



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 72

Retention Of Court Records

REPORT

JUNE 1980

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972-1978*.

The Commissioners are -

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To: THE HON. I.G. MEDCALF, Q.C., M.L.C.
ATTORNEY GENERAL

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972-1978*, I am pleased to present the Commission's report on the retention of records of Courts of Petty Sessions and Local Courts.

(Signed) David K. Malcolm, QC
Chairman

19 June 1980

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CHAPTER 1 - INTRODUCTION

Terms of reference

1.1 The Commission has been asked to consider and report on the law relating to the retention of records of Courts of Petty Sessions¹ and Local Courts. The Commission was asked to consider this matter because the State Intermediate Records Repository, where the records of these courts are retained, is nearing the stage where it will be unable to accept any more of the courts records. As it is the records created at the Perth Court of Petty Sessions and the Perth Local Court which are placing a strain on the resources of the Repository at present, the record keeping procedures of those courts are emphasised in this report. However, the Commission's recommendations are intended to be applicable to all Courts of Petty Sessions and Local Courts.

1.2 This report is concerned therefore with considering the length of time and the manner in which the records of Courts of Petty Sessions and Local Courts should be retained. It is not concerned with the privacy aspects of the storage of records or with whether a person's criminal record should be expunged after a certain length of time.²

Working Paper

1.3 In March 1979, the Commission issued a working paper³ to inform the public of the issues involved in the project and to elicit comment on those issues. The names of those who commented on the Working Paper are set out in Appendix I, and the Working Paper is reproduced as Appendix II. The Commission wishes to express its appreciation to those who responded.

¹ These include records of proceedings of Courts of Petty Sessions under the *Married Women's Protection Act 1922-1954*. This Act was repealed by s.4(1) of the *Married Persons (Summary Relief) Act 1960*.

² The Commission has a project on *Privacy* (Project No. 65). One matter which the Commission is required to consider under that project is whether:

"...a person's criminal record should be expunged after a stipulated time, and if so, in what circumstances and under what conditions, and as to whether the same should revive in the event of such person sustaining a further conviction".

³ *Retention of Court Records* (Project No.72). Referred to in this report as "the Working Paper".

CHAPTER 2 - LAW AND PRACTICE IN WESTERN AUSTRALIA AND ELSEWHERE

THE LAW AND PRACTICE IN WESTERN AUSTRALIA

Courts of Petty Sessions

2.1 Courts of Petty Sessions have jurisdiction to hear charges relating to criminal matters which may be heard in a summary way¹ and to hold preliminary hearings into charges involving indictable offences. Courts of Petty Sessions also have jurisdiction to hear some proceedings of an administrative nature; for example, a Court of Petty Sessions may sit as a licensing tribunal under a number of Acts.²

2.2 The principal records of Courts of Petty Sessions are the file relating to a case and the document known as the "complaint".³ The Court also retains copies of receipts for the payment of fines and costs and an annual index of names of defendants. At the Perth Court of Petty Sessions the court administration prepares a Petty Sessions Charge List which lists the matters to be heard by a particular magistrate each day, but this is not retained for long.

2.3 At the Perth Court of Petty Sessions the file and the complaint are kept separately. The file commences with a copy of the summons, except in arrest cases where no summons is issued. In those cases in which a defendant pleads guilty⁴ the file usually comprises two or three pages and may contain only proof of service of the summons in proceedings commenced by summons, and any recognisances, satisfied warrants or references. Where the case is defended the file is naturally larger and may contain, in addition, the magistrate's notes of evidence, his reasons for the decision, exhibits or a transcript of the proceedings. The Court also maintains tape recordings of proceedings in the Court for a period of twelve months, after

¹ For example, charges relating to traffic and parking offences and offences under the *Health Act 1911-1979*, as well as certain indictable offences triable summarily, such as some assaults and stealing offences.

² *Inquiry Agents Licensing Act 1954-1964*, s.4; *Employment Agents Act 1976*, s.23; *Marine Stores Act 1902-1963*, s.9.

³ The document referred to in this report as "the complaint" is the document used to initiate proceedings in Courts of Petty Sessions whether the defendant is arrested or summoned to appear: see form 3 of the Fourth Schedule of the *Justices Act 1902-1979*. The document is sometimes known as the "charge sheet". The document is also used to keep a summary record of the proceedings of the court.

⁴ In a survey carried out by the Crown Law Department it was estimated that defendants plead guilty in seventy-five to eighty percent of cases.

which time the tapes are erased and re-used. A transcript is only prepared if it is sought by a magistrate or a party to the proceeding, for example, for the purpose of an appeal.

2.4 The complaint is an important record of the court because it contains a record of its decision and of the payment of any fine or costs ordered to be paid. The latter information is used to determine whether or not action should be taken to recover any sum outstanding. The complaints are kept separately because it is more convenient to refer to them for this purpose than to the more bulky files.

2.5 The usual practice at the Perth Court of Petty Sessions is for files relating to proceedings, whether defended or not, to be retained for a period of two to three years after which time they are transferred to the State Intermediate Records Repository. A survey carried out by the Crown Law Department showed that 29,956 files were created in 1976. In view of the fact that a large number of files are created each year, the provision of adequate storage space is considered to be a major problem.

2.6 In 1972, Part X of the *Justices Act 1902-1979* was enacted⁵ in an attempt to alleviate the storage problem arising from the large quantity of records of Courts of Petty Sessions. This Part enables records of Courts of Petty Sessions to be microfilmed and destroyed, and for the microfilm, or records which have not been microfilmed, to be destroyed after fifty-three years.⁶

2.7 Under this Part, a "court record"⁷ may be destroyed only after the expiration of fifty-three years from the time it became a record.⁸ A negative⁹ of a court record may be made at any time and held by or on behalf of the court.¹⁰ If such a negative is made, the court record

⁵ *Justices Act Amendment Act 1972.*

⁶ It appears that Part X must be read together with the State's archival legislation: see paragraphs 2.14 to 2.16 below.

⁷ A "court record" means an "...official record of any proceedings in any Court of Petty Sessions and includes any document filed in the Court, or in the custody of the Court, in relation to proceedings": *Justices Act 1902-1979*, s.233. There is no definition of "official record". See paragraph 3.22 below.

⁸ *Justices Act 1902-1979*, s.235.

⁹ A "negative" in relation to a document means "...a transparent negative photograph used or intended to be used as a medium for reproducing the contents of that document and includes any transparent photograph made from surface contact with the original negative photograph": *Justices Act 1902-1979*, s.233 and s.73A of the *Evidence Act 1906-1979*.

¹⁰ *Justices Act 1902-1979*, s.234.

may be destroyed after the expiration of three years from the time it became such a record.¹¹ The negative must then be held until the expiration of the fifty-three year period.¹²

2.8 Where a negative of a court record has been made, the negative is deemed to be the court record for the purpose of any of the laws relating to the admissibility of evidence without otherwise affecting those laws. As such, the negative must be treated as a court record by any court without any enquiry as to whether or not the original court record has been destroyed.¹³

2.9 At present, the only document forming part of the court record which is microfilmed at the Perth Court of Petty Sessions is the complaint. Because complaints are kept separately,¹⁴ the task of checking and collating complaints and files would add to the cost of microfilming all complete files. Complaints for proceedings commenced during a year are retained at the court for three years and are microfilmed at the end of that period. This microfilming is carried out whether or not the matter the subject of the complaint has been completed by the hearing of the charge or the payment of any fines or costs ordered to be paid. The complaints for incomplete matters are then culled and retained at the Court, while those for completed matters are sent to the State Intermediate Records Repository. The culling process is carried out so that the complaints for incomplete matters can be retained at the court in order to record subsequent payments. The complaints are microfilmed so that the Court has a record of the decisions in the Court office. If the Police or the Crown Law Department seek a certificate of conviction from the Clerk of Courts he is able to use the microfilm record to prepare it instead of having the original complaint sent to the court from the State Intermediate Records Repository.

Local Courts

2.10 The Local Courts have a limited jurisdiction to hear civil cases and may also determine certain administrative matters, for example, applications for licences under the *Debt Collectors Licensing Act 1964-1966* and appeals from bodies such as the Builders' Registration Board of Western Australia. A separate file is maintained for each action or

¹¹ The time at which a document becomes a record of the court is not clear from the Act.

¹² *Justices Act 1902-1979*, s.236.

¹³ *Id.*, s.237.

¹⁴ See paragraph 2.4 above.

proceeding.¹⁵ At the Perth Local Court the files are periodically sent to the State Intermediate Records Repository depending on the space available at the Court. At present files dating back to 1976 are kept at the court. When the files are sent to the State Intermediate Records Repository no attempt is made to determine whether a matter has been completed and to cull the files which are still active. In many cases it is not possible to ascertain from the files whether a matter has been completed because the payment of any sum of money in dispute may have been made without that fact being recorded on the court file.

2.11 Apart from the files for each proceeding, the Clerk of the Local Court is required to maintain a minute book called the "Record and Minute Book of the Local Court".¹⁶ This book contains details of the plaintiff and the defendant, the sum claimed and the particulars of the plaintiff's cause of action. It is also used to record the various documents filed at the court and stored on the file relating to a proceeding, and the summons or warrants issued by the court. Although it is used to record any judgments entered by default or confession it is not usually used to record the details of a judgment in a defended case. Such a judgment is usually recorded on the file. The Clerk is also required to maintain a Foreign Executions Re-issue Book.¹⁷ This book is used to record the receipt of warrants of execution or orders of commitment which have been sent to the court by a foreign court for execution. For administrative convenience the Clerk also prepares a "cause list" showing the actions to be heard by each magistrate on each day. Accounting records are also kept at the court. Proceedings of the Courts may be recorded on tape and as with the Perth Court of Petty Sessions the practice is to retain the tapes for twelve months and then to erase and re-use them.

2.12 There is no provision for the destruction or microfilming of Local Court records as there is in the case of records of Courts of Petty Sessions.¹⁸ However, it would appear to be possible to destroy the records of Local Courts under the State's archival legislation referred to in paragraphs 2.14 to 2.16 below.¹⁹

¹⁵ In 1977, 39,806 actions were commenced in the Perth Local Court. A Local Court file may contain documents such as the plaint, proof of service, notice of intention to defend, reply, counter-claim, court orders, notes of evidence and exhibits.

¹⁶ *Local Courts Act 1904-1976*, s.15.

¹⁷ See *Local Court Rules 1961-1978*, Order 25(Div. 2) rule 1.

¹⁸ See paragraphs 2.6 to 2.9 above.

¹⁹ Under s.6 of the *Local Courts Act 1904-1976* a Local Court is a court of record. This does not necessarily mean that the court is obliged to keep its records in perpetuity: Halsbury, *Laws of England* (4th ed., 1975) Vol. 10, paragraph 709 at 319.

Recording of Evidence Act 1975-1979

2.13 The *Recording of Evidence Act 1975-1979*²⁰ provides for the recording of legal proceedings, including those in Courts of Petty Sessions, other than committal proceedings conducted under Part V of the *Justices Act 1902-1979*, and Local Courts. The record which is made (called the "master-record") cannot be destroyed within the time allowed for instituting an appeal, and where an appeal is instituted, until the appeal is finally determined or otherwise terminated.²¹ In any event, the master-record must not be destroyed within twelve months of its creation.²²

Archival legislation

2.14 Under the *Library Board of Western Australia Act 1951-1974* the Library Board of Western Australia is vested with custody and control of all State Archives.²³ Amongst the documents which may be classified as a State Archive are documents made or received by any court or person acting judicially.²⁴ The Act provides by s.30(5) that:

"Public records in the custody, or under the control, of a public office shall not be destroyed or disposed of otherwise than in accordance with this Act".

2.15 The officer in charge of a public office may destroy or dispose of any public record or class of public record in his custody or under his control if -

- (i) the destruction or disposal is in accordance with a Retention and Disposal Schedule authorised by the Board; or

²⁰ The Act has not been proclaimed as at 30 May 1980.

²¹ *Recording of Evidence Act 1975-1979*, s.9(1).

²² Ibid.

²³ *Library Board of Western Australia Act 1951-1974*, s.22. A "State archive" is a "...non-current public record which has been selected for preservation under the provisions of this Act" : *ibid.* , s.3. A "non-current public record" is "...any public record that has ceased to be in current use in the public office in which it was originally made or received, or in the public office in whose custody it has been placed after being so made or received": *ibid.*

²⁴ See the definitions of "public record " and "public office" in s.3 of the *Library Board of Western Australia Act 1951-1974*. The definition of "public record" includes " any record made or received by a court or person acting judicially in Western Australia", and "public office" includes "...any department, branch or office of the Government of Western Australia". Although it is not free from doubt it would appear that this definition would include the Central Office of the Supreme Court, the principal registry of the District Court, the registry of the Family Court of Western Australia and the offices of the clerks of Local Courts and Courts of Petty Sessions.

- (ii) the Board has informed him that it does not require the record or class of record to be transferred to it for inclusion among the State Archives.²⁵

2.16 It appears therefore that the archival legislation not only provides an avenue for the destruction of records of Local Courts, but also imposes a restriction on the destruction of records of Courts of Petty Sessions pursuant to Part X of the *Justices Act 1902-1979*. Despite the provisions of Part X, it would appear that a record of a Court of Petty Sessions or a negative of it could not be destroyed, unless the destruction was in accordance with a Retention and Disposal Schedule or the Library Board had indicated that it did not require that the record be transferred to it for inclusion among the State Archives.

THE LAW AND PRACTICE ELSEWHERE

2.17 The law and practice in the other States of Australia and in the Australian Capital Territory was outlined in the Working Paper.²⁶ None of those jurisdictions has legislation similar to Part X of the *Justices Act 1902-1979*. Generally, the retention or destruction of records of lower courts is governed by practice or administrative direction. Most of the other States do, however, have some form of archival legislation.

²⁵ *Library Board of Western Australia Act 1951-1974*, s.30(2).

²⁶ See pages 10-12 of the Working Paper.

CHAPTER 3 - RECOMMENDATIONS

Introduction

3.1 As stated in paragraph 1.1 above, the State Intermediate Records Repository is nearing the stage where it will be unable to accept any more records of Courts of Petty Sessions and Local Courts. This is not the only reason why it is desirable to review whether it is necessary to retain the records indefinitely or for a lengthy period of time. Another reason is that it is expensive to store records either in their original form or by microfilming them. In 1978 it was estimated that it cost approximately \$9,200 per annum to store the records of the Courts of Petty Sessions and Local Courts in their original form at the State Intermediate Records Repository.¹ The figure must increase each year because of escalating storage costs and because the volume of records stored is increasing.

3.2 It appears to be desirable to retain records of courts for two broad purposes: first, for the administration of justice, and secondly, for archival purposes. In the latter case, the records could be of value for various purposes, for example, in order to obtain information about personalities or localities, or for gathering statistical information. In one case reported to the Commission, court records were used for research into the manner in which magistrates dealt with maintenance for deserted wives and children in the early years of the Colony.

3.3 In making its recommendations, the Commission has principally been concerned with considering how long it is desirable to retain the records of the courts in question for the purposes of the administration of justice. It has not, however, ignored the fact that it may be desirable to retain the records for archival purposes. As the latter is a matter which it is more appropriate for the Library Board of Western Australia to determine, the Commission's recommendations in this Report are designed to ensure that the law is such that the Library Board has the opportunity and the power to preserve any court record which it considers to be desirable to retain for archival purposes.²

3.4 In considering how long it is necessary to retain the records for the purpose of the administration of justice, the Commission has distinguished records of Courts of Petty Sessions from records of Local Courts because the factors which need to be taken into

¹ See paragraph 4.2 of the Working Paper.

² See paragraph 3.25 below.

account in the case of records of Courts of Petty Sessions differ, to some extent, from those applicable to records of Local Courts.

Records of Courts of Petty Sessions

3.5 At present, records of Courts of Petty Sessions, either in their original form or in a microfilmed form, must be kept for fifty-three years. It seems that this period was selected in order to ensure that a record of the court is available for most, if not all, of the life of a person dealt with by that court.³ As a person cannot be charged with an offence in a Court of Petty Sessions unless he is an adult, that is eighteen years of age or older, the period of fifty-three years means that a record of a court proceeding in which he was involved would not be destroyed before he was at least seventy-one years old. Seventy-one years is approximately the life expectancy of an eighteen year old male in Australia.

3.6 The purposes for which it is necessary to retain a record are discussed more fully below. Briefly they are -

1. to prove an acquittal;
2. to prove a conviction;
3. for an appeal;
4. for an application for a rehearing under s.56A of the *Justices Act 1902-1979*;
and
5. as evidence in or for the examination or cross-examination of witnesses in other proceedings, either civil or criminal.

Whether or not it is necessary to retain all records of Courts of Petty Sessions indefinitely or for a lengthy period of time in order reasonably to fulfil these purposes is also discussed below.

3.7 The first purpose arises where a person has been charged with an offence of which he alleges that he has previously been acquitted. In such a case the acquittal may be proved by producing any record or extract of the acquittal.⁴ It is not necessary to retain a record of the

³ The reason for selecting the period is, however, somewhat obscure: see W.A. Parl. Deb. (1972) Vol. 193 at 440.

⁴ *Evidence Act 1906-1979*, s.47(1).

acquittal for a lengthy period for this purpose because, in general, proceedings in a Court of Petty Sessions must be commenced within six months of the date on which the matter arose,⁵ and may be expected to be concluded within a period of two years.

3.8 The second purpose for which it is necessary to retain a record of the court is to prove a conviction in a later proceeding, for example, to assist the court in determining what sentence or penalty would be appropriate. It should, however, be borne in mind that the offences tried in a Court of Petty Sessions are of a relatively minor nature and consequently it may be unnecessary to keep a record of a conviction for a long period for the purpose of assisting the court in making a sentencing decision. Moreover, as the period of time since the conviction increases, the relevance of the conviction to the sentencing decision decreases. In some cases it will be necessary to retain a record of a conviction because the punishment for a second or subsequent offence is greater than that for a first offence. If nevertheless it is considered necessary to retain records for these purposes, it is sufficient to keep only the complaint.⁶

3.9 The period for which a record of a Court of Petty Sessions would be required for an appeal is also limited. In the case of ordinary appeals, the appeal must be instituted within seven days, and in the case of appeals by way of an Order to Review, the appeal must be instituted within two months.⁷ These times may, however, be enlarged by a judge of the Supreme Court.⁸ Even assuming all avenues of appeal were exhausted, the proceedings would not be expected to continue for more than two or three years.

3.10 Another purpose for which it is desirable to retain a record is to preserve a defendant's right to apply for a rehearing where he has been convicted, in his absence, after a summons was served by post under s.56A(1) of the *Justices Act 1902-1979*. In such a case, if the summons did not come to his notice prior to his being convicted, the defendant may apply for a rehearing of the case within fourteen days of becoming aware of the conviction. Although most people are aware of such a conviction shortly after it is made, because an attempt is made to enforce the order of the court, there are a number of cases each year where this is not

⁵ *Justices Act 1902-1979*, s.51.

⁶ See paragraph 2.4 above.

⁷ *Justices Act 1902-1979*, ss.184 and 197(1). At paragraph 5.7 of the report, *Review of the Justices Act 1902 : Part I - Appeals* (Project No.55), the Commission recommended that an appeal should be commenced within twenty-one days of the date of the decision appealed against.

⁸ *Justices Act 1902-1979*, s.206B.

so. The defendant may eventually be found, for example, if he commits another offence or applies for a passport. If he then seeks to dispute the conviction, the details on the file may be important. It is impossible to assess at the outset how long a record may have to be kept to fulfil this purpose.

3.11 A criminal conviction is inadmissible in civil proceedings as evidence of the facts upon which it was based.⁹ However, evidence of a conviction or statements recorded in documents on a court file may be admissible in civil proceedings for other purposes. For example -

- (a) in defamation proceedings, if the plaintiff's conviction is relevant to his present character, the defendant can give evidence of the conviction for the purpose of mitigating damages;¹⁰
- (b) evidence of a conviction or acquittal may also be admissible in an action for malicious prosecution as evidence of whether or not the prosecution terminated favourably to the plaintiff;¹¹
- (c) a document on the file, such as a transcript of a witness's evidence, may be admissible to prove that the witness made a prior statement inconsistent with his testimony¹² or as evidence of a fact stated therein.¹³

3.12 The period for which it would be necessary to keep a record of a Court of Petty Sessions in order to ensure its availability in civil proceedings is difficult to assess. Although the *Limitation Act 1935-1978* provides that proceedings must be commenced within specified times,¹⁴ records need to be retained for longer periods of time because the commencement of the limitation period may be delayed¹⁵ or the limitation period extended¹⁶ in certain cases.

⁹ *Hollington v Hewthorn and Co. Ltd.* [1943] 2 All ER 35. See also the report of the Commission's predecessor, the Law Reform Committee, on Project No. 20: *Evidence of Criminal Convictions in Civil Proceedings* (1972).

¹⁰ See *Goody v Odham Press Ltd* [1966] 3 All ER 369.

¹¹ See generally *Commonwealth Life Assurance Society Limited v Smith* (1938) 59 CLR 527.

¹² *Evidence Act 1906-1979*, s.21.

¹³ *Id.*, s.79C.

¹⁴ For example, an action founded on tort must be commenced within six years: *Limitation Act 1935-1978*, s.38(1)(c)(vi). The Commission is reviewing this Act.

¹⁵ *Limitation Act 1935-1978*, s.27.

¹⁶ *Fatal Accidents Act 1959-1973*, s.7.

3.13 In the Working Paper, the Commission suggested that records of Courts of Petty Sessions, other than the complaint, need only be retained for a period of fifteen years in order reasonably to fulfil the purposes for which they may subsequently be required. None of those who commented on the Working Paper suggested that a period greater than fifteen years was required for the purpose of the administration of justice. Indeed, the Crown Law Department suggested that the period be seven years rather than fifteen years.

3.14 The Commission has considered whether the period should be seven years rather than fifteen years, but has concluded that seven years is inadequate. The Commission considers that fifteen years is a more reasonable period because there are some limitation periods which are greater than seven years.¹⁷ It should also be borne in mind that even if the limitation period for a particular action is less than seven years,¹⁸ the commencement of that period may be delayed or the period extended in certain cases.¹⁹ The Commission therefore recommends that, subject to the recommendations in paragraphs 3.20, 3.21 and 3.25 below, it should be possible to destroy records of Courts of Petty Sessions, other than the complaint, after fifteen years from the date the proceeding was commenced.

3.15 The complaint provides a record of the final decision of the court and provides proof of the conviction or acquittal of a defendant. Although convictions which are more than fifteen years old are unlikely to carry much weight, if any, in subsequent sentencing decisions, the Commission considers that it would be undesirable to destroy such a record because its destruction would make it more difficult to prove a conviction or that fines or costs remain unpaid. In order to avoid this result the Commission recommends that the complaint should be retained for the period prescribed at present, that is fifty-three years, either in its original form or in a microfilmed form. Whether or not the complaints are microfilmed or retained in their original form is, in the Commission's view, an administrative matter to be determined by the court administration taking into account the cost of the respective storage methods.

3.16 Although the Commission does not wish to make any recommendations on the matter, it does wish to refer to one problem associated with retaining the complaints in a microfilmed form. That problem is that, under the present practice of the Perth Court of Petty Sessions, not

¹⁷ The period for commencing an action for debt for rent upon a covenant in an indenture of demise, for example, is 12 years: *Limitation Act 1935-1978*, s.38(1)(d).

¹⁸ The period for commencing an action founded on a simple contract, for example, is six years: *Limitation Act 1935-1978*, s.38(1)(c)(v).

¹⁹ See footnotes 15 and 16 above.

all matters microfilmed may be completed at the time of microfilming either because the charge has not been heard, or, where it has been heard, because the fine or costs have not been paid. The practice at that Court is to cull the complaints after they have been microfilmed so that the original complaints for incomplete matters can be kept at the Court.²⁰ The final decision and any subsequent payment of fines or costs and proceedings to enforce the decision can then be recorded on the complaint. One way in which the problem could be overcome would be to microfilm all complaints for completed matters periodically, say every five years. The original complaints for completed matters could then be destroyed. In this way, all complaints for matters completed prior to 1980 would be microfilmed in that year. Any complaints for matters incomplete at that time and which were completed in the next five years, would be microfilmed in 1985 together with the complaints for charges laid between 1980 and 1985 which were complete at that time. It would, of course, be essential to have an accurate index of the complaints microfilmed each five year period. It might be desirable to microfilm the complaints at shorter intervals for security reasons. The Commission understands that the complaints are microfilmed by the State Microfilm Bureau. The Bureau sends a copy to the court and retains a security film in case the court's copy is lost or destroyed.

Records of Local Courts

3.17 As with records of Courts of Petty Sessions, the time for which it would be necessary to retain the record of a Local Court will be affected by the fact that information on the record may be required for other court proceedings. The records may also be required for the purpose of an appeal to the District Court.²¹ The appeal must be commenced within twenty-one days of the date of the judgment or within such further time as a judge allows.²² A record of a Local Court may also be required in order to enable a judgment of the court to be enforced.²³

3.18 Once again, the Commission considers that in order reasonably to satisfy these purposes, the records of Local Courts (including the Record and Minute Book) need only be retained for fifteen years from the date on which the action was commenced. The Commission, therefore, recommends that, subject to the Commission's recommendations in

²⁰ See paragraph 2.4 above.

²¹ *Local Courts Act 1904-1976*, s.107.

²² *District Court (Appeal) Rules 1977*, rule 6.

²³ See Part VIII of the *Local Courts Act 1904-1976*.

paragraphs 3.20, 3.21 and 3.25 below, it should be possible to destroy records of Local Courts after fifteen years from the date of the commencement of an action or matter.²⁴ From comments made to the Commission, this period appears to be a reasonable one. It also appears that a requirement that the records be kept for such a period would not unduly strain the resources of the State Intermediate Records Repository. One exception to the Commission's recommendation that the records of Local Courts need only be kept for a period of fifteen years relates to the Foreign Executions Re-issue Book. As this Book relates to proceedings in other courts, the Commission recommends that it be retained indefinitely.

3.19 Although the Commission has recommended that it should be possible to destroy records of Local Courts after fifteen years it may be more economical to microfilm the records and to store the microfilm for that period than to store the records for fifteen years in their original form.²⁵ For this reason, the Commission recommends that a provision along the lines of Part X of the *Justices Act 1902-1979* be provided in the case of records of Local Courts, so that they can be microfilmed if that is considered to be desirable for economic reasons.

Tape recordings of court proceedings

3.20 One matter which requires special attention is the use of tape recorders to record court proceedings. The current practice in relation to information recorded by means of a tape recording is to retain the tape for a period of one year and then to erase and re-use it. The practice is broadly in accordance with the *Recording of Evidence Act 1975-1979*.²⁶ It has not been suggested to the Commission that this practice is in any way unsatisfactory. The Commission recommends therefore that recordings be retained -

- (a) for a period of twelve months from their being made; or
- (b) for the period of time allowed for instituting an appeal; or
- (c) where an appeal is instituted, until the appeal is finally determined or otherwise terminated,

²⁴ Any legislation implementing this recommendation should make it clear that this power does not detract from the status of a Local Court as a court of record: see footnote 19 in Chapter 2.

²⁵ In footnote 12 at page 17 of the Working Paper the Commission suggested that it would probably only be economical to microfilm records if the records had to be kept for a period of at least fourteen years.

²⁶ This Act has not been proclaimed as at 30 May 1980.

whichever is the longest. Although this period is shorter than the retention period recommended for other court records, the Commission considers that it is justified because of the considerable capital cost involved in purchasing tapes and because tapes, unlike the more traditional recording materials, can be re-used. If tapes used to record court proceedings had to be retained for fifteen years the cost involved could lead to the curtailment of the very useful service provided by the courts. In any case, a plaintiff, defendant or other interested person could apply to have the tape recording of a particular proceeding preserved.²⁷

Extending the time for retaining records

3.21 Although the Commission considers that fifteen years is an adequate period to retain records of Courts of Petty Sessions and Local Courts for the purpose of the administration of justice, it does recognise that it is possible for a matter still to be incomplete after such a period. This would, however, be an exceptional circumstance.²⁸ In order to ensure that records relating to such matters are not destroyed, the Commission recommends that the courts should publicise the fact that their records may be destroyed after fifteen years from the date of the commencement of the proceeding and that the Clerk of Courts, of his own motion, or on the application of a plaintiff, defendant or other interested person, should be able to order that the record be preserved for a further period of one year. It should be possible to renew the preservation order annually.

Microfilming records

3.22 In paragraph 3.19 above, the Commission recommended that a provision along the lines of Part X of the *Justices Act 1902-1979* should be provided in the case of records of Local Courts. The Commission wishes, however, to draw attention to one anomaly in Part X which should be rectified. Section 233 provides that "official record" has the same meaning in Part X as it has in the division of the *Evidence Act 1906-1979* relating to the reproduction of documents, that is, ss.73A-73V. However, "official record" is not defined in that division. The Commission recommends that such a definition be provided.²⁹

²⁷ See paragraph 3.21 below.

²⁸ In the Working Paper the Commission noted that the oldest file still in action in the Perth Local Court was commenced in 1961: see footnote 17 on page 6 of the Working Paper.

²⁹ Perhaps it could be defined as including:

"any document, book, plan, paper, parchment or other material or part thereof on which is any writing or printing or which is marked with any letters or marks denoting words or any other signs capable of

3.23 Whether or not records of Courts of Petty Sessions and Local Courts are microfilmed, and if so, the extent to which they are microfilmed is, in the Commission's view, an administrative matter to be determined by the court administration. One factor to be considered, of course, is the comparative cost of storing records in their original form and in a microfilmed form. Another factor which could be taken into account is that the cost of storing records in their original form or having them microfilmed probably could not be justified merely to retain the records for archival purposes. For this reason, once the records were no longer required by the Courts, the State Archives would probably not accept them unless they had already been microfilmed by the court administration.³⁰ However, the State Archives would probably accept the complaints either in their original form or in a microfilmed form.

Courts in country areas

3.24 The storage of records of courts in country areas does not appear to be causing a great deal of difficulty because the number of files created each year is not great. However, the Commission can see no reason why its recommendations should not be implemented with respect to both metropolitan and country courts.

Archival legislation

3.25 At present it appears that Part X of the *Justices Act 1902- 1979* is subject to the State's archival legislation, though the matter is not free from doubt.³¹ In the Commission's view it is desirable that Part X, and any legislation providing for the destruction of records of Local Courts, should be made subject to the State's archival legislation. The Commission recommends, therefore, that the relationship between Part X and the archival legislation should be clarified in order to ensure that an original or microfilmed record is not destroyed unless the destruction is in accordance with a Retention and Disposal Schedule or the Library Board has indicated that it does not require that the record or class of record be transferred to it for inclusion among State Archives. The Commission also recommends that any legislation relating to the destruction of records of Local Courts should be made subject to the State's

carrying a definite meaning to persons conversant with them and photographs made or received by a court or person acting judicially under the Act".

³⁰ Whether or not the records would be retained in the State Archives appears to be a matter within the discretion of the Library Board.

³¹ See footnote 24 in Chapter 2.

archival legislation. In this way the State Archives would be given the opportunity and the power to preserve the records of Courts of Petty Sessions and Local Courts, or at least those with a particular archival value.

CHAPTER 4 - SUMMARY OF RECOMMENDATIONS

4.1 The Commission summarizes its recommendations as follows -

Records of Courts of Petty Sessions

1. Subject to recommendations 2, 6, 8 and 11 below, the person having custody of a record of a Court of Petty Sessions should be empowered to destroy it after fifteen years from the date of the commencement of the proceeding.
(paragraphs 3.13 and 3.14)
2. As at present, the complaint should be retained for fifty-three years, either in its original form or in a microfilmed form.
(paragraph 3.15)

Records of Local Courts

3. Subject to recommendations 4, 6, 8 and 11 below the person having custody of a record of a Local Court should be empowered to destroy it after fifteen years from the date of the commencement of the action or matter.
(paragraph 3.18)
4. The Foreign Executions Re-issue Book should be retained indefinitely.
(paragraph 3.18)
5. A provision along the lines of Part X of the *Justices Act 1902-1979* should be provided in the case of records of Local Courts.
(paragraph 3.19)

Tape recordings of court proceedings

6. In accordance with present practice, tape recordings of proceedings of Courts of Petty Sessions and Local Courts should be retained -

- (a) for a period of twelve months from their being made; or
- (b) for the period of time allowed for instituting an appeal; or
- (c) where an appeal is instituted, until the appeal is finally determined or otherwise terminated;

whichever is the longest.

(paragraph 3.20)

Extending the time for retaining records

7. The Courts of Petty Sessions and the Local Courts should publicise a fact that their records may be destroyed after fifteen years.

(paragraph 3.21)

8. The Clerk of Courts, of his own motion, or on the application of a plaintiff, defendant or other interested person, should be able to order that the record be preserved for a further period of one year. It should be possible to renew the preservation order annually.

(paragraph 3.21)

Microfilming records

9. A definition of "official record" should be provided.

(paragraph 3.22)

Courts in country areas

10. The above recommendations should be implemented with respect to both metropolitan and country courts.

(paragraph 3.24)

Archival legislation

11. The legislation relating to the destruction of records of Courts of Petty Sessions and Local Courts should be subject to the State's archival legislation.

(paragraph 3.25)

David K. Malcolm
Chairman

Eric Freeman
Member

H.H. Jackson
Member

Charles Ogilvie
Member

L.L. Proksch
Member

19 June 1980

APPENDIX I

List of those who commented on the Working Paper

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The Crown Law Department

The State Archivist, M. Medcalf