. If the identity of the person driving or in charge of the vehicle is not known and cannot immediately be ascertained, the notice may be addressed to the owner of the vehicle, without naming him or her or stating his or her address, and be served by leaving it in or upon, or by attaching it to, the vehicle.

4.25 Where the notice is served personally or by post the alleged offender may dispose of the matter by payment of the penalty shown or by declining to be dealt with under the provisions of the section. If the penalty is not paid within a specified period, the person is deemed to have declined to be so dealt with. Where anyone declines to be so dealt with under the provisions or is deemed to have so declined the matter must be dealt with by a court.

4.26 Where the notice is served by addressing it to the owner of the vehicle and leaving it in or upon, or attaching it to the vehicle, the owner is deemed to have committed the offence if the prescribed penalty is not paid within the period specified in the notice[42] or if he or she does not identify the person who was the driver of or person in charge of the vehicle at the relevant time or satisfy a prescribed officer that, at the relevant time, the vehicle had been stolen or unlawfully taken or used.[43] It would also seem that the owner of the vehicle can decline to be dealt with under the provisions, in which case the matter must be dealt with by a court.

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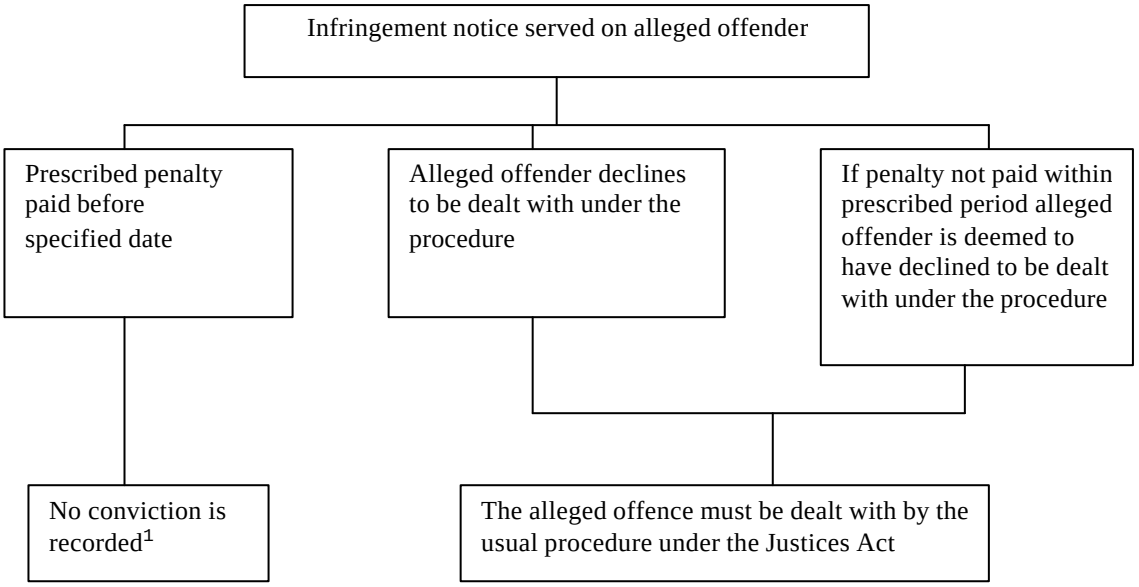
41 See *Road Traffic (Infringements) Regulations 1975-1986*, reg 3 and the First Schedule.

42 There appears to be a conflict between this provision (*Road Traffic Act 1974-1985*, s 102(3)(a)) and s 102(4) of the Act which provides that a person who receives a notice is deemed to have declined to be dealt with under the provisions if he or she fails to pay the prescribed penalty within the specified time.

43 *Road Traffic Act 1974-1985*, s 102(3). In these cases the notice may be withdrawn.

4.27 The following chart provides a summary of this procedure.



4.28 Although the infringement notice schemes in some Acts are substantially the same as that in the *Road Traffic Act*,[44] there are differences in other Acts. One notable difference is in the *Control of Vehicles (Off-Road) Areas Act 1978-1985*. That Act provides that the "....payment of a modified penalty pursuant to an infringement notice constitutes a conviction of an offence."[45] Another Act [46] omits the provision in the *Road Traffic Act* that a person can decline to be dealt with under the infringement notice procedure. If the modified penalty is not paid the owner of the vehicle concerned is deemed to be the person who committed the offence. Yet another approach is followed under the *Western Australian Institute of Technology Land and Traffic By-laws*[47] where production of an acknowledgement of payment of the penalty is a defence to a charge of a breach of a by-law in respect of which the penalty was paid.

(b) Development of a standard infringement notice procedure

4.29 An infringement notice scheme should have four main advantages. First, because it would not be necessary to obtain a summons or a warrant from a justice by way of complaint

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44 *Litter Act 1979-1986*, s 30; *Local Government Act 1960-1986*, s 669D; *Metropolitan Market Act 1926-1985*, s 13B; *Parks and Reserves Act 1895-1985*, s 14; *Police Act 1892-1985*, s 87(7)-(9); *Secret Harbour Management Trust Act 1984-1985*, s 30; *Western Australian Marine Act 1982*, s 132.

45 S 37(7).

46 *City of Perth Parking Facilities Act 1956-1983*, s 19A.

47 By-law 51.

it provides a simple means of commencing proceedings with a minimal use of the time of the police and other enforcement officers. Secondly, by paying the prescribed penalty, it enables a person to avoid the need for a court appearance and the cost and time necessarily involved therewith.[48] Thirdly, it reduces the number of cases required to be dealt with by Courts of Petty Sessions.[49] Fourthly, payment of the prescribed penalty enables a person to avoid a conviction for the offence. As regards this last aspect the Commission considers that the procedure provided by the *Control of Vehicles (Off-Road) Areas Act* referred to in the previous paragraph is defective.

4.30 In the Discussion Paper the Commission suggested that a standard infringement notice procedure should be introduced to replace the infringement notice provisions in various statutes. The commentators overwhelmingly supported the proposal. A number of commentators pointed out that a standard procedure would become common knowledge and thereby reduce uncertainty as to the steps to be followed by those who received a notice.

4.31 Accordingly, the Commission recommends that a standard infringement notice procedure be introduced. It is of the view that the existing procedure in the *Road Traffic Act* provides a suitable model and recommends that it be adopted as the standard. The Commission notes that section 16 of the *Road Traffic Act Amendment Act 1978* has been repealed without ever coming into force. That section would have allowed a conviction to be recorded against persons if they failed to pay the prescribed penalty or failed to notify the Traffic Board that they wished to have the matter heard by a court. In the Discussion Paper[50] the Commission criticised this section on the ground that a conviction could be automatically recorded (without the safeguards associated with a matter being dealt with by a court) merely because the defendant failed to take certain steps. The Commission also notes the standard infringement notice procedures which have recently been enacted in New South Wales and Victoria.[51] In the Commission's view those procedures have the undesirable characteristic that

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48 By pleading guilty by endorsement, a defendant can also avoid the need for a court appearance in the ordinary case; para 6.22 below. However, a defendant may be reluctant to do this if it is considered that there may be a risk that the court will impose a heavier sentence in the absence of an account by the defendant or his or her counsel of extenuating circumstances.

49 For example, in 1984-1985 169,467 infringement notices for traffic offences were finalised. Of these 142,193 (83.91%) were finalised by payment of the penalty. 26,840 (15.84%) were dealt with by court proceedings. 434 (0.25%) were withdrawn: Police Department, Western Australia, Annual Report 1985, 56 (Appendix Q).

50 Para 4.32.

51 *Justices Act* (NSW), 88 100I-100X; *Summary Proceedings Act* (Vic), Pt VIIA.

an order for the enforcement of the penalty (which may involve imprisonment in default of payment) may be made without a court hearing.

4.32 While various Acts and regulations would continue to prescribe the offences which could be dealt with by an infringement notice, the penalty to be imposed and the procedure for issuing an infringement notice, there would be a standard procedure for dealing with matters once the notice was served. If the person served with the notice declined or neglected to pay the fine it would be necessary to deal with the alleged offence by complaint in the ordinary way. If the person paid the prescribed penalty, the effect in all cases would be that no conviction would be recorded.

4.33 A standard infringement notice procedure could initially be available in respect of offences presently dealt with under the various existing infringement notice procedures. Two commentators on the Discussion Paper suggested that infringement notices could be extended to "shoplifting offences" and "cannabis use",[52] in the latter case, because, although it carries a high maximum penalty, "tariff penalties" are generally imposed. Another submitted that there were many minor offences brought into court which are rarely defended and for which the offender receives a criminal conviction. He doubted that it was useful for these infractions of the law to proceed in this way if payment of a modest penalty would not outrage the community. The Commission has not considered the question whether or not infringement notices should be extended into areas where they presently do not apply. The question is one of policy to be determined on a case by case basis and is outside the scope of this report.

4. SUMMARY OF RECOMMENDATIONS

4.34 The Commission recommends that –

A written complaint

1. All complaints should be in writing.

Paragraph 4.2

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52 The South Australian Parliament has recently enacted legislation providing for an infringement notice procedure to be available in respect of the possession of a small quantity of cannabis: *Controlled Substances Amendment Act 1986* (to be proclaimed).

Filing complaint in court

2. The complaint should be filed by the complainant in the office of the court where the defendant is to appear as soon as practicable after the summons has been served or the defendant has been arrested as the case may be.

Paragraph 4.3

Particulars of the offence

3. The complaint should be required to contain such particulars as are necessary for giving reasonable information as to the nature of the charge.

Paragraph 4.10

4. A formal procedure should be provided for seeking particulars or further and better particulars about the nature of the charge.

Paragraph 4.10

Joinder of offences

5. Section 43 of the *Justices Act* should be redrafted so that the circumstances in which more than one matter may be joined in a complaint are the same as those in the second paragraph of section 585 of the *Criminal Code*. Where more than one matter is charged in a complaint, each charge should be set out in a separate paragraph.

Paragraph 4.14

Charging more than one defendant in a complaint

6. Provision should be made for more than one defendant to be charged in a complaint. However, the court should have a discretion to direct that separate trials be conducted.

Paragraphs 4.15 and 4.16

Amendment of summons

7. Any person authorised to issue a summons should have power to extend the time for attendance or to issue a fresh summons in respect of the complaint if there is good cause for doing so.

Paragraph 4.18

Service of the summons

8. It should be provided that a summons may be served by bringing it to the defendant's notice if he or she refuses to accept it.

Paragraph 4.19

9. The provision allowing a summons to be left at the defendant's last known place of abode should be amended to require instead that it be served on the defendant, if he or she cannot be found, by leaving it at the defendant's usual place of residence with a person who appears to be not less than 16 years of age. Where the defendant's residence is a hotel or boarding house or similar establishment the summons should be required to be left with a person not less than 16 years of age who is apparently in charge of the establishment or employed in its office.

Paragraph 4.19

Arrest with or without a warrant

10. A person arrested with or without a warrant should be given a statutory right to receive, on application to the relevant clerk of court, without charge, a copy of the complaint.

Paragraph 4.21

Revocation of a warrant or a summons

11. Provision should be made for the revocation of a warrant or a summons.

Paragraph 4.22

Infringement notices

12. A standard infringement notice procedure should be introduced.

Paragraph 4.31

Chapter 5

MATTERS PRELIMINARY TO A HEARING

1. A PRE-TRIAL HEARING

5.1 At present the *Justices Act* contains no procedure for dealing with matters before the day set down for a trial. In the Discussion Paper, the Commission considered whether, procedure for conducting pre-trial hearings should be introduced.[1]

5.2 A majority of commentators favoured this proposal. Some of those who were against it suggested that such a procedure was not appropriate in a summary jurisdiction and could lead to delay and additional cost. Others suggested that the issues which could be dealt with at a pre-trial hearing could be dealt with in opening submissions to the court on the day set down for trial.

5.3 While the issues which could be dealt with at a pre-trial hearing are capable of being disposed of in opening submissions this could be inconvenient. It could lead to delay in the start of a trial, or even to an adjournment to another date or place, which would inconvenience the defendant and any person who attended the court that day expecting to be called as a witness. Although generally the issues raised in summary trials are simple, some cases do raise complex or special issues of law or fact. A pre-trial hearing would provide a means of dealing with questions of law before the trial, such as those relating to the admissibility of evidence, which could result in the dismissal or withdrawal[2] of a charge or alternatively a plea of guilty. Other matters which could be dealt with at the hearing, such as an admission of fact,[3] could shorten the trial, reduce the number of witnesses required to be called or avoid the need for an adjournment.

5.4 Although the Commission acknowledges that a pre-trial hearing would be unnecessary in the vast majority of cases, it has concluded that it would be of value in some. Accordingly, the Commission recommends that provision be made for a party to apply for a pre-trial hearing but that the court should have a discretion to decide whether or not such a hearing

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1 Paras 5.5 to 5.8.
2 Para 6.17 below.
3 *Evidence Act 1906-1985*, s 32.

should be held having regard to the savings in time, expense or inconvenience that would be likely to result therefrom.

5.5 The court should have power on a pre-trial hearing to make such orders and give such directions as are necessary for the just and efficient disposal of the proceedings,[4] including orders and directions relating to -

(1) The giving by the prosecutor to the defendant of particulars or further and better particulars.
(2) Any question of law affecting the trial.
(3) Any admission by the defendant under section 32 of the *Evidence Act 1906-1985*.
(4) The severing of charges or the holding of separate trials.[5]
(5) Submissions as to the jurisdiction of the court or pleas of autrefois acquit or autrefois convict.
(6) The selection of the venue for the trial.

2. SUMMONING WITNESSES AND REQUIRING THE PRODUCTION OF DOCUMENTS

(a) Issuing a summons

5.6 A party may apply to a justice or clerk of petty sessions for a summons to any person requiring him or her to appear as a witness at the time and place mentioned in the summons.[6] A person may also be compelled to bring and produce all relevant documents and writings in his or her possession or power so that they may be tendered in evidence. A person is not bound to produce any document or writing not specified or otherwise sufficiently described in the summons or which he or she would not be bound to produce upon a subpoena duces tecum in the Supreme Court.[7]

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4 Cf *Supreme Court Rules 1970-1984* (NSW), Pt 75 r 11(4).
5 See para 4.16 above.
6 *Justices Act*, s 74(1).
7 Id, s 78.

5.7 In order to reduce the inconvenience to a person who is merely required to produce any document or writing, and not to give oral evidence,[8] the Commission recommends that it should be sufficient compliance with a summons if the document or writing is produced to the clerk of court at least two days before the date on which the person's attendance is required at the hearing.[9] The Commission's inquiries indicate that such a provision operates satisfactorily in the Federal Court where it is of particular value to banks and other financial institutions. Where documents are produced to a Registrar of the Federal Court before the trial, the other parties to the matter are informed that the documents have been lodged and are given an opportunity to inspect them before the hearing.

5.8 In the Discussion Paper the Commission referred to the preliminary submissions of two stipendiary magistrates who referred to cases involving an apparent abuse of the process of the court. A number of people had been summoned as witnesses but were unable to give any material evidence; in one case thirty people had been summoned. As a result the Commission suggested that two limitations could be imposed on the power to summon a person to give evidence. First, a requirement could be introduced to the effect that a summons should only be issued if the justice was satisfied that the person sought to be summoned was "likely to give material evidence or to have in his possession or power any article ...required for the purpose of evidence upon behalf of either party."[10] Secondly, a requirement could be introduced to the effect that it would be necessary to show that the person proposed to be summoned would not appear voluntarily.[11]

5.9 Those who commented on the Discussion Paper did not refer to any other cases in which the summons power had been abused. On the present evidence of isolated abuse the Commission is not convinced that there is need to introduce either of the limitations referred to above, particularly as both have disadvantages. The first has the disadvantage that a party may be denied an opportunity to tender persuasive evidence if, in fact, the person had been able to give material evidence. The second has the disadvantage that if a person who was not summoned did not appear voluntarily at the hearing a summons or warrant would then have to be issued and the hearing adjourned. As an alternative the Commission recommends that it be

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8 Of course a person required to produce documents may also be require to give oral evidence as to the documents.

9 Cf *Rules of the Supreme Court 1970-1984* (NSW), Pt 37 r 4 and *Federal Court Rules*, O 27 r 4.

10 *Justices Act* (SA), s 23.

11 *Justices Act* (NSW), s 61; *Justices Act* (Qld), s 78; *Ordinance* (ACT), s 61; and *Magistrates' Courts Act* (Eng), s 97(1).

expressly provided that a witness summons may be set aside by the court on application of the person summoned where the witness is unable to give any material evidence or to produce any documents or writings which are material and are not privileged. The Supreme Court has a common law power to set aside a summons in these circumstances.[12] A Court of Petty Sessions may itself have a similar power.[13] However, an express provision would alert people to the power and avoid a dispute over whether or not the matter was one within the court's power to control its own procedure.[14]

(b) Service of summons

5.10 Where a witness summons is issued it must be served by delivering a duplicate of the summons to the person personally or, if he or she cannot be found, by leaving it with someone for him or her at his or her last known place of abode.[15] Service by post is not permitted.[16] The Commission recommends two changes to the provisions for service of a witness summons.[17] First, it should be provided that a summons may be served by bringing it to the person's notice if he or she personally refuses to accept it.[18] Secondly, the provision allowing a summons to be left at the person's last known place of abode should be replaced by one providing that the summons may be served on a person who cannot be found, by leaving it at the person's usual place of residence with a person who appears to be not less than 16 years of age. Where the person's usual residence is a hotel or boarding house or similar establishment the summons should be required to be left with a person not less than 16 years of age who is apparently in charge of the establishment or employed in its office.

(c) Issuing a warrant

5.11 At present, if a justice or stipendiary magistrate is satisfied upon oath that it is probable that a person whose evidence is desired will not attend to give evidence without being compelled to do so, he or she may issue a warrant instead of a summons.[19] The warrant

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12 *R v Lewes Justices; Ex parte The Gaming Board of Great Britain* [1971] 2 All ER 1126, 1132; *R v Hove Justices; Ex parte Donne* [1967] 2 All ER 1253.

13 *R v Lewes Justices; Ex parte The Gaming Board of Great Britain* [1971] 2 All ER 1126, 1132; *Darcey v Pre-Term Foundation Clinic* [1983] 2 NSWLR 497, 503.

14 *Sparks v Bellotti* [1981] WAR 65.

15 *Justices Act*, ss 74(2) and 56.

16 Unlike service of a summons on a defendant: para 4.19 above.

17 These changes are also recommended in respect of service of summons on a defendant: para 4.19 above.

18 Cf *Summary Proceedings Act* (NZ), ss 26 and 24(1).

19 *Justices Act*, s 76. It is not common for a warrant to be sought.

requires the arresting officer to take the person arrested before a justice or justices "to testify what [he or she] knows concerning the matter of the said complaint".[20] This could possibly be construed as requiring the officer to hold the person in custody until the hearing of the complaint without the possibility of the person being bailed meanwhile. It is true that section 89 of the *Justices Act* provides that a witness or person sought to be made a witness may be discharged upon recognisance. However, because of the wording of the warrant this provision may be construed as applying only to an adjournment of a summary trial or preliminary hearing or where a defendant has been committed for trial. In order to clarify this matter, the Commission recommends that it be expressly provided that a person so arrested be immediately taken before a justice who should be empowered to grant bail on appropriate conditions.[21]

5.12 A similar issue arises where a witness fails to appear at a hearing in response to a summons, or where a hearing is adjourned, fails to appear at the resumption of the hearing having been discharged upon recognisance to so appear.[22] A warrant may be issued for the apprehension of anyone who does not then appear as required by the recognisance[23] or summons.[24] Where a person is arrested in these circumstances, the Commission recommends that provision should be made for the person to be taken before a justice so that his or her release on recognisance can be considered in the same manner referred to in the previous paragraph.

(d) Failure to appear in response to a summons

5.13 A person who neglects or refuses to appear at the time or place appointed in a summons either to appear as a witness or to produce documents may "then and there ...in [his or her] absence" be fined a sum not exceeding $40 by the court before which he or she was required to appear, if no just excuse is offered for such neglect or refusal. It must also be proved that the summons was duly served and, except in the case of indictable offences, that a reasonable sum was paid or tendered for the costs and expenses of attendance (called

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20 *Justices Act*, Fourth Schedule, Form No 13.

21 Cf *Summary Proceedings Act* (Vic), s 23. A refusal to discharge on recognisance could be the subject of an appeal under s 197 of the *Justices Act*.

22 *Justices Act*, ss 89 and 90. At present, in practice, the police do not seek such a recognisance but apply for a new summons for the person's appearance on the date set down for the recommencement of the hearing.

23 *Justices Act*, s 91.

24 Id, s 75(2).

"conduct money").[25] The court may also issue its warrant to bring the person before such justices or stipendiary magistrate who are present at a time and place mentioned to testify.[26]

5.14 In the Discussion Paper the Commission considered whether or not the requirement for conduct money should be retained. It suggested that if a person's place of residence was reasonably close to the court there would be no great financial hardship in travelling to the court at his or her own expense initially (a witness is entitled to reimbursement of his or her expenses).

5.15 The commentators were evenly divided on the question of whether or not the requirement for conduct money should be retained. A number pointed out that the abolition of the requirement could cause hardship. For example, persons whose sole or main source of income is a social security payment would be placed in an invidious position. They might have great difficulty in meeting the expenses of attending the court from their own resources initially, particularly if they lived at a considerable distance from the court, and yet might feel that they should comply with the summons in case their explanation for non-attendance was not accepted. They may even be unaware that financial hardship was a relevant consideration. The Commission agrees with those who submitted that the requirement for conduct money should be retained and recommends accordingly.

5.16 At present the penalty prescribed in section 75(1) of the *Justices Act* may be imposed "then and there" and in the person's absence. The Commission considers that it is undesirable that a court should be able to impose penalties in such a summary manner. It accordingly recommends that the present procedure be replaced by a provision making it an offence to fail to obey a witness summons in the circumstances specified in section 75(1). This would entitle the person concerned to the procedural safeguards available to other alleged offenders.

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25 Id, s 75(1).

26 Id, s 75(2).

3. SUMMARY OF RECOMMENDATIONS

5.17 The Commission recommends that –

A pre-trial hearing

1. Provision should be made for the holding of pre-trial hearings at the discretion of the court.

Paragraph 5.4

2. Where a pre-trial hearing is held, the court should have power to make such orders and give such directions as are necessary for the just and efficient disposal of the proceedings.

Paragraph 5.5

Summons to produce documents

3. Where a person is merely required to produce any document or writing, and not to give oral evidence, it should be sufficient compliance with a summons if the document or writing is produced to the appropriate clerk of court at least two days before the date on which his or her attendance is required at the hearing.

Paragraph 5.7

Setting aside a witness summons

4. Provision should be made for a witness summons to be set aside where the witness is unable to give any material evidence or to produce any documents or writings which are material and are not privileged.

Paragraph 5.9

Service of the summons

5. A witness summons should be served upon the person to whom it is directed by -

   (i) delivering a duplicate thereof to him or her personally or by being brought to his or her notice if he or she personally refuses to accept it; or

   (ii) if he or she cannot be found, by leaving it at his or her usual place of residence with a person who appears to be not less than 16 years of age. Where the person's usual residence is a hotel or a boarding house or similar establishment the summons should be required to be left with a person not less than 16 years of age who is apparently in charge of the establishment or employed in its office.

Paragraph 5.10

Arrest on warrant

6. Where a person sought as a witness either at the hearing or at an adjourned hearing is arrested under a warrant he or she should be immediately taken before a justice who should be empowered to grant bail on appropriate conditions.

Paragraphs 5.11 and 5.12

Conduct money

7. The present requirement that a reasonable sum be paid or tendered to a person summoned to appear as a witness for his or her costs and expenses of attendance should be retained.

Paragraph 5.15

An offence of failing to appear in response to a summons

8. The present power of the court to impose a penalty for failure to obey a witness summons in certain circumstances should be replaced by a provision making it an offence to fail to obey a witness summons in those circumstances.

Paragraph 5.16

Chapter 6

THE HEARING

1. ENTRY OF PLEA

6.1 At the hearing, the *Justices Act* provides that the substance of the complaint must be stated to the defendant and the defendant must be asked if "...he has any cause to show why he should not be convicted, or why an order should not be made against him".[1] As with trials on indictment,[2] the Commission recommends that a defendant should be entitled, on application, to receive a copy of the complaint before entering a plea, whether or not the defendant has previously received a copy of it.[3] The court should be under a duty to inform defendants of their right in this regard, and to ensure that they are given a copy of the complaint (including amendments allowed by the court) if the right is exercised. The court should also be under a duty to give defendants sufficient time to consider the complaint's contents before requiring them to plead. These arrangements would help ensure that defendants are under no misapprehension as to the nature of the charge.

6.2 In practice defendants are not asked to show cause why they should not be convicted of offences. Instead they are merely asked to plead guilty or not guilty.[4] The Commission considers that the requirement in the *Justices Act*, if followed, could cause confusion because it suggests that the burden of proof rests on the defendant. It therefore recommends that the present practice, which is similar to the position with respect to trials on indictment,[5] should be statutorily confirmed by requiring the defendant to enter a plea of guilty or not guilty. The defendant would, of course, be able to enter any other plea which may be appropriate in the circumstances, such as -

(1) that the complaint does not disclose any offence cognisable by the court;
(2) that the court has no jurisdiction to try the defendant for the offence;[6]
(3) that the defendant has already been convicted of the offence charged;
(4) that the defendant has already been acquitted of the offence charged.[7]

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1 *Justices Act*, s 138.
2 *Criminal Code*, s 613.
3 Paras 4.3 and 4.21 above.
4 The *Handbook for Justices* prepared by P W Nichols (at 7.2) advises justices to ask this question.
5 Cf *Criminal Code*, s 612.
6 It seems that this matter can also be raised under a plea of not guilty: R Watson and H Purnell, *Criminal Law in New South Wales* (1971), vol 1, 361.

As in trials on indictment, the Commission recommends that if, on being called upon to plead to the complaint, the defendant does not plead, the court should be expressly empowered to order that a plea of not guilty be entered on his or her behalf, [8] so long as the defendant is properly before the court.[9]

2. PRACTICE AT THE HEARING

6.3 At a hearing of the charge the court must hear the complainant and the defendant and their witnesses. The practice at the hearing in respect of the examination and cross-examination of witnesses must be in accordance with the practice for the time being of the Supreme Court upon the trial of an issue of fact in an action at law.[10] However, if the defence gives evidence other than as to the defendant's general character, section 139 of the *Justices Act* provides that the complainant may examine witnesses in reply. This is an apparent departure from the general principle that the prosecution should adduce all the evidential matter on which it intends to rely before it closes its case,[11] subject to the court's discretion to permit evidence to be given in reply or rebuttal.[12] No commentator on the Discussion Paper suggested any reason for the departure, nor can the Commission. Accordingly, the Commission recommends that section 139 of the *Justices Act* be revised so that it conforms to the general principle.

3. REPRESENTATION

6.4 Each party to a proceeding before a Court of Petty Sessions is entitled to be represented by a counsel or solicitor.[13] The court also has a discretion to allow a party to be represented by any other person.[14] Courts of Petty Sessions in this State allow a police officer as a matter of course to conduct proceedings on behalf of another police officer-complainant.

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7 Cf *Criminal Code*, s 616. The Murray Report (at 390 and 598) contains a recommendation for a minor amendment of this section.

8 Cf *Criminal Code*, s 619. In the Murray Report it is recommended at 395-396 and 600 that this section be amended so that it would also deal with the situation where a person does not plead because he or she is unable to do so.

9 Para 6.15 below.

10 *Justices Act*, s 141.

11 *R v Rice* [1963] 1 All ER 832, 839 per Winn J.

12 D Byrne and J D Heydon, *Cross on Evidence* (1986, 3rd Aus ed). 465-466, paras 9.94 and 9.95.

13 *Justices Act*, s 68. See also the *Aboriginal Affairs Planning Authority Act 1972-1985*, s 48 referred to in the following paragraph.

14 *Busato v Dempsey* (1909) 11 WALR 238. See also *O'Toole v Scott* [1965] 2 All ER 240. These cases on their facts involved representation by a police officer, but the principle laid down was expressed in the wide terms indicated. See also *Local Courts Act 1904-1985*, s 29.

The Discussion Paper raised the question whether this practice should be confirmed by statute. The overwhelming majority of commentators were in favour of doing so. The Commission agrees and recommends that it be provided that a police officer be given a statutory right to conduct proceedings on behalf of another police officer. It further recommends that, similarly, an officer of a Government department or authority should be entitled to appear on behalf of another officer of that department or authority.[15]

6.5 Section 67 of the *Justices Act* provides that the power to exclude any person from the court may not be exercised for the purpose of excluding any counsellor solicitor engaged in the case. The Commission considers that this provision is unduly limited and recommends that it should be extended -[16]

(a) To include any person appearing on another's behalf pursuant to a statutory right to do so. This would cover the situation provided for in section 48 of the *Aboriginal Affairs Planning Authority Act 1972-1985* which entitles a person of aboriginal descent to be represented in legal proceedings by an officer of the Department for Community Services or any other person so authorised by the Minister. The extension should also cover the case of a police officer or officer of a department or authority if the recommendation in the previous paragraph is adopted.

(b) To include any person to whom the court has granted leave to appear on behalf of a party. Clearly if leave has been granted, it would be improper to exclude the representative from the court.

4. REPRESENTATION OF A CORPORATION

6.6 Although corporations may be prosecuted for offences[17] there is no express provision setting out the procedural steps to be taken. In particular, there is no provision as to how a corporation may be represented in court or how it may enter a plea or conduct its case. Express provisions have been introduced in Queensland[18] with regard to trials on indictment

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15 Police officers and officers of departments and authorities are given such a right in at least two other jurisdictions: *Justices Act* (Tas), s 38(3) and (4); *Summary Proceedings Act* (NZ), s 37(2)-(4).

16 S 134 of the *Justices Act* would also consequentially require amendment.

17 See *Interpretation Act 1984-1985*, s 5.

18 Following a case in which this problem was raised in respect of an indictable offence: *R v Ampol Refineries Ltd* [1978] Qd R 378.

and committal proceedings. Section 594A of the Queensland *Criminal Code* provides[19] that where an indictment is presented against a corporation in respect of an indictable offence, the corporation may be present in court by its representative (that is, a person appointed by the corporation for the purposes of the section) and may enter a plea in writing by its representative. In respect of the trial, anything required to be done in the presence of the accused person, or to be read or said to or asked of the accused person shall, in the case of a corporation present in court by its representative, be construed as applying to that representative. Conversely, anything required to be done or said by the accused person personally may be done and said by the representative. It has been recommended in the Murray Report [20] that similar provisions should be enacted in this State in respect of trials on indictment and preliminary proceedings for indictable offences. The Commission considers that there is also a need for such a provision in the case of summary proceedings and recommends accordingly.

5. EVIDENCE OF A PERSON NOT PRESENT IN COURT

6.7 At present a person must generally be present in court in order to give evidence in summary proceedings.[21] There is no procedure for obtaining evidence from a person who is dangerously ill,[22] about to leave the State before the trial is held, or who lives at a considerable distance from the court whether within the State or elsewhere.

6.8 The Commission understands that the position with regard to evidence from persons outside the State is under review by the Government and consequently the Commission makes no recommendation on that matter.[23]

6.9 In the interest of ensuring that a court is able to have before it all relevant evidence the Commission considers that there should be provision for obtaining evidence from a person in Western Australia who cannot be present in court either because the person is not likely to be

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19 *Justices Act* (Qld), s 113A has equivalent provisions in respect of committal proceedings.

20 At 388-389.

21 Affidavit evidence in support of matters alleged in a complaint may be received in respect of some offences where a court proceeds to hear and determine a complaint in the absence of a defendant: para 6.27 below.

22 There is, however, provision for obtaining a statement; from a person who is dangerously ill in relation to indictable offences: *Justices Act*, ss 110-113 and *Evidence Act 1906-1985*, s 108. Ss 110-118 of the *Justices Act* substantially duplicate s 108 of the *Evidence Act 1906-1985*. The Commission suggests that consideration be given to repealing the former provisions.

23 In respect of federal matters the *Evidence Act 1905* (Cth) has recently been amended to provide for the examination of witnesses abroad.

able to attend the trial by reason of illness, physical disability or for some other good and sufficient cause, or because it would be impracticable for the trial to be adjourned to be held at the place where the witness is situated. The Commission recommends accordingly.[24] A party to the proceedings should be able to apply to the court, either before or during a trial, for an order appointing a commissioner to take the evidence in such a case.[25] Evidence so taken should be read in evidence at the trial only if[26] -

(i) it is proved by oral evidence or by affidavit that the witness is unable to attend for the reason given for appointing a commissioner;

(ii) the transcript of the evidence is signed by the commissioner by or before whom it purports to have been taken; and

(iii) it is proved to the satisfaction of the court that reasonable notice of the time and place for taking the evidence was given to the other party, and that party had full opportunity to cross-examine the witness.

6. VARIATION AND AMENDMENT

6.10 The *Justices Act* contains provisions designed to ensure that a complaint is not dismissed because of some technical drafting error. Section 46 provides that no objection shall be taken to any complaint or to any summons or warrant issued on a complaint, for any defect, in substance or form, therein or to any variation between it and the evidence in support thereof. Any such variance can be corrected by order of the court. The order must be recorded and, if required, a minute of the amendment must be given to the party against whom it was made.[27] If it appears to the court that the variance is such that the defendant has been deceived or misled, the court may, and at the request of the defendant must, adjourn the hearing of the case to some future day on such terms as it thinks fit. In the meantime the defendant may be held in custody or released on bail.[28]

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24 It would be more appropriate to provide such a provision in the *Evidence Act 1906-1985*.

25 Cf *Provincial Offences Act* (Ont), s 44(1).

26 Cf *Provincial Offences Act* (Ont), s 44(2). The Commission suggests that consideration also be given to permitting the video-taping of the evidence subject to similar safeguards.

27 *Justices Act*, s 48.

28 Id, s 47.

6.11 Most of those who commented on the Discussion Paper were of the view that the general approach adopted in these provisions was satisfactory. The Commission agrees but recommends three changes -

(1) A strict interpretation of these provisions suggests that the power of amendment and the power to adjourn apply only to a variance and not to a correction of a defect of substance or form. This result may not have been intended. The powers of adjournment of the hearing and amendment of a complaint, summons or warrant should expressly apply to both a variance and a defect of substance or form.

(2) Section 46 is obscurely drafted. It provides that no objection may be taken to any variance between the complaint, summons or warrant and the evidence in support of it but then goes on to provide, in effect, that the complaint, summons or warrant shall be amended by order of the justices at the hearing. This appears to imply that although the court can act of its own motion the defendant has no power to raise the issue at all. The section should be redrafted so as also to entitle the defendant to object, and that if he or she does so, the court may make such amendment to the complaint, summons or warrant as seems just.[29]

(3) As a result of the operation of section 593 of the Code, sections 590 and 591, which deal with formal defects and the amendment of indictments, apply to the summary trial of indictable offences. However, the effect of sections 590 and 591 of the *Criminal Code* is not precisely the same as that of sections 46 and 47 of the *Justices Act*. In order to make the procedure in summary trials consistent for simple offences and indictable offences triable summarily, sections 590 and 591 should no longer apply to the summary trial of indictable offences.

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29 Cf *Justices Act* (Qld), s 48.

7. ADJOURNMENT SINE DIE

6.12 During a hearing the court has power to adjourn the hearing to an appointed time and place.[30] The onus of persuading the court to grant an adjournment is upon the person seeking it.[31] In an unreported decision, the Full Court of the Supreme Court of Western Australia suggested that Courts of Petty Sessions have an inherent power to adjourn a hearing sine die, that is, without then fixing a date for resumption.[32] However, in a later decision the Full Court held that Courts of Petty Sessions only have power to control their procedure where there is no applicable statutory provision.[33] Because the *Justices Act* contains a provision to the effect that any adjournment must be to an appointed time and place, a power to adjourn sine die would seem to be excluded.

6.13 Permitting a proceeding to be adjourned sine die with the charge unresolved means that the defendant is left in an uncertain position. It may also mean that a complaint will not be dealt with again or lead to unnecessary delays which may prejudice one of the parties. Nevertheless circumstances can arise where an adjournment to a date to be set may be desirable, for example, where the proper determination of the proceedings depends on the outcome of proceedings in another court.

6.14 The Commission considers that, on balance, the court should be empowered to adjourn a matter sine die and recommends accordingly.[34] However, it should be provided that the power should not be exercisable in a case in which the defendant is to be remanded in custody[35] or on bail.[36] In order to ensure that the hearing is ultimately brought to finality (which could involve withdrawal of the complaint),[37] the court[38] should be obliged to bring the case on again for hearing no later than 12 months after the adjournment. Where a hearing

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30 *Justices Act*, s 86.

31 *Vick v Drysdale and Robb* [1981] WAR 321, 326.

32 *R v Martin; Ex parte Pitts*, No 10115 of 1976, 15.7.76, per Burt J.

33 *Sparks v Bellotti* [1981] WAR 65.

34 This power would, of course, have to be exercised judicially and not upon extraneous grounds or so as in effect to amount to a refusal by the court to hear and determine the case before it: *Howard v Pacholli* [1973] VR 833, 840 and *R v Martin; Ex parte Pitts*, No 10115 of 1916, 15.7.76, per Burt J at 3.

35 Cf *Magistrates' Courts Act* (Eng), s 10(2). It would be wrong to permit the court to make an order committing the defendant to indeterminate custody.

36 It would be impracticable to release a defendant on bail when the date for his or her appearance was undetermined.

37 Para 6.17 below.

38 A supplemental administrative obligation should be placed on the clerk of court to bring this requirement to the notice of the justices or magistrate in any case where the time limit will shortly expire and a date for the hearing has not yet been fixed.

adjourned sine die is set down for a further hearing the proceedings should not be resumed unless the court is satisfied that the parties have had adequate notice thereof.[39]

8. BRINGING COMPLAINT ON FOR HEARING

6.15 In practice the parties may make arrangements for a matter to be brought on for hearing at an earlier date than that set down,[40] particularly if the defendant intends to plead guilty. This practice has the advantage that it can reduce the inconvenience or delay involved in dealing with a complaint. In order to alert people as to the availability of such a facility, the Commission recommends that this practice be confirmed by an express provision.[41] The provision should make it possible for a complaint to be brought on for hearing earlier than would otherwise be the case either with the consent of the parties or by order of the court following an application by one of the parties, notice of the application having been given to the other parties.[42] The provision should also apply where a hearing has been adjourned sine die.

9. ADJOURNMENT AFTER THE DETERMINATION OF A MATTER

6.16 Once the court has heard the evidence adduced, it must consider and determine the matter and convict or make an order against the defendant or dismiss the complaint.[43] It may be that the power contained in section 86 of the *Justices Act* to adjourn the hearing can only be exercised up to the time the matter being heard is determined, that is, until the defendant is convicted or an order is made against him or her.[44] Although there is express power to adjourn a hearing in order to obtain a pre-sentence report,[45] there may be circumstances in which an adjournment is required for other purposes, for example, to give a defendant an opportunity to make restitution to the victim of the offence. In the interests of clarity, the Commission

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39 Cf *Magistrates' Courts Act* (Eng), s 10(2).

40 They merely ask the clerk for a new hearing date. However, in busy courts it may be difficult to set an earlier date.

41 Cf *Summary Proceedings Act* (Vic), s 79(3) and (4).

42 The Commission was informed of an instance involving a number of defendants where, for the convenience of the prosecution and upon its ex parte application, the clerk of court listed a hearing for the following morning before the date on which the defendants had been ordered to appear. When those defendants who attended next morning objected that they should not be required to plead until they had had time to engage counsel, the presiding judicial officer insisted they plead and, upon their refusal, entered pleas of not guilty and commenced the hearing.

43 *Justices Act*, s 139.

44 *Green v Sargeant* [1951] VLR 500.

45 *Offenders Probation and Parole Act 1963-1985*, s 9(1a).

recommends that section 86 should be amended to provide that the court may, after convicting the defendant and before sentencing or otherwise dealing with him or her, exercise its power to adjourn the matter.

10. WITHDRAWAL OF A COMPLAINT

6.17 At present there is no express statutory power to withdraw a complaint. If a complainant does not wish to proceed with a charge, for example, because he or she considers that on the available evidence the defendant has no case to answer or because the defendant has pleaded guilty to other charges, the practice is to offer no evidence at the hearing, in which case the complaint is dismissed. This practice appears somewhat contrived. The overwhelming majority of commentators supported the Commission's suggestion in the Discussion Paper that the court should be empowered to grant leave to withdraw a complaint. The Commission confirms its provisional view and recommends accordingly.[46] A requirement for leave would enable a defendant who preferred that the matter proceed in the expectation of an acquittal to object to the withdrawal. The withdrawal of a complaint should not operate as a bar to any further proceedings in respect of the same matter. Where a complaint is withdrawn, a defendant would be able to obtain an order for costs under the *Official Prosecutions (Defendants' Costs) Act 1973-1974* in respect of an official prosecution.[47] The Commission recommends that in other cases the court should have a discretion to make an order as to costs.

11. DISMISSAL OF COMPLAINT ON FAILURE OF COMPLAINANT TO APPEAR

6.18 If the complainant does not appear, either personally or by counsel or solicitor, at the time and place set down in the summons for the hearing and determining of a complaint, but the defendant attends the hearing, the court is required either to dismiss the complaint or to adjourn the hearing to some other day on such terms as it thinks fit.[48] Where the hearing is adjourned, the defendant may be remanded in custody or released on bail.

6.19 This provision applies only to the "time and place appointed by the **summons**" for the hearing. There is no reason why the provision should not also apply where a hearing has been

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46 Cf *Justices Act* (SA), s 69 and *Summary Proceedings Act* (NZ), s 86.

47 S 5.

48 *Justices Act*, s 134.

adjourned and the complainant fails to appear at the adjourned hearing. The Commission recommends that the section be so amended.[49]

6.20 Where a complaint is dismissed because of the complainant's failure to appear, the dismissal does not operate as a bar to subsequent proceedings with respect to the same offence.[50] This is because it is an essential ingredient of a plea of autrefois acquit that the defendant should have been in peril at the earlier proceedings, that is, that the dismissal must have been "on the merits".[51] The Commission does not consider that there is any need to alter this rule.[52]

12. THE PROCEDURE WHERE A DEFENDANT DOES NOT APPEAR

(a) General Procedure

6.21 Where the defendant fails to appear at the hearing of an offence that is not an indictable offence,[53] and due service of the summons is proved, the court may either proceed to hear and determine the matter in the defendant's absence or adjourn the hearing and issue a warrant to bring the defendant before a court to answer the complaint and be dealt with according to law. A defendant who is apprehended under the warrant must be detained in safe custody until he or she can be brought before a court at a time and place of which the complainant has had due notice,[54] at which time the complaint may be heard.

6.22 Where a defendant who has notified the clerk of court in writing that he or she wishes to plead guilty to the charge fails to appear at the hearing, the court may proceed to hear and determine the complaint as though the defendant were present and pleaded guilty. In this case, the court cannot impose a sentence of imprisonment until the defendant is before it and, for this purpose, may issue its warrant to arrest the defendant.[55] If a defendant, having been given such a written notice, subsequently notifies the clerk that he or she wishes to withdraw the

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49 Although s 134 is expressed to be subject to s 136 of the *Justices Act*, it may be that it does not apply where the court has fixed the time and place for a hearing under s 136(2) so that the date for the original hearing is no longer "appointed by the summons".

50 The ordinary rules as to costs would apply: see para 7.10 below.

51 *Barnes v Gougousis* [1969] VR 1019, 1022.

52 The position could, however, be made more certain by an express provision that such a dismissal does not operate as a bar to other proceedings: cf *Summary Proceedings Act* (NZ), s 64.

53 *Justices Act*, s 135.

54 Id, s 135(3).

55 *Justices Act*, s 135(1).

plea but does not appear at the hearing the court may take one of the actions referred to in paragraph 6.21 above.

6.23 Apart from advising a defendant that he or she may plead guilty or not guilty, the summons form also states that the defendant may, if a guilty plea is made, forward "with the summons any written explanation or other information [he or she believes] is relevant to the charge". Although most defendants respond by making a plea in mitigation of penalty, some give an explanation of the circumstances of the alleged offence which appears to indicate that the plea of guilty was not justified. The Commission recommends that the wording be revised so as to express more clearly that the defendant is entitled to do either of these things.[56]

6.24 The question of the time allowed to pay a fine is in the discretion of the court. The Commission recommends that a defendant who pleads guilty in writing should be advised on the summons form that he or she may request time to pay any fine imposed. This would place such a defendant in a position similar to that of a defendant who appeared in court. Defendants who pleaded guilty in writing and requested time to pay would be notified of the court's decision in a notice of the fine imposed,[57] but in any case they could contact the clerk to find out if their request had been granted.

6.25 If a defendant is unable to comply with an order to pay a fine within the time ordered by the court, he or she may apply to the relevant clerk of petty sessions for an extension of time to pay. Under authority delegated by the Attorney General, the clerk may grant an extension of time if the amount involved does not exceed $250 or the period of extension sought does not exceed three months. In other cases the clerk must submit the application to the Under Secretary for Law for consideration. The Commission will review the practice and procedure relating to the enforcement of fines imposed by Courts of Petty Sessions in the final part of this project.[58]

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56 A form of words could be "You may also write down on a separate sheet of paper (which you should send back with this summons) anything you think that the court should know about the matter, including any facts which you think would help the court in deciding on the penalty".
The Commission acknowledges that the drafters of the present form have been at pains to make it readily understandable by recipients. However, further improvement may be possible both as to layout and contents and the Commission suggests that in revising it regard be had to the comments of the Law Reform Commission of Victoria in its Discussion Paper No 1, *Legislation, Legal Rights and Plain English* (1986).

57 Para 7.4 below.

58 Para 1.4 above.

6.26 As indicated above,[59] the court may not impose a sentence of imprisonment on the defendant until he or she is before it and for that purpose it may issue a warrant for the defendant's arrest. Another penalty which can be imposed is a disqualification from holding or obtaining a licence, certificate, permit or other authority. One problem which can arise at present is that a defendant may not learn of the disqualification until some time after it has been imposed. This may mean that in the intervening period the defendant can inadvertently breach some law, for example, by driving a car whilst disqualified. In order to reduce the possibility of this occurring, the Commission recommends that the court should have a discretion to order that any disqualification from holding a licence, certificate, permit or other authority should commence at any time within seven days from the time of conviction.

(b) Use of affidavit evidence under the Justices Act

6.27 Where the court proceeds to hear and determine the complaint in the absence of a defendant, it may receive affidavits of evidence in support of the matters alleged in the complaint and determine the complaint on that evidence if the complaint is of a simple offence against -

(a) the *Road Traffic Act 1974-1985*;[60]
(b) any other prescribed Act;[61]
(c) any regulation rule by-law or order made under the above Acts.[62]

6.28 The effect of this provision is to avoid the need for prosecution witnesses to attend the hearing. One commentator on the Discussion Paper suggested that a wider range of minor offences could be dealt with by affidavit under this provision than those to which it presently applies. The Commission agrees and suggests that the Government consider extending the provision to other enactments. Examples of what the Commission has in mind are parking by-laws in local authority districts other than the City of Perth and all offences which may be dealt with by an infringement notice.

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59 Para 6.22.

60 This procedure is used in the case of traffic offences in which a police officer has observed an offence being committed.

61 Only two enactments have been prescribed under the *Justices Act (Evidence by Affidavit) Regulations 1914-1915*: the *City of Perth Parking Facilities Act 1956-1988* and the *Motor Vehicle Dealers Act 1913-1985*.

62 *Justices Act*, s 135(2).

13. SETTING ASIDE DECISION GIVEN IN DEFAULT OF APPEARANCE OF ANY PARTY

6.29 Where a decision is given by a court in default of appearance either by the complainant or by the defendant, the defaulting party may, within 21 days of the decision or such further period as is permitted, apply to the court to set the decision aside. At the hearing of the application the court may either refuse the application to set aside the decision or adjourn the hearing to an appointed time and place and direct that the applicant give to the other party written notice of that time and place. The other party may appear to oppose the application. The court may either set the decision aside or refuse to do so. [63]

6.30 The court's discretion either to set the decision aside or to refuse to do so must, of course, be exercised judicially and not capriciously. The provision, however, is in very general terms and gives the court and the parties very little guidance as to the circumstances in which a decision may be set aside. In South Australia more guidance is given by the legislature. In that State section 76a(3) of the *Justices Act* provides:

> "Where a court of summary jurisdiction is satisfied, upon an application under this section, that -
>
> (a) the applicant did not receive notice of the proceedings in which the conviction or order was made, or not in sufficient time to enable him to attend the hearing; or
>
> (b) the applicant failed to attend the hearing for reasons that render it desirable, in the interests of justice, that the conviction or order should be set aside and the proceedings re-heard,
>
> the court may set aside the conviction or order to which the application relates."

The Commission recommends that similar statutory criteria be adopted in this State.

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63 Id s 136A. The court, either on its own motion or on the application of a party, may also rectify an order imposing punishment which is incorrect: *Justices Act*, s 166B -see Discussion Paper, para 7.34.

14. ONUS OF PROOF

6.31 Section 72 of the *Justices Act* provides that where a complaint negatives any exemption, exception, proviso or condition contained in the Act[64] creating the offence, the defendant has the onus of proving that he or she is entitled to a defence based on the exemption, exception, proviso or condition.[65] In such cases section 72 has the effect of placing a legal burden of proof on the defendant,[66] that is, the matter must be taken as proved against the defendant unless the court is satisfied, on a balance of probabilities, to the contrary.[67]

6.32 The Senate Standing Committee on Constitutional and Legal Affairs has examined the law relating to proof of negatives in Commonwealth legislation.[68] It concluded that all such legal burdens on the defendant should be reduced to evidential burdens.[69] That Committee, however, went further by recommending that Commonwealth legislation be reviewed to ensure that not even an evidential burden should rest on a defendant unless the offence involves matters:

> "(i) where the prosecution faces extreme difficulty in circumstances where the defendant is presumed to have peculiar knowledge of the facts in issue; or
>
> (ii) where proof by the prosecution of a peculiar matter in issue would be extremely difficult or expensive but could be readily and cheaply provided by the defence."[70]

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64 This section, therefore, appears to apply only to Acts or Ordinances and not to subordinate legislation: *Interpretation Act 1984-1985*, s 5.

65 See, for example, *W Thomas & Co (WA) Ltd v Martin* [1967] WAR 68. The defendant was charged with having carried on an offensive trade without the consent of the local authority. It was held that it was for the defendant to prove that the consent had been obtained.

66 *Gatland v Metropolitan Police Commissioner* [1968] 2 All ER 100.

67 Such a provision has been criticised because:

> "...even after allowance has been made for the fact that the standard of proof would be that appropriate to civil proceedings it means that the tribunal of fact may be obliged to convict a person of whose guilt they are so far from being sure as to regard the probabilities of the existence of a lawful excuse as equally balanced": D Byrne and J D Heydon, *Cross on Evidence* (1986 3rd Aus ed), 195, para 4.36.

68 *The Burden of Proof in Criminal Proceedings* (1982).

69 Id, 49-50, para 5.41. "The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue, due regard being had to the standard of proof demanded of the party under such obligation": D Byrne and J D Heydon, *Cross on Evidence* (1986 3rd Aus ed), 170, para 4.4.

70 Senate Standing Committee on Constitutional and Legal Affairs, *The Burden of Proof in Criminal Proceedings* (1982) 62, para 6.13(b).

6.33 In the Discussion Paper the Commission considered whether merely an evidential burden should be placed on defendants to prove negatives and, whether or not such an approach was taken, whether a requirement for the proof of a negative by a defendant should be confined to the circumstances recommended by the Senate Standing Committee on Constitutional and Legal Affairs. A majority of commentators on this issue favoured a change in the burden of proof from a legal burden to an evidential burden. The Commission is of the view that section 72 is undesirable in that it provides a general rule for reversing the onus of proof without regard to the question whether any particular offence justifies reversal, and that the section should eventually be repealed.[71] As a transitional measure, pending a review of the offences to which it applies, the Commission recommends that section 72 be limited so that it applies only to offences in existence at present. In the review of existing offences and also in the case of new offences, the onus of proof should be considered on a case by case basis and, where it is considered to be necessary to have a special rule relating to that onus, the rule should be expressed in the provision creating the offence.[72]

15. EVIDENTIARY PROVISIONS

6.34 The *Justices Act* contains two evidentiary provisions: sections 70 and 71. Section 70 provides that upon any complaint of an indictable offence, simple offence or other matter, the prosecutor or complainant is a competent witness to support the complaint.[73] The section is intended to overcome the common law rule that a party with a pecuniary interest in a proceeding cannot give evidence in that proceeding. However, since that rule is now negated in general terms by section 6 of the *Evidence Act 1906-1985*, section 70 is obsolete and can be repealed. Section 71 makes provision for the competence of a defendant and the defendant's spouse and the compellability of the defendant's spouse. The Commission made recommendations with regard to this provision in its report *Competence and Compellability of Spouses to Give Evidence in Criminal Proceedings* (1977). These recommendations have not as yet been implemented.

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71 See Victorian Legal and Constitutional Committee, *Report on the Burden of Proof in Criminal Cases* (1985), para 3.3.2.

72 Expressing the rule in the provision creating the offence would ensure that there was certainty as to the cases in which the onus lay upon the defendant. It would avoid the possibility of the courts holding that the onus had been reversed merely because of the way in which the provision creating the offence had been drafted: D Byrne and J D Heydon, *Cross on Evidence* (1986 3rd Aus ed), 187-190, para 4.32.

73 The section is based on s 14 of an 1850 Act: 14 Vict No 5.

16. APPROPRIATE VENUE

6.35 The *Justices Act* contains no express provision that a complaint or other proceeding should be heard at the most convenient venue. The complaint is usually heard in the courthouse nearest to the place where the offence is alleged to have been committed. This location may not, however, always be the most convenient location for the parties and witnesses. Accordingly, the Commission recommends that a party should be able to apply to the court to have a complaint or other proceeding heard at a place which on balance is the most convenient for all the parties and the witnesses. [74]

17. OPEN COURT

(a) Exclusion of members of the public from trials

6.36 The room or place in which an offence being tried summarily is heard is deemed to be an open and public court to which all persons may have access, or at least so many as may be conveniently admitted to it.[75] This provision recognises a fundamental principle of the administration of justice, namely that courts should operate under public scrutiny. However, there is a statutory exception in that the presiding judicial officer may require that all or any persons, except counsellor solicitors engaged in the case,[76] be excluded from the court if that is required in the interests of "public morality". There are also common law powers[77] to exclude members of the public to ensure that justice is done, for example, in the case of tumult or disorder or the reasonable apprehension of it,[78] to protect a witness who might otherwise be terrorised[79] or to order a person from the courtroom where the person is to give evidence in the proceedings.[80]

6.37 In the Discussion Paper, the Commission criticised the power to exclude people from the courtroom on the basis of public morality. The concept, which presumably refers to a case in which the evidence to be given is of an indecent nature, is not a proper reason for excluding

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74 Cf *Justices Act* (Qld), s 139(2).

75 *Justices Act*, s 65.

76 Id, s 67.

77 Powers which appear to be within the court's power to control its own procedure: *Sparks v Bellotti* [1981] WAR 65, 68-69, and 70-71. See generally J B Bishop, *Criminal Procedure* (1983), 128-130.

78 *Scott v Scott* [1911-1913] All ER Rep 1, 13.

79 *R v Governor of Lewes Prison; Ex parte Doyle* [1916-1917] All ER Rep (Ext) 1218, 1228.

80 *Chandler v Horne* (1842) 2 M & Rob 423 [1835-1842] All ER Rep 621; *Roberts v Garratt* (1842) 6 JP 154.

the public. The Commission invited comment on whether the power to exclude members of the public should be expressly defined and limited to cases in which it is necessary to do so in the interests of justice or to protect the reputation of a victim of a crime. The majority of those who commented on this issue favoured so doing.

6.38 The Commission is of the view that the fundamental principle that courts should be open and public should only be limited where that is necessary to ensure that justice is done. Accordingly, the Commission recommends that section 65 of the *Justices Act* be amended by removing the proviso relating to public morality and providing that persons may be excluded where it appears to the presiding officer to be necessary in the interests of justice so to do.[81]

(b) Exclusion of a defendant for misbehaviour

6.39 At present in summary trials there is no express power to exclude from a hearing a defendant who misbehaves. The overwhelming majority of commentators on the Discussion Paper favoured the introduction of such a power. The Commission agrees and accordingly recommends that, as in the *Criminal Code* in relation to trials on indictment,[82] where a defendant's conduct renders the continuation of proceedings in his or her presence impracticable, the court should have power to order the defendant's removal and direct that the trial proceed in his or her absence.[83] The Commission expects that the power would only be used in extreme circumstances and where an adjournment to give the defendant an opportunity to regain composure had been unsuccessful.

(c) Removal for disobedience to an order to leave the court

6.40 As an incidental power to be exercised when excluding a person from the court.[84] the Commission recommends that the presiding judicial officer should have power to order the physical removal from the courtroom of any person who has disobeyed an order to leave.[85]

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81 In effect this would make statutory what is now a common law power.

82 *Criminal Code*, s 635.

83 Unless a defendant appears to be mentally disordered and is remanded for examination under s 36 of the *Mental Health Act 1962-1985*.

84 Paras 6.38 and 6.39 above.

85 Cf *Magistrates' Courts Act* (Vic), s 47(2).

18. SUMMARY OF RECOMMENDATIONS

6.41 The Commission recommends that –

Entry of plea

1. A defendant should be entitled to receive, on application, a copy of the complaint before entering a plea, whether or not he or she has previously received a copy of it. The court should be obliged to -

   (a) inform the defendant of his or her right in this regard;
   (b) ensure that the defendant is given a copy of the complaint if the right is exercised; and
   (c) give the defendant sufficient time to consider it before requiring the defendant to plead.

   Paragraph 6.1

2. The defendant should be required to enter a plea in a manner similar to that in trials on indictment.

   Paragraph 6.2

3. If, on being called upon to plead, the defendant does not do so, the court should be expressly empowered to order that a plea of not guilty be entered on his or her behalf so long as the defendant is properly before the court.

   Paragraph 6.2

Practice at the hearing

4. Section 139 of the *Justices Act* should be revised to make it clear that the complainant may call witnesses in reply only if the court so permits.

   Paragraph 6.3

Representation

5. It should be provided that a police officer is entitled to conduct proceedings on behalf of another officer and that an officer of a government department or

authority is entitled to conduct proceedings on behalf of another officer of the department or authority.

Paragraph 6.4

6. The power given to the court to exclude persons from the courtroom should not be able to be exercised so as to exclude -

(a) a person appearing on another's behalf pursuant to a statutory right to do so; or
(b) a person to whom the court has given leave to appear on another person's behalf.

Paragraph 6.5

Representation of a corporation

7. An express procedure should be introduced for dealing with prosecutions of corporations.

Paragraph 6.6

Evidence of a person not present in court

8. Provision should be made for obtaining evidence, from a person in Western Australia who cannot be present at the trial.

Paragraph 6.9

Variation and amendment

9. The power to adjourn a hearing and to amend a complaint, summons or warrant should apply to both a variance and a defect of substance or form.

Paragraph 6.11

10. Section 46 of the *Justices Act* should be redrafted so as to entitle the defendant to object to a defect or variance, and that if he or she does so, to empower the

court to make such amendment to the complaint, summons or warrant as seems just.

Paragraph 6.11

11. Sections 590 and 591 of the *Criminal Code* should not apply to the summary trial of indictable offences.

Paragraph 6.11

Adjournment sine die

12. The court should be given express power when adjourning a matter to leave the time and place at which the hearing is to be resumed to be determined later by the court, but, in any event, no later than 12 months after such an adjournment. The power should not extend to a case in which the defendant is to be remanded in custody or on bail.

Paragraph 6.14

Bringing complaint on for hearing

13. The practice of allowing matters to be brought on for hearing at an earlier date than that set down should be statutorily confirmed.

Paragraph 6.15

Adjournment after the determination of a matter

14. The court should be given express power to adjourn a matter after recording a conviction but before sentencing or otherwise dealing with the defendant.

Paragraph 6.16

Withdrawal of a complaint

15. Express provision should be made for the withdrawal of a complaint with the leave of the court. In cases in which the *Official Prosecutions (Defendants'*

Costs) Act 1973-1974 does not apply the court should be empowered to make an order as to costs.

Paragraph 6.17

Dismissal of complaint on failure of complainant to appear

16. The provision for the dismissal of a complaint, or the adjournment of a hearing, where a complainant fails to appear at the time and place set down in the summons for a hearing should also apply where a complainant fails to appear at an adjourned hearing.

Paragraph 6.19

Information which may be given to the court where defendant does not appear

17. The summons form should be amended to make it clear as to the matters on which a defendant may give the court information where he or she does not appear.

Paragraph 6.23

Request for time to pay where defendant does not appear

18. A defendant who pleads guilty in writing should be advised on the summons form that he or she may request time to pay any fine imposed by the court.

Paragraph 6.24

Disqualifications

19. The court should have a discretion to order that any disqualification from holding a licence, certificate, permit or other authority should commence at any time within seven days from the time of the conviction.

Paragraph 6.26

Setting aside decision given in default of appearance of any party

20. The criteria for setting aside a decision given in default of appearance of any party should be that -

(a) the applicant did not receive notice of the proceedings in which the conviction or order was made, or not in sufficient time to enable him or her to attend the hearing; or

(b) the applicant failed to attend the hearing for reasons that render it desirable, in the interests of justice, that the conviction or order should be set aside and the proceedings re-heard.

Paragraph 6.30

Onus of proof

21. Section 72 of the *Justices Act* should eventually be repealed. As a transitional measure, pending a review of the offences to which it applies, it should be limited to offences in existence at present.

Paragraph 6.33

Section 70 of the Justices Act

22. Section 70 of *the Justices Act* should be repealed.

Paragraph 6.34

Appropriate venue

23. A party should be entitled to apply to the court to have a complaint or other proceeding heard at a place which on balance is the most convenient for all the parties and the witnesses.

Paragraph 6.35

Exclusion of the public

24. The court should have power to exclude persons from the courtroom only where that is necessary in the interests of justice.

Paragraph 6.38

Exclusion of a defendant for misbehaviour

25. The court should be given power to exclude a defendant whose conduct renders the continuance of the proceedings in his or her presence impracticable and to direct that the trial proceed in the defendant's absence.

Paragraph 6.39

Removal of a person who has disobeyed an order to leave the court

26. Where a person has disobeyed an order to leave the court, the presiding judicial officer should have power to order the physical removal of that person.

Paragraph 6.40

Chapter 7

MATTERS ANCILLARY TO THE COURT'S DECISION AND OTHER MATTERS

1. RECORDING THE COURT'S DECISION

7.1 Where a complaint is dismissed, the court may make an order of dismissal and give the defendant a certificate thereof. The certificate is a bar to any subsequent complaint for the same matter against the same person.[1] A formal record must be prepared if it is required by a party to the proceedings for the purpose of an appeal against the decision or for a writ of habeas corpus or other writ of the Supreme Court.[2] In other cases the *Justices Act* does not require the court to draw up a formal record of the decision, except on summary conviction for an indictable offence.[3]

7.2 In the Discussion Paper the Commission referred to two cases in which the failure to record accurately the decision led to people being wrongly imprisoned.[4] In both cases there was no record that the defendant had been given time to pay a fine.

7.3 Although the Commission considers it unnecessary to require the court to draw up a formal order in those cases where it is not at present obliged to do so,[5] it recommends that the court be expressly obliged to make a minute of any conviction or order against the defendant at the time the determination was made,[6] including, in particular, a minute as to whether the defendant had been given time to pay a fine or other monetary penalty. In most cases it should be sufficient if that minute were made on a modified complaint form.[7]

2. NOTICE OF FINE IMPOSED

7.4 Although there is no statutory requirement that a defendant be given a written notice of any fine imposed or costs that are payable, it is now the practice for clerks of court to do so whether or not the defendant is present in court when the penalty was imposed. The extension

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1 *Justices Act*, s 142.
2 Id, s 146.
3 Ibid.
4 Paras 7.3 and 7.4.
5 Most commentators were also of this view, many drawing attention to the immense amount of paperwork that would be involved.
6 Cf *Justices Act* (SA), s 70.
7 The Commission suggests that the general layout of the forms currently in use be reviewed to ensure that there is adequate space for information to be recorded on them satisfactorily.

of the practice to defendants who were present in court when the order was made followed a recommendation in the Dixon Report.[8] The notice specifies -

(a) The name and address of the offender.
(b) The court reference, that is the name of court and charge number.
(c) The amount of the fine and costs.
(d) The time allowed for payment.
(e) The default provisions.
(f) Any other court order.

The Commission endorses the present practice and recommends that it be statutorily confirmed. However, failure of the defendant to receive the notice should not affect the validity of the court order. As stated in paragraph 6.25 above a defendant may apply to a clerk of petty sessions for an extension of the time for paying a penalty. The Commission recommends that the notice also inform the defendant that such an application may be made.

3. ORDERS INVOLVING IMPRISONMENT

7.5 If the court orders that a convicted defendant be imprisoned it must issue a warrant of commitment accordingly.[9] In fixing the term of imprisonment, the court may, where provision is made for imprisonment with hard labour, impose imprisonment without hard labour, and may reduce the prescribed period of imprisonment.[10] As the Prisons Department has no special regime for "hard labour", the Commission considers that the reference to that concept in the *Justices Act* is an anachronism and recommends that it be removed. The Murray Report made a similar recommendation in respect of references to that concept in the *Criminal Code*.[11] The *Justices Act* also provides that the court may impose a fine not exceeding $500 where an Act provides that the offence is punishable with a term of imprisonment and provides no monetary penalty as an alternative.[12] The Commission recommends that the sum of $500, which was set in 1975, be increased to, say, $1,000 because it is no longer adequate

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8 Dixon Report, 157. This recommendation was made because "...defendants are under considerable stress at the time or may not understand fully what was said".
9 *Justices Act*, s 149.
10 Id, s 166.
11 At 23. It should also be removed from other Acts in which it is found, such as the *Police Act 1892-1985*.
12 *Justices Act*, s 166.

as a result of inflation since that date. The increase is desirable since it would enable the court to impose a fine of a realistic amount instead of sentencing an offender to imprisonment.

4. PAYMENT OF A FINE TO A VICTIM OF AN ASSAULT

7.6 Where a person has been convicted of assault, the court may order that the fine or part thereof be paid to the person assaulted.[13] Where the fine is paid to the clerk of petty sessions, the clerk is authorised to pay it to the person assaulted. In the Discussion Paper the Commission considered whether this provision should be retained. The majority of commentators on the issue favoured its retention. However, claims for compensation may be made under the *Criminal Injuries Compensation Act 1985*. Furthermore, since the Discussion Paper was published, section 719 of the *Criminal Code* has been revised and now, in the Commission's view, makes adequate provision in this regard. The section now enables the court to order the offender to pay compensation to a person who has suffered personal injury as well as property damage. Accordingly the Commission considers that section 145 of the *Justices Act* has been superseded and recommends that it be repealed.

5. ORDERS INVOLVING A PAYMENT OF MONEY

7.7 Where a fine or penalty is recovered by a warrant of execution, section 168 of the *Justices Act* provides that if the Act under which the complaint was made contains no direction for the payment of the money to any person the money must be paid into the Treasury. Section 2 of the *Fines and Penalties Appropriation Act 1909* also contains directions for the disposal of money collected as the consequence of the imposition of a fine or penalty by a court of summary jurisdiction. Although this section has a general provision requiring every fine or penalty so imposed to be paid to the Treasury, it is expressed as not to:

> "affect the appropriation of fines and penalties -
>
> (a) Incurred and recovered "under any law in force for the time being relating to the sale of fermented or spiritous liquor; or
>
> (b) Incurred under the provisions of any Act or by-law relating to local government; or
>
> (c) Incurred under any Act administered by a local authority.

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13 Id, s 145.

(d) Fines and penalties recovered under sub-sections (b) and (c) shall be paid to the local authority within whose district the offences are proved to have been committed."

The Commission recommends that these provisions be consolidated in a single provision in the Justices Act or the enactment setting out the court's procedure in respect of complaints if the Commission's recommendations in chapter 3 are adopted. [14]

7.8 Section 171 of the *Justices Act* provides that when any fine or penalty or part thereof is payable to any person other than Her Majesty, the clerk of petty sessions must retain the sum and not pay it to any such person for a period of seven days from the date of payment or such further period as the court directs. Where such a payment is made to the person entitled to it, it is not recoverable from Her Majesty, even if the conviction is subsequently set aside. Section 197 of the *Justices Act* provides that an appeal by way of an order to review may be commenced within two months of the giving of the decisions. The period for commencing an ordinary appeal is seven days.[15] However, in the case of both types of appeal, the time for commencing the appeal may be extended.[16] The requirement in section 171 of the *Justices Act* that money be held for seven days is therefore inadequate. The Commission recommends that it be replaced with a requirement that the money be held for one month or such further period as the court directs. The Commission further recommends that express provision be made for the fine or penalty to be repaid by the clerk, or the person to whom it was paid, as the case may be. [17]

6. COMPENSATION OF VICTIMS OF CRIMES AND RESTITUTION OF PROPERTY

7.9 In the Discussion Paper the Commission considered the recommendations contained in the Murray Report relating to the compensation of victims of crimes and the restitution of property in so far as they related to Courts of Petty Sessions. Since the Discussion Paper was

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14 Consideration will need to be given to the extent to which such a provision and the provision referred to in the following para are subject to the *Financial Administration and Audit Act 1985-1986*.

15 *Justices Act*, s 184.

16 Id, s 206B.

17 The payment should be in full if the conviction is quashed, or in part to the extent that the fine or penalty is reduced on appeal.

published these recommendations have been adopted.[18] The Commission has therefore not given further consideration to this issue.

7. COSTS

(a) The present position

7.10 Where a defendant is convicted or an order is made against him or her, the court has a discretion to order the defendant to pay to the complainant such costs as seem just and reasonable.[19] Costs generally include fees for legal representation, court fees, necessary disbursements and witnesses' expenses.[20] Where a complaint is dismissed the court has a similar discretion to order the complainant to pay costs to the defendant.[21] The sum ordered to be paid must be specified in the conviction or order or order of dismissal.[22] Where the prosecution is an "official prosecution", the provision for the award of costs to a defendant must be read with the *Official Prosecutions (Defendants' Costs) Act 1973-1974*.[23] Where this Act applies, that is in respect of an "official prosecution", the amount ordered to be paid must generally[24] be no more than an amount specified in a prescribed scale.

(b) Scale of Costs

7.11 In proceedings other than those to which the *Official Prosecutions (Defendants' Costs) Act 1973-1974* applies, that is, where a charge laid by a private complainant is either proved or dismissed or where a defendant is convicted on an official prosecution, there is no scale of costs, allowances and other expenses. In the Discussion Paper the Commission invited

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18 *Criminal Code*, s 719. This section was inserted by the *Criminal Law Amendment Act 1985*: para 7.6 above.

19 *Justices Act*, s 151.

20 In practice where a prosecution is conducted by a police officer, the application for costs is confined to witnesses' expenses, disbursements and court fees. Where, however, a prosecution is conducted by counsel acting for a government department the order sought includes the costs of counsel. A party for whom counsel employed by the Crown in a salaried capacity acts is entitled to recover fees in respect of any work so performed to the same extent as if counsel were a certificated practitioner: *Legal Practitioners Act 1893-1982*, s 62A

21 *Justices Act*, s 152.

22 Id, s 153.

23 Discussion Paper, paras 7.24 to 7.26.

24 S 5(5) of this Act empowers the court to make an order for payment in excess of the scale if it is satisfied that "having regard to the special difficulty, complexity, or importance of the case, the payment of greater costs" is desirable.

comment on whether a scale of costs should be provided in such cases. The majority of commentators on this matter favoured the introduction of a scale.

7.12 The Commission has considered the matter in the light of these comments and has concluded that, on balance, a scale of costs in respect of proceedings not covered by the *Official Prosecutions (Defendants' Costs) Act* should not be introduced. Prior to the enactment of that legislation, Courts of Petty Sessions seldom awarded costs to a successful defendant in an official prosecution, even though they had power to do so,[25] and the basic purpose of the legislation was to reverse that practice. The provision of a scale of costs under the *Official Prosecutions (Defendants' Costs) Act* is to be seen in that context.

7.13 In effect the prescribed scale controls as a matter of policy the amounts which defendants are reimbursed from public funds. The same considerations do not apply to other proceedings. The *Justices Act* gives the court a general discretion to award costs, and the Commission has not been made aware of any instance either where an award has been unjustly refused or where the amount awarded has been unreasonable. An application for an award of costs is presently made when the court's decision on the complaint is given and the amount (if any) ordered to be paid by the party concerned is determined then and there. The Commission's recommendation below as to taxation of costs would provide a procedure, where necessary, for each item to be specifically checked, both as to amount and as to the reasonableness of its being incurred. In the Commission's view this should be sufficient without the need to prescribe a scale.

(c) Taxation of costs

7.14 At present there is no provision for the taxation of costs in respect of proceedings in Courts of Petty Sessions, either in proceedings within the *Official Prosecutions (Defendants' Costs) Act 1973-1974* or other proceedings.[26] An order for costs, specifying the amount thereof, must be made upon the conviction of the defendant or the dismissal of the complaint.[27] One reason for this rule is that where the court is constituted by justices there may be practical difficulty in reconstituting the same bench.

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25 Discussion Paper, para 7.25. In particular, orders for costs were not made against police officers unless there had been some proven default.

26 There is provision for the taxation of costs in Local Courts: *Local Courts Act 1904-1985*, s 82.

27 *Bateman v Clarke* [1973] WAR 101.

7.15 A majority of those who commented on this issue were in favour of providing for the taxation of costs. The Commission agrees with these commentators. Although proceedings in Courts of Petty Sessions are generally straightforward there may be some proceedings, for example, prosecutions under the *Companies (Western Australia) Code*, the complexity of which would warrant the taxation of costs. Accordingly, the Commission recommends that provision should be made for the taxation of costs in proceedings in the Offences Division[28] to deal with cases where costs cannot conveniently be assessed at the determination of the complaint. The taxation should be performed by the clerk of court subject to review by a stipendiary magistrate on the application of either party. However, where the clerk is a police officer the taxation should be performed by a stipendiary magistrate. Under this approach there would be no need to reconstitute the same bench of justices to perform the task.

8. SURETIES FOR WITNESSES

7.16 Certain provisions of the *Justices Act* provide that a witness or person sought to be made a witness may be discharged upon a recognisance[29] with or without sureties.[30] Part VI of the *Bail Act 1982-1984*[31] contains provisions relating to sureties in respect to the grant of bail to defendants. The matters covered deal with the meaning of a surety and surety undertakings,[32] the giving of certain information to a surety,[33] the duties of a person before whom a surety undertaking is entered into,[34] and the forfeiture of money under a surety's undertaking.[35] The Commission considers that it is appropriate for similar provisions to apply also to sureties for witnesses and recommends accordingly.

9. APPLICATIONS TO THE COURT

7.17 This report contains a number of recommendations the adoption of which would enable a person to make an application to the court, for example, an application for a pre-trial

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28 Para 3.13 above.
29 *Justices Act*, ss 89 and 124.
30 Id, s 90.
31 This Act has not yet been proclaimed.
32 *Bail Act 1982-1984*, s 35.
33 Id, s 37.
34 Id, s 43.
35 Id, s 49.

hearing [36] or the setting aside of a witness summons.[37] The Commission recommends that a simple procedure by way of an application on notice to the other party be introduced for dealing with such matters.

10. TIME LIMIT

7.18 Unless some other time limit is provided for making a complaint of a simple offence or other matter,[38] it must be made within six months from the time when the matter of complaint arose.[39] In the Discussion Paper the Commission considered whether a person should be permitted to apply to a court for leave to lay a complaint outside the six months period. Although a number of commentators favoured the proposal the Commission recommends that the existing rule should not be changed. The rule is certain and provides protection by ensuring that persons are not harassed by accusations of stale offences. If a longer limitation period is justified for a particular offence, for example because of its seriousness or because it is one which is unlikely to be discovered within six months of its commission, a longer limitation period can be provided by the legislature, as has been done in a number of cases.[40]

11. RULES OF COURT

7.19 Section 96 of the *Justices Act* provides that the Governor may make regulations for carrying out the Act, including prescribing the forms to be used and the fees to be taken in Courts of Petty Sessions and providing for procedural matters.

7.20 As the Justices Act itself contains detailed provisions as to the procedure to be used in Courts of Petty Sessions few regulations have in fact been made. The regulations which have been made provide for the fees payable in Courts of Petty Sessions, the form of warrant which may be issued under section 91 of the *Justices Act*, the summons form, the offences for which

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36 Para 5.4 above.

37 Para 5.9 above. For others see para 4.10 above (particulars), para 6.9 above (obtaining evidence from a person not present in court), para 6.35 above (change of court venue) and para 7.15 above (review of taxation of costs).

38 For example, s 117 of the *Stamp Act 1921-1985* provides a time limit of two years for an offence against the Act and s 127(2) of the *Securities Industry Act 1975-1978* provides a time limit of three years for offences against the Act.
See also s 574(3) of the *Criminal Code*, which provides that a prosecution for an indictable offence punishable on summary conviction may be commenced at any time.

39 *Justices Act*, s 51.

40 See footnote 38 above.

evidence by affidavit may be received, the Acts prescribed for the purpose of service of a summons by post, and the procedure to be followed and forms to be used in applications for an extraordinary driver's licence.

7.21 In the Discussion Paper the Commission considered whether the provisions relating to the practice and procedure of Courts of Petty Sessions should be contained in rules rather than a statute. Although such an approach received considerable support, the Commission has concluded that it should not be adopted. In the area of criminal law much of the procedure is designed to provide protection to defendants and, in the view of the Commission, is best dealt with in an Act of Parliament. Forms, fees and other ancillary matters such as those referred to in the previous paragraph should however continue to be dealt with by regulation.

12. SUMMARY OF RECOMMENDATIONS

7.22 The Commission recommends that -

Recording the court's decision

1. The court should be required to make a minute of any conviction or order against the defendant at the time the determination is made.

Paragraph 7.3

Notice of fine imposed

2. The clerk of court should be required to give the defendant a notice of any fine imposed.

Paragraph 7.4

Orders involving imprisonment

3. The references to "hard labour" in the *Justices Act* should be removed.

Paragraph 7.5

4. The sum of $500 prescribed in section 166 of the *Justices Act* should be increased to, say, $1,000.

Paragraph 7.5

Payment of a fine to a victim of an assault

5. Section 145 of the *Justices Act* which provides for the payment of a fine to the victim of an assault, should be repealed.

Paragraph 7.6

Payment of other sums of money

6. Section 168 of the *Justices Act* and the *Fines and Penalties Appropriation Act 1909* should be consolidated in a single provision in the *Justices Act* or the enactment setting out the court's procedure if the Commission's recommendations in Chapter 3 are adopted.

Paragraph 7.7

7. Section 171 of the *Justices Act* should be amended to provide that any fine or penalty payable to any person other than Her Majesty which is paid to the clerk should be held for one month or such further period as the court directs and should be repayable in whole or in part, depending on the result of any appeal.

Paragraph 7.8

Costs

8. No scale of costs should be introduced in respect of proceedings other than those covered by the *Official Prosecutions (Defendants' Costs) Act 1973-1974*.

Paragraph 7.13

9. Provision should be made for the taxation of costs in those cases where costs cannot otherwise be assessed conveniently at the determination of the complaint.

Paragraph 7.15

Sureties for witnesses

10. Similar provisions to those in Part VI of the *Bail Act 1982-1984* should apply to sureties for witnesses under the *Justices Act*.

Paragraph 7.16

Applications to the court

11. A simple procedure by way of an application on notice to the other party should be introduced for dealing with applications to the court, such as an application for a pre-trial hearing or for an early hearing.

Paragraph 7.17

Time limit

12. The general rule that a complaint of a simple offence or other matter should be made within six months from the time when the matter of complaint arose should be retained.

Paragraph 7.18

Chapter 8

INDICTABLE OFFENCES

1. INTRODUCTION

8.1 Proceedings for an indictable offence in the Supreme Court or District Court are usually preceded by the procedure discussed in this chapter. However, trials of indictable offences may also be commenced either by an ex officio indictment,[1] a private information[2] or following a committal for trial by a coroner.[3]

8.2 The principal function of the procedure discussed in this chapter is to ensure that defendants will not be brought to trial unless there is sufficient evidence to warrant it. It provides a safeguard against misconceived or speculative prosecutions in the higher courts. At the same time it provides the defence with an opportunity to test the prosecution's case and witnesses. The right to a preliminary consideration of a charge of an indictable offence has existed in England in one form or another for many centuries, and in this State since its foundation. In England, before the development of police forces, one of the functions of justices was to investigate alleged offences.[4] Once that information was collected it was presented to a grand jury, comprised of laymen, which decided whether or not the accused person should stand trial. When the colony of Western Australia was established similar provision was made for grand juries.[5] In 1850 the role of justices in respect of indictable offences was reviewed and they were given power to discharge a defendant following a committal hearing.[6] By 1855 grand juries were no longer considered necessary for the due administration of justice and were abolished.[7] The hearing before justices involved recording in depositions the evidence given orally before them in the presence of the defendant. The justices could commit the defendant for trial if of the opinion that the evidence given was sufficient to put the defendant on trial for an indictable offence. If not, the defendant was discharged.

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1 *Criminal Code*, s 579.

2 Id, s 720. The leave of the Supreme Court is required. In *Goldham v Sharrett* [1966] WAR 129 the Supreme Court set out the principles on which applications for leave would be determined.

3 *Coroners Act 1920-1983*, s 12A.

4 See generally J B Bishop, *Criminal Procedure* (1983), 163.

5 (1832) 2 Wm IV No 3, s 1.

6 14 Vict No 4, s 16.

7 18 Vict No 5, s 1.

8.3 This procedure remained basically unchanged[8] until the present procedure was introduced in 1976 following a report of the Commission's predecessor, the Law Reform Committee.[9] The new procedure gives the defendant the right to elect whether or not to have a preliminary hearing and requires the prosecution to give him or her certain information for this purpose.[10]

8.4 In the Discussion Paper the Commission considered whether the present procedure should be replaced by one recommended by the Philips Commission in England.[11] Under that Commission's proposals, the decision whether or not a person should be required to stand trial would be made by a Crown prosecutor. The defence would be given copies of statements made by the witnesses the prosecution proposed to call at the trial and given an opportunity to apply to a magistrate for a dismissal of the charge on the ground that there was no case to answer. However, the magistrate would be confined to a consideration of the prosecution's written case. There would be no examination or cross-examination.

8.5 Although the Philips Commission's proposals attracted significant support from the commentators, the Commission has decided not to recommend their adoption. There are two reasons which influenced the Commission in coming to its view. First, it has received no evidence that a significant proportion of weak cases are committed for trial in this State. In England, evidence of such a problem[12] prompted the Philips Commission to recommend a new system. Secondly, the existing system provides defendants with an important safeguard against unwarranted prosecutions which is omitted from that proposed by the Philips Commission. Prosecution witnesses may now be required to give evidence on oath and be cross-examined by the defence. While the supply of particulars and witness statements would give a defendant information relating to the prosecution case, the loss of an opportunity to cross-examine prosecution witnesses before the trial is irremediable.[13] It may only be after the cross-examination of a key prosecution witness that it becomes clear that the prosecution is misconceived.

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8 One important change in the intervening years was the introduction, in 1873, of the right of the defendant to call witnesses: 37 Vict; No 4, s 1.

9 *Committal Proceedings* (1970).

10 Paras 8.10 and 8.11 below. In addition, instead of requiring a witness to attend to give oral evidence, the new legislation permits his or her written statement to be tendered in evidence provided the other party does not object.

11 Paras 9.54 to 9.58.

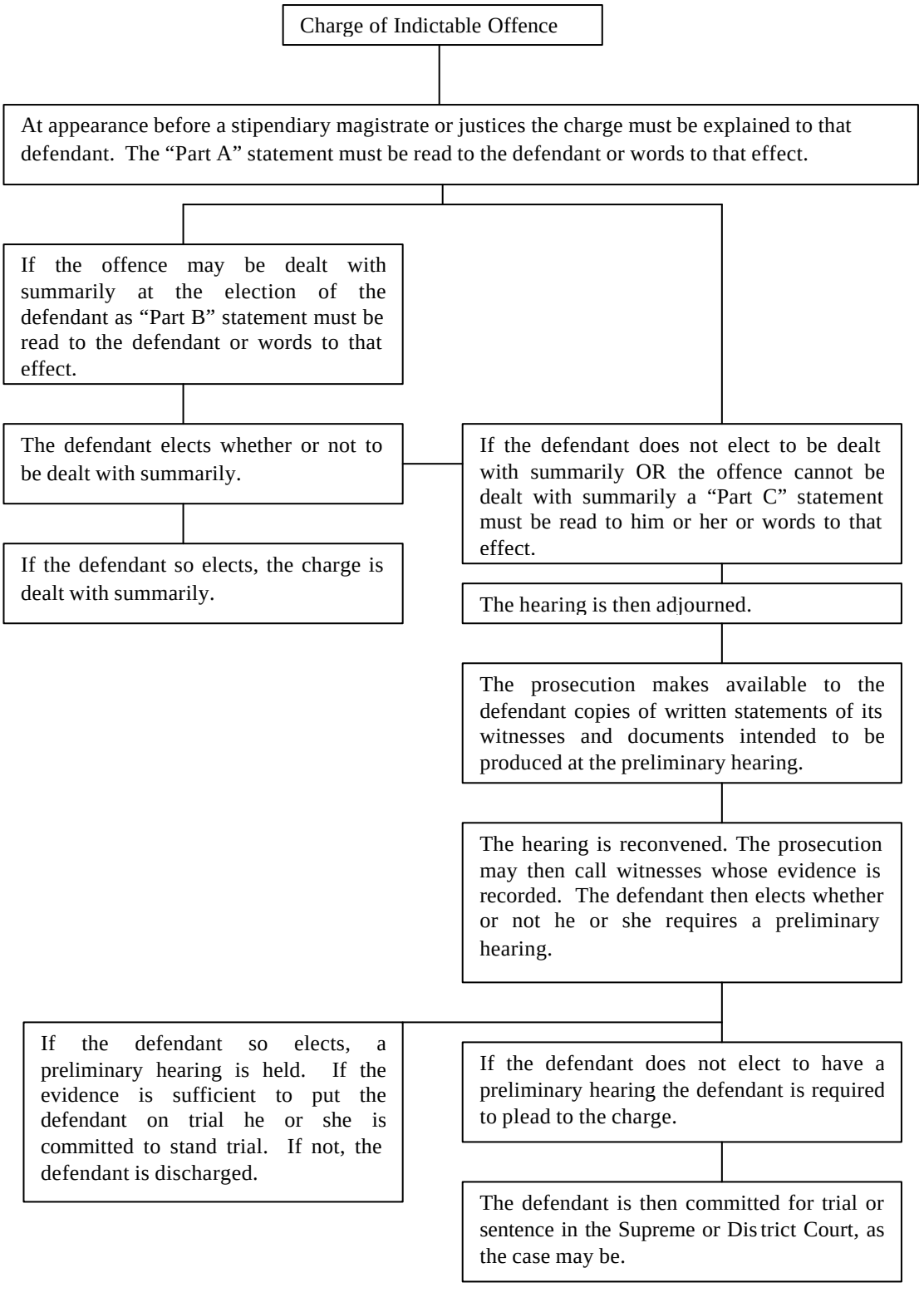
12 Discussion Paper, para 9.54.

13 *Barton v R* (1980) 147 CLR 75, 105 per Stephen J. In the same case Gibbs ACJ and Mason J expressed the opinion that committal proceedings constituted an important element in the protection which the criminal process gave an accused person: id, 99.

8.6 Accordingly, the Commission recommends retention of the present procedure in its general form. However, it makes a number of recommendations below to overcome certain problems which have become apparent since the present procedure was introduced in 1976.

2. SUMMARY OF THE PRESENT PROCEDURE

8.7 The following chart sets out in tabular form the procedure now provided in the *Justices Act* for dealing with charges of indictable offences.


Charge of Indictable Offence
At appearance before a stipendiary magistrate or justices the charge must be explained to that defendant. The "Part A" statement must be read to the defendant or words to that effect.
If the offence may be dealt with summarily at the election of the defendant as "Part B" statement must be read to the defendant or words to that effect.
The defendant elects whether or not to be dealt with summarily.
If the defendant so elects, the charge is dealt with summarily.
If the defendant does not elect to be dealt with summarily OR the offence cannot be dealt with summarily a "Part C" statement must be read to him or her or words to that effect.
The hearing is then adjourned.
The prosecution makes available to the defendant copies of written statements of its witnesses and documents intended to be produced at the preliminary hearing.
The hearing is reconvened. The prosecution may then call witnesses whose evidence is recorded. The defendant then elects whether or not he or she requires a preliminary hearing.
If the defendant so elects, a preliminary hearing is held. If the evidence is sufficient to put the defendant on trial he or she is committed to stand trial. If not, the defendant is discharged.
If the defendant does not elect to have a preliminary hearing the defendant is required to plead to the charge.
The defendant is then committed for trial or sentence in the Supreme or District Court, as the case may be.

3. THE COMMISSION'S RECOMMENDATIONS

(a) Commencement of procedure and elections

8.8 Where a person first appears in court charged with an indictable offence, the presiding officer must read the charge to the defendant and explain to him or her the offence with which he or she is charged.[14] The officer must then address the defendant in the form of words prescribed in Part A of the Ninth Schedule of the *Justices Act* or in words to the like effect, that is:

> "You are not required to plead to this charge [these charges] now but your rights will be explained to you."

In those cases in which the charge is one which may be dealt with summarily at the election of the defendant,[15] the presiding officer is also required to address the defendant in the form of words prescribed in Part B of the Ninth Schedule of the *Justices Act*. These words are to the effect that the defendant may elect to have the charge dealt with summarily by a Court of Petty Sessions instead of by the Supreme Court or the District Court.[16]

8.9 A case may arise where a defendant on being asked whether or not he or she elects to have the charge dealt with summarily stands mute. Presumably this would be treated as a failure to elect summary trial. However, it would be desirable to clarify the position in the same way as it has been clarified in section 101B(2)(a) of the *Justices Act* in relation to the election whether or not to have a preliminary hearing. Accordingly, the Commission recommends that where a defendant, on being asked whether or not he or she elects to be dealt with summarily, stands mute or does not answer the question directly he or she shall be deemed to have elected not to be so dealt with.

8.10 Where the charge cannot be dealt with summarily before a Court of Petty Sessions, or the defendant does not elect to have the charge dealt with summarily, the presiding officer must also address the defendant in the form of words prescribed in Part C of the Ninth

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14 The Commission's recommendations in para 4.10 above as to particulars are intended to apply to indictable offences whether or not triable summarily.

15 That is, an indictable offence triable summarily.

16 *Justices Act*, s 101A(1)(a).

Schedule of the *Justices Act* or words to the like effect. These words advise the defendant in detail of -

(i) the obligation of the prosecution to supply the defendant with copies of its witness statements and other material;

(ii) the nature of a preliminary hearing, including the right of the defendant to call witnesses and to tender written statements;

(iii) the legal consequences if the defendant elects not to have a preliminary hearing, namely that he or she will be required to plead to the charge and that he or she will be committed for trial or sentence, as the case may be.

Where a defendant is legally represented it should not be necessary to require the court to address the defendant as described in Part C. Accordingly, the Commission recommends that the requirement be limited to defendants who are unrepresented.

(b) Provision of written statements and tendering of evidence

8.11 At present, the prosecution is obliged only to serve on the defendant copies of statements of witnesses it proposes to tender in evidence at the preliminary hearing should the defendant elect to have one. The prosecution is not obliged to serve on the defendant copies of statements of any witnesses it intends to call to give oral testimony at the hearing should the defendant elect to have one.[17] The defendant may accordingly be put to the election even though he or she has not been given copies of the statements of all the witnesses upon which the prosecution intends to rely should a preliminary hearing be held. The Commission considers that it would be fairer to require the defendant to be given copies of the statements of all such persons[18] and recommends accordingly.[19] A study o all the statements would place the defendant in a better position to consider whether there was sufficient evidence to put him or her on trial, and to balance the cost of a preliminary hearing against the likelihood that the evidence might not be sufficient to warrant a committal for trial. A defendant who elected to have a preliminary hearing would also be better placed to test the prosecution evidence at that hearing. Where the prosecution does not have a written statement of a witness, it should be

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17 *Re Harlock; ex parte Robinson* [1980] WAR 260, 264-265, per Brinsden J.

18 This was the view of most commentators on the Discussion Paper, including a majority of stipendiary magistrates who commented on this issue.

19 If this recommendation is not adopted Part C should be amended to make it clear that the prosecution is not obliged to provide copies of statements of all its witnesses.

sufficient compliance if the person is called by the prosecution to give evidence and the recorded deposition is given to the defendant.[20] If a preliminary hearing is held, the presiding officer should have power to grant the prosecution leave to call a person to give oral testimony if it did not know of his or her existence or availability before the defendant elected to have a preliminary hearing.

(c) Service of written statements

8.12 While section 101A(1)(b)(ii) of the *Justices Act* provides that the statements must be served on the defendant, Part C of the Ninth Schedule of the *Justices Act* indicates that they may be served either on the defendant or on the defendant's solicitor. The Commission understands that some stipendiary magistrates have held that the statements must be served on the defendant and that the hearing cannot proceed until they are so served.[21] Where a defendant is represented by a solicitor, it does not seem unreasonable to make provision for service on the solicitor. Accordingly, the Commission recommends that the existing inconsistency in the *Justices Act* be removed by amending section 101A(1)(b)(ii) to provide for service either on the defendant or the defendant's solicitor.

(d) Plea of guilty

8.13 Under the existing procedure a defendant may plead guilty only after he or she has elected not to have a preliminary hearing or, where an election to have a preliminary hearing has been made, at the preliminary hearing.[22] The Commission understands that there are cases where a defendant is aware of the evidence against him or her, intends to plead guilty and wishes to dispose of the matter as quickly as possible. If a defendant were permitted to so plead at an early stage of the proceedings, it would avoid the need for an adjournment to allow the prosecution time to obtain and serve witness statements and for the defendant to consider them. It would reduce the delay before a defendant was sentenced, the court time involved in dealing with a case and the clerical work of the police and court administrators. On the other hand, such a provision could lead to the entry of ill-considered pleas of guilty.

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20 *Justices Act*, s 101B(1). It sometimes happens that a witness has indicated to the prosecution that, although not prepared to make a written statement, he or she is prepared to give oral evidence on oath at a hearing.

21 But cf *R v Bott* [1968] 1 All ER 1119, where it was held in England under similar legislation that it is sufficient if a statement is served on the defendant's solicitor.

22 In this latter case the so called plea is more correctly described as an admission: *Margetson v R* [1980] WAR 135.

Accordingly, the Commission recommends that defendants should be able to make such a plea before the Part C statement is read to the defendant, or if it is not so read,[23] before the hearing is adjourned to allow the prosecution to serve its witnesses' statements on the defendant,[24] provided the following conditions are met -

(1) If the defendant is legally represented, the presiding officer must -

(a) be assured by the defendant's representative that the defendant is aware of the elements of the offence charged, the consequences of the plea, and that the defendant's plea is a considered one; and

(b) record the fact of that assurance.

(2) If the defendant is not legally represented, the presiding officer must -

(a) require the prosecutor to outline to the defendant, to the satisfaction of the presiding officer, the alleged facts upon which the charge is based;

(b) explain to the defendant the offence with which he or she is charged and the ingredients which at law constitute such offence;

(c) record the outline of the alleged facts and any statement made by the defendant in pleading guilty to the charge, and that the offence and the ingredients which at law constitute the offence were explained to the defendant; and

(d) satisfy him or her self that the defendant by his or her plea of guilty admits the ingredients which constitute the offence charged.[25]

If the presiding officer accepts the plea, he or she should be required to commit the defendant to the Supreme or District Court, as appropriate, for sentencing.[26] If the

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23 That is, assuming the Commission's recommendation in para 8.10 above is adopted.

24 If the recommendation in this para is accepted an appropriate modification of the Ninth Schedule of the *Justices Act* would be required.

25 Cf *Magistrates Ordinance* (HK), s 81B(3).

26 S 618 of the *Criminal Code* in effect provides that defendants who have pleaded guilty cannot change their plea after they have been committed for sentence except where the court to which they have been committed is not satisfied that the plea was made. The Commission **suggests** that consideration be given to permitting defendants to change their plea if they can satisfy the court that the plea was ill-considered. It would, of course, be rare for the defendants to satisfy the court in the circumstances provided for in this para but they may be able to do so where they have pleaded guilty after electing not to have a preliminary hearing (*Justices Act*, s 101C(b)(i)) or they have admitted guilt at a preliminary hearing: id, s 102.

presiding officer does not accept the plea, the proceedings should continue as if the plea had not been made.

(e) Change of election to have a charge dealt with on indictment

8.14 Although there does not appear to be any express provision in the *Justices Act* authorising it, in practice some defendants who have elected to have an indictable offence triable summarily dealt with on indictment[27] have sometimes been permitted to change their election so that the charge could be dealt with summarily. The Commission considers that this practice should be statutorily confirmed by giving the presiding officer a statutory discretion to permit a defendant to change his or her election as to the mode of trial,[28] and recommends accordingly.

(f) Examination of witnesses

8.15 Where a preliminary hearing is held, the presiding officer is required to examine all the witnesses called by the prosecution and to read aloud, or ca use to be read aloud, the parts of written statements of any person tendered in evidence by the prosecution which are admissible to the like extent as oral evidence to the like effect by that person. [29]

8.16 The *Justices Act* does not provide any exemption from this requirement that the written statements be read aloud. Sometimes the reading can be time-consuming. For example, in one case brought to the attention of the Commission, lengthy statements of fifteen witnesses were involved. The object of the requirement appears to be to ensure that the public attending the hearing can hear the totality of the evidence upon which the presiding officer's decision to commit or discharge is based. In the Discussion Paper[30] the Commission suggested that it should be sufficient to empower the presiding officer to summarise the contents of written statements, so long as the full statements are afterwards made available to members of the public for inspection. Although most commentators favoured this proposal, it was criticised by others because of the difficulty in accurately summarising the statements. The suggestion that the documents be made available for public inspection was also criticised

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27 Para 8.8 above.

28 The presiding officer would still be required to be satisfied that a particular charge can appropriately be dealt with summarily: see, for example, s 465(1) of the *Criminal Code*.

29 *Justices Act*, s 102(b).

30 Para 9.21.

as going counter to the general rule that only persons with a special interest are given access to court documents. The difficulty in maintaining adequate security over the documents was also pointed out. The Commission accepts the validity of these criticisms. Instead, the Commission recommends that the existing provision be amended to provide that the written statements should be required to be read aloud only if the defendant or the prosecutor so requests. The presiding officer would of course be entitled to read them aloud should he or she consider it desirable to do so.

8.17 The evidence of a witness who is examined during a hearing is taken down either by a typist or the presiding officer. Once the deposition has been reduced to writing it is required to be read to the witness who is required to sign it.[31] The process is slow and laborious, with a consequent increase in the cost of the proceedings both to the parties and to the judicial system.

8.18 In the Discussion Paper the Commission suggested that a provision found elsewhere[32] be adopted whereby a deposition may be recorded by a tape recording machine without the necessity for it to be transcribed and read to and signed by the witness.[33] Most of those who commented on this issue were in favour of such a provision. Since the publication of the Discussion Paper a Bill has been introduced which provides for depositions to be recorded in the manner suggested.[34]

(g) The requirement that the evidence given at the preliminary hearing be sufficient to put the defendant upon trial

8.19 Under section 106 of the *Justices Act*, where a preliminary hearing is held, the presiding officer must, at the end of the evidence offered by the prosecution, order the defendant to be discharged, if then in custody, if the officer is of the opinion that that evidence is not sufficient to put the defendant upon trial for any indictable offence.[35] Section 107 of the *Justices Act* provides that if the evidence is sufficient to put the defendant upon trial for an

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31 *Justices Act*, s 73(1). The presiding officer is also required to sign.

32 For example, *Summary Proceedings Act* (Vic), s 48(3).

33 S 73(1) of the *Justices Act* would appear to permit the recording of the evidence by a tape recorder but the evidence would require to be transcribed and read to and signed by the witness. This would involve the witness in the inconvenience of waiting at the court until this was done or returning later for the purpose.

34 Acts Amendment (Recording of Depositions) Bill 1986.

35 The provision does not in its terms apply to a person who is free on bail at the time of the hearing. It seems to be based on the practice in the nineteenth century when the hearing was held immediately after the arrest of the defendant: A H Manchester. *A Modern Legal History of England and Wales 1750-1950* (1980), 230.

indictable offence the presiding officer must commit the defendant for trial for the offence before a court of competent jurisdiction.

8.20 Sections 106 and 107 appear to contemplate a two-stage process, requiring the presiding officer to form an opinion as to the sufficiency of the prosecution evidence both at the close of the prosecution case and after any evidence for the defendant has been presented.[36] The Commission considers that it is unnecessary to split the hearing up in such a way, particularly as the material on which the presiding officer is required to base his or her opinion at the end of the first stage seems unduly limited. In considering the then equivalent provision to section 106 in New South Wales,[37] the Court of Appeal of that State held that the presiding officer was required to disregard any evidence favouring the defendant which emerged during the prosecution case and also any view the officer may have formed as to the credibility of the prosecution witnesses or the weight to be given to their evidence.[38] If this interpretation is correct it would mean, for example, that the presiding officer was not entitled at that stage to discharge the defendant even though it had been shown by cross-examination that the evidence of the prosecution witnesses was seriously flawed.

8.21 Assuming a two stage process, section 107 would appear to relate to the second stage. However it is defective in that it refers only to the presiding officer's power to commit the defendant for trial. One can only infer the existence of a corresponding power not to commit if that course is justified in the light of evidence presented by the defence.[39]

8.22 Since the function of a preliminary hearing is to determine whether or not the evidence given at the hearing is such as to justify the defendant being required to stand trial, that determination should be made when all the evidence, both for the prosecution and defence,[40] has been presented. There is no need for the hearing to be split into two stages, requiring the presiding officer to apply different criteria at each stage. Accordingly the Commission

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36 Including, presumably, any statement made by the defendant pursuant to s 102 of the *Justices Act*.

37 *Justices Act* (NSW), s 41(2)(a). This provision has now been repealed and a new provision substituted: *Justices (Amendment Act) 1985* (NSW).

38 *Wentworth v Rogers* [1984] 2 NSWLR 422, 429 per Glass J A.

39 The reason for this defect in s 107 may be because, when the provision was first introduced in 1850, the relevant Ordinance (14 Vict No 4) did not give the defendant the right to call evidence on his or her own behalf. Accordingly what is now s 107 was merely the converse of s 106. If at the close of the prosecution case the evidence was insufficient to put the defendant on trial he or she was discharged (s 106); if it was sufficient he or she was committed for trial (s 107). S 107 was not amended when the defendant was subsequently given the right to present evidence.

40 Including, in the case of the defence, any unsworn statement the defendant makes pursuant to s 102 of the *Justices Act*.

recommends that sections 106 and 107 be replaced by a provision which clearly expresses this as has been done in England.[41] As in England, the defence should be entitled, if it so wishes, to make submissions at the end of the prosecution case,[42] including a submission of no case to answer, for example that there is no evidence of some element essential to the case against the defendant.[43]

8.23 A further question arises as to the standard required to be reached by the evidence, taken as a whole, to justify committal. The present test is whether the evidence is "sufficient to put the defendant upon his trial".[44] The overwhelming majority of commentators were of the view that the present formulation was satisfactory and that no change was warranted. The Commission agrees and recommends accordingly.[45]

(h) Ancillary matters

(i) Exclusion of members of the public from preliminary hearings

8.24 At present the room or place in which a preliminary hearing of an indictable offence is held is not deemed to be an open court and the presiding officer may, where the interests of justice require it, order that no person, other than any counsellor solicitor engaged in the case, shall be in the room without permission.[46]

8.25 A preliminary hearing is an important part of the criminal justice system and in the Commission's view should take place in a room to which the public have a right of access.[47]

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41 *Magistrates' Courts Act* (Eng), s 6(1).

42 *Magistrates' Courts Rules 1981* (Eng), r 7(6).

43 This, of course, should not prevent the defendant from calling witnesses or making a statement, should the submission fail: *R v Horseferry Road Magistrates' Court, ex parte Adams* [1978] 1 All ER 373.

44 In substance, this means that the magistrate is required to commit if of opinion that the whole of the evidence before him or her is such that a reasonable jury could convict upon it: *In re Roberts* [1961] 1 WLR 474, 475-476.

45 A new test was recently adopted in New South Wales which in effect requires the magistrate to commit unless he or she is of opinion that a reasonable jury would **not be likely** to convict: (NSW) Justices Act, s 41(6). This formulation has been criticised on the ground that it requires the magistrate to make the difficult prediction about the likely behaviour of a hypothetical jury: P A Fairall, *The Preliminary Examination of Indictable Offences in New South Wales -Part I* (1986) 10 Crim LJ 24. 80. Another possible criticism is that the finding of the magistrate that in his or her opinion a jury would not be unlikely to convict may tend to prejudice the defendant at his trial. The Commission has concluded that the New South Wales test should not be adopted.

46 *Justices Act*, ss 66 and 67.

47 The existing provision seems to be an anachronism left over from the time when examining justices acted the part of a public prosecutor and inquisitor: *Moularas v Nankervis* [1985] VR 369, 373-374.
In practice, preliminary hearings generally do take place in open court.

The Commission accordingly recommends that emphasis should be given to this principle by declaring the place to be an open court, thus reversing the present position. However, as with hearings of simple offences and indictable offences being tried summarily,[48] the presiding officer should have power to exclude members of the public where that is necessary in the interests of justice.[49]

(ii) Publication of a report of a preliminary hearing

8.26 At present, the presiding officer at a preliminary hearing has power to prohibit the publication of any report of, or relating to, the evidence given or tendered at the proceedings[50] if of the opinion that such publication is undesirable in the interests of justice.[51] A person who publishes a report contrary to a prohibition commits a contempt of the Supreme Court and is punishable accordingly by that Court.[52]

8.27 This provision appears to be aimed at balancing the principle that openness tends to maintain confidence in the fairness and impartiality of legal proceedings against the need to ensure that the defendant's subsequent trial is not prejudiced by information published beforehand. Information disclosed at a preliminary hearing is capable of giving potential jurors a distorted view because usually only the prosecution case is then presented, the defence reserving its defence for the trial. On the other hand publication of an account of the proceedings may be helpful to the defendant or the prosecution if it causes a witness to come forward who would not otherwise do so and would, to that extent, actually assist in the administration of justice. While it is difficult to assess the extent to which publication of a report of a preliminary hearing would be likely to prejudice the subsequent trial, it seems prudent to have some provision whereby the publication of a report of the hearing can be prohibited. The Commission accordingly recommends that the existing provision be retained.

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48 Para 6.38 above.

49 s 66 of the *Justices Act* is confusingly drafted, but the effect appears to be that although members of the public have no right to be in the room where the preliminary hearing is taking place, if they are otherwise lawfully there (for example, by invitation) the presiding officer may only order them to leave if it appears to be in the interests of justice to do so.

50 *Justices Act*, s 101D.

51 S 36C of the *Evidence Act 1906-1985* prohibits the publication of information which is likely to lead to the identification of the victim of a sexual assault, except with the leave of the trial court.

52 *Justices Act*, s 101D.

(iii) Admissibility of statements

8.28 Where a statement complying with section 69 of the *Justices Act*[53] has been tendered in evidence at a preliminary hearing it is admissible as evidence, before any court of competent jurisdiction, to the like extent that a deposition of the person who made the statement would be so admissible.[54] It has been held that where there is no preliminary hearing a statement complying with section 69 is tendered *to be used in evidence* for the purpose of the trial or sentencing of the defendant but not "tendered in evidence" and accordingly is not admissible to the like extent as a deposition.[55]

8.29 In the Discussion Paper the Commission considered whether a statement tendered to be used in evidence should be admissible to a like extent as a deposition. While there was considerable support from commentators for such a change the Commission recommends that it not be made. Although there is a safeguard in that a statement cannot be tendered during preliminary proceedings if another party objects to it, the defendant may not study the statement as carefully as would be the case if he or she intended to apply for a preliminary hearing at which the contents of the statement could be tested by means of an examination of the person who made it.[56] In any case such a statement may be admissible "if all the parties consent and the trial Judge is satisfied that the presence of such witness is not necessary in the interests of justice".[57] Such a statement may also be admissible under statutory or common law exceptions to the hearsay rule.

(iv) Adjournments and remands

8.30 In the Discussion Paper the Commission considered a proposal for changing the system of adjournments and remands then in existence.[58] Since the publication of the Discussion Paper the *Justices Act* has been amended to provide a system of adjournments and

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53 s 69 of the *Justices Act* contains a number of limitations under which a written statement can be tendered as evidence at a preliminary hearing. No other party must object to the tender of the statement, the statement must contain a declaration by the person who made it to the effect that it is true to the best of his or her knowledge and belief and that the statement was made knowing that, if it were tendered in evidence, he or she would be guilty of a crime if the maker of the statement has wilfully included anything which he or she knew to be false or did not believe to be true.

54 *Justices Act*, s 69(4) and (6). For circumstances in which a deposition is admissible see *Justices Act*, s 109; *Evidence Act 1906-1985*, s 107; *Criminal Code*, s 635B.

55 *R v Abbott and Hunter* [1981] WAR 130.

56 *Justices Act*, s 73(2)(c).

57 *Criminal Code*, s 635B.

58 Discussion Paper, paras 9.34 to 9.44. The maximum period of remand was then eight days.

remands broadly in line with the proposal. Under the new procedure, where it becomes necessary to adjourn a hearing, the presiding officer may remand the defendant in custody for such period as the officers consider reasonable. This discretion is subject to two limitations. In the case of a defendant who is undergoing a term of imprisonment at the time of the remand, the defendant may be remanded for a period not exceeding eight days or, with the consent of the defendant, to a day not later than the day on which his or her term of imprisonment will expire.[59] In any other case, the remand may be for a period not exceeding eight clear days or such longer period not exceeding 30 days as may be consented to by the defendant.[60] At this stage the new system seems to be working satisfactorily and there does not seem to be any tendency developing for cases not to be treated with the urgency due to them. However, the Commission recommends that the new system be kept under review.

(v) Attendance of defendant at a preliminary hearing

8.31 The Commission understands that some stipendiary magistrates have ruled that a defendant must be present throughout a preliminary hearing while others have excused the defendant from attending. A requirement that defendants attend the hearing throughout could prove to be very inconvenient to them or lead to financial loss, particularly in complicated cases such as those involving conspiracy charges where it may take many days for the prosecution to present its evidence. So long as a defendant who does not wish to be personally present is legally represented it does not appear necessary to require the defendant's presence at all times. Accordingly, the Commission recommends that the presiding officer should be expressly empowered to excuse defendants from attendance during the taking of any evidence for the prosecution so long as they will be represented by a legal practitioner during any period of absence. The presiding officer should be able to impose such conditions as he or she thinks fit on the grant.

(i) Costs

8.32 At present where there is insufficient evidence to put a defendant on trial the presiding officer cannot award costs to the defendant.[61] The question of whether there should be power

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59 *Justices Act*, s 79(3)(a).
60 Id, s 79(3)(b).
61 *Gill v Pace and Hall* (unreported) Supreme Court of Western Australia, No 1789 of 1977, 4.11.1977.

to award costs in these circumstances was raised in the Discussion Paper.[62] The overwhelming majority of those who commented on the issue favoured such a power. In the interests of fairness to a defendant, the Commission recommends that in both "official" and private prosecutions the presiding officer should have a discretion to award costs to a defendant where the presiding officer does not commit for trial. Consequent on this approach, the Commission recommends that the *Official Prosecutions (Defendants' Costs) Act 1973-1974* be extended to apply to such awards. As in summary proceedings[63] there should be provision for the taxation of costs.

(j) Private prosecutions

8.33 In the Discussion Paper, the Commission raised the question of whether or not private persons should be able to commence proceedings under the *Justices Act* for indictable offences. On the one hand, prosecutions by private persons can be used "as an instrument of oppression or to effect some ulterior purpose of the prosecutor and can result in vexatious or malicious prosecutions".[64] On the other, the capacity of the "...private individual to assist in the enforcement of the law is a valuable check upon arbitrary official practice and to that extent a safeguard of public interests as well as private rights".[65] On balance, the Commission does not consider that private prosecutions should be abolished or subjected to special procedural limitations.[66] In any case, the Commission's recommendation in paragraph 8.32 above that the court should have a discretion to award costs to a successful defendant should serve to discourage abuse of the power.

4. SUMMARY OF RECOMMENDATIONS

8.34 The Commission recommends that –

Present system

1. The present procedure for preliminary hearings should be retained subject to the recommendations for change made below.

Paragraph 8.6

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62 Paras 9.45 to 9.48.
63 Para 7.15 above.
64 Australian Law Reform Commission, *Standing in Public Interest Litigation* (1985, Report No 27), 206.
65 Ibid.
66 As is the case in Queensland: see Discussion Paper, paras 9.52 and 9.53.

Defendant standing mute

2. A defendant who stands mute when asked whether he or she elects to be dealt with summarily should be deemed to have elected not to be so dealt with.

Paragraph 8.9

Statement to defendant

3. It should not be necessary to address a defendant who is legally represented in accordance with the words set out in Part C of the Ninth Schedule or words to a like effect.

Paragraph 8.10

Provision of written statements

4. Before a defendant is asked to elect whether or not to have a preliminary hearing, the prosecution should provide the defendant with copies of statements of all the witnesses it intends to call at the hearing should one be held.

Paragraph 8.11

5. If a preliminary hearing is held, the presiding officer should have power to grant the prosecution leave to call a person to give oral testimony if it did not know of the person's existence or availability before the defendant made the election.

Paragraph 8.11

Service of written statements

6. It should be possible to serve written statements either on the defendant or the defendant's solicitor.

Paragraph 8.12

Plea of guilty

7. Defendants should be able to plead guilty at an early stage of the proceedings subject to prescribed safeguards.

Paragraph 8.13

Change of election to have a charge dealt with on indictment

8. The presiding officer should be given an express discretion to permit a defendant to change his or her election with regard to the mode of trial.

Paragraph 8.14

Examination of witnesses

9. Written statements should be required to be read aloud only if the defendant or the prosecutor so requests.

Paragraph 8.16

The sufficient evidence test

10. The requirement that the evidence given at the preliminary hearing be sufficient to put the defendant upon trial should be retained.

Paragraph 8.23

11. The question of whether or not there is sufficient evidence to put the defendant on trial by jury for any indictable offence should be considered when all the evidence for the prosecution and for the defence has been taken.

Paragraph 8.22

12. At the end of the prosecution evidence the defendant should be permitted to make a submission including a submission that there is no case to answer.

Paragraph 8.22

Attendance of public at preliminary hearings

13. Preliminary hearings should be held in open court, subject to the power of the presiding officer to exclude members of the public where that is necessary in the interests of justice.

Paragraph 8.25

Publication of a report of a preliminary hearing

14. The existing provision empowering the presiding officer to prohibit the publication of any report of or relating to the evidence given or tendered at the hearing should be retained.

Paragraph 8.27

Attendance of defendant at a preliminary hearing

15. The presiding officer should be expressly entitled to excuse a defendant from attendance during the taking of any evidence for the prosecution so long as the defendant will be represented by a legal practitioner during any such absence.

Paragraph 8.31

Costs

16. The presiding officer should have a discretion to award costs to the defendant where he or she is not committed for trial.

Paragraph 8.32

17. The *Official Prosecutions (Defendants' Costs) Act 1973-1974* should be extended to apply to such awards of costs.

Paragraph 8.32

18. Provision should be made for the taxation of costs.

Paragraph 8.32

Private prosecutions

19. Private prosecutions should not be abolished or subject to special procedural limitations.

Paragraph 8.33

Chapter 9

PREVENTIVE JURISDICTION

1. ORDERS TO KEEP THE PEACE

(a) The present law

9.1 Under section 172(1) of the *Justices Act*, where a Court of Petty Sessions is satisfied on the balance of probabilities,

> "(a) that -
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> (i) the defendant has caused personal injury or damage to property; and
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> (ii) the defendant is, unless restrained, likely again to cause personal injury or damage to property;
>
> (b) that -
>
> (i) the defendant has threatened to cause personal injury or damage to property; and
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> (ii) the defendant is, unless restrained, likely to carry out that threat; or
>
> (c) that -
>
> (i) the defendant has behaved in a provocative or offensive manner;
>
> (ii) the behaviour is such as is likely to lead to a breach of the peace; and
>
> (iii) the defendant is, unless restrained, likely again to be have in the same or a similar manner",

the court may make an order (hereinafter called a "restraining order") imposing such restraints upon the defendant as are necessary or desirable to prevent that person from acting in the apprehended manner. Such proceedings must be commenced by complaint. The complaint may be made by a police officer or a person against whom, or against whose property, the relevant behaviour was directed.[1]

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[1] *Justices Act*, s 172(2).

9.2 Where a defendant is summoned to appear at the hearing and fails to do so, an order may be made in the defendant's absence.[2] A restraining order may also be made without the defendant being summoned to appear, but the court must summon the defendant to show cause why the order should not be confirmed. The order is not effective after the conclusion of the hearing to which the defendant is summoned unless -

(i) the defendant does not appear at the hearing in obedience to the summons; or

(ii) the justices, having considered the evidence of the defendant and any other evidence adduced by the defendant, confirm the order.[3]

9.3 The order made by the court may restrain the defendant from entering premises, or limit the defendant's access to premises, whether or not he or she has a legal or equitable interest in the premises. Before making an order in such terms, the justices must consider:[4]

"(a) the effect of making or declining to make the order on the accommodation of the persons affected by the proceedings; and

(b) the effect of making or declining to make the order on any children of, or in the care of, the persons affected by the proceedings."

Where an order is made, the clerk of petty sessions must serve a copy of the order on the defendant and forward a copy of the order to the Commissioner of Police and, where the complainant is not a police officer, the complainant.[5] Once the order is personally served on the defendant, it is an offence for the defendant to contravene or fail to comply with it.[6] This applies to ex parte orders as well as to orders made where the defendant has been summoned to appear.

9.4 Any order may be revoked or varied at any time by justices on application by a party and after all parties have been given an opportunity to be heard.[7]

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2 Id, s 172(3).
3 Id, s 172(4).
4 Id, s 172(5).
5 Id, s 172(6).
6 Id, s 173(1).
7 Id, s 174(1).

(b) Recommendations

9.5 Restraining orders were introduced in 1982 to "provide some immediate legal redress for those who find themselves in situations of domestic violence".[8] They do, however, apply in other circumstances. For example, an elderly woman who alleged that she was regularly abused and insulted by a teenage girl and her friends obtained a restraining order against the girl on the basis that the girl had behaved in a provocative or offensive manner.[9]

9.6 The question of domestic violence, including the use of restraining orders, has recently been considered by the Domestic Violence Task Force.[10] That body saw a continuing role for such orders and the ex parte procedure in dealing with abuse occurring in domestic relationships. Its report contains a number of recommendations which are particularly relevant to the use of restraining orders in that area, for example, that the complainant's home address need not be disclosed so long as an address for service is given[11] and that an order restraining a person from entering premises may allow that person to attend at specified hours on a specified day for the collection of property.[12]

9.7 In view of the recent report of the Domestic Violence Task Force the Commission has not examined the use of restraining orders in detail. The Commission did, however, consider whether a separate procedure, for example by summons and complaint, should be provided for applications for orders in situations not involving a domestic relationship. The Commission concluded that it would not be desirable to do so because there could be circumstances not involving domestic violence (however that term is defined) in which a person would need to obtain the immediate legal redress provided by an ex parte application. Furthermore, if a distinction were made between proceedings involving domestic and other relationships, there could be wasteful disputes over whether or not the form of procedure used was correct in the particular case.

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8 The Hon I G Medcalf QC, Western Australian *Parliamentary Debates* (1982) Vol 240, 3843.

9 'Court Backs Widow', *The West Australian*, 13.10.1984, 11.

10 Report, *Break the Silence* (1986).

11 Id, paras 6.28 and 6.29.

12 Id, para 6.38. The Commission endorses the Task Force's recommendation in para 6.42 that s 172(4) of the *Justices Act* be clarified to provide expressly that the complainant is entitled to be heard on the return of a summons to show cause why an order should not be confirmed. Commentators on the Discussion Paper pointed out that the present lack of any express provision had resulted in some magistrates holding that the complainant had no right to be heard in these cases.

9.8 There are two matters, apparently not adverted to by the Task Force, which should be dealt with. The first relates to the persons who can apply for a restraining order. At present, an application for an order may only be made by a police officer or a person against whom, or against whose property, the relevant behaviour is directed. There is no provision for an application to be made on behalf of a person who is incapable of making an application such as a child or a person who is mentally incompetent. The Commission accordingly recommends that it should also be possible for an application to be made by any person for the protection of a person under the care or charge of the applicant.[13]

9.9 The second matter concerns the power to award costs. The Commission understands that where the court has not confirmed a restraining order it has been held that costs may not be awarded. The basis for this decision appears to be that section 152 of the *Justices Act*, which relates to costs, applies to an order dismissing a complaint and not to a refusal to confirm an order. The Commission recommends that the court be given a discretion to award costs at the hearing on the return of a summons to show cause.

2. SURETIES OF THE PEACE AND SURETIES FOR GOOD BEHAVIOUR

(a) The present law

9.10 There is authority for the view that justices of the peace have power to require a person to enter into a surety to keep the peace or a surety for good behaviour.[14] The power to require a person to enter into a surety to keep the peace appears to be based on the Commission of the Peace [15] and the common law. The power to require a person to enter into a surety to be of good behaviour appears to be based on the *Justices of the Peace Act 1360*[16] and the common law. Under the 1360 statute a person who is not "of good fame" may be required to enter into a surety of good behaviour.[17]

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13 Cf *Peace and Good Behaviour Act 1982* (Qld), s 4.

14 *Rust v Smith* (unreported) Supreme Court of Western Australia, Appeal No 141 of 1979, 21.5.1980, per Wallace J. *R v Wright; Ex parte Klar* (1971) 1 SASR 103. See also P Power, *"An Honour and Almost A Singular One": A Review of the Justices' Preventive Jurisdiction* (1981) 8 Mon LR 69 and B Bough, *Binding Over in the Magistrates' Court* [1983] The Law Society's Gazette 1267.

15 *Justices Act*, Second Schedule, First Assignment: see Appendix II to this report.

16 34 Edw III, c 1: see Appendix III.

17 There is also power in s 19(7) of the *Criminal Code* for a summary court to discharge a convicted defendant upon the person entering into a recognisance, with or without sureties, to keep the peace and be of good behaviour for a term not exceeding one year. The primary purpose of this provision is to provide an alternative means of dealing with a convicted person rather than to provide a means of preventing an

9.11 Until 1982 the *Justices Act* contained a procedure by way of complaint for dealing with applications for sureties of the peace and for sureties for good behaviour. These provisions were repealed when the *Justices Amendment Act (No 2) 1982*, which introduced the statutory concept of orders to keep the peace referred to above,[18] was proclaimed. Notwithstanding these legislative changes it may be that the ancient remedies of sureties of the peace and sureties for good behaviour remain available in Western Australia.

9.12 It appears that these powers can be used not only upon application in that regard but also on the judicial officer's own motion against the parties or witnesses where the proceedings before the court relate to another matter altogether.[19] The Commission is not aware of any case where a judicial officer in Western Australia has purported to exercise the power in such circumstances.

(b) Recommendation

9.13 The Commission considers that it is undesirable that courts should even theoretically, have powers so apparently wide in scope[20] and obscure in origin, and recommends that the law be clarified by providing that the powers do not apply in this State. If it is considered that judicial officers should have powers beyond those presently existing in relation to restraining orders, the proper course is to make appropriate amendments to those provisions.[21]

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apprehended breach of the law. The Commission notes that the Murray Report (at 27-28) recommends that this provision be modernised.

18 Paras 9.1 to 9.4.

19 Such as for the prosecution of a summary offence: *Sheldon v Bromfield Justices* [1964] 2 All ER 131 and *R v Aubrey-Fletcher; Ex parte Thompson* [1969] 2 All ER 846.

20 P Power. *"An Honour and Almost A Singular One": A Review of the Justices' Preventive Jurisdiction* (1981) 8 Mon LR 69. Speaking of those jurisdictions where the power has been exercised, the author says, "The jurisdiction has frequently been used to impose a sanction in excess of that permitted by the legislature. Because there are no limits on the amount of surety which may be required and because the default mechanism for failure to find sureties, for whatever reason, is imprisonment, justices have in effect, a blank cheque to imprison": id, 73.

21 Sir Clifford Grant, Chief Stipendiary Magistrate, has informed the Commission that in his comments to the Government on the report of the Domestic Violence Task Force, he suggested that the provisions dealing with restraining orders should be enlarged to enable the court to act of its own motion as well as on complaint.

3. SUMMARY OF RECOMMENDATIONS

Orders to keep the peace (ie restraining orders)

9.14 Because the Domestic Violence Task Force has so recently reviewed the provisions, the Commission has not considered it necessary to make a separate study of them. There are, however, two changes which should be made in any case. These are that -

1. It should be possible for an application for a restraining order to be made by any person for the protection of a person under the care or charge of the applicant.

   Paragraph 9.8

2. There should be power to award costs at the hearing on the return of a summons to show cause.

   Paragraph 9.9

Sureties of the peace and sureties for good behaviour

9.15 The Commission recommends that sureties of the peace and sureties for good behaviour should be abolished.

Paragraph 9.13

Chapter 10

UNREPRESENTED DEFENDANTS

1. INTRODUCTION

10.1 The Commission has been asked to consider and report on the question whether any alterations are desirable in the procedure of Courts of Petty Sessions in cases where defendants are not legally represented. [1]

2. DISADVANTAGES SUFFERED BY UNREPRESENTED DEFENDANTS

10.2 In the Discussion Paper the Commission referred to a number of disadvantages which unrepresented defendants may suffer.[2] These are that they -

(1) do not always appreciate the nature and seriousness of the charge;
(2) do not understand the practice and procedure of the court;
(3) do not understand the sentencing process; and
(4) may submit to pressure to plead guilty.

The Paper also referred to a number of studies of the effects of representation.[3]

3. PROTECTION OR ASSISTANCE AVAILABLE AT PRESENT

(a) Introduction

10.3 Although it has been recognised that "...a defence conducted by a competent counsel has an advantage to an accused and that it is in the best interest of the administration of justice that an accused be so represented"[4] courts in Australia have declined to create a "right to counsel" at public expense.[5] It has, however, been recognised that judicial officers should play

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1 This matter was initially referred to the Commission as a separate project (Project No 42) but has now been subsumed in this project.
2 Discussion Paper, paras 11.12 to 11.15.
3 Id, paras 11.6 to 11.10.
4 *McInnis v R* (1979) 143 CLR 575, 579
5 Ibid. Such a right has, however, been recognised in the United States of America: id, 586-587.

some role in protecting unrepresented defendants. These are referred to in the following paragraphs.

(b) The rules in Cooling v Steel

10.4 In South Australia in *Cooling v Stee1*[6] Wells J set out a number of rules to be followed by a court when an unrepresented defendant appears before it. These rules have been commented on favourably or applied in cases in Western Australia.[7] The rules are -

1. Before the defendant's plea is taken, the court should ensure that the defendant understands the nature of the charge.[8] he defendant should be told briefly and simply with what he or she is charged.

2. The court should make the defendant appreciate that the plea is entirely a matter for his or her own independent decision, that he or she is entitled to legal advice and representation, and that the defendant may ask for a reasonable adjournment to seek that advice or representation.

3. If the case is adjourned and the question of bail arises, the defendant should be made clearly aware of what bail is, that an application can be made for bail, which matters a court takes into account and that representations can be made in support of an application.

4. Where the case is proceeded with, the defendant should be informed of the seriousness of the charge and of the penalties that may be imposed.

5. Where a plea of guilty is entered by the defendant -

    (i) it should be made clear that the defendant may put matters in mitigation and call witnesses or produce other relevant material for the court;

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6 (1971) 2 SASR 249, 250-252.

7 *Jones v Holmwood* [1974] WAR 33, per Wallace J and *Draper v Norbury* (unreported) Supreme Court of Western Australia, Appeal No 345 of 1982, 22.4.1983, per Brinsden J.

8 See also *R v Inglis* [1917] VLR 672, 675 and *Thomason v Martin* [1964] WAR 136.

(ii) before the prosecutor places the facts before the court, the defendant should be informed that he or she is entitled to dispute or comment upon the facts alleged by the prosecutor;

(iii) if the defendant disputes any of those facts, the court should be quick to recognise any denials or explanations by the defendant which suggest that he or she should not have pleaded guilty, in which case a plea of not guilty should be entered.[9]

6. Special consideration should be given to Aborigines whose understanding of court procedure is slight or to people who may have an imperfect understanding of the English language.

7. In general, the court should ensure that the defendant is appraised of his or her rights and duties at all times, and be vigilant to keep the proceedings free of error or misunderstanding.

(c) Statutory safeguards

10.5 Apart from this common law duty, section 49(1) of the *Aboriginal Affairs Planning Authority Act 1972-1985* provides that:[10]

> "In any proceedings in respect of an offence which is punishable in the first instance by a term of imprisonment for a period of 6 months or more the court hearing the charge shall refuse to accept or admit a plea of guilt at trial or an admission of guilt or confession before trial in any case where the court is satisfied upon examination of the accused person that he is a person of Aboriginal descent who from want of comprehension of the nature of the circumstances alleged, or of the proceedings, is or was not capable of understanding that plea of guilt or that admission of guilt or confession."

10.6 Section 20(4a) of the *Child Welfare Act 1947-1985* provides that a Children's Court, when hearing a complaint of an indictable offence brought against the child, must not accept a plea of guilty entered by a child unless:

"(a) the child is represented at the hearing by counsel or solicitor; or

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9 See also *Slater v Marshall* [1965] WAR 222.

10 See *Smith v Grieve* [1974] WAR 193.

(b) the court is satisfied that the child received legal advice before entering the plea."

(d) Undue pressure to plead guilty

10.7 In Queensland it has been held that where an unrepresented defendant is charged by a police officer, the court should inquire from the defendant whether anyone connected with the police made a suggestion that he or she should plead guilty. If the court does not receive a prompt and convincing disclaimer from the defendant it should suggest to the defendant that a plea be entered of not guilty and emphasise the impropriety of such advice.[11]

(e) Fair trial

10.8 So far as the conduct of a trial is concerned it has recently been reiterated that a judicial officer should ensure that a trial is conducted fairly. In *MacPherson v R,* a case involving an unrepresented defendant, Mason J stated that:

> "...the trial judge is bound to ensure that an accused person has a fair trial. To that end he is under a duty to give the accused such information and advice as is necessary to ensure that he has a fair trial... A trial in which a judge allows an accused to remain in ignorance of a fundamental procedure which, if invoked, may prove to be advantageous to him, can hardly be labelled as 'fair'."[12]

An unrepresented defendant therefore should not be kept in ignorance of the "rules of the game" even if the court is not obliged to tell him or her how to play the game. The court has a duty to give the defendant advice or information concerning the right to give evidence, the right to cross-examine witnesses, the right to remain silent and the right to test the admissibility of evidence.[13] Gibbs CJ and Wilson J stated that the court is also under a duty to exclude evidence tendered against the defendant which is not shown to be admissible and, in particular, where there is a real question as to the voluntariness of a confession the court has a duty to satisfy itself as to its voluntariness.[14]

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11 *Heffernan v Ward* [1959] Qd R 12, 15-16; *Hallahan v Kryloff; Ex parte Kryloff* [1960] QWN 18; *Robinson v Hankins; Ex parte Hankins* [1966] Qd R 383. In *Di Camillo v Wilcox* [1964] WAR 44, 49, Hale J said that this was "excellent advice".

12 (1981) 147 CLR 512, 534. Judgment was given in similar terms by Gibbs CJ and Wilson J (524) and Brennan J (546-547).

13 Id, 534, per Mason J.

14 Id, 524.

4. RECOMMENDATIONS

10.9 Defendants appear in Courts of Petty Sessions without legal representation for a number of reasons. Some could afford to obtain representation but fail to do so or do not consider it necessary to do so. Others either cannot afford to obtain it or do not know how to go about obtaining it. To a large extent, the disadvantages suffered by unrepresented defendants can only be overcome by improving the availability of legal representation through legal aid and the Duty Counsel Scheme. This is a matter beyond the purview of this report.

10.10 The position of unrepresented defendants can also be improved by the application of the measures referred to in paragraphs 10.4 to 10.8 above. The extent to which this occurs depends on the awareness of the need and ability of magistrates and justices to apply these measures in individual cases. The Commission has received evidence that the level of awareness of these measures amongst justices is not great. The Commission recommends that these measures be fully set out and explained in the *Handbook for Justices* and in training courses for justices.

10.11 In the Discussion Paper the Commission invited comment on a number of specific measures to improve the position of unrepresented defendants.[15] These are discussed below.

(a) A brief statement of case by the prosecution before a plea is entered

10.12 The Commission suggested that the defendant's appreciation of the nature of a charge could be improved if the prosecution were required to make a brief statement outlining its case before the defendant was required to plead. The statement might serve to ensure that an unrepresented defendant who wished to enter a plea of guilty unequivocally admitted all the elements of the offence charged and accepted all of the facts read to the court which were material to the elements of the offence or to the determination of the appropriate sentence.

10.13 The Commission has concluded that such a requirement is unnecessary because, where a defendant pleads guilty, the prosecution makes a brief statement of the facts before a

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15 Discussion Paper, paras 11.24 to 11.29.

sentence is imposed by the court. However, the Commission recommends that the court should be under a statutory duty at this stage to ensure that the defendant's plea is unequivocal and, if not, order that a plea of not guilty be entered and adjourn the matter so that a trial can be conducted.

(b) Assistance by judicial officers

10.14 At present a judicial officer is required to provide some assistance to an unrepresented defendant[16] though the officer does not generally play an active role in the conduct of the hearing. One proposal canvassed in the Discussion Paper was that an express obligation be imposed on a judicial officer to play a role in the case beyond the existing duty, for example, by examining or cross-examining witnesses and, where necessary, calling witnesses. The Commission has concluded that this would be undesirable. Such an obligation would require the officer to fill the role of defence counsel and it would be difficult for the officer to do so without jeopardising his or her primary role as a neutral and final arbiter on questions of law and fact.

(c) Providing information to defendants

10.15 One means of alerting people as to the desirability and sources of legal advice or assistance and providing information about court procedures would be by a pamphlet. The Commission understands that the Legal Aid Commission of Western Australia is preparing pamphlets on the procedure in Courts of Petty Sessions and bail. These pamphlets should be available, to defendants in court houses, lock-ups and gaols.

(d) Pre-sentence report

10.16 Under section 8 of the *Offenders Probation and Parole Act 1963-1985* a court may require the Director, Probation and Parole Services, to cause to be prepared and submitted to the court a report containing such information with respect to any convicted person as the court requires. In the Discussion Paper the Commission considered whether or not an obligation should be placed on a court to obtain a pre-sentence report in every case where the court contemplates imposing a sentence of imprisonment on an unrepresented defendant. The

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16 Para 10.8 above.

Commission has concluded that it is preferable to rely on the discretion of the court to obtain a pre-sentence report in those cases in which the court considers that such a report may be of assistance. The court may already have adequate information and be satisfied that a term of imprisonment is appropriate. In these cases a requirement to obtain a pre-sentence report would unnecessarily increase the burden on the resources of the Probation and Parole Service.

5. SUMMARY OF RECOMMENDATIONS

10.17 The Commission recommends that –

Training of justices

1. The *Handbook for Justices* and the training course for justices should deal with the measures judicial officers should adopt to provide protection for unrepresented defendants.

Paragraph 10.10

Pleas of guilty by unrepresented defendants

2. Before proceeding to impose a sentence on an unrepresented defendant who has pleaded guilty the court should be under a statutory duty to ensure that the plea is unequivocal and, if not, to order that a plea of not guilty be entered and adjourn the matter so that a trial can be conducted.

Paragraph 10.13

Chapter 11

SUMMARY OF RECOMMENDATIONS

JUSTICES OF THE PEACE

Selection of justices

1. A Justices of the Peace Council should be statutorily established to -

   (a) develop criteria for the appointment of Justices;
   (b) recommend individual appointments to the Governor in accordance with those criteria;
   (c) develop a course of training and instruction for justices and ensure that they are kept informed of developments in the law relevant to their duties and, in particular, the sentencing principles laid down by appellate courts;
   (d) ensure that justices perform their duties competently;
   (e) receive and investigate complaints respecting misbehaviour or neglect of duty by individual justices;
   (f) recommend to the Governor the removal from office of justices who do not perform their duties competently or who are otherwise unfit to continue as a justice.

   Paragraph 2.5

Appointment of justices

2. Justices should be appointed for the whole State by a special or general warrant under the hand of the Governor notified in the *Government Gazette.* A general warrant should be issued periodically having regard to the need for justices in various locations.

   Paragraph 2.8

The General Commission of the Peace

3. The General Commission of the Peace should be abolished.

Paragraph 2.8

Ex officio appointments

4. Members of the Executive Council should not be justices ex officio.

Paragraph 2.9

5. Mayors of cities or towns or the presidents of shires should not be justices ex officio.

Paragraph 2.10

Members of Parliament

6. As justices should be selected on the basis that their primary function is to perform judicial duties, members of Parliament should no longer be appointed justices of the peace.

Paragraph 2.12

Justices resident outside Western Australia

7. The provision for the appointment of justices resident outside Western Australia should be repealed.

Paragraph 2.13

Resignation of justices

8. A justice should continue to be able to resign his or her office.

Paragraph 2.14

Removal or discharge from office

9. It should continue to be possible to remove or discharge a justice from office by an order of the Governor or by the omission of the name of a person from a general warrant, as is presently the case with a General Commission of the Peace.

Paragraph 2.15

Age limit

10. Persons should cease to hold the office of justice of the peace at the age of 70 years.

Paragraph 2.17

Jurisdiction and powers of justices

11. There should be no change in the jurisdiction of justices of the peace.[1] However, they should no longer be able to impose a sentence of imprisonment exceeding one month or a fine of more than $500 on anyone occasion.

Paragraphs 2.19, 2.22 and 2.24

Expenses and allowances

12. Justices should be entitled to the payment of expenses involved in attending court sittings and training courses. However they should not be entitled to the payment of an attendance allowance for attending to sit in court.

Paragraphs 2.26 and 2.27

Civil actions against justices

13. Sections 222-232 of the *Justices Act* relating to civil actions against justices should not be amended in substance.

Paragraph 2.28

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1 This recommendation is made on the assumption that justices continue to follow the existing practice in relation to their jurisdiction: para 2.18 above.

Imperial statutes

14. The Imperial statutes relating to justices and other matters referred to in Appendices III and IV of this report should be repealed.

Paragraph 2.29

A MAGISTRATES' COURT

A Magistrates' Court

15. A new court, to be named the Magistrates' Court,[2] should be established merging Courts of Petty Sessions and Local Courts.

Paragraphs 3.2. 3.8 and 3.12

16. The Court should have the following divisions -

1. an Offences Division;
2. a Civil Division;
3. a Small Debts Division;
4. an Administrative Law Division; and
5. a Family Law Division.

Paragraph 3.10

17. The places at which the Offences Division may sit should be prescribed and publicly announced.

Paragraph 3.26

18. The Government should review present arrangements throughout the State with the aim of ensuring that, wherever possible, the proceedings of the Offences Division are not conducted in a police station.

Paragraph 3.28

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[2] The recommendation as to the name is on the assumption that the term "stipendiary magistrate" is retained.

Jurisdiction of the Offences Division

19. The following matters should be assigned to the Offences Division -

(a) hearing and determining any complaint of a simple offence;

(b) hearing and determining complaints of an indictable offence which may be tried summarily;

(c) conducting preliminary proceedings in relation to indictable offences;

(d) hearing and determining applications for orders to keep the peace.

Paragraph 3.13

Constitution of the Court in dealing with matters assigned to the Offences Division

20. In dealing with matters assigned to the Offences Division, the Court should be constituted by a stipendiary magistrate or two or more justices.

Paragraph 3.14

21. A single justice should only be empowered to determine a complaint if no other justice usually residing within a distance of 50 kilometres of the site of the court can be found within that distance at the time of the hearing *and* all the parties concerned consent. In the case of the defendant, the consent should be an informed consent.

Paragraph 3.18

22. The certificate as to the non-availability of another justice should be required to be completed as a condition of a single justice having the jurisdiction to hear the complaint.

Paragraph 3.18

23. The clerk or justice who made the inquiry as to the availability of another justice should complete the necessary certificate. Where the clerk completes the certificate, the justice should sign it by way of acknowledgment that he or she has seen it.

Paragraph 3.19

24. As regards indictable offences the court should be constituted by a stipendiary magistrate, unless no magistrate is available and the defendant gives an informed consent to the matter being dealt with by two or more justices.

Paragraph 3.23

Clerks of court

25. The appointment of clerks of court should not be confined to particular magisterial districts.

Paragraph 3.29

26. In places where a police officer is appointed as a clerk of petty sessions at present, the officer should be appointed as a clerk of the proposed Offences Division. Police officers who are clerks should not have power to issue a summons.

Paragraphs 3.31 and 3.32

27. Clerks should not be given power to issue warrants of execution or commitment.

Paragraph 3.30

Appeals from decisions of justices

28. A right of appeal from decisions of justices to a stipendiary magistrate should not be introduced.

Paragraph 3.35

Review of sentences of imprisonment imposed by justices

29. A provision for the review by a stipendiary magistrate of sentences of imprisonment imposed by justices should not be introduced.

Paragraph 3.37

Contempt of court

30. If a court of general inferior jurisdiction is established, the provision in respect of contempt in Local Courts should apply to the new court.

Paragraph 3.40

31. The punishment available for contempt should be a fine of $500 or imprisonment not exceeding 14 days.

Paragraph 3.41

32. The court should have power to remit the penalty imposed, in whole or part, if the offender apologises before the rising of the court.

Paragraph 3.41

COMMENCEMENT OF PROCEEDINGS

A written complaint

33. All complaints should be in writing.

Paragraph 4.2

Filing complaint in court

34. The complaint should be filed by the complainant in the office of the court where the defendant is to appear as soon as practicable after the summons has been served or the defendant has been arrested as the case may be.

Paragraph 4.3

Particulars of the offence

35. The complaint should be required to contain such particulars as are necessary for giving reasonable information as to the nature of the charge.

Paragraph 4.10

36. A formal procedure should be provided for seeking particulars or further and better particulars about the nature of the charge.

Paragraph 4.10

Joinder of offences

37. Section 43 of the *Justices Act* should be redrafted so that the circumstances in which more than one matter may be joined in a complaint are the same as those in the second paragraph of section 585 of the *Criminal Code*. Where more than one matter is charged in a complaint, each charge should be set out in a separate paragraph.

Paragraph 4.14

Charging more than one defendant in a complaint

38. Provision should be made for more than one defendant to be charged in a complaint. However, the court should have a discretion to direct that separate trials be conducted.

Paragraphs 4.15 and 4.16

Amendment of summons

39. Any person authorised to issue a summons should have power to extend the time for attendance or to issue a fresh summons in respect of the complaint if there is good cause for doing so.

Paragraph 4.18

Service of the summons

40. It should be provided that a summons may be served by bringing it to the defendant's notice if he or she refuses to accept it.

Paragraph 4.19

41. The provision allowing a summons to be left at the defendant's last known place of abode should be amended to require instead that it be served on the defendant, if he or she cannot be found, by leaving it at the defendant's usual place of residence with a person who appears to be not less than 16 years of age. Where the defendant's residence is a hotel or boarding house or similar establishment the summons should be required to be left with a person not less than 16 years of age who is apparently in charge of the establishment or employed in its office.

Paragraph 4.19

Arrest with or without a warrant

42. A person arrested with or without a warrant should be given a statutory right to receive, on application to the relevant clerk of court, without charge, a copy of the complaint.

Paragraph 4.21

Revocation of a warrant or a summons

43. Provision should be made for the revocation of a warrant or a summons.

Paragraph 4.22

Infringement notices

44. A standard infringement notice procedure should be introduced.

Paragraph 4.31

MATTERS PRELIMINARY TO A HEARING

A pre-trial hearing

45. Provision should be made for the holding of pre-trial hearings at the discretion of the court.

Paragraph 5.4

46. Where a pre-trial hearing is held, the court should have power to make such orders and give such directions as are necessary for the just and efficient disposal of the proceedings.

Paragraph 5.5

Summons to produce documents

47. Where a person is merely required to produce any document or writing, and not to give oral evidence, it should be sufficient compliance with a summons if the document or writing is produced to the appropriate clerk of court at least two days before the date on which his or her attendance is required at the hearing.

Paragraph 5.7

Setting aside a witness summons

48. Provision should be made for a witness summons to be set aside where the witness is unable to give any material evidence or to produce any documents or writings which are material and are not privileged.

Paragraph 5.9

Service of the summons

49. A witness summons should be served upon the person to whom it is directed by -

(i) delivering a duplicate thereof to him or her personally or by being brought to his or her notice if he or she personally refuses to accept it; or

(ii) if he or she cannot be found, by leaving it at his or her usual place of residence with a person who appears to be not less than 16 years of age. Where the person's usual residence is a hotel or a boarding house or similar establishment the summons should be required to be left with a

person not less than 16 years of age who is apparently in charge of the establishment or employed in its office.

Paragraph 5.10

Arrest on warrant

50. Where a person sought as a witness either at the hearing or at an adjourned hearing is arrested under a warrant he or she should be immediately taken before a justice who should be empowered to grant bail on appropriate conditions.

Paragraphs 5.11 and 5.12

Conduct money

51. The present requirement that a reasonable sum be paid or tendered to a person summoned to appear as a witness for his or her costs and expenses of attendance should be retained.

Paragraph 5.15

An offence of failing to appear in response to a summons

52. The present power of the court to impose a penalty for failure to obey a witness summons in certain circumstances should be replaced by a provision making it an offence to fail to obey a witness summons in those circumstances.

Paragraph 5.16

THE HEARING

Entry of plea

53. A defendant should be entitled to receive, on application, a copy of the complaint before entering a plea, whether or not he or she has previously received a copy of it. The court should be obliged to -

(a) inform the defendant of his or her right in this regard;

(b) ensure that the defendant is given a copy of the complaint if the right is exercised; and

(c) give the defendant sufficient time to consider it before requiring the defendant to plead.

Paragraph 6.1

54. The defendant should be required to enter a plea in a manner similar to that in trials on indictment.

Paragraph 6.2

55. If, on being called upon to plead, the defendant does not do so, the court should be expressly empowered to order that a plea of not guilty be entered on his or her behalf so long as the defendant is properly before the court.

Paragraph 6.2

Practice at the hearing

56. Section 139 of the *Justices Act* should be revised to make it clear that the complainant may call witnesses in reply only if the court so permits.

Paragraph 6.3

Representation

57. It should be provided that a police officer is entitled to conduct proceedings on behalf of another officer and that an officer of a government department or authority is entitled to conduct proceedings on behalf of another officer of the department or authority.

Paragraph 6.4

58. The power given to the court to exclude persons from the courtroom should not be able to be exercised so as to exclude -

(a) a person appearing on another's behalf pursuant to a statutory right to do so; or

(b) a person to whom the court has given leave to appear on another person's behalf.

Paragraph 6.5

Representation of a corporation

59. An express procedure should be introduced for dealing with prosecutions of corporations.

Paragraph 6.6

Evidence of a person not present in court

60. Provision should be made for obtaining evidence from a person in Western Australia who cannot be present at the trial.

Paragraph 6.9

Variation and amendment

61. The power to adjourn a hearing and to amend a complaint, summons or warrant should apply to both a variance and a defect of substance or form.

Paragraph 6.11

62. Section 46 of the *Justices Act* should be redrafted so as to entitle the defendant to object to a defect or variance, and that if he or she does so, to empower the court to make such amendment to the complaint, summons or warrant as seems just.

Paragraph 6.11

63. Sections 590 and 591 of the *Criminal Code* should not apply to the summary trial of indictable offences.

Paragraph 6.11

Adjournment sine die

64. The court should be given express power when adjourning a matter to leave the time and place at which the hearing is to be resumed to be determined later by the court, but, in any event, no later than 12 months after such an adjournment. The power should not extend to a case in which the defendant is to be remanded in custody or on bail.

Paragraph 6.14

Bringing complaint on for hearing

65. The practice of allowing matters to be brought on for hearing at an earlier date than that set down should be statutorily confirmed.

Paragraph 6.15

Adjournment after the determination of a matter

66. The court should be given express power to adjourn a matter after recording a conviction but before sentencing or otherwise dealing with the defendant.

Paragraph 6.16

Withdrawal of a complaint

67. Express provision should be made for the withdrawal of a complaint with the leave of the court. In cases in which the *Official Prosecutions (Defendants' Costs) Act 1973-1974* does not apply the court should be empowered to make an order as to costs.

Paragraph 6.17

Dismissal of complaint on failure of complainant to appear

68. The provision for the dismissal of a complaint, or the adjournment of a hearing, where a complainant fails to appear at the time and place set down in

the summons for a hearing should also apply where a complainant fails to appear at an adjourned hearing.

Paragraph 6.19

Information which may be given to the court where defendant does not appear

69. The summons form should be amended to make it clear as to the matters on which a defendant may give the court information where he or she does not appear.

Paragraph 6.23

Request for time to pay where defendant does not appear

70. A defendant who pleads guilty in writing should be advised on the summons form that he or she may request time to pay any fine imposed by the court.

Paragraph 6.24

Disqualifications

71. The court should have a discretion to order that any disqualification from holding a licence, certificate, permit or other authority should commence at any time within seven days from the time of the conviction.

Paragraph 6.26

Setting aside decision given in default of appearance of any party

72. The criteria for setting aside a decision given in default of appearance of any party should be that -

(a) the applicant did not receive notice of the proceedings in which the conviction or order was made, or not in sufficient time to enable him or her to attend the hearing; or

(b) the applicant failed to attend the hearing for reasons that render it desirable, in the interests of justice, that the conviction or order should be set aside and the proceedings re-heard.

Paragraph 6.30

Onus of proof

73. Section 72 of the *Justices Act* should eventually be repealed. As a transitional measure, pending a review of the offences to which it applies, it should be limited to offences in existence at present.

Paragraph 6.33

Section 70 of the Justices Act

74. Section 70 of the *Justices Act* should be repealed.

Paragraph 6.34

Appropriate venue

75. A party should be entitled to apply to the court to have a complaint or other proceeding heard at a place which on balance is the most convenient for all the parties and the witnesses.

Paragraph 6.35

Exclusion of the public

76. The court should have power to exclude persons from the courtroom only where that is necessary in the interests of justice.

Paragraph 6.38

Exclusion of a defendant for misbehaviour

77. The court should be given power to exclude a defendant whose conduct renders the continuance of the proceedings in his or her presence impracticable and to direct that the trial proceed in the defendant's absence.

Paragraph 6.39

Removal of a person who has disobeyed an order to leave the court

78. Where a person has disobeyed an order to leave the court, the presiding judicial officer should have power to order the physical removal of that person.

Paragraph 6.40

MATTERS ANCILLARY TO THE COURT'S DECISION AND OTHER MATTERS

Recording the court's decision

79. The court should be required to make a minute of any conviction or order against the defendant at the time the determination is made.

Paragraph 7.3

Notice of fine imposed

80. The clerk of court should be required to give the defendant a notice of any fine imposed.

Paragraph 7.4

Orders involving imprisonment

81. The references to "hard labour" in the *Justices Act* should be removed.

Paragraph 7.5

82. The sum of $500 prescribed in section 166 of the *Justices Act* should be increased to, say, $1,000.

Paragraph 7.5

Payment of a fine to a victim of an assault

83. Section 145 of the *Justices Act*, which provides for the payment of a fine to the victim of an assault, should be repealed.

Paragraph 7.6

Payment of other sums of money

84. Section 168 of the *Justices Act* and the *Fines and Penalties Appropriation Act 1909* should be consolidated in a single provision in the *Justices Act* or the enactment setting out the court's procedure if the Commission's recommendations in Chapter 3 are adopted.

Paragraph 7.7

85. Section 171 of the *Justices Act* should be amended to provide that any fine or penalty payable to any person other than Her Majesty which is paid to the clerk should be held for one month or such further period as the court directs and should be repayable in whole or in part, depending on the result of any appeal.

Paragraph 7.8

Costs

86. No scale of costs should be introduced in respect of proceedings other than those covered by the *Official Prosecutions (Defendants' Costs) Act 1973-1974*.

Paragraph 7.13

87. Provision should be made for the taxation of costs in those cases where costs cannot otherwise be assessed conveniently at the determination of the complaint.

Paragraph 7.15

Sureties for witnesses

88. Similar provisions to those in Part VI of the *Bail Act 1982-1984* should apply to sureties for witnesses under the *Justices Act*.

Paragraph 7.16

Applications to the court

89. A simple procedure by way of an application on notice to the other party should be introduced for dealing with applications to the court, such as an application for a pre-trial hearing or for an early hearing.

Paragraph 7.17

Time limit

90. The general rule that a complaint of a simple offence or other matter should be made within six months from the time when the matter of complaint arose should be retained.

Paragraph 7.18

INDICTABLE OFFENCES

Present system

91. The present procedure for preliminary hearings should be retained subject to the recommendations for change made below.

Paragraph 8.6

Defendant standing mute

92. A defendant who stands mute when asked whether he or she elects to be dealt with summarily should be deemed to have elected not to be so dealt with.

Paragraph 8.9

Statement to defendant

93. It should not be necessary to address a defendant who is legally represented in accordance with the words set out in Part C of the Ninth Schedule or words to a like effect.

Paragraph 8.10

Provision of written statements

94. Before a defendant is asked to elect whether or not to have a preliminary hearing, the prosecution should provide the defendant with copies of statements of all the witnesses it intends to call at the hearing should one be held.

Paragraph 8.11

95. If a preliminary hearing is held, the presiding officer should have power to grant the prosecution leave to call a person to give oral testimony if it did not know of the person's existence or availability before the defendant made the election.

Paragraph 8.11

Service of written statements

96. It should be possible to serve written statements either on the defendant or the defendant's solicitor.

Paragraph 8.12

Plea of guilty

97. Defendants should be able to plead guilty at an early stage of the proceedings subject to prescribed safeguards.

Paragraph 8.13

Change of election to have a charge dealt with on indictment

98. The presiding officer should be given an express discretion to permit a defendant to change his or her election with regard to the mode of trial.

Paragraph 8.14

Examination of witnesses

99. Written statements should be required to be read aloud only if the defendant or the prosecutor so requests.

Paragraph 8.16

The sufficient evidence test

100. The requirement that the evidence given at the preliminary hearing be sufficient to put the defendant upon trial should be retained.

Paragraph 8.23

101. The question of whether or not there is sufficient evidence to put the defendant on trial by jury for any indictable offence should be considered when all the evidence for the prosecution and for the defence has been taken.

Paragraph 8.22

102. At the end of the prosecution evidence the defendant should be permitted to make a submission including a submission that there is no case to answer.

Paragraph 8.22

Attendance of public at preliminary hearings

103. Preliminary hearings should be held in open court, subject to the power of the presiding officer to exclude members of the public where that is necessary in the interests of justice.

Paragraph 8.25

Publication of a report of a preliminary hearing

104. The existing provision empowering the presiding officer to prohibit the publication of any report of or relating to the evidence given or tendered at the hearing should be retained.

Paragraph 8.27

Attendance of defendant at a preliminary hearing

105. The presiding officer should be expressly entitled to excuse a defendant from attendance during the taking of any evidence for the prosecution so long as the defendant will be represented by a legal practitioner during any such absence.

Paragraph 8.31

Costs

106. The presiding officer should have a discretion to award costs to the defendant where he or she is not committed for trial.

Paragraph 8.32

107. The *Official Prosecutions (Defendants' Costs) Act 1973-1974* should be extended to apply to such awards of costs.

Paragraph 8.32

108. Provision should be made for the taxation of costs.

Paragraph 8.32

Private prosecutions

109. Private prosecutions should not be abolished or subject to special procedural limitations.

Paragraph 8.33

PREVENTIVE JURISDICTION

Orders to keep the peace (ie restraining orders)

110. It should be possible for an application for a restraining order to be made by any person for the protection of a person under the care or charge of the applicant.

Paragraph 9.8

111. There should be power to award costs at the hearing on the return of a summons to show cause.

Paragraph 9.9

Sureties of the peace and sureties for good behaviour

112. The Commission recommends that sureties of the peace and sureties for good behaviour should be abolished.

Paragraph 9.13

UNREPRESENTED DEFENDANTS

Training of justices

113. The *Handbook for Justices* and the training course for justices should deal with the measures judicial officers should adopt to provide protection for unrepresented defendants.

Paragraph 10.10

Pleas of guilty by unrepresented defendants

114. Before proceeding to impose a sentence on an unrepresented defendant who has pleaded guilty the court should be under a statutory duty to ensure that the plea is unequivocal and, if not, to order that a plea of not guilty be entered and adjourn the matter so that a trial can be conducted.

Paragraph 10.13

P W JOHNSTON
Chairman

R S FRENCH

C W OGILVIE

J R PACKINGTON

M E RAYNER

11 November 1986

Appendix I

LIST OF THOSE WHO COMMENTED ON THE DISCUSSION PAPER[1]

Aboriginal Legal Service of Western Australia (Inc)
Albany Branch, Royal Association of Justices of Western Australia
Australian Bankers' Association (Western Australia)
W M Bartlett, Deputy Commonwealth Statistician and Government Statistician
N Belpitt JP
D G Blair
A C Bothie JP
H A Bottrell JP
S M Brennan
D W J Brown SM
R H Burton SM
G Campbell MHR
P M Canet
W J Casey JP
Civil Rehabilitation Council of Western Australia (Inc)
D C K Collins JP
Country Shire Councils' Association of Western Australia (Inc)
M Coyne JP
Criminal Law Association Inc
J J Cunningham
A M De Leeuw
E E Dolley JP
J Doogue
V C Edwards
J Falconer
C A Fisher, then a stipendiary magistrate
Fremantle Branch, Royal Association of Justices of Western Australia
W S T Frost JP
Y Graham JP
Sir Clifford Grant, Chief Stipendiary Magistrate
P S Harris JP
Health Department of Western Australia
R V Hill JP
P Hogan
R K Howlett
E E Johnston JP
A R B King JP
J King
C le B Langoulant, then Crown Solicitor
W J Lapham JP
Law Society of Western Australia
K J Leahy
J Loot JP
Magistrates' Courts Administration, Crown Law Department

[1] Seventeen commentators requested anonymity and therefore have not been included in this list.

F J Martin JP
A J McBeath JP
F T McCarthy JP
T J McIntyre SM
I G Medcalf QC
L Merritt
W J Millar, then Deputy Director of Legal Aid, Legal Aid Commission of Western Australia
G L Mooney JP
K Moore SM
T E Mulligan SM
P G Mulrennan JP
Northam Branch, Royal Association of Justices of Western Australia
Lt Col R J Nyman JP
T R O'Neill JP
R G Pape
W B V Peacock JP
Perth Branch, Royal Association of Justices of Western Australia
C Phillips
R H Pickles JP
Prisons Department
Probation and Parole Service
R F Pugh JP
S F Ravenhill
C M Roach
L W Roberts-Smith, Director of Legal Aid, Legal Aid Commission of Western Australia
F C Robins SM
Rockingham and Districts Branch, Royal Association of Justices of Western Australia
Royal Association of Justices of Western Australia (Council)
His Honour Judge G T Sadleir
D M Simpson JP
J Simpson SM
R G Simpson JP
M J Stapp SM
Stirling-Wanneroo Branch, Royal Association of Justices of Western Australia
B G Tennant
D Thackrah
P G Thobaven SM
D W Walsh SM
L D Wareham JP
D G Weir JP
R H Wilcox JP
H G Williams
Women Justices' Association of Western Australia
A Wray JP
R D Wray JP
C Zempilas SM

Appendix II

THE SECOND SCHEDULE OF THE JUSTICES ACT

Elizabeth the Second, by the Grace of God, etc.

To A.B. of
C.D. of
etc.

First Assignment. - Know Ye, that We have assigned you, and each and every of you, to be Our Justices to keep Our Peace in [the Magisterial District in] Our State of Western Australia [and its Dependencies], either alone or with any one or more of Our Justices that hereafter shall be appointed in Our said State and its Dependencies [or the said District], and to keep and to cause to be kept all laws, for the preservation of the Peace, and for the quiet rule and good government of Our people, in our said State and its Dependencies [or the said District] according to the form and effect of the same, and to punish all persons offending against them, or any of them, in the said State and its Dependencies [or the said District], as by the said laws is provided, and to cause to come before you all persons within Our said State and its Dependencies [or the said District] who use threats to any of Our People, to find security for keeping the peace or for their good behaviour towards US and Our People: And if they refuse to find such security, then to cause them to be safely kept until they find such security:

Second Assignment. - We have also assigned you, and each and every of you, either alone or with any one or more of such Justices to be appointed as aforesaid, to inquire the truth concerning all manner of crimes, misdemeanours, and offences, concerning which Our Justices of the Peace may lawfully or ought to inquire, by whomsoever and in what manner soever done, perpetrated, or attempted in Our said State and its Dependencies [or the said District]: And upon all complaints before you to issue such process against the persons charged until they are taken or surrender themselves, as may by law be issued.

Third Assignment. - We have also assigned you, and each and every of you, either alone or with any one or more of such Justices to be appointed as aforesaid, to have, exercise, and discharge all other the powers, authorities, and duties which under or by virtue of any law of Our Realm or of Our said State belong or appertain to the office of Justices of the Peace in or for Our said State.

And therefore We command you and each and every of you that you diligently apply yourselves to keep and cause to be kept the peace and all laws of Our Realm and of Our said State, and that at certain days and places duly appointed for these purposes you make inquiries into the premises and hear and determine all and singular the matters aforesaid. and perform and fulfil the duties aforesaid doing therein what is just according to the laws of Our Realm and of Our said State: And we command Our Sheriff and other officers of Our said State to aid you by all lawful means in the performance and due execution of the premises.

In testimony whereof, We have caused these Our Letters to be made Patent, and the Great Seal of Our said State to be hereunto affixed.

Witness Our Trusty and Well-beloved, etc., etc., etc., Governor, etc., at this day of in the year of our Lord one thousand nine hundred and .

Appendix III

IMPERIAL STATUTES RELATING TO JUSTICES OF THE PEACE[1]

1327 1 Edw 3, c 16
1330 4 Edw 3, c 2
1344 18 Edw 3, c 2

These statutes provide for the assignment of men to keep the peace. They have either been repealed and replaced or repealed in New South Wales: *Imperial Acts Application Act 1969-1984* (NSW), ss 5 and 8. The first and third statutes were repealed in Victoria by the *Imperial Acts Application Act 1980-1984*, s 5. The second statute was repealed in Victoria by the *Imperial Acts Application Act 1922*, s 7. In the Australian Capital Territory it has been recommended that they be repealed: ACTLRC, 26-27. In South Australia and Papua New Guinea it has been recommended that the first and third statutes be retained: SALRC, 4-5 and O'Regan, 18-19, respectively.

In view of the Commission's recommendations with respect to the appointment of justices these statutes should be repealed.

1346 20 Edw 3, c 3

This statute requires those appointed to be justices to take an oath. It has been repealed in New South Wales: (*Imperial Acts Application Act 1969-1984* (NSW), s 8) and in Victoria: *Imperial Acts Application Act 1922* (Vic), s 7. In South Australia it has been recommended that this statute be repealed: South Australian Law Reform Committee, *Inherited Imperial Law Regarding The Crown* (Report No 65, 1981), 6.

In view of the provisions in the *Justices Act* relating to the taking of an oath (which should be retained) this statute should be repealed.

1360 34 Edw 3, c 1

This statute makes provision for the appointment of justices of the peace and for their jurisdiction, including a provision relating to a surety for good behaviour. This provision is still the basis of the power to require sureties for good behaviour in Western Australia together with the common law. In New South Wales this statute has been repealed and replaced with a provision empowering the Governor to appoint justices and empowering justices "to restrain offenders and to take of them or of persons not of good fame surety for their good behaviour": *Imperial Acts Application Act 1969*-1984 (NSW), ss 5, 29 and 30. The

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[1] There have been reports in a number of jurisdictions relating to these statutes, as follows -
New South Wales Law Reform Commission, *Application of Imperial Acts* (NSWLRC 4, 1967).
Law Reform Commission of the Australian Capital Territory, *Imperial Acts in Force in the Australian Capital Territory* (1973), hereinafter cited as " ACTLRC".
R S O'Regan, *English Statutes in Papua New Guinea* (1973), hereinafter cited as "O'Regan".
G Kewley, *The Imperial Acts Application Act 1922* (1974-1975).
Victorian Statute Law Revision Committee, *Imperial Acts Application Act 1922* (1978) and *Imperial Acts Application Bill, Imperial Law Re-enactment Bill and the Constitutional Powers (Requests) Bill* (1979).
Law Reform Committee of South Australia, *Inherited Imperial State Law With Regard to Proceedings in Summary Jurisdiction* (Report No 58, 1981), hereinafter cited as "SALRC".
The application of these statutes has been terminated in Queensland: *Imperial Acts Application Act 1984*, s 7.

statute has been repealed in Victoria: *Imperial Acts Application Act 1980-1984* (Vic), s 5. The power to require a person to give a surety to keep the peace or be of good behaviour has been re-enacted: *Penalties and Sentences Act 1985* (Vic), s 80. In the ACT it has been recommended that this statute be repealed: ACTLRC, 27. In South Australia it has been recommended that this statute be retained because it is the authority for the appointment of justices and the basis of the power to require sureties for good behaviour: SALRC, 5. In Papua New Guinea it has been recommended that it be retained: O'Regan, 18-19.

In view of the Commission's recommendation that sureties of the peace and sureties for good behaviour should be abolished, this statute should be repealed.

1389 13 Rich 2, c 7

This statute provides for the types of persons to be appointed as justices of the peace. In South Australia it has been recommended that this statute be repealed: SALRC, 6. It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1984* (NSW), s 8) and in Victoria: *Imperial Acts Application Act 1922* (Vic), s 7.

In view of the Commission's recommendations relating to the appointment of justices this statute should be repealed.

1390 14 Rich 2, c 11

This statute provides for the appointment of justices of the peace and for the payment of wages to them. It may not apply in Western Australia. In South Australia it has been recommended that this statute be repealed: SALRC, 6. It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1984* (NSW), s 8) and Victoria: *Imperial Acts Application Act 1922* (Vic), s 7.

Insofar as the statute applies in this State it should be repealed.

1414 2 Hen 5, c 1

This statute deals with the appointment of justices. It may not apply in Western Australia. In South Australia it has been recommended that this statute be repealed: SALRC, 6. Insofar as it was in force it has been repealed in New South Wales: *Imperial Acts Application Act 1969-1984* (NSW), s 8. This statute has been repealed in Victoria: *Imperial Acts Application Act 1922* (Vic), s 7.

Insofar as the statute applies in this State it should be repealed.

1433 11 Hen 6, c 6

This statute in effect provides that proceedings before justices shall not lapse merely because of the issue of a new commission of the peace. In South Australia it has been recommended that this statute be repealed but with a saving provision: SALRC, 6. It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1984* (NSW), s 8) and Victoria: *Imperial Acts Application Act 1922* (Vic), s 7.

Consequent on the recommendation that the General Commission of the Peace be abolished this statute should be repealed if it applies in Western Australia.

1439 18 Hen 6, c 11

This statute provides that no person shall be assigned to be a justice unless he holds lands or tenements of the value of twenty pounds per annum. In South Australia it has been recommended that this statute be repealed: SALRC, 6-7. It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1984* (NSW), s 8) and Victoria: *Imperial Acts Application Act 1922* (Vic), s 7.

In view of the Commission's recommendations relating to the appointment of justices this statute should be repealed.

1487 4 Hen 7, c 12

This statute deals with the manner in which justices must execute their commission and provides remedies for people aggrieved by the justices' acts or omissions. In South Australia it has been recommended that this statute be repealed. It was considered that the present law adequately covered the matter dealt with by the statute: SALRC, 7. It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1984* (NSW), s 8) and Victoria: *Imperial Acts Application Act 1922* (Vic), s 7.

As other remedies are adequate this statute should be repealed.

1547 1 Edw 6, c 7, s 4

This section provides that the elevation of a justice to the position of duke, earl etc does not abate the commission. Its repeal has been recommended in the ACT: ACTLRC, 31. It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1984* (NSW), s 8) and Victoria: *Imperial Acts Application Act 1980-1984* (Vic), s 5.

This statute should be repealed.

1553 1 Mary, sess 2, c 8

This statute provides that a sheriff shall not act as a justice during his term of office. In South Australia it has been recommended that this statute be repealed: SALRC, 7. It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1984* (NSW), s 8) and Victoria: *Imperial Acts Application Act 1922* (Vic), s 7.

This statute should be repealed.

1732 5 Geo 2, c 18

This statute prescribes qualifications for justices. In South Australia it has been recommended that this statute be repealed: SALRC, 9. It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1984* (NSW), s 8) and Victoria: *Imperial Acts Application Act 1922* (Vic), s 7.

This statute should be repealed.

1745 18 Geo 2, c 20

This statute provides for the qualifications of justices. In South Australia it has been recommended that this statute be repealed: SALRC, 10. It has been repealed in New South Wales: (*Imperial Acts Application Act 1969-1984* (NSW), s 8) and Victoria: *Imperial Acts Application Act 1922* (Vic), s 7.

This statute should be repealed.

1753 26 Geo 2, c 27
1766 7 Geo 3, c 21
1823 4 Geo 4, c 27

It seems that at the time these statutes were enacted one clause of the Commission of the Peace required that only justices learned in the law should be "of the quorum" and that only those justices should exercise specified judicial powers. The first statute provides that a warrant should stand though it did not express that the justice who issued it was of the quorum. The second statute provides that acts required to be done by one or more justices of the quorum are valid even though done by justices not of the quorum. The third statute allows justices in places having a limited number of justices to act though they are not of the quorum. It has been recommended that the first statute be repealed in South Australia (SALRC, 11) and the Australian Capital Territory: ACTLRC, 43. These statutes have been repealed in New South Wales: (*Imperial Acts Application Act 1969-1984* (NSW), s 8) and Victoria: *Imperial Acts Application Act 1922* (Vic), s 7.

These statutes should be repealed since the concept of the "quorum" does not apply in Western Australia.

1760 1 Geo 3, c 13
1766 7 Geo 3, c 9

Under these statutes justices are relieved from taking oaths on the demise of the Crown. These statutes have been repealed in New South Wales: *Imperial Acts Application Act 1969-1984* (NSW), s 8. It has been recommended in the Australian Capital Territory that the first statute be repealed and replaced with modern legislation: ACTLRC, 43. It has been recommended in South Australia that all the Imperial Statutes relating to demise of the Crown insofar as they apply to South Australia should be repealed and replaced with legislation enacted in that State: Law Reform Committee of South Australia, Report No 81 *Relating to the Demise of the Crown* (1984). These statutes have been repealed in Victoria: *Imperial Acts Application Act 1922* (Vic), s 7.

These statutes have been superseded by (Imp) Demise of the Crown Act 1901 and should be repealed.

1778 18 Geo 3, c 19

This statute deals with the payment of costs to parties, constables and to witnesses in relation to work of justices out of Sessions. It has been recommended in South Australia that this statute be repealed: SALRC, 12. It has been repealed in New South Wales: (*Imperial Acts Application Act 1969-1984* (NSW), s 8) and Victoria: *Imperial Acts Application Act 1922* (Vic), s 7.

This statute should be repealed.

1788 28 Geo 3, c 49 (amended by 1821 1 & 2 Geo 4, c 63)

This statute provides for justices appointed for one county to act in relation to matters arising in an adjoining county. It may not apply in Western Australia. Insofar as it was in force in New South Wales it was repealed: *Imperial Acts Application Act 1969-1984* (NSW), s 8. This statute has been repealed in Victoria: *Imperial Acts Application Act 1922* (Vic), s 7.

Insofar as this statute applies in this State it should be repealed.

1803 43 Geo 3, c 141

This statute provides protection for justices in the execution of their duty. It has been recommended in South Australia that this statute be repealed: SALRC, 13-14. It has been repealed in New South Wales: (*Imperial Acts Application Act 1969-1984* (NSW), s 8) and Victoria: *Imperial Acts Application Act 1922* (Vic), s 7.
This statute has been superseded by sections 222-232 of the *Justices Act* (which the Commission recommends should be retained) and should be repealed.

1822 3 Geo 4, c 23

This statute provides for a general form of conviction, that one justice may receive a complaint and that convictions may not be set aside for a defect of form.

In view of the existing provisions of the *Justices Act* and the law relating to judicial review by the Supreme Court this statute should be repealed.

Appendix IV

MISCELLANEOUS IMPERIAL STATUTES [1]

QUARTER SESSIONS

1362 36 Edw 3, c 12

This statute fixes times for holding Quarter Sessions. In South Australia it has been recommended that this statute be repealed: SALRC, 5. It has been repealed in New South Wales: (*Imperial Acts Application Act 1969-1984* (NSW), s 8) and Victoria: *Imperial Acts Application Act 1922* (Vic), s 7.

This statute should be repealed.

1388 12 Rich 2, c 10

This statute deals with sessions of the peace and in particular Quarter Sessions. In South Australia it has been recommended that this statute be repealed: SALRC, 5. It has been repealed in New South Wales: (*Imperial Acts Application Act 1969-1984* (NSW), s 8) and Victoria: *Imperial Acts Application Act 1922* (Vic), s 7.
This statute should be repealed.

1694 5 & 6 Will & Mary, c 11 (made perpetual by 1697 8 & 9 Will 3, c 33)

This statute deals with the abuse of the writ of certiorari for the purpose of delaying proceedings at Quarter Sessions. In South Australia it has been recommended that this statute be repealed but with a saving of the change in the law brought about by the statute: SALRC, 8. It has been repealed in New South Wales: (*Imperial Acts Application Act 1969-1984* (NSW), s 8) and Victoria: *Imperial Acts Application Act 1922* (Vic), s 7.

This statute should be repealed.

1732 5 Geo 2, c 19

This statute deals with Quarter Sessions appeals. In the Australian Capital Territory it has been recommended that this statute be repealed: ACTLRC, 40. It has been repealed in New South Wales (*Imperial Acts Application Act 1969-1984* (NSW), s 8) and Victoria: *Imperial Acts Application Act 1922 (*Vic), s 7.

This statute should be repealed.

1814 54 Geo 3, c 84

This statute fixes the time for holding the Michaelmas Quarter Sessions. It may not apply in Western Australia. Insofar as it was in force in New South Wales it was repealed: *Imperial Acts Application Act 1969-1984* (NSW), s 8. This statute has been repealed in Victoria: *Imperial Acts Application Act 1922* (Vic), s 7.
Insofar as this statute applies in this State, it should be repealed.

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[1] The application of these statutes has been terminated in Queensland: *Imperial Acts Application Act 1984*, s 7.

1819 59 Geo 3, c 28

This statute empowers Courts of Quarter Sessions or General Sessions to form a court to sit apart from them in order to deal with the court's business. In South Australia it has been recommended that this statute be repealed; SALRC, 14. It has been repealed in New South Wales: (*Imperial Acts Application Act 1969-1984* (NSW), s 8) and Victoria; *Imperial Acts Application Act 1922* (Vic), s 7.

This statute should be repealed.

IMPRISONMENT IN COMMON GAOL

1403 5 Hen 4, c 10

This statute provides that justices are not to imprison other than in a common gaol. It may not apply in Western Australia. In South Australia it has been recommended that this statute be repealed: SALRC, 6. Insofar as it was in force in New South Wales it was repealed; *Imperial Acts Application Act 1969-1984* (NSW), s 8. This statute has been repealed in Victoria; *Imperial Acts Application Act 1922* (Vic), s 7.

Insofar as this statute applies in this State, it should be repealed.

OTHERS

1740 13 Geo 2, c 18, s 5

In an action against a justice of the peace, section 5 places a time limit of six months on an application for certiorari and requires that notice be given to the justices against whose order the writ is sought. Generally the *Rules of the Supreme Court 1971-1986* place a time limit of six months on an application for certiorari (0 56 r 11(1)). It has been repealed in New South Wales: (*Imperial Acts Application Act 1969-1984* (NSW), s 8) and Victoria: *Imperial Acts Application Act 1922* (Vic), s 7.

This provision should be repealed.

1741 15 Geo 2, c 24

This statute enables justices of a liberty (that is, a market) or corporation to commit offenders to a house of correction. It may not apply in Western Australia. This statute has been repealed in New South Wales: (*Imperial Acts Application Act 1969-1984* (NSW), s 8) and Victoria: *Imperial Acts Application Act 1922* (Vic), s 7.

Insofar as this statute applies in this State, it should be repealed.