



SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT

**REPORT OF THE
STANDING COMMITTEE ON LEGISLATION
IN RELATION TO THE
MAGISTRATES COURT BILL 2003
MAGISTRATES COURT (CIVIL PROCEEDINGS)
BILL 2003 AND
COURTS LEGISLATION AMENDMENT AND REPEAL
BILL 2003**

Presented by Hon Jon Ford MLC (Chairman)

Report 22
September 2004

STANDING COMMITTEE ON LEGISLATION

Date first appointed:

May 24 2001

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“1. Legislation Committee

- 1.1 *A Legislation Committee* is established.
- 1.2 The Committee consists of 5 members.
- 1.3 The functions of the Committee are to consider and report on any bill or other matter referred by the House.
- 1.4 Unless otherwise ordered, the policy of a bill referred under subclause 1.3 at the second reading or any subsequent stage is excluded from the Committee’s consideration.”

Members as at the time of this inquiry:

Hon Jon Ford MLC (Chairman)

Hon Peter Foss MLC

Hon Giz Watson MLC (Deputy Chair)

Hon Bill Stretch MLC

Hon Kate Doust MLC

Staff as at the time of this inquiry:

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EXECUTIVE SUMMARY AND RECOMMENDATIONS

EXECUTIVE SUMMARY

- 1 On June 29 2004, the Magistrates Court Bill 2003, the Magistrates Court (Civil Proceedings) Bill 2003 and the Courts Legislation Amendment and Repeal Bill 2003 were referred to the Standing Committee on Legislation with the direction that the Committee give priority over other business to consideration of the Bills.¹
- 2 Based on the parliamentary debate regarding the referral, the Committee understands that the purpose of the referral was that it consider a discrete number of issues.² Consequently, the Committee resolved to address those issues canvassed during the second reading debate and raised by the submissions and conducted its inquiry accordingly.
- 3 The three Bills are part of a broader legislative package.³ The other bills in the legislative package are the:⁴
- Justices of the Peace Bill 2003;⁵
 - Civil Judgments Enforcement Bill 2003;⁶
 - Oaths, Affidavits and Statutory Declarations Bill 2003; and
 - Oaths, Affidavits and Statutory Declarations (Consequential Provisions) Bill 2003.
- 4 In the Second Reading Speech relating to the Magistrates Court Bill 2003, Hon Nick Griffiths MLC, the Minister for Housing and Works representing the Attorney General stated that the legislative package will modernise Western Australia's lower court system by:⁷

¹ Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, June 29 2004, pp4448-4449.

² Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, June 29 2004, pp4448-4449.

³ Hon Nick Griffiths MLC, Minister for Housing and Works, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, March 30 2004, p1094.

⁴ See the Explanatory Memorandum to the Courts Legislation Amendment and Repeal Bill 2003 and the Civil Judgments Enforcement Bill 2003, p1.

⁵ As at September 7 2004, this Bill had been passed by both Houses and was awaiting assent. Clause 2 of the Bill provides that it comes into operation on the day the *Magistrates Court Act 2003* comes into operation.

⁶ As at September 21 2004, this Bill had been passed by both Houses and was awaiting assent.

⁷ Hon Nick Griffiths MLC, Minister for Housing and Works, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, March 30 2004, p1094.

- establishing a new Magistrates Court - amalgamating Courts of Petty Sessions, the Local Court and the Small Claims Tribunal;
 - carrying out 221 Law Reform Commission of Western Australia recommendations; and
 - creating a unified civil judgment enforcement system, including a wider choice of civil enforcement options, notably, the ability of judgment creditors to garnishee wages of judgment debtors.
- 5 The Committee has addressed selected issues raised in the submissions and the second reading debate and has recommended amendments to each of the Bills.
- 6 The Committee particularly draws the attention of the Legislative Council to Recommendation 5 which proposes amendments to Schedule 1, clause 14, of the Magistrates Court Bill 2003. Schedule 1, clause 14, relates to the suspension of magistrates from office due to substandard performance. The Committee received a number of submissions raising serious concerns about the effect of this clause on judicial independence.
- 7 In addressing the issues raised, the Committee has considered and agreed to the following clauses without amendment:
- Magistrates Court Bill 2003 - clauses 15, 26 and 31; Schedule 1, clause 11(1)(a); and Schedule 2; and
 - Courts Legislation Amendment and Repeal Bill 2003 - clause 43.
- 8 The Committee has recommended amendments to the following clauses:
- Magistrates Court Bill 2003 - clauses 27 and 33; and Schedule 1, clauses 2, 13, 14 and 17;
 - Magistrates Court (Civil Proceedings) Bill 2003 - clauses 25, 30 and 31; and
 - Courts Legislation Amendment and Repeal Bill 2003 - clauses 146 and 147.

RECOMMENDATIONS

- 9 Recommendations are grouped as they appear in the text at the page number indicated:

Page 12

Recommendation 1: The Committee recommends that clause 27(3) of the Magistrates Court Bill 2003 be amended to enable the Chief Magistrate to issue administrative directions to registrars. This can be effected in the following manner:

Page 16, line 24 - To insert after “magistrate” -

“ and registrar in the exercise of the Court’s judicial functions ”.

Page 18

Recommendation 2: The Committee recommends that clause 33 of the Magistrates Court Bill 2003 be amended to allow wider access to the court record in criminal proceedings. The statutory amendments required to effect this change are set out in Appendix 3.

Page 22

Recommendation 3: The Committee recommends that Schedule 1, clause 2(2)(a) of the Magistrates Court Bill 2003 be deleted to remove the requirement that to be qualified for appointment as a magistrate of the Magistrates Court a person must be or have been a practising barrister of the High Court of Australia, or a legal practitioner. This can be effected in the following manner:

Page 28, lines 19 and 20 - To delete the lines.

Page 27

Recommendation 4: The Committee recommends that Schedule 1, clause 13 of the Magistrates Court Bill 2003 be amended to remove references to a magistrate being “suspended” with those references to be replaced with “relieved from duties” so that it reads as set out in paragraph 3.32. The statutory amendments required to effect these changes are set out in Appendix 5.

Page 35

Recommendation 5: The Committee recommends that Schedule 1, clause 14 of the Magistrates Court Bill 2003 be amended so that it reads as set out in paragraph 3.68 and incorporates the amendments referred to in paragraph 3.66. The statutory amendments required to effect these changes are set out in Appendix 6.

Page 37

Recommendation 6: The Committee recommends that Schedule 1, clause 17 of the Magistrates Court Bill 2003 which proposes to change the title and form of address for magistrates from “Your Worship” to “Your Honour” be deleted. This can be effected in the following manner:

Page 37, lines 7 to 10 - To delete the lines.

Page 51

Recommendation 7: The Committee recommends that clause 30 of the Magistrates Court (Civil Proceedings) Bill 2003 be amended as set out in Appendix 11 to address the matters set out in paragraphs 4.44 to 4.46.

Page 53

Recommendation 8: The Committee recommends that clause 25 and clause 31 of the Magistrates Court (Civil Proceedings) Bill 2003 be amended as set out in Appendix 12.

Page 57

Recommendation 9: The Committee recommends that clause 146(2) of the Courts Legislation Amendment and Repeal Bill 2003 be extended to relate to warrants of execution. This can be effected in the following manner:

Page 156, after line 33 - To insert -

“

- (3) In subsection (2), a reference to a writ of *feri facias* includes a reference to a warrant of execution issued out of a Local Court under the *Local Courts Act 1904* .

”.

Page 63

Recommendation 10: The Committee recommends that clause 147(2) of the Courts Legislation Amendment and Repeal Bill 2003 be amended to provide that bailiffs (who are not police officers) currently holding appointments under the *Local Courts Act 1904* are entitled to be appointed under the Civil Judgments Enforcement Bill 2003 for a period of five years. This can be effected in the following manner:

Page 158, line 2 - To delete “2” and insert instead - “5”.

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Recommendation 11: The Committee recommends that the Magistrates Court Bill 2003, the Magistrates Court (Civil Proceedings) Bill 2003 and the Courts Legislation Amendment and Repeal Bill 2003 be passed subject to Recommendations 1 to 10.

CHAPTER 1

INTRODUCTION

REFERENCE AND PROCEDURE

- 1.1 On June 29 2004, the Magistrates Court Bill 2003, the Magistrates Court (Civil Proceedings) Bill 2003 and the Courts Legislation Amendment and Repeal Bill 2003 (**Bills**) were referred to the Standing Committee on Legislation (**Committee**) with the direction that the Committee give priority over other business to consideration of the Bills.⁸
- 1.2 Based on the parliamentary debate regarding the referral of the Bills, the Committee understands that the purpose of the referral was that the Committee only consider a discrete number of issues.⁹ Consequently, the Committee resolved to address those issues canvassed during the second reading debate and raised by the submissions and conducted its inquiry accordingly.
- 1.3 As the Bills were referred after the second reading question was put, the policy of the Bills was not open to inquiry.
- 1.4 The Committee appointed a subcommittee comprising Hon Giz Watson MLC (Convenor), Hon Jon Ford MLC and Hon Peter Foss MLC to assist the Committee with the inquiry (**subcommittee**).
- 1.5 The subcommittee invited submissions from the general public. On July 10 2004, the subcommittee advertised in *The West Australian* newspaper seeking written submissions. A list of the submissions received by the subcommittee is attached as Appendix 1. Details of the inquiry were also placed on the parliamentary website (www.parliament.wa.gov.au).
- 1.6 Based on the issues raised during the second reading debate, the subcommittee wrote to a number of stakeholders seeking their views in relation to the Bills and specific clauses of the Bills. A list of the stakeholders to whom the subcommittee wrote is attached as Appendix 2.
- 1.7 The subcommittee held public hearings on August 16, 27 and 30 2004 with the following people:
- Ms Julie Wager SM, President of the Magistrates' Society of Western Australia;

⁸ Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, June 29 2004, pp4448-4449.

- Mr William Machlin of Machlins Lawyers;
- Mr Steven Heath, Chief Stipendiary Magistrate; and
- Mr Peter Smith, Midland Bailiff.

1.8 The Committee thanks the individuals and organisations that provided evidence and information as part of the inquiry.

BACKGROUND TO THE BILLS

Legislative package

1.9 The three Bills referred to the Committee for inquiry are part of a broader legislative package.¹⁰ The other bills in the legislative package are the:¹¹

- Justices of the Peace Bill 2003;¹²
- Civil Judgments Enforcement Bill 2003;¹³
- Oaths, Affidavits and Statutory Declarations Bill 2003; and
- Oaths, Affidavits and Statutory Declarations (Consequential Provisions) Bill 2003.

1.10 In the Second Reading Speech relating to the Magistrates Court Bill 2003, Hon Nick Griffiths MLC, the Minister for Housing and Works representing the Attorney General (**Hon Nick Griffiths MLC**) indicated that the legislative package represents:

*the most extensive legislative reforms to this State's lower court structure and procedures since the enactment of the Justices Act 1902 and the Local Courts Act 1904.*¹⁴

1.11 Hon Nick Griffiths MLC also stated that the legislative package will modernise Western Australia's lower court system¹⁵ by:

⁹ Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, June 29 2004, pp4448-4449.

¹⁰ Hon Nick Griffiths MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, March 30 2004, p1094.

¹¹ See the Explanatory Memorandum to the Courts Legislation Amendment and Repeal Bill 2003 and the Civil Judgments Enforcement Bill 2003, p1.

¹² As at September 7 2004, this Bill had been passed by both Houses and was awaiting assent. Clause 2 of the Bill provides that it comes into operation on the day the *Magistrates Court Act 2003* comes into operation.

¹³ As at September 21 2004, this Bill had been passed by both Houses and was awaiting assent.

¹⁴ Hon Nick Griffiths MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, March 30 2004, p1094.

- establishing a new Magistrates Court - amalgamating Courts of Petty Sessions, the Local Court and the Small Claims Tribunal;
- carrying out 221 Law Reform Commission of Western Australia (**Law Reform Commission**) recommendations; and
- creating a unified civil judgment enforcement system, including a wider choice of civil enforcement options, notably, the ability of judgment creditors to garnishee wages of judgment debtors.¹⁶

1.12 The Committee understands that the Government intends to complement the legislative package with further legislation to effect criminal law reforms in the criminal jurisdiction of the new Magistrates Court.¹⁷

Western Australian court system

1.13 Before considering the relevant changes proposed by the Bills affecting the lower courts, it is apposite to briefly indicate how these courts fit within the Western Australian court system.

1.14 Courts operate in a hierarchical system which means that a court is bound by any decisions of a higher court. In Western Australia, the hierarchy moves upwards from the Magistrates Court (comprising the Local Court and the Court of Petty Sessions) to the District Court and then to the Supreme Court.¹⁸ In effect, there are three tiers to the court system in Western Australia.¹⁹

Supreme Court

1.15 This is the superior court of the State and it deals with civil and criminal matters. The Supreme Court deals with criminal charges of a most serious nature, such as wilful murder. The Supreme Court usually deals with civil matters of a complex nature or

¹⁵ The lower court system is the Magistrates Courts. See paragraph 1.13 onwards.

¹⁶ Hon Nick Griffiths MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, March 30 2004, p1094.

¹⁷ Hon Nick Griffiths MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, March 30 2004, p1094.

¹⁸ <http://www.supremecourt.wa.gov.au/about/index.htm>, (current at September 6 2004).

¹⁹ See Western Australia's Court System, *Student Resource Book*, Court Services Division, Department of Justice, October 2001 (http://www.justice.wa.gov.au/portal/server.pt/gateway/PTARGS_0_2_323_201_0_43/http://justicecontent.extranet.justice.wa.gov.au/content/files/student_resource_book.pdf, (current at September 6 2004), p8. The Law Reform Commission, *Review of the Criminal and Civil Justice System in Western Australia: Final Report*, Project No 92, Western Australia, September 1999, indicated that there are five levels of court presently in existence in Western Australia; the three levels set out, the Children's Court and the Coroner's Court, see p15.

where the amount in dispute is more than \$250,000.00 as well as applications for injunctions, damages and other forms of relief.²⁰

- 1.16 The Supreme Court consists of the Chief Justice of Western Australia, 17 judges, two Masters, one Principal Registrar and eight Registrars.²¹

District Court

- 1.17 The District Court is the intermediate court which deals with serious criminal trials, except where the charge is very grave, such as murder or armed robbery. The civil jurisdiction of the District Court is limited to claims to recover sums of not more than \$250,000.00 except in personal injury actions where it has unlimited jurisdiction to hear claims for damages.²²

- 1.18 The District Court consists of 22 judges including the Chief Judge of the District Court, a Commissioner of the Court and five Registrars.²³

Magistrates Courts

- 1.19 The Magistrates Courts are the lower courts of the State and may be considered to be the “*main point of contact between the justice system and the people of the State*”.²⁴

- 1.20 Like the superior courts, the Magistrates Courts have both a criminal and civil jurisdiction.

- 1.21 The criminal jurisdiction of the Magistrates Court is administered in the Court of Petty Sessions which is constituted under the *Justices Act 1902*. Approximately 84,000 defendants appear before the Court of Petty Session every year.²⁵

- 1.22 The civil jurisdiction of the Magistrates Court is administered in the Local Court, which is constituted under the *Local Courts Act 1904*.²⁶ Approximately 43,000 civil claims are lodged in the Local Court every year.²⁷

²⁰ Hon David Malcolm AC CitWA, Chief Justice of Western Australia, *2003 Annual Review of Western Australian Courts*, Western Australia, March 16 2004, p4.

²¹ <http://www.supremecourt.wa.gov.au/judges/index.htm>, (current at September 14 2004).

²² Hon David Malcolm AC CitWA, Chief Justice of Western Australia, *2003 Annual Review of Western Australian Courts*, Western Australia, March 16 2004, p20.

²³ <http://www.districtcourt.wa.gov.au/default.asp?id=30854662>, (current at September 14 2004).

²⁴ Submission No 11 from Criminal Lawyers Association, July 23 2004, p1.

²⁵ Hon Nick Griffiths MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, March 30 2004, p1095.

²⁶ Hon David Malcolm AC CitWA, Chief Justice of Western Australia, *2003 Annual Review of Western Australian Courts*, Western Australia, March 16 2004, p28.

²⁷ Hon Nick Griffiths MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, March 30 2004, p1095.

1.23 The Local Court has two divisions:

- **General Division** which deals with all personal actions (subject to certain exceptions) where the amount claimed is not more than \$25,000.00,²⁸ and
- **Small Disputes Division** which deals with residential tenancy disputes between a property owner and a tenant up to \$6,000.00 and claims for debts or liquidated damage²⁹ of not more than \$3,000.00.³⁰

1.24 The Magistrates Court consists of the Chief Stipendiary Magistrate, the Deputy Chief Stipendiary Magistrate, one State Coroner and 35 Stipendiary Magistrates. In addition, there are 3,536 Justices of the Peace (**JPs**) who may preside in Courts of Petty Sessions (in certain circumstances).³¹

Background to the reforms

1.25 The Second Reading Speech to the Magistrates Court Bill 2003 indicated that the legislative package implements 221 recommendations of the Law Reform Commission.³²

1.26 When presenting the Second Reading Speech, Hon Nick Griffiths MLC tabled a document setting out the recommendations of the Law Reform Commission implemented by the Magistrates Court Bill 2003, the Magistrates Court (Civil Proceedings) Bill 2003, the Civil Judgments Enforcement Bill 2003 (not part of the Committee's inquiry) and the Courts Legislation Amendment and Repeal Bill 2003.³³ The tabled document indicates that reforms are drawn from the following Law Reform Commission reports:

- *Report on the Jurisdiction, Procedures and Administration of Local Courts*, Project No 16 (Part I), June 1988;
- *Reports on Enforcement of Judgments of Local Courts*, Project No 16 (Part II), December 1995;

²⁸ Section 30, *Local Courts Act 1904*.

²⁹ Liquidated damages are damages sought or awarded to a plaintiff, the amount being a sum fixed by the parties to a contract as a genuine pre-estimate of the plaintiff's loss in the event of the defendant's breach or ascertainable by a simple calculation or fixed by any scale of charges or other positive data. Dr P. Nygh and P. Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Australia, 1997, p697.

³⁰ Sections 106C and 106Q, *Local Courts Act 1904*; section 12, *Residential Tenancies Act 1987* and regulation 6, *Residential Tenancies Regulations 1989*.

³¹ <http://www.justice.wa.gov.au>, (current at September 14 2004), 'Courts and their jurisdiction'.

³² Hon Nick Griffiths MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, March 30 2004, p1094.

³³ Tabled Paper 2052, tabled March 31 2004 in the Legislative Council.

- *Review of the Criminal and Civil Justice System in Western Australia: Final Report*, Project No 92, September 1999; and
- *Report on Writs and Warrants of Execution*, Project No 67, June 2001.

1.27 The Committee notes that whilst some of the reforms are drawn from these reports, not all the reforms originate in these reports and this was highlighted by a number of the submissions.³⁴

Scope of the Report

1.28 As indicated, in inquiring into the Bills, the Committee resolved to limit its consideration to those issues canvassed in the second reading debate and the submissions and this Report is presented accordingly. The Committee has not considered each of the clauses of the Bills referred.

³⁴ See for example, Ms Julie Wager SM, President of the Stipendiary Magistrates' Society of Western Australia, *Transcript of Evidence*, August 16 2004, p4; submission No 16 from Law Society of Western Australia, July 27 2003, p3.

CHAPTER 2

MAGISTRATES COURT BILL 2003

INTRODUCTION

2.1 The Second Reading Speech with respect to the Magistrates Court Bill 2003 describes it as the “*foundation*” of the legislative package of reforms.³⁵ Amongst other things, this Bill:

- creates the Magistrates Court;
- sets out the composition, jurisdiction and powers of the Magistrates Court;
- contains provisions relating to the administration of the Magistrates Court, including the role of the Chief Magistrate and the appointment of administrative staff; and
- provides for the appointment and conditions of magistrates (Schedule 1).

2.2 In this Chapter, the Committee canvasses those issues raised by selected clauses of the Magistrates Court Bill 2003.

2.3 In Chapter 3, the Committee considers those issues raised by Schedule 1 of the Magistrates Court Bill 2003.

CLAUSE 15 - CONTEMPTS OF THE COURT

2.4 Clause 15 sets out the circumstances that will constitute contempt of the Magistrates Court. Clause 15(1) provides that:

A person is guilty of a contempt of Court if the person -

(a) while the Court is sitting wilfully -

(i) interrupts the proceedings;

(ii) misbehaves before the Court;

(iii) insults a person constituting the Court; (emphasis added)

³⁵ Hon Nick Griffiths MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, March 30 2004, p1094.

2.5 The Law Student Community Support at the University of Western Australia (**LSCS**) submitted that the term “*wilfully interrupts the proceedings*” in clause 15(1)(a)(i) is too wide, as it may encompass matters such as an objection by counsel.

2.6 On this issue, Ms Julie Wager SM (**Ms Wager SM**) President of the Stipendiary Magistrates’ Society of Western Australia (**Stipendiary Magistrates’ Society**) stated:

*On behalf of the society, I do not have any difficulty in having that as part of clause 15. Once again, it is open to interpretation, and if counsel was properly making submissions - if there is an exchange at least between bar table and the bench - there would be no difficulty with that. It is obviously there to cover the situations that arise repeatedly in which people are behaving in a very inappropriate way; screaming abuse, screaming out during the course of proceedings and compromising the proceedings in that way. I am sure even if clause 15 became law and if a magistrate failed to give counsel or indeed an unrepresented defendant a right to be heard, the matter would be very successful on appeal.*³⁶

2.7 Currently, section 156 of the *Local Courts Act 1904* and section 41 of the *Justices Act 1902* make provision in relation to contempt of the Local Court and the Court of Petty Sessions. The Committee notes that both these sections contain the phrase “*wilfully interrupts*”. Further, the Committee notes that this phrase has been considered and interpreted by the Supreme Court of Western Australia.³⁷

2.8 In response to the submission of the LSCS, the Department of Justice advised:

*It is not intended that clause 15(1)(a)(i) would apply to an objection by counsel in the normal course of the proceedings. It is not seen as necessary to further qualify, or provide a definition of, the term “interrupts” as it is already qualified by the word “wilfully” and as its counterparts, section 41 of the Justices Act 1902 (WA) and section 63(1)(b) of the District Court of Western Australia Act 1969 (WA), have stood the test of time.*³⁸

³⁶ Ms Julie Wager SM, President of the Stipendiary Magistrates’ Society of Western Australia, *Transcript of Evidence*, August 16 2004, p13.

³⁷ See for example, *Stuart v Brown* [1996] BC9605011 (unreported, Supreme Court of Western Australia, Murray, Owen and Parker JJ, October 18 1996), pp7-9. See also *Gliosca v Ninyett* (1992) 10 WAR 562.

³⁸ Letter from Mr Ray Warnes, Acting Executive Director, Court Services, Department of Justice, September 8 2004, p2 of enclosure “Response to Questions”.

Observations

2.9 The Committee does not consider that clause 15(1)(a)(i) applies to an objection by counsel in the usual course of proceedings and as such is not concerned about its operation.

CLAUSE 26 - ADMINISTRATIVE STAFF

2.10 Currently, the *Local Courts Act 1904* enables the Governor to appoint a Clerk of Courts and Assistant Clerks for every Local Court.³⁹ The Clerk of the Local Court has primarily administrative functions connected with the day to day running of the court, such as, issuing the processes of the court.⁴⁰ However, the Clerk of the Local Court is also vested with quasi-judicial functions, such as, the taxing of bills of costs and conducting pre-trial hearings.⁴¹

2.11 Pursuant to the Magistrates Court Bill 2003, it is intended that the role of Clerk of Courts or Assistant Clerk be replaced with that of a Registrar or Deputy Registrar.⁴²

2.12 Clause 26(1) provides that the administrative staff of the Magistrates Court consist of the following:

- Principal Registrar;
- Registrars;
- Deputy Registrars; and
- any other persons appointed to the administrative staff.

2.13 Clause 26(2) provides that the Minister may appoint the Principal Registrar and as many Registrars and Deputy Registrars as are needed to deal with the workload of the Court.

2.14 The Explanatory Memorandum to clause 26 indicates that the Magistrates Court will have a single Principal Registrar but sufficient Registrars will be appointed to ensure representation at each of the registries of the Magistrates Court.⁴³

³⁹ Section 13, *Local Courts Act 1904*.

⁴⁰ Law Reform Commission, *Report on the Jurisdiction, Procedures and Administration of Local Courts*, Project No 16 (Part I), Western Australia, June 1988, p81.

⁴¹ Explanatory Memorandum, Courts Legislation Amendment and Repeal Bill 2003, p2. See for example section 45B and section 82, *Local Courts Act 1904*.

⁴² Explanatory Memorandum, Courts Legislation Amendment and Repeal Bill 2003, p2 in relation to clause 6. Clause 6 provides for Clerks of the Local Court or Assistant Clerks of the Local Court who have been appointed under the *Local Courts Act 1904* to be deemed to have been appointed a Registrar or Deputy Registrar under the Magistrates Court Bill 2003.

- 2.15 The Law Society of Western Australia (**Law Society**) noted that the Chief Magistrate is to be responsible for the professional development and training of the Principal Registrar, Registrars and Deputy Registrars (clause 24(4)) and submitted that as a consequence, consideration should be given to providing the Chief Magistrate with the power to appoint these staff under clause 26, instead of the Minister.⁴⁴ The Law Society was of the view that this would serve to clearly establish judicial independence from government.
- 2.16 On this issue Ms Wager SM stated that this suggestion would be desirable but “*recognised that there are some difficulties in that in terms of resources and current procedures for the appointment of staff and matters of that nature*”.⁴⁵ As an example of the desirability of the Chief Magistrate having the power of appointment, her Worship indicated that it would be preferable for magistrates to have allocated judicial support staff, which is currently not the case.
- 2.17 The Chief Stipendiary Magistrate, Mr Steven Heath (**Chief Stipendiary Magistrate**) indicated that:

*[I]f we are going down that line, to the point at which a judicial commission administers all the courts and their staff separately, there should probably be a power in the Act that enables me to manage and direct the administrative staff when they are sitting as judicial officers. The Bill really makes the distinction between them now being registrars or deputy registrars when they are performing judicial or quasi-judicial functions ... It seems quite proper for them in their administrative functions to be answerable to the minister and employed through the department. If they are not performing their functions in that role, that is properly a department issue. All I would say is that in performing quasi-judicial functions, I should have the same power to direct them as I have to direct magistrates. At the moment under the Act I have the power to direct magistrates, but I do not have the power to direct the registrars when they are doing the judicial functions that can be delegated under the Act. That would be the only additional power that I think would be appropriate.*⁴⁶

⁴³ Explanatory Memorandum, Magistrates Court Bill 2003, p9.

⁴⁴ Submission No 16 from Law Society of Western Australia, July 27 2004, p3.

⁴⁵ Ms Julie Wager SM, President of the Stipendiary Magistrates’ Society of Western Australia, *Transcript of Evidence*, August 16 2004, p14.

⁴⁶ Mr Steven Heath, Chief Stipendiary Magistrate, Magistrates Court, *Transcript of Evidence*, August 27 2004, p5.

- 2.18 His Worship indicated that the actual control of staff is more appropriately an administrative matter for the department and that economic factors barred the option of personal staff for magistrates.⁴⁷
- 2.19 The concerns of the Law Society were put to the Department of Justice who advised that clause 26 follows the current methods of appointment in the *Local Courts Act 1904* in relation to Local Court Clerks and Assistant Clerks (Governor and the Minister), and the *Justices Act 1902 (WA)* in relation to the Clerk of Petty Sessions (Minister). The Department of Justice also highlighted that this power of appointment is not vested in the Chief Judge of the District Court or the Chief Justice of Western Australian in relation to the Supreme Court. The Department of Justice stated that clause 26:

*Does nothing more than reflect the existing methods of appointment and recognises the responsibility of the Government to provide administrative support to enable the Courts to carry out their judicial functions. If and when administrative staff are required to perform quasi-judicial or judicial functions, it is entirely up to the Court as to whom they delegate to exercise the jurisdiction and powers of the Court. These delegations will be regulated by rules of court made by the Chief Magistrate and at least 3 other magistrates as is required by clause 39 of the Bill.*⁴⁸

Observations

- 2.20 Based on the evidence, the Committee does not consider it appropriate that the Chief Stipendiary Magistrate be vested with the power to appoint administrative staff under clause 26.
- 2.21 However, the Committee supports the suggestion of the Chief Stipendiary Magistrate to the effect that it is appropriate for that office to be vested with the power to direct Registrars or Deputy Registrars when they are performing judicial or quasi-judicial functions which may be delegated under the Magistrates Court Bill 2003.
- 2.22 Pursuant to clause 28, the rules of court may delegate to a “**registrar**” any or all of the Magistrates Court’s jurisdiction and powers other than certain matters which are set out in that clause. Clause 3 defines “**registrar**” as a person appointed under clause 26 as the Principal Registrar, a Registrar or a Deputy Registrar.

⁴⁷ Mr Steven Heath, Chief Stipendiary Magistrate, Magistrates Court, *Transcript of Evidence*, August 27 2004, p6.

⁴⁸ Letter from Mr Ray Warnes, Acting Executive Director, Court Services, Department of Justice, September 8 2004, pp2-3 of enclosure “Response to Questions”.

- 2.23 Recommendation 1 of the Committee implements the proposal of the Chief Stipendiary Magistrate.

Recommendation

Recommendation 1: The Committee recommends that clause 27(3) of the Magistrates Court Bill 2003 be amended to enable the Chief Magistrate to issue administrative directions to registrars. This can be effected in the following manner:

Page 16, line 24 - To insert after “magistrate” -

“ and registrar in the exercise of the Court’s judicial functions ”.

CLAUSE 31 - JUDGMENTS, CONTENT OF

- 2.24 Clause 31(1) provides that:

- (1) *The Court’s reasons for a judgment in a case -*
- (a) *need only identify the facts that the Court has accepted in coming to its decision and give the reasons for doing so;*
 - (b) *need only identify the law that the Court has applied in coming to its decision and give the reasons for doing so;*
 - (c) *need not canvass all the evidence given in the case; and*
 - (d) *need not canvass all the factual and legal arguments or issues arising in the case.*

- 2.25 Submissions received by the Committee have asserted that clause 31 imposes a lesser standard on magistrates in relation to their reasons for decision than the common law requirements imposed on other judicial officers.⁴⁹ It was submitted that by reducing judgments to the specific matters in clause 31(1), litigants might not know the basis on which their cases have been decided and appeal courts would be limited in their ability to review decisions.⁵⁰

⁴⁹ Submission No 12 from Law Student Community Support, University of Western Australia, July 23 2004, pp2-3; submission No 16 from Law Society of Western Australia, July 27 2004, p3.

⁵⁰ Submission No 16 from Law Society of Western Australia, July 27 2004, p3.

- 2.26 The common law requirements relating to reasons for decision were succinctly restated in the recent judgment of the Honourable Justice McLure in *Tran v Claydon* [2003] WASCA 318 where her Honour stated:

Ordinarily, it is the duty of a Judge to state his or her reasons for decision and failure to do so may constitute an error of law: Garrett v Nicholson (1999) 21 WAR 226 per Owen J at 248. In determining whether in a particular case there is a duty and the extent of that duty, regard should be had to the function to be served by the giving of reasons: Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247 per Mahoney JA at 270.

Where there is a right of appeal, the function of reasons is to allow an appeal court to determine whether the decision was based on an appealable error. In addition to securing a right of appeal, the obligation to give adequate reasons is an aspect of procedural fairness to a litigant who is entitled to know why it is that he or she has been successful or unsuccessful. Thus, it is sufficient if the reasoning process which led to a result is disclosed with sufficient certainty to enable a litigant to know why it is that the result ensued and to ensure that the statutory right of appeal has been secured: Garrett v Nicholson (above) per Owen J at 248. If that is achieved there is no additional requirement that every fact relevant to the ultimate decision or the detailed chain of reasoning be set out or every submission be addressed: Soulemezis v Dudley Holdings Pty Ltd (above).⁵¹

- 2.27 On this issue, the Chief Stipendiary Magistrate was of the view that:

This is a clause with good intention, and it will depend upon how it is interpreted. Some comments coming back seem to have interpreted it more harshly and strictly than was its original intention. The view of the Local Court magistrates whom I have discussed it with is that it was not in any way designed to remove a requirement to provide the essentials of a judgment to define the issue to explain how a decision was arrived at. All it was intended to do was remove what had been seen to be a requirement to deal with every argument and every piece of evidence ...

It is certainly my view that a clause such as clause 31 is very helpful to a high-volume court such as the Magistrates Court. In the end it will depend on how the District and Supreme Courts interpret it as to

⁵¹ *Tran v Claydon* [2003] WASCA 318 paragraphs 35 and 36.

*the extent of the requirement. If a magistrate does not address the essential issues of the case, the appeal will be granted irrespective of clause 31. If they have left out some minor matters, I think clause 31 will save it ... I like it in the legislation because it is a statement that reminds magistrates of the ability to give judgments that go to the heart of the matter rather than being exhaustive.*⁵²

2.28 Ms Wager SM (in her individual capacity)⁵³ provided a similar opinion to the subcommittee.⁵⁴

2.29 In relation to this issue, the Department of Justice advised that:

The purpose of the clause is to ensure consistency between the material content of the Court's judgments, to facilitate understanding by the parties affected and to aid determination of whether grounds of appeal exist.

*The clause does not affect the obligation at common law to provide adequate reasons. What it aims to do is to make the reasons as succinct and clear as possible.*⁵⁵

2.30 The Department of Justice also advised that the drafting of the clause incorporates suggestions by the Chief Justice of Western Australia (**Chief Justice**), and meets the minimum requirements laid down by the Full Court of the Supreme Court.⁵⁶

Observations

2.31 The Committee is satisfied with the advice from the Department of Justice with respect to the operation of clause 31.

2.32 The Committee considers that clause 31 is consistent with the high volume nature of the jurisdiction of the proposed Magistrates Court which necessitates efficient and prompt decision-making.

⁵² Mr Steven Heath, Chief Stipendiary Magistrate, Magistrates Court, *Transcript of Evidence*, August 27 2004, p5.

⁵³ Rather than as the President of the Stipendiary Magistrates' Society.

⁵⁴ Ms Julie Wager SM, President of the Stipendiary Magistrates' Society of Western Australia, *Transcript of Evidence*, August 16 2004, p12.

⁵⁵ Letter from Mr Ray Warnes, Acting Executive Director, Court Services, Department of Justice, September 8 2004, p3 of enclosure "Response to Questions".

⁵⁶ Letter from Mr Ray Warnes, Acting Executive Director, Court Services, Department of Justice, September 8 2004, p3 of enclosure "Response to Questions".

CLAUSE 33 - COURT'S RECORDS, ACCESS TO

2.33 Access to the records of the new Magistrates Court is to be regulated by clause 33. In relation to both civil and criminal proceedings clause 33(3) provides that:

- (3) *A party to a case⁵⁷ is entitled, on request, to inspect or obtain a copy of the following documents -*
- (a) *any document that has been lodged with or issued by the Court as required by law and that forms part of the Court's records of the case;*
 - (b) *if an electronic recording has been made of the proceedings and a transcript of it has been prepared, a copy of the transcript;*
 - (c) *if no such recording was made, a copy of the record of proceedings made by the person or persons constituting the court;*
 - (d) *any written judgment (including the reasons for it) given, or written order made, by the Court in the case. (emphasis added)*

2.34 In relation to criminal proceedings only, clause 33(5) provides that:

- (5) *In respect of criminal proceedings in the Court, each of the following people is entitled, on request, to inspect or obtain a copy of any document that is part of the Court's records and any document received by the Court in sentencing proceedings -*
- (a) *a party to the proceedings;*
 - (b) *the Commissioner of Police;*
 - (c) *the Director of Public Prosecutions appointed under the Director of Public Prosecutions Act 1991;*
 - (d) *the Corruption and Crime Commission established under the Corruption and Crime Commission Act 2003;*

⁵⁷ The term "party to a case" is not defined in the Magistrates Court Bill 2003, however, the term "case" is defined to mean proceedings in the Court involving or in connection with the Court's civil or criminal jurisdiction, (see clause 3).

- (e) *the Chief Assessor appointed under the Criminal Injuries Compensation Act 2003;*
- (f) *the Parliamentary Commissioner for Administrative Investigations appointed under the Parliamentary Commissioner Act 1971;*
- (g) *the chief executive officer of the department of the Public Service principally assisting in the administration of the licensing provisions of the Road Traffic Act 1974;*
- (h) *a person authorised by one of the above persons;*
- (i) *a person prescribed by the regulations. (emphasis added)*

2.35 The Committee notes that in relation to criminal proceedings only, clause 33(5)(i) provides that the persons who may access the records of criminal proceedings may be expanded by regulations.

Reduced access to the court record

2.36 Mr Richard Titelius, Acting Manager Court Records, Perth Magistrates Court submitted that section 148 of the *Justices Act 1902* (which regulates access to the court records of the Courts of Petty Sessions) has appropriately served the needs of the court and those with an interest in the court record. He submitted that, in contrast, clause 33 will significantly reduce the right to access the court record.

2.37 Section 148(1) of the *Justices Act 1902* enables access to the court record by “*any party interested therein*”. The phrase “*any party interested therein*” was interpreted by the Full Court of the Supreme Court in *Titelius v Public Service Appeal Board and Ors*, as having a meaning wider than “*party to the proceedings*” but narrower than simply being curious or having some emotional or other interest.⁵⁸

2.38 The Department of Justice advised that:

It has though always been understood that the term “party interested” meant a party who has an “interest”, as opposed to a member of the general public, as many of the courts records such as pre-sentence reports, psychiatric and medical reports and references are by their very nature sensitive documents. Therefore, the position

⁵⁸ See *Titelius v Public Service Appeal Board and Ors* [1999] (unreported, Supreme Court of Western Australia, Malcolm CJ, Ipp and Wallwork JJ, May 19 1999), paragraphs 46 and 104.

*was that following the Titelius case; the meaning of the term “party interested” remained unclear.*⁵⁹

- 2.39 In addition, the Chief Stipendiary Magistrate indicated that despite the decision in *Titelius v Public Service Appeal Board and Ors*, section 148 still creates problems of interpretation.⁶⁰
- 2.40 The Department of Justice indicated that clause 33 is intentionally narrower than section 148 and this change is considered necessary to clarify who is entitled to access the records of the court.⁶¹
- 2.41 Similarly, the Chief Stipendiary Magistrate submitted that the intention in clause 33 is to provide a clear starting point for court staff at the Registry counter in relation to access to the court record.⁶² His Worship also indicated that it is hoped that through **court rules and procedures**, the group of persons able to access court files will be widened but so as to ensure that the process protects what would otherwise be confidential documents that should not be widely distributed.⁶³
- 2.42 The Committee notes the reference by his Worship to an expansion of the group of persons able to access court files by **court rules and procedures**. As indicated, clause 33(5)(i) contemplates **regulations** being made, expanding the persons able to access the court record with respect to criminal proceedings, but this does not relate to civil proceedings. Clause 33(6) provides that:

Subject to this section, the rules of court may provide for unconditional or conditional access to records and things held by the Court by parties to cases and by other persons.

- 2.43 Clause 33(6) is limited by the other parts of clause 33 and, therefore, would not be a basis for expanding the group of persons able to access court files. Instead, clause 33(6) is directed to the conditions to be imposed on persons accessing court records.⁶⁴

⁵⁹ Letter from Mr Ray Warnes, Acting Executive Director, Court Services, Department of Justice, September 8 2004, pp3-4 of enclosure “Response to Questions”.

⁶⁰ Mr Steven Heath, Chief Stipendiary Magistrate, Magistrates Court, *Transcript of Evidence*, August 27 2004, p6.

⁶¹ Letter from Mr Ray Warnes, Acting Executive Director, Court Services, Department of Justice, September 8 2004, p4 of enclosure “Response to Questions”.

⁶² Mr Steven Heath, Chief Stipendiary Magistrate, Magistrates Court, *Transcript of Evidence*, August 27 2004, p6.

⁶³ Mr Steven Heath, Chief Stipendiary Magistrate, Magistrates Court, *Transcript of Evidence*, August 27 2004, p6.

⁶⁴ See also Explanatory Memorandum, Magistrates Court Bill 2003, p11.

Legal practitioners

- 2.44 The Committee notes that neither clause 33(3) nor clause 33(5) expressly grants legal practitioners access to the court record. However, the Chief Stipendiary Magistrate considered that access would be granted on the basis of ostensible authority.⁶⁵
- 2.45 Additionally, the Committee notes that in relation to criminal proceedings, clause 33(5)(h) enables access by an “*person authorised*” which it is expected would include a legal practitioner acting for a party to the case.

Observations

- 2.46 The Committee is concerned about the proposed narrowing of the access to the court record, particularly in relation to criminal proceedings. The Committee does not consider that there is adequate justification for this change.
- 2.47 The Committee notes that with respect to criminal proceedings, clause 33(5)(i) enables the category of persons able to access the court record to be expanded by regulation. However, the Committee does not consider that this mechanism would achieve the level of access to the court record currently provided by section 148 of the *Justices Act 1902*. The Committee, therefore, recommends that clause 33 be amended to incorporate the provisions of section 148 of the *Justices Act 1902*. The Committee intends that these amendments be read as supplementing clause 33(5).

Recommendation

Recommendation 2: The Committee recommends that clause 33 of the Magistrates Court Bill 2003 be amended to allow wider access to the court record in criminal proceedings. The statutory amendments required to effect this change are set out in Appendix 3.

⁶⁵ Mr Steven Heath, Chief Stipendiary Magistrate, Magistrates Court, *Transcript of Evidence*, August 27 2004, p6.

CHAPTER 3

MAGISTRATES COURT BILL 2003 - SCHEDULES

INTRODUCTION

- 3.1 Schedule 1 contains provisions with respect to the appointment, conditions of service, resignation, suspension and removal from office of magistrates. Together, these provisions operate to define the office of magistrate for the purposes of the new Magistrates Court.
- 3.2 There is a view held by some sections of the legal community that magistrates should be elevated to the status of judges.⁶⁶ Consequently, a number of issues raised in the submissions concerning Schedule 1 broached the broader issue of parity between the magistracy and judges. Thus, before addressing the issues raised by the submissions it is apposite to briefly outline the origins of the magistracy in Western Australia.
- 3.3 This Chapter also canvasses a technical issue raised in relation to Schedule 1, clause 2, concerning the qualifications for appointment as a magistrate and issues relating to Schedules 2 and 3.

Office of magistrate

- 3.4 The modern Australian magistracy originated in the ancient English office of Justice of the Peace: an office which combined judicial and administrative functions.⁶⁷ The office of Justice of the Peace was transported to Australia when it was settled.⁶⁸ In the Australian colonies, the early paid magistrates were also known as ‘police magistrates’ as their roles combined both administrative and judicial functions, such as, preserving the peace, detecting crime, the apprehension of offenders, and sentencing and punishing.⁶⁹

⁶⁶ See the arguments put forward in John Lowndes SM, ‘The Australian Magistracy: From Justices of the Peace to Judges and Beyond - Part II’ (2000) 74, *Australian Law Journal*, 592.

⁶⁷ John Lowndes SM, ‘The Australian Magistracy: From Justices of the Peace to Judges and Beyond - Part I’ (2000) 74, *Australian Law Journal*, 509.

⁶⁸ John Lowndes SM, ‘The Australian Magistracy: From Justices of the Peace to Judges and Beyond - Part I’ (2000) 74, *Australian Law Journal*, 509, 512.

⁶⁹ John Lowndes SM, ‘The Australian Magistracy: From Justices of the Peace to Judges and Beyond - Part I’ (2000) 74, *Australian Law Journal*, 509, 514-515.

- 3.5 Since those early beginnings, the magistracy has undergone considerable change.⁷⁰ Those changes need not be set out for the purposes of this Report, however, the Committee notes that the administrative functions of magistrates have narrowed such that the modern magistrate primarily undertakes judicial functions with administrative functions forming an ancillary part of their role.⁷¹
- 3.6 The narrowing of administrative functions and other changes have, as indicated above, led to a view in some parts of the legal community, that magistrates should be elevated to the status of judges.⁷²

SCHEDULE 1, CLAUSE 2 - QUALIFICATIONS FOR APPOINTMENT

- 3.7 The qualifications for appointment as a magistrate were raised during the second reading debate.⁷³
- 3.8 Clause 2(2) of Schedule 1 provides that a person is qualified to be appointed as a magistrate of the Court if he or she -

- (a) *is or has been a practising barrister of the High Court of Australia, or is a legal practitioner;*
- (b) *has had at least 5 years' legal experience; and*
- (c) *is under 65 years of age.* (emphasis added)

- 3.9 Thus, clause 2(2)(a) requires an applicant to be either:
- a) a current or former practising barrister of the High Court; or
 - b) a **legal practitioner**.

- 3.10 The term “**legal practitioner**” is defined in Schedule 1, clause 1 to have the meaning given to that term in the *Legal Practice Act 2003*. The *Legal Practice Act 2003* defines “**legal practitioner**” as a person -

- (a) *who is admitted as a legal practitioner, whose name is on the Roll of Practitioners and who is not a disqualified person; or*

⁷⁰ For a full account of this history see John Lowndes SM, ‘The Australian Magistracy: From Justices of the Peace to Judges and Beyond - Part I’ (2000) 74, *Australian Law Journal*, 509 and John Lowndes SM, ‘The Australian Magistracy: From Justices of the Peace to Judges and Beyond - Part II’ (2000) 74, *Australian Law Journal*, 592.

⁷¹ See the evidence of Mr Steven Heath, Chief Stipendiary Magistrate, Magistrates Court, *Transcript of Evidence*, August 27 2004, p4.

⁷² See the arguments put forward in John Lowndes SM, ‘The Australian Magistracy: From Justices of the Peace to Judges and Beyond - Part II’ (2000) 74, *Australian Law Journal*, 592.

(b) *who is an interstate practitioner who practises in this State;*⁷⁴

3.11 Therefore, for the purposes of clause 2(2)(a), an applicant must be someone who:

- is or has been a practising barrister of the High Court;
- is a person who is admitted as a legal practitioner, whose name is on the Supreme Court Roll of Practitioners and who is not a disqualified person; or
- is an interstate practitioner practising in this State.

3.12 It was noted during the second reading debate that this appears to place restrictions on persons from interstate applying for appointment as a magistrate.⁷⁵ An interstate practitioner (who does not also practise in Western Australia) or a person such as a Judge of the Supreme Court of Victoria who does not fall into the categories above would be excluded from appointment.

3.13 In comparison, the Committee notes that:

- Currently, the *Stipendiary Magistrates Act 1957* simply requires a stipendiary magistrate to be a barrister or solicitor of a State or Territory of the Commonwealth, the High Court of Australia, England or Northern Ireland.⁷⁶
- In New South Wales and Victoria, a magistrate may simply be admitted to practice in another State or Territory or the High Court of Australia.⁷⁷

3.14 The Law Society did not consider that clause 2(2)(a) inappropriately restricts the classes of people entitled to appointment stating that:

*There is no evidence, nor any suggestion, that the government has in recent times had any difficulty in attracting candidates of an appropriate quality for appointment as magistrates. For that matter, there seems no reason why most suitable interstate practitioners would not be eligible [to] apply for admission in the High Court, if this were a necessary qualification toward appointment.*⁷⁸

⁷³ Hon Peter Foss MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, June 25 2004, pp4385-4386.

⁷⁴ Section 3, *Legal Practice Act 2003*.

⁷⁵ Hon Peter Foss MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, June 25 2004, pp4385-4386.

⁷⁶ Section 4, *Stipendiary Magistrates Act 1957*.

⁷⁷ Section 7, *Magistrates' Court Act 1989* (Vic); section 12, *Local Courts Act 1982* (NSW). In Victoria, the applicant must have been enrolled as a legal practitioner of the High Court for a period of not less than five years.

⁷⁸ Letter from Mr Ian Weldon, President, Law Society of Western Australia, September 3 2004, pp1-2.

- 3.15 The Department of Justice advised that both the Solicitor General and Parliamentary Counsel agreed with the Committee's construction of the clause which they considered exposed a drafting error. The Department of Justice advised that it was not the intention to exclude the classes of people which the Committee has noted would be excluded.⁷⁹
- 3.16 The Department of Justice indicated that as a consequence, Parliamentary Counsel had drafted an amendment to Schedule 1, clause 2, which proposed to delete clause 2(2)(a). They advised that the amendment was in the process of being submitted to the Attorney General for his approval following which it was to be forwarded to the Hon Nick Griffiths MLC with a request that it be included on the Legislative Council's Notice Paper.⁸⁰
- 3.17 Since that advice, the Committee notes that Supplementary Notice Paper No 260, Issue No 3 has been published and contains a proposed amendment to Schedule 1, clause 2 to delete clause 2(2)(a), (see Appendix 4). The Committee considers that the amendment is appropriate and makes Recommendation 3.

Recommendation

Recommendation 3: The Committee recommends that Schedule 1, clause 2(2)(a) of the Magistrates Court Bill 2003 be deleted to remove the requirement that to be qualified for appointment as a magistrate of the Magistrates Court a person must be or have been a practising barrister of the High Court of Australia, or a legal practitioner. This can be effected in the following manner:

Page 28, lines 19 and 20 - To delete the lines.

SCHEDULE 1, CLAUSE 11(1)(A) - TENURE OF OFFICE

- 3.18 Schedule 1, clause 11(1)(a) provides that a person ceases to be a magistrate when he/she reaches 65 years of age.
- 3.19 Currently, section 5B(1) of the *Stipendiary Magistrates Act 1957* provides that magistrates are to retire upon attaining 65 years of age.

⁷⁹ Letter from Mr Ray Warnes, Acting Executive Director, Court Services, Department of Justice, September 8 2004, p4 of enclosure "Response to Questions".

⁸⁰ Letter from Mr Ray Warnes, Acting Executive Director, Court Services, Department of Justice, September 8 2004, p4 of enclosure "Response to Questions".

- 3.20 The Chief Justice and the Stipendiary Magistrates' Society submitted that the retirement age for magistrates should be the same as that of judges.⁸¹ Judges of the Supreme Court, District Court, Children's Court and Family Court of Western Australia are required to retire at 70 years of age.⁸²
- 3.21 The Department of Justice informed the subcommittee that with the exception of the Federal Magistrates Court, the retiring age for magistrates in other States is 65 years of age.⁸³ The Committee notes that this appears to be correct in relation to all States and Territories except New South Wales where the retirement age is 72 years of age (the same as that of Judges of the District and Supreme Court in New South Wales) and Victoria where the retirement age is 70 years of age.⁸⁴
- 3.22 The Stipendiary Magistrates' Society submitted that clause 11(1)(a) ignores the appropriateness of parity between judicial officers. On behalf of the Stipendiary Magistrates' Society, Ms Wager SM suggested that if it is accepted that magistrates are judicial officers, then parity is required.⁸⁵
- 3.23 In response to a submission of the Stipendiary Magistrates' Society on the issue of retirement age, the Attorney General stated:

*As a general rule, Magistrates are appointed at a much younger age than Judges and I am firmly of the view that there is a limit to how long any individual can be expected to bear the burden of judicial office, particularly in a jurisdiction as taxing as the Magistrates Court.*⁸⁶

⁸¹ Submission No 17 from Hon David Malcolm AC CJCWA, Chief Justice of Western Australia, August 12 2004, pp5-6; submission No 10 from Stipendiary Magistrates' Society of Western Australia, July 22 2004, pp3-4.

⁸² Section 3, *Judges Retirement Act 1937*; section 16, *District Court of Western Australia Act 1969*; section 7(6), *Children's Court of Western Australia Act 1988*; section 18(1), *Family Court Act 1997*.

⁸³ Letter from Mr Ray Warnes, Acting Executive Director, Court Services, Department of Justice, September 8 2004, p4 of enclosure "Response to Questions".

⁸⁴ Section 9, *Magistrates Act 1983* (SA); section 42, *Magistrates Act 1991* (Qld); section 9, *Magistrates Court Act 1987* (Tas); section 10A, *Magistrates Court Act 1930* (ACT); section 7, *Magistrates Act* (NT); section 12, *Magistrates' Court Act 1989* (Vic); section 44, *Judicial Officers Act 1986* (NSW).

⁸⁵ Ms Julie Wager SM, President of the Stipendiary Magistrates' Society of Western Australia, *Transcript of Evidence*, August 16 2004, p9.

⁸⁶ Letter from Mr Ray Warnes, Acting Executive Director, Court Services, Department of Justice, September 8 2004, p4 of enclosure "Response to Questions" containing an extract from a letter to the Stipendiary Magistrates' Society from the Attorney General.

- 3.24 The subcommittee raised this view with Ms Wager SM who pointed out that a number of recent District Court appointees have been of a similar age to recent appointees to the magistracy.⁸⁷
- 3.25 The Chief Stipendiary Magistrate concurred with the Stipendiary Magistrates' Society about parity between judicial officers from a magistrate's point of view. However, his Worship also indicated that the retirement age is a difficult balance to achieve given the management issues relating to health and sick leave, particularly for country magistrates who undertake circuits.⁸⁸

Observations

- 3.26 The Committee has concluded that the appropriate retirement age for magistrates is 65 years of age. The Committee concurs with the view expressed by the Attorney General as set out at paragraph 3.23.

SCHEDULE 1, CLAUSE 13 - SUSPENSION AND TERMINATION DUE TO ILLNESS

Operation of the clause

- 3.27 Schedule 1, clause 13 enables the Minister to suspend a magistrate if he or she is of the opinion that the magistrate is incapable of performing satisfactorily his or her official functions due to physical or mental incapacity (other than due to a temporary illness).
- 3.28 Once the Minister has suspended the magistrate, the Minister must establish a committee comprising the Chief Justice (or a Judge nominated by the Chief Justice) and two medical practitioners to inquire into the matter and report and make recommendations to the Minister. In accordance with the recommendations, the Governor may terminate the suspension or terminate the magistrate's appointment.

Submissions

- 3.29 With respect to clause 13, the Chief Justice submitted that there is a strong argument against suspension or removal from office by reason of physical or mental incapacity. His Honour indicated that in the past in Western Australia, judicial officers in the

⁸⁷ See the proposition put to Ms Julie Wager SM, President of the Stipendiary Magistrates' Society of Western Australia by Hon Peter Foss MLC during a hearing on August 16 2004, Ms Julie Wager SM, President of the Stipendiary Magistrates' Society of Western Australia, *Transcript of Evidence*, August 16 2004, pp9-10.

⁸⁸ Mr Steven Heath, Chief Stipendiary Magistrate, Magistrates Court, *Transcript of Evidence*, August 27 2004, pp2-3.

Supreme and District Courts have been provided with unlimited sick leave when they have been taken ill until their recovery or death.⁸⁹

- 3.30 On behalf of the Stipendiary Magistrates' Society, Ms Wager SM submitted that clause 13 should be amended to replace the reference to "*suspension*" with a reference to being "*relieved from duties*". Her Worship indicated that this accords with the current wording of the *Stipendiary Magistrates Act 1957*.⁹⁰
- 3.31 Although he did not have a strong view on this issue, the Chief Stipendiary Magistrate agreed that "*relieved from duties*" in the case of an illness is appropriate terminology.⁹¹

Observations

- 3.32 The Committee concurs with Ms Wager SM that, as with section 5(4) of the *Stipendiary Magistrates Act 1957*, clause 13 should refer to a magistrate being "*relieved from duties*" rather than "*suspended*". In relation to matters of ill health, the Committee considers that this terminology is more appropriate. The Committee recommends that Schedule 1, clause 13 of the Magistrates Court Bill 2003 be amended so that it reads as follows:

[Note: Words proposed to be inserted are underlined. Words proposed to be struck out are shown with the text struck through.]

13. Suspension and termination due to illness

- (1) If the Attorney General ~~Minister~~ is of the opinion that a magistrate is incapable of performing satisfactorily his or her official functions due to physical or mental incapacity, other than due to a temporary illness, he or she may relieve the magistrate from his or her duties ~~suspend the magistrate from office~~.
- (2) A magistrate who is relieved from duties ~~suspended~~ is entitled to his or her full remuneration ~~while suspended~~.
- (3) If the Attorney General ~~Minister~~ relieves a magistrate from duties ~~suspends a magistrate~~ the Attorney General ~~Minister~~ must establish a committee of the Chief Justice of Western

⁸⁹ Submission No 17 from Hon David Malcolm AC CitWA, Chief Justice of Western Australia, August 12 2004, p5.

⁹⁰ Ms Julie Wager SM, President of the Stipendiary Magistrates' Society of Western Australia, *Transcript of Evidence*, August 16 2004, pp4-5. See section 5(4), *Stipendiary Magistrates Act 1957*.

⁹¹ Mr Steven Heath, Chief Stipendiary Magistrate, Magistrates Court, *Transcript of Evidence*, August 27 2004, p2.

Australia, or a Judge nominated by the Chief Justice, and 2 medical practitioners (within the meaning of the *Medical Act 1894*) to -

- (a) inquire into and report to the Attorney General ~~Minister~~ on whether the magistrate is mentally or physically incapable of carrying out satisfactorily the duties of office; and
 - (b) make recommendations to the Attorney General ~~Minister~~ about the matter.
- (4) The Attorney General ~~Minister~~ may direct the magistrate to attend and be examined by and to cooperate with the reasonable requests of the committee.
 - (5) The magistrate must comply with such a direction.
 - (6) The committee is to determine the procedure governing its inquiry to the extent it is not prescribed by the regulations.
 - (7) In accordance with recommendations made under subclause (3) the Governor may —
 - (a) reinstate the magistrate and if appropriate, make a recommendation about the duties to be assigned to the magistrate by the Chief Magistrate under section 25 ~~terminate the suspension~~; or
 - (b) terminate the magistrate's appointment.
 - (8) If the magistrate's appointment is terminated, it is deemed to be a retirement on the ground of total and permanent disablement for the purposes of the *State Superannuation Act 1999*.

3.33 The Committee points out that the proposed amendments also change references to “*the Minister*” in clause 13 to “*the Attorney General*”. The Committee's discussion of this issue is at paragraphs 3.63 to 3.66.

Recommendation

Recommendation 4: The Committee recommends that Schedule 1, clause 13 of the Magistrates Court Bill 2003 be amended to remove references to a magistrate being “suspended” with those references to be replaced with “relieved from duties” so that it reads as set out in paragraph 3.32. The statutory amendments required to effect these changes are set out in Appendix 5.

SCHEDULE 1, CLAUSE 14 - SUSPENSION FROM OFFICE DUE TO SUBSTANDARD PERFORMANCE**Operation of the clause**

3.34 Pursuant to Schedule 1, clause 14(2), the Minister may recommend to the Governor that a magistrate is suspended if, after consulting:

- the Chief Justice - in relation to the suspension of the Chief Stipendiary Magistrate; or
- the Chief Stipendiary Magistrate - in relation to the suspension of other magistrates,

he or she alleges that **proper reasons** exist for the suspension.

3.35 Clause 14(1) provides that **proper reasons** exist if the magistrate has:

- shown incompetence or neglect in performing his or her functions;
- misbehaved or engaged in conduct which renders him or her unfit to hold office as a magistrate whether or not the conduct relates to those functions;
- failed to comply with directions of the Chief Stipendiary Magistrate in relation to assigned duties or administrative functions;
- failed to attend a medical committee inquiry as required in clause 13;
- become bankrupt.

3.36 On such a recommendation, the Governor may suspend the magistrate from office (clause 14(3)).

3.37 If the Governor has suspended the magistrate, the allegation and suspension must be reported to the Chief Justice (clause 14(5)). The Chief Justice (or a nominated Judge) is then to conduct an inquiry into the allegation and make recommendations (including recommendations relating to remuneration) to the Minister (clause 14(6)).

- 3.38 Upon receiving the recommendations, the Governor may terminate the suspension or continue it, pending consideration of the removal of the magistrate from office pursuant to clause 15 which provides that the Governor may, upon the address of both Houses of Parliament, terminate a magistrate's appointment (clause 14(8)).
- 3.39 The Chief Justice, the Judicial Conference of Australia, Senior Judge PJ Healy of the District Court,⁹² the Chief Stipendiary Magistrate, the Stipendiary Magistrates' Society, the Criminal Lawyers' Association of Western Australia and the Law Society raised serious concerns with clause 14, which are outlined below.

Submissions - judicial independence

- 3.40 The submissions principally objected to clause 14 on the basis that its operation undermines judicial independence. Judicial independence is freedom from direction, control or interference in the operation or exercise of judicial power by either the legislative or executive arms of government.⁹³
- 3.41 The *Commonwealth Constitution* incorporates a separation of powers, pursuant to which the three arms of government: the executive, the legislature and the judiciary, are separate, and their respective functions and powers are mutually exclusive.⁹⁴ Judicial independence is protected by Chapter III of the *Commonwealth Constitution*.⁹⁵
- 3.42 Although the State Constitution⁹⁶ does not provide for a formal separation of powers, in the High Court decision of *Kable v Director of Public Prosecutions* (1995) 189 CLR 51, Gaudron, McHugh and Gummow JJ considered that the fact that State courts are invested with federal jurisdiction requires those courts to be, and be perceived to be, independent of the legislature and executive government in the exercise of federal jurisdiction.⁹⁷
- 3.43 The submissions objected to clause 14 on the basis that empowering the Minister to suspend a magistrate, inappropriately places the judiciary in the control of the executive. For example, a magistrate might be suspended as a result of an unpopular decision or for reasons which do not involve a serious breach of proper behaviour.⁹⁸ As the Judicial Conference of Australia noted, the Minister may hold in his or her

⁹² Letter from Senior Judge PJ Healy to Hon Jon Ford MLC, June 29 2004.

⁹³ Dr P. Nygh and P. Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Australia, 1997, p648.

⁹⁴ *New South Wales v Commonwealth* (1915) 20 CLR 54.

⁹⁵ *Attorney-General (Cth) v R (Boilermakers' Case)* (1957) 95 CLR 529.

⁹⁶ *Constitution Act 1889*.

⁹⁷ *Kable v Director of Public Prosecutions* (1995) 189 CLR 51 at 103, 116 and 143. See also P. Johnston and R. Hardcastle 'State Courts: The Limits of *Kable*' (1998) 20 *Sydney Law Review* 216 at 219.

⁹⁸ Submission No 3 from Mr Steven Heath, Chief Stipendiary Magistrate, Magistrates Court, July 16 2004, p2.

hands the fate of a magistrate who is hearing criminal cases or other litigation to which a representative of the State is a party.⁹⁹

- 3.44 Ms Wager SM emphasised that the problem becomes more acute in small towns in the north of the State where there are often very political issues that arise when certain defendants come before the court. In that context, whilst a magistrate's decision may be seen as being incompetent or negligent in the political arena, this does not necessarily mean that such a finding could be made about the magistrate's actions.¹⁰⁰
- 3.45 The submissions pointed to the following elements as exacerbating the difficulties created by clause 14.

What is "incompetence" and "neglect"?

- 3.46 The submissions objected to the use of the terms "*neglect*" and "*incompetence*" in clause 14 which they asserted are broad, subjective and undefined.¹⁰¹
- 3.47 Ms Wager SM submitted that the subjective nature of the terms means that they are not tests that should lead to a decision to suspend a magistrate.¹⁰²
- 3.48 The Judicial Conference of Australia queried whether "*incompetence*" is a failure to be aware of a binding superior court decision or whether it might be construed as a grant of bail to a person who, in the opinion of the Crown or the police, should not have been granted bail.¹⁰³

Procedural fairness and presumption of innocence

- 3.49 The submissions highlighted that the proposed suspension process does not appear to require the magistrate to be given notice of an intention to suspend or to make representations as to why he or she should be suspended.¹⁰⁴ The submissions asserted that this is of particular concern when the decision by a Minister to suspend a

⁹⁹ Submission No 9 from Hon Justice CSC Sheller, Chairman, Judicial Conference of Australia, July 19 2004, p3.

¹⁰⁰ Ms Julie Wager SM, President of the Stipendiary Magistrates' Society of Western Australia, *Transcript of Evidence*, August 16 2004, pp3-4.

¹⁰¹ Submission No 17 from Hon David Malcolm AC CitWA, Chief Justice of Western Australia, August 12 2004, p2 where his Honour refers to the words as being "*very broad terms*"; submission No 9 from Hon Justice CSC Sheller, Chairman, Judicial Conference of Australia, July 19 2004, p2 and p5; Ms Julie Wager SM, President of the Stipendiary Magistrates' Society of Western Australia, *Transcript of Evidence*, August 16 2004, pp3-4.

¹⁰² Ms Julie Wager SM, President of the Stipendiary Magistrates' Society of Western Australia, *Transcript of Evidence*, August 16 2004, pp3-4.

¹⁰³ Submission No 9 from Hon Justice CSC Sheller, Chairman, Judicial Conference of Australia, July 19 2004, p5.

¹⁰⁴ Submission No 9 from Hon Justice CSC Sheller, Chairman, Judicial Conference of Australia, July 19 2004, p3; submission No 17 from Hon David Malcolm AC CitWA, Chief Justice of Western Australia, August 12 2004, p3.

magistrate will cause significant damage to the reputation and career of the magistrate.¹⁰⁵

- 3.50 The Judicial Conference of Australia noted that the fact that clause 14 creates a process for the Chief Justice (or another judicial officer) to inquire into the allegations after suspension, clearly contemplates a scenario where the Minister's allegation is not substantiated. However, by the time that inquiry occurs, huge damage would have occurred to the integrity of the magistrate and the court system.¹⁰⁶
- 3.51 The Criminal Lawyers' Association submitted that the effect of the suspension provisions is to abolish the presumption of innocence.¹⁰⁷

Sallmann Report

- 3.52 It has been submitted that magistrates should be subject to the same removal processes as other judicial officers. In support of this argument, the Committee was directed to the recent recommendation of Professor Sallmann¹⁰⁸ in his *Report on the Judicial Conduct and Complaints System in Victoria (Sallmann Report)*.¹⁰⁹
- 3.53 Professor Sallmann asserted that there was a good case for the proposition that removal grounds and procedures should be the same for all judicial officers.¹¹⁰
- 3.54 The Sallmann Report recommended that to strengthen judicial independence and the security of judicial tenure, the removal process for all judicial officers (including magistrates) should be on address from both Houses of Parliament. The Sallmann Report detailed a process whereby an independent standing committee of judges would determine whether, in any matter referred by the Attorney General, the facts are capable of amounting to proved misbehaviour or incapacity warranting removal from office. The committee would be required to observe the principles of natural justice and would report to the Attorney General.¹¹¹

¹⁰⁵ Submission No 10 from Stipendiary Magistrates' Society of Western Australia, July 22 2004, enclosing copy of letter to Hon J McGinty MLA, Attorney General, p4.

¹⁰⁶ Submission No 9 from Hon Justice CSC Sheller, Chairman, Judicial Conference of Australia, July 19 2004, p4.

¹⁰⁷ Submission No 11 from Criminal Lawyers Association of Western Australia, July 23 2004, p1.

¹⁰⁸ Since the report was published Professor Sallmann has been appointed to the Supreme Court of Victoria.

¹⁰⁹ Submission No 17 from Hon David Malcolm AC CitWA, Chief Justice of Western Australia, August 12 2004, pp4-5; submission No 9 from Hon Justice CSC Sheller, Chairman, Judicial Conference of Australia, July 19 2004, pp6-7; submission No 10 from Stipendiary Magistrates' Society of Western Australia, July 22 2004, p2; submission No 3 from Mr Steven Heath, Chief Stipendiary Magistrate, Magistrates Court, July 16 2004, p3.

¹¹⁰ Professor Sallmann, *Report on the Judicial Conduct and Complaints System in Victoria*, Victoria, December 2003, pp51-52.

¹¹¹ See Recommendations 1 and 4, Professor Sallmann, *Report on the Judicial Conduct and Complaints System in Victoria*, Victoria, December 2003, pp11-12.

3.55 Professor Sallmann recommended that lower level complaints which would not justify removal from office should continue to be dealt with informally by the head of the jurisdiction.¹¹²

Alternative approaches

3.56 The submissions mooted a number of alternative approaches designed to overcome the perceived problems with clause 14.

3.57 The Chief Justice indicated that the Minister should be required to give notice of an intention to suspend a magistrate by calling upon the magistrate to show cause why he or she should not be suspended and setting out the reasons for suspension. If the magistrate wished to contest the matter he should be entitled to have the issue dealt with at a closed inquiry to be conducted by the Chief Justice or a Supreme Court Judge nominated by the Chief Justice.¹¹³

3.58 The Chief Stipendiary Magistrate suggested that Minister should refer the allegation to the Chief Justice with the Chief Justice or another Supreme Court Judge undertaking an inquiry during which the magistrate would have the opportunity to answer the allegations. His Worship submitted that any suspension should only occur following that process.¹¹⁴

3.59 His Worship was also of the view that the only grounds for suspension that are appropriate are those set out in clause 14(1)(b) - namely suspension if the magistrate has misbehaved or engaged in any conduct that renders him or her unfit to hold office as a magistrate.¹¹⁵

3.60 Based on the hearing with Ms Wager SM, the Committee understands that the Stipendiary Magistrates' Society concurred with the approach suggested by the Chief Justice, but further submitted that clause 14 should be deleted.¹¹⁶

3.61 The Law Society submitted that the decision to suspend a magistrate should be made by the Chief Justice who would usually act on the referral of the Chief Stipendiary Magistrate.¹¹⁷

¹¹² See Recommendation 8, Professor Sallmann, *Report on the Judicial Conduct and Complaints System in Victoria*, Victoria, December 2003, p13.

¹¹³ Submission No 17 from Hon David Malcolm AC CitWA, Chief Justice of Western Australia, August 12 2004, pp2-3.

¹¹⁴ Submission No 3 from Mr Steven Heath, Chief Stipendiary Magistrate, Magistrates Court, July 16 2004, p2; Mr Steven Heath, Chief Stipendiary Magistrate, Magistrates Court, *Transcript of Evidence*, August 27 2004, pp1-2.

¹¹⁵ Submission No 3 from Mr Steven Heath, Chief Stipendiary Magistrate, Magistrates Court, July 16 2004, p5.

¹¹⁶ Ms Julie Wager SM, President of the Stipendiary Magistrates' Society of Western Australia, *Transcript of Evidence*, August 16 2004, p6.

- 3.62 The Judicial Conference of Australia submitted that those parts of the Magistrates Court Bill 2003 which enable the Minister to suspend a magistrate without proper judicial process should be abandoned.¹¹⁸

References to “*the Minister*”

- 3.63 Clauses 13 and 14 refer to “*the Minister*” suspending magistrates in certain circumstances. Whilst that phrase is not defined in the Magistrates Court Bill 2003, the *Interpretation Act 1984*¹¹⁹ provides that it is to be construed as a reference to the Minister of the Crown with responsibility for the administration of the Act. The Committee notes that this may not be the Attorney General and may, for example, be the Minister for Justice.
- 3.64 The Committee notes that section 5 of the *Stipendiary Magistrates Act 1957* vests the task of suspending magistrates specifically in the Attorney General.
- 3.65 Ms Wager SM indicated that the change in terminology from “*the Attorney General*” to “*the Minister*” came during later drafts of the Magistrates Court Bill 2003 and was a matter of concern.¹²⁰

Observations

References to “*the Minister*”

- 3.66 The Committee is of the view that the references in Schedule 1, clauses 13 and 14 to “*the Minister*” should be replaced with “*the Attorney General*”. The Committee is recommending other amendments to these clauses and these amendments incorporate this change in terminology, (see Recommendations 4 and 5).

Clause 14

- 3.67 The Committee is concerned about the potential for there to be a perception that magistrates are not independent and may be able to be controlled by the executive as a result of Schedule 1, clause 14. This is of particular concern given that magistrates are the main point of contact between the justice system and the people of Western Australia.¹²¹

¹¹⁷ Submission No 16 from Law Society of Western Australia, July 27 2004, p2.

¹¹⁸ Submission No 9 from Hon Justice CSC Sheller, Chairman, Judicial Conference of Australia, July 19 2004, p7.

¹¹⁹ Section 12, *Interpretation Act 1984*.

¹²⁰ Ms Julie Wager SM, President of the Stipendiary Magistrates’ Society of Western Australia, *Transcript of Evidence*, August 16 2004, p6.

¹²¹ See submission No 11 from Criminal Lawyers Association of Western Australia, July 23 2004, pp1-2.

3.68 The process for the suspension of magistrates proposed by the Chief Justice appropriately addresses the Committee's concerns about judicial independence. The Committee understands that the Chief Stipendiary Magistrate and the Stipendiary Magistrates' Society supported this proposal, although the Stipendiary Magistrates' Society suggested further amendments.¹²² Consequently, the Committee recommends that Schedule 1, clause 14 of the Magistrates Court Bill 2003 be amended so it reads as follows:

[Note: Words proposed to be inserted are underlined. Words proposed to be struck out are shown with the text struck through.]

14. Suspension from office due to substandard performance

- (1) A proper reason for suspending a magistrate from office exists if the magistrate -
 - (a) has shown incompetence or neglect in performing his or her functions;
 - (b) has misbehaved or engaged in any conduct that renders him or her unfit to hold office as a magistrate, whether or not the conduct relates to those functions;
 - (c) has contravened section 25(3) or 27(3) or clause 13(5);
 - (d) is bankrupt or has applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of salary for their benefit.
- (2) ~~The Minister may recommend to the Governor that a~~
~~magistrate be suspended~~
Attorney General may give notice to
a magistrate to show cause why he or she should not be
suspended from office if -
 - (a) in the case of the Chief Magistrate - ~~the Minister~~
Attorney General, after consulting the Chief Justice of Western Australia, alleges that a proper reason exists for suspending the Chief Magistrate; or

¹²² Mr Steven Heath, Chief Stipendiary Magistrate, Magistrates Court, *Transcript of Evidence*, August 27 2004, p2; Ms Julie Wager SM, President of the Stipendiary Magistrates' Society of Western Australia, *Transcript of Evidence*, August 16 2004, p6.

- (b) in the case of any other magistrate - the Minister Attorney General, after consulting the Chief Magistrate, alleges that a proper reason exists for suspending the magistrate,

and shall forward a copy of the notice to the Chief Justice.

~~(3) On such a recommendation the Governor may suspend the magistrate from office.~~

~~(3) Upon receipt of a notice referred to in subclause (2), the Chief Justice shall:~~

~~(a) nominate himself or herself or another judge (“**the Inquirer**”) to carry out an inquiry into the allegations; and~~

~~(b) notify the magistrate of the commencement of the inquiry.~~

and upon receipt of such notice the magistrate shall be relieved from carrying out the duties of his or her office.

(4) A magistrate who is ~~suspended~~ relieved from duties under subclause (3) is entitled to be remunerated while relieved from duties until an order is made under subclause ~~(8)~~(7).

~~(5) If the Governor suspends a magistrate the Minister must report the allegation and the suspension to the Chief Justice of Western Australia.~~

~~(6)~~(5) The Chief Justice, or a Judge nominated by the Chief Justice Inquirer -

(a) is to inquire into and report to the Minister Attorney General about the truth of the allegation, unless the magistrate, in writing, admits the allegation; and

(b) following such an inquiry or admission, is to make recommendations to the Minister Attorney General about the matter and as to whether and to what extent the magistrate should be remunerated while suspended under any order that may be made under subclause ~~(8)~~(7)(b).

- ~~(7)~~(6) The ~~person conducting an inquiry~~ Inquirer is to determine the procedure governing the inquiry to the extent it is not prescribed by the Supreme Court's rules of court.
- ~~(8)~~(7) In accordance with recommendations made under subclause ~~(6)~~ (5) the Governor may –
- (a) ~~terminate the suspension~~ reinstate the magistrate and if appropriate, make a recommendation about the duties to be assigned to the magistrate by the Chief Magistrate under section 25; or
 - (b) ~~continue any suspension~~ suspend the magistrate pending consideration under clause 15 of the removal of the magistrate.
- ~~(9)~~(8) If under subclause ~~(8)~~(7)(b) the Governor ~~continues any suspension of~~ suspends a magistrate, the Governor must determine whether and to what extent the magistrate is to be remunerated during the ~~continued~~ suspension.

Recommendation

Recommendation 5: The Committee recommends that Schedule 1, clause 14 of the Magistrates Court Bill 2003 be amended so that it reads as set out in paragraph 3.68 and incorporates the amendments referred to in paragraph 3.66. The statutory amendments required to effect these changes are set out in Appendix 6.

SCHEDULE 1, CLAUSE 17 - TITLE AND ADDRESS

- 3.69 Clause 17 of Schedule 1 changes the title and address of magistrates in court and in relation to court proceedings from “Your Worship” to “Your Honour”.
- 3.70 The Explanatory Memorandum states that the current form of address creates confusion with the titles of other judicial officers who are referred to as “Your Honour”. Thus, the Explanatory Memorandum indicates that the change in title and address removes a source of confusion for members of the public and reflects the judicial role undertaken by magistrates in courts of summary jurisdiction.¹²³

¹²³ Explanatory Memorandum, Magistrates Court Bill 2003, p18.

- 3.71 The Chief Stipendiary Magistrate and the Stipendiary Magistrates' Society supported the change in title and address.¹²⁴
- 3.72 The principal reason for their support of this change was because it would make the proceedings simpler for persons appearing in the Magistrates Court. As Ms Wager SM stated:

*Basically, in the society's view, the only reason it would be appropriate to have magistrates addressed as "Your Honour" is that we are dealing with the public. We have huge number of people who will appear only in the Magistrates Court and nowhere else. Those people are nervous and do not know what they are doing. It is very difficult to put them at ease. Add to that equation that they have all seen on television that when a person goes into court your call the person sitting at the top "Your Honour".*¹²⁵

- 3.73 In relation to this issue, the Chief Justice stated:

To date, the title of "The Honourable" has been limited to Supreme Court Judges and Judges of the Family Court of Western Australia. District Court Judges are not currently entitled to use the title "The Honourable". They are addressed orally as "Your Honour" and referred to "His Honour" or "Her Honour" as are Judges of the Supreme Court and a Family Courts.

Concerns have been expressed about conferring a title on Magistrates which would tend to suggest that they have similar status as Supreme Court Judges and, on the face of it, a status above that of District Court Judges. This is a matter which has been of particular concern to the past and present Chief Judge of the District Court. Representations were made to me by the former Chief Judge of the District Court that this change to an established and well known precedent was being disturbed. There is a long-standing convention that the title "The Honourable" was an honorific bestowed upon retired Judges of the Supreme Court by the Governor.

¹²⁴ Submission No 3 from Mr Steven Heath, Chief Stipendiary Magistrate, Magistrates Court, July 16 2004, pp5-6; Ms Julie Wager SM, President of the Stipendiary Magistrates' Society of Western Australia, *Transcript of Evidence*, August 16 2004, p11.

¹²⁵ Ms Julie Wager SM, President of the Stipendiary Magistrates' Society of Western Australia, *Transcript of Evidence*, August 16 2004, p11.

*I am not aware of any convincing reason for the proposed change in title or mode of address, which would produce an anomaly so far as the District Court is concerned.*¹²⁶

Observations

- 3.74 The Committee considers that the form of address and title for magistrates should not be changed from “Your Worship” to “Your Honour”.
- 3.75 The Committee is cognisant that there is a view that magistrates should be elevated to the status of judges. If that were to occur, clause 17 would be an appropriate provision in achieving that status. However, magistrates have not yet been accorded judicial status and thus the Committee considers that magistrates should continue to be referred to as “Your Worship” as this is the term of address that has always been used for magistrates. In reaching this view, the Committee has noted the submission of the Chief Justice as set out at paragraph 3.73.
- 3.76 To the extent that it is argued that clause 17 promotes uniformity in relation to titles and forms of address, the Committee highlights that in a court constituted by one JP or two or more JPs,¹²⁷ the Committee understands that they will continue to be referred to as “Your Worship”.
- 3.77 The Committee is of the view that Schedule 1, clause 17 should be deleted.

Recommendation

Recommendation 6: The Committee recommends that Schedule 1, clause 17 of the Magistrates Court Bill 2003 which proposes to change the title and form of address for magistrates from “Your Worship” to “Your Honour” be deleted. This can be effected in the following manner:

Page 37, lines 7 to 10 - To delete the lines.

SCHEDULE 2 - FORM OF COMMISSION

- 3.78 Schedule 1, clause 3(2) provides that the appointment of a magistrate is to be by a commission¹²⁸ in the form provided in Schedule 2 issued under the Public Seal of the State to the appointee. Paragraph 2 of the form of commission in Schedule 2 states:

¹²⁶ Submission No 17 from Hon David Malcolm AC CitWA, Chief Justice of Western Australia, August 12 2004, pp1-2.

¹²⁷ As contemplated by clause 7(2) of the Magistrates Court Bill 2003.

¹²⁸ A commission is an authority granted for a particular action, function or office. Dr P. Nygh and P. Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Australia, 1997, p215.

*The office of magistrate is a judicial office with **administrative functions**. You are to assist in and promote the administration of justice and the maintenance of peace, order and good government in the State. (emphasis added)*

- 3.79 The Stipendiary Magistrates' Society submitted that the reference to administrative functions should be deleted as there is no such reference in the commission for judges and in relation to this issue, there is no case for treating one tier of the judiciary any differently from the other tiers.¹²⁹ The Stipendiary Magistrates' Society further submitted that the only administrative functions which a magistrate is required to perform are those which are incidental to judicial functions or have been conferred specifically by particular legislation.
- 3.80 The Chief Stipendiary Magistrate indicated that he had no concerns with the form of commission but was of the view that there is substantial merit in the views of the Stipendiary Magistrates' Society in the sense that the traditional administrative functions of magistrates are narrowing.¹³⁰ His Worship indicated that the issue goes to the core of the future role of magistrates in light of the narrowing of administrative tasks and the increase in their judicial role.
- 3.81 The subcommittee put to the Chief Stipendiary Magistrate the view that the reference to administrative duties is essential in reflecting the role of magistrates to pro-actively approach the application of the law.¹³¹ In response, the Chief Stipendiary Magistrate acknowledged that in making new appointments for the office of magistrate persons are sought who will be active in making the law work. However, as to whether this is an administrative function, the Chief Stipendiary Magistrate considered this to be an academic argument.¹³²

Observations

- 3.82 The Committee is satisfied with the form of commission provided for in Schedule 2. The Committee considers that the reference to both judicial and administrative functions appropriately reflects the nature of the office of magistrate and importantly, reflects the role of magistrates to pro-actively approach the application of the law.

¹²⁹ Submission No 10 from Stipendiary Magistrates' Society of Western Australia, July 22 2004, enclosing a copy of letter to Hon J McGinty MLA, Attorney General, pp9-10.

¹³⁰ Mr Steven Heath, Chief Stipendiary Magistrate, Magistrates Court, *Transcript of Evidence*, August 27 2004, p4.

¹³¹ Mr Steven Heath, Chief Stipendiary Magistrate, Magistrates Court, *Transcript of Evidence*, August 27 2004, p4.

¹³² Mr Steven Heath, Chief Stipendiary Magistrate, Magistrates Court, *Transcript of Evidence*, August 27 2004, p4.

SCHEDULE 3 - OATH AND AFFIRMATION OF OFFICE

- 3.83 Schedule 3 contains clauses which set out the relevant oath or affirmation for a magistrate commencing in that office.
- 3.84 Supplementary Notice Paper No 260, Issue No 3 contains amendments to clauses 1 and 2 of Schedule 3. The Committee notes that one of the amendments proposes to include an oath or affirmation according to the *Oaths, Affidavits and Statutory Declarations Act 2003*. The Committee observes that the *Oaths, Affidavits and Statutory Declarations Bill 2003* has yet to commence and thus, at this time, an amendment to this effect would appear to be inappropriate. The Committee considers that this amendment would be more appropriately dealt with once the *Oaths, Affidavits and Statutory Declarations Act 2003* has come into effect.

CHAPTER 4

MAGISTRATES COURT (CIVIL PROCEEDINGS) BILL 2003

INTRODUCTION

4.1 The Magistrates Court (Civil Proceedings) Bill 2003 provides for the civil jurisdiction of the new Magistrates Court which replaces the Local Court. Amongst other things, this Bill:

- sets out the jurisdiction of the Magistrates Court, namely claims for not more than \$50,000.00;
- sets out the general procedures which are to apply in the Magistrates Court including matters such as costs orders;
- sets out the new minor cases procedure which will be available for claims for not more than \$7,500.00; and
- makes provision for court ordered mediation.

4.2 The submissions principally related the issues of legal representation and costs orders with respect to claims of not more than \$7,500.00.

4.3 The Committee also received a submission relating to clause 6 of the Magistrates Court (Civil Proceedings) Bill 2003.

CLAUSE 6 - GENERAL CIVIL JURISDICTION

4.4 Clause 6(1) sets out the general civil jurisdiction of the Magistrates Court. Clause 6(1) provides:

(1) *The Court has jurisdiction to deal with -*

(a) *a claim for an amount of money that is -*

(i) *a debt or **damages**, whether liquidated or unliquidated;*

(ii) *the whole or a part of the unliquidated balance of a partnership account; or*

(iii) *the whole or a part of the amount of the distributive share under an intestacy or of a legacy under a will,*

where the amount claimed, even if it is a balance after allowing for a payment on account or for any admitted set-off or for any other amount, is not more than the jurisdictional limit;

(b) a claim that involves an **equitable claim** or demand where the only relief claimed is the recovery of an amount of money or of damages, whether liquidated or unliquidated, and the amount claimed is not more than the jurisdictional limit;

(c) a consumer/trader claim; (emphasis added)

4.5 The LSCS submitted that:

Section 6(1)(a) only speaks of ‘damages’ being awarded. Only ‘damages’ can be awarded. Damages only include ‘compensation’ and ‘disgorgement’...This is problematic as ‘damages’, on some people’s definition, do not include restitution. Compensatory damages are for loss. Disgorgement damages are for an account of profits made by a wrongdoer. Restitution simply deals with transfers of value

S6(1)(b) a claim for an ‘amount of money’ maybe a claim for restitution. However, it must be an ‘equitable claim’. The claim for unjust enrichment, which always receives the remedy of restitution, is not an equitable concept.

S6(1)(c) may provide a remedy of restitution if the contract is one of ‘consumer/trader’. But there would be many circumstances where a consumer/trader contract is not in issue but the restitutionary remedy is required.

*It is submitted that section 6(1)(a) be amended to include the term ‘**restitution**’ or, at least, ‘**restitutionary damages**’, alongside other remedies’ names. This would permit the award of restitution, as a remedy, and the hearing of smaller unjust enrichment claims (mistaken overpayments, contracts whose consideration has failed, payments made pursuant to illegal contracts, etc).¹³³ (emphasis added)*

4.6 The law of **restitution** has been defined as:

¹³³ Submission No 12 from Law Student Community Support, University of Western Australia, July 23 2004, p4.

*... relating to all claims, quasi-contractual or otherwise, which are founded on the principle of unjust enrichment. Restitutionary claims are to be found in equity as well as at law.*¹³⁴

4.7 **Damages** is a monetary remedy which is intended to compensate the person making the claim for loss suffered by the defendant's wrong, the wrong being either a tort¹³⁵ or breach of contract.¹³⁶ In certain circumstances, damages may serve a purpose other than compensation and this might include **restitutionary damages**.¹³⁷ **Restitutionary damages** are damages measured by the expenditure saved by the defendant as a result of the tort committed against the plaintiff.¹³⁸

4.8 With respect to the submission of the LSCS, the Department of Justice advised:

This question asks about 'restitution' or 'restitutionary damage'. In the context of civil proceedings, this refers to an equitable remedy. Currently section 32 of the Local Courts Act 1904 (WA) and section 20 of the Small Claims Tribunals Act 1974 (WA) provide for the exercise of equitable jurisdiction. By virtue of clauses 6(1)(b) and 11(2)(b), the Bill proposes to give the Magistrates Court similar equitable jurisdiction to that presently held by the Local Courts and, by virtue of clauses 6(1)(c), 7(3) and 11(2)(a), with the Small Claims Tribunal.

*Accordingly any proposal to amend clause 6(1) is not supported.*¹³⁹

Observations

4.9 The Committee notes the advice from the Department of Justice indicating that 'restitution' or 'restitutionary damages' are equitable remedies. In contrast, the submission of the LSCS and the definition of the law of restitution used in paragraph 4.6 suggest that claims in restitution may be based in common law and equity.

¹³⁴ Justice Keith Mason, President, New South Wales Court of Appeal, 'Where has Australian restitution law got to and where is it going' (2003) 77(6) *Australian Law Journal*, 333, 358 citing Goff and Jones, *The Law of Restitution*, 1st ed, 1996 to 5th ed, 1998.

¹³⁵ A 'tort' is a breach of a duty which has been imposed by law and which gives rise to a civil right of action for unliquidated damages. The law of tort protects certain recognised interests, such as the protection of one's person and chattels, reputation and use of land. *Halsburys Laws of Australia*, Butterworths online, paragraph 415-1.

¹³⁶ *Halsburys Laws of Australia*, Butterworths online, paragraph 135-1.

¹³⁷ *Halsburys Laws of Australia*, Butterworths online, paragraph 135-1.

¹³⁸ *Halsburys Laws of Australia*, Butterworths online, paragraph 135-520.

¹³⁹ Letter from Mr Ray Warnes, Acting Executive Director, Court Services, Department of Justice, September 8 2004, p7 of enclosure "Response to Questions".

- 4.10 However, the Committee does not consider that it is required to resolve this apparent disparity. The advice of the Department of Justice does not support an amendment to address this issue. Presumably, if there were problems in the Local Court or the Small Claims Tribunal with respect to claims based in the law of restitution this would have been specifically addressed in the Magistrates Court (Civil Proceedings) Bill 2003. However, the Magistrates Court (Civil Proceedings) Bill 2003 creates a similar jurisdiction to that of the Local Court and Small Claims Tribunal.
- 4.11 The Committee is not convinced that the disparity set out above might become problematic, nor is it likely that the Parliament could properly address possible problems without the benefit of a decision of the Supreme Court of Western Australia. In light of the speculative nature of the problem, the Committee does not recommend any change.

PART 4 - MINOR CASES PROCEDURE

Local Courts Act 1904 - current procedures

- 4.12 Pursuant to the *Local Courts Act 1904*, the Local Court currently comprises the:
- **General Division** which deals with all personal actions (subject to certain exceptions) where the amount claimed is not more than \$25,000.00;¹⁴⁰ and
 - **Small Disputes Division** which deals with residential tenancy disputes between a property owner and a tenant up to \$6,000.00 and claims for debts or liquidated damages¹⁴¹ of not more than \$3,000.00.¹⁴²
- 4.13 When a plaintiff has a claim within the jurisdictional limit of the Small Disputes Division, they can elect whether to bring a claim in the Small Disputes Division or the General Division.¹⁴³
- 4.14 In the General Division parties are:
- entitled to legal representation as of right;
 - able to seek costs orders;¹⁴⁴ and

¹⁴⁰ Section 30, *Local Courts Act 1904*.

¹⁴¹ Liquidated damages are damages sought or awarded to a plaintiff, the amount being a sum fixed by the parties to a contract as a genuine pre-estimate of the plaintiff's loss in the event of the defendant's breach or ascertainable by a simple calculation or fixed by any scale of charges or other positive data. Dr P. Nygh and P. Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Australia, 1997, p697.

¹⁴² Sections 106C and 106Q, *Local Courts Act 1904*; section 12, *Residential Tenancies Act 1987* and regulation 6, *Residential Tenancies Regulations 1989*.

¹⁴³ Sections 106B and 106C, *Local Courts Act 1904*.

- entitled to appeal judgments of the Local Court.¹⁴⁵
- 4.15 In the Small Disputes Division:
- legal representation is not usually allowed;¹⁴⁶
 - as a general rule, costs orders are not made;¹⁴⁷ and
 - there is no appeal from decisions.¹⁴⁸
- 4.16 Separate from the Local Court is the **Small Claims Tribunal** which resolves disputes between *consumers* and *traders* about the sale, supply or hire of goods and services. The amount in dispute must be less than \$6,000.00.¹⁴⁹
- 4.17 The Courts Legislation Amendment and Repeal Bill 2003 provides for the *Local Courts Act 1904* and the *Small Claims Tribunal Act 1904* to be repealed.¹⁵⁰ These Acts are to be replaced by the Magistrates Court Bill 2003 and the Magistrates Court (Civil Proceedings) Bill 2003.

Magistrates Court (Civil Proceedings) Bill 2003 - proposed procedures

- 4.18 The Magistrates Court (Civil Proceedings) Bill 2003 creates two procedures for claims namely, the:
- **general procedure** which applies to all claims within the jurisdictional limit of not more than \$50,000.00 (to be increased to \$75,000.00 on January 1 2009)¹⁵¹ except for those where the claimant has elected to use the minor cases procedure;¹⁵² and

¹⁴⁴ Sections 29 and 81, *Local Courts Act 1904*. Costs are defined as the fees, disbursements, expenses and remuneration for work done by a person in the capacity of a barrister or solicitor. Dr P. Nygh and P. Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Australia, 1997, p290. A costs order may be made by a court or tribunal for one party to pay the other party's costs of the proceedings.

¹⁴⁵ Section 107, *Local Courts Act 1904*.

¹⁴⁶ Section 106L, *Local Courts Act 1904*. All parties to the action must agree or the court must be satisfied that the parties (other than the party who applied for the approval) or any of them shall not be thereby unfairly disadvantaged.

¹⁴⁷ Section 106M, *Local Courts Act 1904*.

¹⁴⁸ Section 106N, *Local Courts Act 1904*.

¹⁴⁹ Sections 4 and 16, *Small Claims Tribunal Act 1974*; regulation 3A, *Small Claims Tribunal Regulations 1975*.

¹⁵⁰ Clauses 4 and 12 respectively, Courts Legislation Amendment and Repeal Bill 2003.

¹⁵¹ Clauses 4 and 5, Magistrates Court (Civil Proceedings) Bill 2003.

¹⁵² See clause 3 and the definition of "*minor cases jurisdictional limit*" and Part 3, Magistrates Court (Civil Proceedings) Bill 2003.

- **minor cases procedure** which is available for claims of not more than \$7,500.00 (to be increased to \$10,000.00 on January 1 2009)¹⁵³.

4.19 For claims of not more than \$7,500.00, the claimant can elect whether to bring the application in the general procedure or the minor cases procedure.¹⁵⁴

Representation

4.20 In the **general procedure**, pursuant to clause 44, a party to a case may be represented by:

- a lawyer;
- if the party is a corporation, by an authorised officer;
- if the party is a police officer or other public officer acting in the course of duty or a public authority (such as local government)¹⁵⁵ and the case involves the Court's jurisdiction pursuant to a statute, by a person prescribed by the regulations; or
- by a person who is not a lawyer, with the court's leave (which will only be granted in exceptional circumstances).

4.21 In contrast, in the **minor cases procedure**, pursuant to clause 30, a party to a case is not entitled to representation except where:

- the party is a corporation, in which case they may be represented by an authorised officer;
- the party is a police officer or other public officer acting in the same capacity as provided in clause 44, in which case they may be represented by a person prescribed by the regulations; or
- the court grants **leave**, in which case, an agent (including a lawyer)¹⁵⁶ may represent the party.

¹⁵³ See clause 3 and the definition of "*minor cases jurisdictional limit*" and Part 4, Magistrates Court (Civil Proceedings) Bill 2003.

¹⁵⁴ See clause 26(1) and the definition of "*minor case*", Magistrates Court (Civil Proceedings) Bill 2003.

¹⁵⁵ A "*public authority*" is defined in clause 4 of the Magistrates Court (Civil Proceedings) Bill 2003 as meaning a Minister of the Crown, a department of the Public Service, a local government or regional local government or a body (whether incorporated or not) that is established for a public purpose under a written law and that, under the authority of the written law performs a statutory function on behalf of the State.

¹⁵⁶ See the definition of "*agent*" in clause 30(1), Magistrates Court (Civil Proceedings) Bill 2003 which provides that an "*agent*" means a lawyer or any other person.

- 4.22 Clause 30(3) provides that **leave** to be represented may only be granted where:
- the proceedings are not a trial (that is, interim proceedings) and are prescribed by the regulations; or
 - the proceedings are a trial and the Court considers that the party should be given leave so that the party is not unfairly disadvantaged.
- 4.23 In addition to clause 30(3), clause 30(4) provides that **leave** must not be granted for a lawyer to appear unless all parties agree or the Court is satisfied none of the other parties will be unfairly disadvantaged as a result. The Committee notes that this clause appears to impose an additional test when a party seeks leave to be represented by a lawyer.
- 4.24 Generally, clause 30(5) provides that if it appears to the Court that it should give leave for a party to be represented by an agent (including a lawyer),¹⁵⁷ the Court must be satisfied as to certain matters such as the agent's knowledge of the matter.

Costs

- 4.25 According to the Law Reform Commission, *Review of the Criminal and Civil Justice System in Western Australia*, the usual order in civil litigation in Western Australia is that the loser must pay the winner's 'costs'.¹⁵⁸ 'Costs' include the fees, disbursements, expenses and remuneration for work done by a person in the capacity of a barrister or solicitor.¹⁵⁹
- 4.26 Clause 31 provides that for cases brought within the **minor cases procedure**, a successful party is entitled to a costs order for "*allowable costs*" only. "*Allowable costs*" are defined in clause 31(1) to mean:
- the courts fees and service fees paid by a successful party; and
 - the costs of enforcing a judgment.
- 4.27 However, clause 31(3) provides that if the Magistrates Court is satisfied that the successful party's other costs were incurred due to an unreasonable act or omission by the other party then an order as to those other costs may be made.
- 4.28 Significantly, clause 25(5) provides that a successful claimant with a claim of not more than \$7,500.00, who elected **not to proceed in the minor cases procedure**, is

¹⁵⁷ Clause 30(1) defines "*agent*" to mean a lawyer or any other person.

¹⁵⁸ Law Reform Commission, *Review of the Criminal and Civil Justice System in Western Australia: Final Report*, Project No 92, Western Australia, September 1999, p127.

¹⁵⁹ Dr P. Nygh and P. Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Australia, 1997, p290.

still only entitled to a costs order permitted by clause 31 namely an order for “allowable costs” except for the limited circumstances provided in clause 31(3).

- 4.29 The Committee notes that the effect of clause 25(5) is that for all claims of not more than \$7,500.00 whether brought in the general procedure or the minor cases procedure, successful claimants are, in the usual course, limited to an order for “allowable costs”. Thus if the claim is brought within the general procedure and the party is represented by a lawyer, the successful claimant will be denied these costs. In both procedures, costs incurred in obtaining assistance from a lawyer such as for the preparation of court documents, are unlikely to be the subject of a costs order.

Supplementary Notice Paper

- 4.30 The Committee is aware that Supplementary Notice Paper No 261, Issue No 2 indicates that the Minister for Housing and Works proposes to move amendments to clause 30 (Representation of parties) and clause 31 (Costs) with respect to the minor cases procedure.
- 4.31 The Supplementary Notice Paper is set out at Appendix 7. Appendix 8 contains a copy of clauses 30 and 31 with the proposed amendments marked by Parliamentary Counsel.¹⁶⁰ On the request of the Committee, the Department of Justice provided an Explanatory Note in relation to the proposed amendments. This is attached at Appendix 9.¹⁶¹
- 4.32 The Committee considered these proposed amendments in addressing the following submissions.

Submissions - ability to elect which procedure to use

- 4.33 A number of submissions raised significant concerns about what they perceived to be the requirement for all claims of not more than \$7,500.00 to be dealt with in the minor cases procedure.¹⁶² As representation is only permitted in limited circumstances pursuant to that procedure, the submissions pointed to serious consequences for small businesses and individuals seeking to recover debts.
- 4.34 These submissions appeared to be based upon clause 28(1)¹⁶³ which provides:

¹⁶⁰ Provided in letter from Mr Ray Warnes, Acting Executive Director, Court Services, Department of Justice, September 8 2004.

¹⁶¹ Provided in letter from Mr Ray Warnes, Acting Executive Director, Court Services, Department of Justice, September 8 2004.

¹⁶² For example, submission No 15 from Australian Institute of Credit Management, July 22 2004; submission No 13 from Machlins Lawyers, July 23 2004 and submission No 5, Austral Mercantile Collections, July 20 2004.

¹⁶³ See for example, submission No 13 from Machlins Lawyers, July 23 2004, p4.

*The Court must deal with a **minor case** in accordance with the minor cases procedure unless an order has been made under subsection (2) or (3).¹⁶⁴ (emphasis added)*

4.35 However, the Committee considers that a claimant is able to elect whether to use the minor cases procedure on the basis that clause 28(1) refers to a “**minor case**” which is defined in clause 26(1) as:

- (a) *a claim within the jurisdiction of the Court where -*
 - (i) *the value of the claim or of the relief claimed is not more than the minor cases jurisdictional limit; **and***
 - (ii) *the claimant has **elected** to have the claim dealt with under the minor cases procedure. (emphasis added)*

4.36 Clause 25(5) supports the Committee’s view as it refers to the claimant for a sum of not more than \$7,500.00 electing not to have the claim dealt with under the minor cases procedure.

4.37 Advice from the Department of Justice confirmed that clause 26(1)(a) enables a claimant to elect whether to proceed under the minor cases procedure. The Department of Justice indicated that the submissions may have been based on an earlier draft of the Magistrates Court (Civil Proceedings) Bill 2003 which, following discussions with the Law Society, was amended before it was introduced into the Legislative Assembly, to allow for an election.¹⁶⁵

Submissions - legal representation

4.38 On the basis of issues raised in the submissions the Committee clarified with the Department of Justice the extent to which legal representation will be permitted in the Magistrates Court in relation to claims of not more than \$7,500.00.

4.39 The Department of Justice confirmed that if a claimant elects to have a claim of not more than \$7,500.00 dealt with in general procedure as opposed to the minor cases procedure, then pursuant to clause 44(2) they are entitled to legal representation.¹⁶⁶

4.40 If a claimant elects to have a claim dealt with in the minor cases procedure, then clause 30 applies and leave is required for any representation including legal

¹⁶⁴ These subclauses relate to cases concerning Commonwealth jurisdiction conferred on the Magistrates Court, or cases where all the parties so request or there is an important principle of law or complex facts or issues.

¹⁶⁵ Letter from Mr Ray Warnes, Acting Executive Director, Court Services, Department of Justice, September 8 2004, p8 of enclosure “Response to Questions”.

¹⁶⁶ Letter from Mr Peter Richards, Court Services, Department of Justice, September 21 2004.

representation. The operation of this clause was set out at paragraphs 4.20 to 4.24. As indicated, Supplementary Notice Paper No 261, Issue No 2 contains a proposed amendment to clause 30.

4.41 Appendix 10 is a comparative table prepared by the Committee that indicates the current operation of clause 30 and its operation if amended as proposed in Supplementary Notice Paper No 261, Issue No 2. The Committee notes that the proposed amendments widen the circumstances in which leave may be granted for a party to be represented by a lawyer.

4.42 With respect to the proposed amendment, the Department of Justice stated that:

following consultation with the Law Society of Western Australia it is recommended that clause 30 be altered to provide that the court may allow a party to be represented if all the parties agree or it is in the interests of justice for the party to be represented by a lawyer. This could include a situation where one party is represented by a “professional” officer or agent under clause 44(2)(b) and (c).¹⁶⁷

4.43 The Department of Justice also indicated that the intention of the clause when amended will be to allow representation by agreement or where the court considers it is appropriate that there is legal representation.¹⁶⁸

Observations

4.44 The Committee has considered the amendments proposed in Supplementary Notice Paper No 261, Issue No 2 in relation to clause 30. The Committee notes that the proposed amendments widen the circumstances in which legal representation will be permitted from those currently applying in the Small Claims Tribunal and the Small Disputes Division of the Local Court. In both those jurisdictions, legal representation will only be permitted where:

- all the parties to the proceedings agree; or
- the court or tribunal is satisfied that the parties, other than the party who has applied for the approval, or any of them shall not be unfairly disadvantaged.¹⁶⁹

4.45 The Committee notes that “*consumer/trader claims*” as defined in clause 7(3) of the Magistrates Court (Civil Proceedings) Bill 2003 effectively replicates the consumer/trader jurisdiction of the Small Claims Tribunal. The Committee considers

¹⁶⁷ Letter from Mr Ray Warnes, Acting Executive Director, Court Services, Department of Justice, September 8 2004.

¹⁶⁸ Letter from Mr Ray Warnes, Acting Executive Director, Court Services, Department of Justice, September 8 2004, p8 of enclosure “Response to Questions”.

¹⁶⁹ Section 32, *Small Claims Tribunal Act 1974* and section 106L, *Local Courts Act 1904*.

that the Small Claims Tribunal has been effective in providing an efficient and inexpensive forum for the resolution of “*consumer/trader claims*”.

- 4.46 As such, the Committee is concerned about the widening of the circumstances in which legal representation may be permitted in that jurisdiction. Whilst the Committee supports the amendments proposed by Supplementary Notice Paper No 261, Issue No 2 in relation to other claims, it does not support the amendments relating to “*consumer/trader claims*”.

Recommendation

Recommendation 7: The Committee recommends that clause 30 of the Magistrates Court (Civil Proceedings) Bill 2003 be amended as set out in Appendix 11 to address the matters set out in paragraphs 4.44 to 4.46.

Submissions - costs

- 4.47 As indicated in paragraphs 4.25 to 4.29, for all claims of not more than \$7,500.00, the Magistrates Court (Civil Proceedings) Bill 2003 proposes that costs will be limited, in the usual course, to “*allowable costs*” (court fees, service fees and the costs of enforcing a judgment). This is to apply regardless of whether a claimant has elected to bring the claim in the minor cases procedure or the general procedure.
- 4.48 As the Law Society highlighted in their submission, this does not mirror the existing provisions in the *Local Courts Act 1904* where costs are recoverable for matters within the jurisdiction of the Small Disputes Division that are in fact brought in the General Division of the Local Court.¹⁷⁰
- 4.49 The Law Society submitted that the inability to seek costs will act as a significant disincentive to claimants pursuing legitimate rights because the costs incurred cannot be recovered. As the Law Society stated:

[T]he Society retains a fundamental concern that although a litigant may instigate an action under the general procedure - by electing not to proceed under the minor cases procedure - there will in those cases be no provision for cost recovery, save for allowable costs or in those very restricted circumstances envisaged by clause 21(3) [31(3)]. In practice, therefore, this will operate as a very severe constraint on the ability to engage legal representation.¹⁷¹

¹⁷⁰ Submission No 16 from Law Society of Western Australia, July 27 2004, p6.

¹⁷¹ Letter from Mr Ian Weldon, Law Society of Western Australia, September 3 2004, p2.

- 4.50 Mr Machlin, a Local Court practitioner, submitted that this will mean claimants will be “*shut out*” from pursuing legitimate claims because it would not be cost effective with the end result that businesses will pass this cost onto consumers.¹⁷²
- 4.51 As indicated, there is a proposed amendment to clause 31 in Supplementary Notice Paper No 261, Issue No 2. The Explanatory Note to the proposed amendment indicates that:

As a result of consultation with the Law Society of Western Australia it is recommended that clause 31 of the Bill be altered to provide that the only costs that may be awarded are “allowable costs”, except where exceptional circumstances exist as in the present law or the court determines that there is no merit to the application. The words “exceptional circumstances” are adopted from the present law in the Small Claims Tribunal Act 1974 (WA) and the Local Courts Act 1904 (WA).

The inclusion of the “merit test” is intended to thwart other parties who attempt to use the process to defer payment.¹⁷³

Observations

- 4.52 The Committee has considered the amendments proposed in Supplementary Notice Paper No 261, Issue No 2 with respect to clause 31 and considers that these amendments are appropriate, (see Recommendation 8).
- 4.53 However, the Committee considers that with respect to claims for not more than \$7,500.00 that are brought within the general procedure, there should be an ability to obtain an order for the costs of a successful application for summary judgment or the summary dismissal of a claim. The Committee notes that summary judgment applications are not a feature of the minor cases procedure and thus an amendment to clause 31 would not be appropriate. Clause 25(5) regulates costs orders in relation to claims for not more than \$7,500.00 which are brought in the general procedure and thus it is appropriate for any amendment to relate to clause 25.
- 4.54 The Committee recommends that a new subclause be inserted after clause 25(5) to allow for costs to be ordered as outlined above.

¹⁷² Submission No 13 from Machlins Lawyers, July 23 2004, p16.

¹⁷³ Letter from Mr Ray Warnes, Acting Executive Director, Court Services, Department of Justice, September 8 2004, enclosing an Explanatory Note.

Recommendation

Recommendation 8: The Committee recommends that clause 25 and clause 31 of the Magistrates Court (Civil Proceedings) Bill 2003 be amended as set out in Appendix 12.

CHAPTER 5

COURTS LEGISLATION AMENDMENT AND REPEAL BILL 2003

INTRODUCTION

- 5.1 The Courts Legislation Amendment and Repeal Bill 2003 accompanies the legislative package which proposes to reform the lower courts in Western Australia. As the long title suggests, the Courts Legislation Amendment and Repeal Bill 2003 amends and repeals a number of existing Acts to facilitate the reforms. For example, the *Local Courts Act 1904*, the *Small Claims Tribunal Act 1974* and the *Stipendiary Magistrates Act 1957* are repealed and the *Justices Act 1902* is amended.
- 5.2 A submission from the Chief Justice raised concerns with clause 43.
- 5.3 Other submissions raised concerns with clauses 146 and 147 of Part 22, which contains transitional provisions about unexecuted procedures, pending proceedings, and the appointment of bailiffs.

CLAUSE 43 - SECTION 185 REPLACED

- 5.4 The Chief Justice submitted that clause 43 which repeals and replaces section 185 of the *Justices Act 1902* is not appropriate.¹⁷⁴
- 5.5 Section 185 relates to section 184 of the *Justices Act 1902* which currently provides that an appeal against a decision of JPs (or a magistrate) can be made to the Supreme Court, but only after leave has been obtained from a single judge. Section 185 sets out how applications for leave are to be dealt with.
- 5.6 Clause 42 amends section 184 of the *Justices Act 1902* to remove the requirement for leave. The Explanatory Memorandum states that the principal reason for the change is that leave is only rarely denied and the process of obtaining leave consumes valuable judicial time.¹⁷⁵ The Explanatory Memorandum indicates that the proposal to remove the requirement for leave, implements recommendation 368 of the Law Reform Commission *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92, June 1999.

¹⁷⁴ Submission No 17 from Hon David Malcolm AC CitWA, Chief Justice of Western Australia, August 12 2004 relating to the Courts Legislation Amendment and Repeal Bill 2003, p2.

¹⁷⁵ Explanatory Memorandum, Courts Legislation Amendment and Repeal Bill 2003, pp13-14. Note that the Explanatory Memorandum appears to relate to the Courts Legislation Amendment and Repeal Bill 2003 [263-1] and not [263-2] because clause 43 in the Explanatory Memorandum relates to section 184 of the *Justices Act 1902* and clause 44 relates to section 185 of the *Justices Act 1902*. In the Courts Legislation Amendment and Repeal Bill 2003 [263-2], clause 43 relates to section 185 of the *Justices Act 1902*.

- 5.7 With respect to the issue of leave under section 184 of the *Justices Act 1902*, the Law Reform Commission Report stated:

*Apart from some more complex issues discussed previously concerning whether issues are questions of fact or law, the leave requirement does not add any particular complexity to the procedure. With hearings of applications for leave generally conducted as a hearing on the merits of the appeal as well, there are no delays arising from the leave requirement. On the other hand, if the purpose of a leave requirement is to weed out hopeless applications, it currently does not appear to serve that purpose. There appears to be no practical benefit in retaining the leave requirement.*¹⁷⁶

- 5.8 Significantly, the Explanatory Memorandum also indicates that the proposal to remove the requirement for leave has the full support of the Judges and Masters of the Supreme Court. However, the Chief Justice submitted that the requirement for leave to appeal should be retained given the increasing numbers of persons seeking to appeal from a decision of a magistrate in a criminal case to a single Judge of the Supreme Court.¹⁷⁷
- 5.9 For the reasons stated in the Law Reform Commission Report, the Committee is satisfied that the amendment is appropriate.

CLAUSE 146 - PENDING PROCESS TO ENFORCE A JUDGMENT

- 5.10 Clause 146(2) is a transitional provision relating to the continuation of **writs of fieri facias** entered on the Land Titles Register under section 133 of the *Transfer of Land Act 1893* in order to satisfy a judgment debt.
- 5.11 A **writ of fieri facias** is a writ authorising an officer of the court to seize and sell the property of a judgment debtor to satisfy a judgment debt.¹⁷⁸ In Western Australia, these writs arise out of a District Court or Supreme Court judgment for the payment of money.
- 5.12 The equivalent procedure in the Local Court is a **warrant of execution**. A **warrant of execution** is a command by the Local Court to the bailiff to obtain the amount of the judgment debt by the seizure and sale of any of the debtor's land or goods.¹⁷⁹

¹⁷⁶ Law Reform Commission, *Review of the Criminal and Civil Justice System in Western Australia: Final Report*, Project No 92, Western Australia, September 1999, pp288-289.

¹⁷⁷ Submission No 17 from Hon David Malcolm AC CitWA, Chief Justice of Western Australia, August 12 2004 relating to the Courts Legislation Amendment and Repeal Bill 2003, p2.

¹⁷⁸ Dr P. Nygh and P. Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Australia, 1997, p1280.

¹⁷⁹ Law Reform Commission, *Report on Writs and Warrants of Execution*, Project No 67, Western Australia, June 2001, p5.

- 5.13 Registration of a writ of *feri facias* or a warrant of execution pursuant to section 133 of the *Transfer of Land Act 1893*, fetters the ability of the judgment debtor to give clear title to the land. Section 133 also sets out the procedure for the sale of land to pay the proceeds of the judgment creditor.¹⁸⁰
- 5.14 Mr BJ Handcock, the Assistant Bailiff for Rockingham, observed that clause 146(2)¹⁸¹ only refers to writs of *feri facias* and not warrants of execution although the Explanatory Memorandum indicates that the clause affects both.¹⁸²
- 5.15 Following an inquiry from the subcommittee, the Department of Justice advised that there is a deficiency in clause 146(2). The subcommittee was provided with a copy of a proposed amendment which it was advised had been provided to the Hon Nick Griffiths MLC with a request that it be included on the Legislative Council's Notice Paper.¹⁸³ The proposed amendment is set out in Appendix 13.

Observations

- 5.16 The Committee supports the amendment proposed by the Department of Justice as contained in Appendix 13.

Recommendation

Recommendation 9: The Committee recommends that clause 146(2) of the Courts Legislation Amendment and Repeal Bill 2003 be extended to relate to warrants of execution. This can be effected in the following manner:

Page 156, after line 33 - To insert -

“

- (3) In subsection (2), a reference to a writ of *feri facias* includes a reference to a warrant of execution issued out of a Local Court under the *Local Courts Act 1904* .

”.

¹⁸⁰ Law Reform Commission, *Report on Writs and Warrants of Execution*, Project No 67, Western Australia, June 2001, p19.

¹⁸¹ The submission referred to clause 147 which became clause 146 in Courts Legislation Amendment and Repeal Bill 2003 [263-2].

¹⁸² Submission No 14 from Mr BJ Handcock, Assistant Bailiff, Rockingham, July 23 2004.

¹⁸³ Letter from Mr Ray Warnes, Acting Executive Officer, Court Services, Department of Justice, August 23 2004.

CLAUSE 147 - EXISTING BAILIFFS AND THEIR ASSISTANTS, TERMINATION OF APPOINTMENT ETC

The role of bailiffs

- 5.17 When a person obtains a judgment in the Local, District or Supreme Court he/she is able to enforce that judgment if the judgment debt is not paid promptly and voluntarily.
- 5.18 Pursuant to the *Supreme Court Act 1935*, the Supreme Court Sheriff is to execute the orders of the Supreme Court and pursuant to the *District Court Act 1969*, the orders of that Court are to be executed by the District Court bailiff. As a matter of practice, the Sheriff combines both roles. The Sheriff and his officers are public servants paid a salary.¹⁸⁴
- 5.19 Section 16 of the *Local Courts Act 1904* provides that every Local Court is required to have one or more bailiffs appointed by the Minister. The bailiff's principal duties are to serve all summonses and execute all warrants issued out of the Local Court.¹⁸⁵
- 5.20 Currently, there are 10 private Local Court bailiffs appointed to the Perth Metropolitan area and major country towns.¹⁸⁶ In smaller and more remote country towns police officers perform those duties.¹⁸⁷ Private bailiffs are independent contractors paid by the fees on each process filed.¹⁸⁸

Proposed amendments

- 5.21 The Civil Judgments Enforcement Bill 2003 reforms the current enforcement processes of the Supreme, District and Local Courts. That Bill proposes to implement the recommendation of the 1995 Law Reform Commission *Report on Enforcement of Judgments of Local Courts*, Project No 16 (Part II) and the 1997 Report of the Court Services Division of the Ministry of Justice *Part II of the Civil Judgment Debt Recovery System (1997 Report)* that legislation be introduced to create a unified civil judgment enforcement system.¹⁸⁹ As part of that reform, it was proposed that the Sheriff be responsible for the execution of judgment debts from the Supreme, District and Local Courts.

¹⁸⁴ Law Reform Commission, *Report on Writs and Warrants of Execution*, Project No 67, Western Australia, June 2001, p9.

¹⁸⁵ Section 18, *Local Courts Act 1904*.

¹⁸⁶ Ministry of Justice, Court Services Division, *Civil Judgment Debt Recovery System, Part II - Administrative Recommendations*, September 1997, p21 and 24. See also Mr Peter Smith, Bailiff, Midland Local Court, *Transcript of Evidence*, August 30 2004, p2.

¹⁸⁷ Explanatory Memorandum, Courts Legislation Amendment and Repeal Bill 2003, p54.

¹⁸⁸ Law Reform Commission, *Report on Writs and Warrants of Execution*, Project No 67, Western Australia, June 2001, p9.

¹⁸⁹ Explanatory Memorandum, Civil Judgments Enforcement Bill 2003, p1.

- 5.22 The Explanatory Memorandum to the Courts Legislation Amendment and Repeal Bill 2003 indicates that the Civil Judgments Enforcement Bill 2003 implements this recommendation by providing that the Sheriff is to assume responsibility for the execution of the orders of all courts.¹⁹⁰ To assist in this task, the Sheriff will appoint civilian contractors (and police officers in their private capacity) as bailiffs pursuant to the Civil Judgments Enforcement Bill 2003.¹⁹¹
- 5.23 In order to effect these changes, clause 147(1) of the Courts Legislation Amendment and Repeal Bill 2003 terminates the current appointments of the District Court and Local Court bailiffs and their assistants.
- 5.24 Clause 147(2) makes transitional arrangements such that persons who are currently bailiffs are entitled to be appointed for a term of two years from the commencement of Part 22.¹⁹² According to the Explanatory Memorandum, after that time, civilian bailiffs will have to reapply for their positions in a competitive process.¹⁹³
- 5.25 With respect to clause 147,¹⁹⁴ the Committee received submissions from:
- Mr Allen Mitchell, Bailiff Bunbury;
 - Mr Ken Steer, Bailiff Perth;
 - Mr Ian Handcock, Bailiff Rockingham;
 - Mr Ray Rowles, Bailiff Fremantle;
 - Mr John Visee, Bailiff Joondalup;
 - Mr Mick Leedham, Bailiff Maddington; and
 - Mr Peter Smith, Bailiff Midland.

¹⁹⁰ Explanatory Memorandum, Courts Legislation Amendment and Repeal Bill 2003, p54.

¹⁹¹ Explanatory Memorandum, Courts Legislation Amendment and Repeal Bill 2003, p54. See also clause 107, Civil Judgments Enforcement Bill 2003.

¹⁹² See clause 143 which defines “*commencement*” and clause 2 which provides that the Act comes into operation on a day fixed by proclamation and that different days may be fixed for different provisions.

¹⁹³ Explanatory Memorandum, Courts Legislation Amendment and Repeal Bill 2003, p54.

¹⁹⁴ The submissions referred to clause 148 which became clause 147 in Courts Legislation Amendment and Repeal Bill 2003 [263-2].

Submissions

Two year appointments

- 5.26 The submissions contained the common proposition that bailiffs should continue their current appointments for a period of five years rather than the period of two years proposed in clause 147(2).¹⁹⁵
- 5.27 In support of this proposition, the following matters were raised:
- The 1997 Report recommended that bailiffs have a five-year contract to enable a smooth transition from one Act to another. This contract period was changed to two years without consultation.¹⁹⁶
 - The Civil Judgments Enforcement Bill 2003 has a number of new and untried provisions, including new contempt provisions with new arrest procedures. The current bailiffs have significant experience in the enforcement of orders which will be required in order to make the transition to the new system.¹⁹⁷ As such, two years is an insufficient period to achieve a smooth transition to a radically different system.
 - Pursuant to the Civil Judgments Enforcement Bill 2003, it is proposed that the process be administered by the Sheriff and his staff who have had little or no civil enforcement experience.¹⁹⁸
- 5.28 The 1997 Report referred to in the submissions recommended transitional provisions which would terminate the current appointments of private bailiffs and replace them with five year contracts with an option, exercisable by the Ministry of Justice, for a further five year period.¹⁹⁹

¹⁹⁵ Submission No 7 from Mr Ian Handcock, Rockingham Bailiff; Mr Ray Rowles, Fremantle Bailiff; Mr John Visee, Joondalup Bailiff; Mr Mike Leedham, Maddington Bailiff and Mr Peter Smith, Midland Bailiff, July 22 2004, pp2-3; submission No 8 from Mr KG Steer, Perth Bailiff, July 21 2004; submission No 2 from Mr Allen G Mitchell, Bunbury Bailiff, July 20 2004.

¹⁹⁶ Submission No 7 from Mr Ian Handcock, Rockingham Bailiff; Mr Ray Rowles, Fremantle Bailiff; Mr John Visee, Joondalup Bailiff; Mr Mike Leedham, Maddington Bailiff and Mr Peter Smith, Midland Bailiff, July 22 2004, p2.

¹⁹⁷ Submission No 7 from Mr Ian Handcock, Rockingham Bailiff; Mr Ray Rowles, Fremantle Bailiff; Mr John Visee, Joondalup Bailiff; Mr Mike Leedham, Maddington Bailiff and Mr Peter Smith, Midland Bailiff, July 22 2004, pp2-3; submission No 8 from Mr KG Steer, Perth Bailiff, July 21 2004.

¹⁹⁸ Submission No 7 from Mr Ian Handcock, Rockingham Bailiff; Mr Ray Rowles, Fremantle Bailiff; Mr John Visee, Joondalup Bailiff; Mr Mike Leedham, Maddington Bailiff and Mr Peter Smith, Midland Bailiff, July 22 2004, p3.

¹⁹⁹ Ministry of Justice, Court Services Division, *Civil Judgment Debt Recovery System, Part II - Administrative Recommendations*, September 1997, p77, Recommendation 77.

- 5.29 The 1997 Report did not contain specific reasons in support of the five-year contract period in the transitional provisions.²⁰⁰ However, it appears to reflect another recommendation in the 1997 Report that under the new civil enforcement system, five year contracts should be offered.²⁰¹ The justification for that recommendation was a submission from the bailiffs that success as a bailiff is founded on debtor knowledge which takes time to accumulate such that a bailiff is only operating at peak efficiency after several years and is only then reaping financial benefits.²⁰²
- 5.30 The Department of Justice advised that the recommendation in the 1997 Report was amended in a Supplementary Report in December 1999 (**1999 Report**) following a National Competition Review conducted in 1998.²⁰³ The 1999 Report observed that the recommendation in the 1997 Report resulted in a restriction of competition for a period of 10 years if the option to renew was exercised.²⁰⁴ As such, the 1999 Report recommended an initial two year contract from the commencement of the Act on the basis that it would give all existing bailiffs sufficient time to make preparation for the termination of their contracts. Further, a two year contract would achieve a smooth transition by avoiding the probable disruption of the selection of civil bailiffs and a possible change of service providers at a crucial time of implementing the new Act.²⁰⁵
- 5.31 Mr Peter Smith, the Midland Local Court Bailiff advised the subcommittee that there was no consultation or discussion about the change in the transitional contracts from five to two years.²⁰⁶
- 5.32 The subcommittee notes that the argument that appointments should be five years rather than two years is premised upon an assumption that experienced bailiffs will not be reappointed after the expiration of two years.²⁰⁷

²⁰⁰ Ministry of Justice, Court Services Division, *Civil Judgment Debt Recovery System, Part II - Administrative Recommendations*, September 1997, pp76-77. At page 76, prior to making Recommendation 77, the Report sets out matters from an earlier part of the Report relating to contract terms under the new system.

²⁰¹ Those contracts were to contain an option exercisable by the Sheriff to extend for a further maximum term of five years. Ministry of Justice, Court Services Division, *Civil Judgment Debt Recovery System, Part II - Administrative Recommendations*, September 1997, p76.

²⁰² Ministry of Justice, Court Services Division, *Civil Judgment Debt Recovery System, Part II - Administrative Recommendations*, September 1997, p66.

²⁰³ Letter from Mr Ray Warnes, Acting Executive Director, Court Services, Department of Justice, September 8 2004, p1 of enclosure "Response to Questions".

²⁰⁴ Ministry of Justice, Court Services Division, *Civil Judgment Debt Recovery System, Amendments to Part I - Legislative Recommendations and Part II - Administrative Recommendations, Supplementary Report*, December 1999, p8.

²⁰⁵ Ministry of Justice, Court Services Division, *Civil Judgment Debt Recovery System, Amendments to Part I - Legislative Recommendations and Part II - Administrative Recommendations, Supplementary Report*, December 1999, p9.

²⁰⁶ Mr Peter Smith, Bailiff, Midland Local Court, *Transcript of Evidence*, August 30 2004, p3.

²⁰⁷ See the hearing with Mr Peter Smith, Bailiff, Midland Local Court, *Transcript of Evidence*, August 30 2004, p3.

“Entitled to be appointed”

5.33 The joint submission of Mr Ian Handcock, Rockingham Bailiff; Mr Ray Rowles, Fremantle Bailiff; Mr John Visee, Joondalup Bailiff; Mr Mike Leedham, Maddington Bailiff and Mr Peter Smith, Midland Bailiff asserted that clause 147(2) should be amended by deleting *“entitled to be appointed”* and substituting *“taken to have been appointed”* on the basis that this ensures that there is no gap between the position of bailiff being repealed and the commencement of the new Act.²⁰⁸

5.34 The Department of Justice advised that words *“entitled to be appointed”*:

*have been used as, in the opinion of Parliamentary Counsel, they better reflect the situation that civilian bailiffs will have the option of declining to accept an appointment under the provisions of section 107 of the Civil Judgments Enforcement Act 2003 (WA). That option is not being extended to police officer bailiffs who will be automatically appointed under the provisions of section 107 of the Civil Judgments Enforcement Act 2003 (WA).*²⁰⁹

5.35 The Department of Justice also advised that Parliamentary Counsel is of the view that there will not be a gap between the bailiff’s positions being repealed and the commencement of the *Civil Judgments Enforcement Act 2003* stating:

*Before proclaiming the Civil Judgments Enforcement Act 2003 (WA), the Department will have to ascertain which bailiffs wish to exercise their entitlement under section 147(2) of the Courts Legislation Amendment and Repeal Act 2003 (WA) to be appointed a bailiff under the provisions of section 107 of the Civil Judgments Enforcement Act 2003 (WA). Under the provisions of section 25 of the Interpretation Act 1984 (WA) those appointments will have to be made to come into effect on the day on which the Courts Legislation Amendment and Repeal Act 2003 (WA) and the Civil Judgments Enforcement Act 2003 (WA) are proclaimed to come into operation. In that way there will not be any gap. It is Parliamentary Counsel’s opinion that an amendment is unnecessary.*²¹⁰

²⁰⁸ Submission No 7 from Mr Ian Handcock, Rockingham Bailiff; Mr Ray Rowles, Fremantle Bailiff; Mr John Visee, Joondalup Bailiff; Mr Mike Leedham, Maddington Bailiff and Mr Peter Smith, Midland Bailiff, July 22 2004, pp2-3; submission No 8 from Mr KG Steer, Perth Bailiff, July 21 2004, p4.

²⁰⁹ Letter from Mr Ray Warnes, Acting Executive Director, Court Services, Department of Justice, September 8 2004, p1 of enclosure “Response to Questions”.

²¹⁰ Letter from Mr Ray Warnes, Acting Executive Director, Court Services, Department of Justice, September 8 2004, p1 of enclosure “Response to Questions”.

Observations

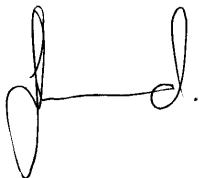
- 5.36 The Committee considers that clause 147(2) should provide that bailiffs currently holding appointments under the *Local Courts Act 1904* (who are not police officers) are entitled to be appointed under the Civil Judgments Enforcement Bill 2003 for a period of five years rather than two years as proposed by that subclause.
- 5.37 The Committee is particularly concerned about the level of disruption that will be caused by the recruitment process and a possible changeover of bailiffs two years after the commencement of the new regime proposed in the Civil Judgments Enforcement Bill 2003 (WA). See Recommendation 10
- 5.38 In considering clause 147, the Committee notes its view that clause 147(2) relates to personal contracts of employment which are not capable of being assigned or transferred.
- 5.39 The Committee is satisfied that the advice of the Department of Justice addresses the concerns raised in the submissions with respect to the use of the phrase “*entitled to be appointed*” in clause 147(2).

Recommendations

Recommendation 10: The Committee recommends that clause 147(2) of the Courts Legislation Amendment and Repeal Bill 2003 be amended to provide that bailiffs (who are not police officers) currently holding appointments under the *Local Courts Act 1904* are entitled to be appointed under the Civil Judgments Enforcement Bill 2003 for a period of five years. This can be effected in the following manner:

Page 158, line 2 - To delete “2” and insert instead - “5”.

Recommendation 11: The Committee recommends that the Magistrates Court Bill 2003, the Magistrates Court (Civil Proceedings) Bill 2003 and the Courts Legislation Amendment and Repeal Bill 2003 be passed subject to Recommendations 1 to 10.



Hon Jon Ford MLC
Chairman

Date: September 28 2004

APPENDIX 1
WRITTEN SUBMISSIONS RECEIVED

APPENDIX 1

WRITTEN SUBMISSIONS RECEIVED

NAME	ORGANISATION	DATE	
Mr Richard Titelius, Acting Manager Court Records	Perth Magistrates Court	July 22 2004	1
Mr Allen Mitchell, Bailiff Bunbury		July 20 2004	2
Mr Steven Heath, Chief Stipendiary Magistrate	Magistrates Court	July 16 2004	3
Intentionally left blank			4
Mr Trevor Greenhill, State Manager	Austral Mercantile Collections	July 20 2004	5
Mr George Etrelezis, Managing Director	Small Business Development Corporation	July 20 2004	6
Mr Ian Handcock, Bailiff Rockingham; Mr Ray Rowles, Bailiff Fremantle; Mr John Visee, Bailiff Joondalup; Mr Mick Leedham, Bailiff Maddington; and Mr Peter Smith, Bailiff Midland		July 22 2004	7
Mr Ken Steer, Bailiff Perth		July 21 2004	8
The Hon Justice CSC Sheller, Chairman	The Judicial Conference of Australia	July 19 2004	9
Ms Julie Wager SM, President	The Stipendiary Magistrates' Society of Western Australia	July 22 2004	10
Mr Hylton Quail, President	Criminal Lawyers Association of Western Australia	July 23 2004	11
Mr Anthony Papamatheos, President	Law Student Community Support, University of Western Australia	July 23 2004	12
Mr William Machlin	Machlin Lawyers	July 23 2004	13
Mr Brett Handcock, Assistant Bailiff Rockingham		July 23 2004	14
Mr Frank Vredendregt, President	Australian Institute of Credit Management	July 22 2004	15

NAME	ORGANISATION	DATE	
Mr Ian Weldon President	The Law Society of Western Australia	July 27 2004	16
The Hon David Malcolm AC CitWA Chief Justice of Western Australia	Supreme Court of Western Australia	August 12 2004	17

APPENDIX 2
STAKEHOLDERS

APPENDIX 2

STAKEHOLDERS

Name	Organisation	Date
The Hon Chief Justice David Malcolm CitWA AC	Supreme Court of Western Australia	July 6 2004
Her Hon Judge Antoinette Kennedy Chief Judge	District Court of Western Australia	July 6 2004
Mr Wayne Gibbons, Associate Secretary	Office of Indigenous Policy Co-ordination	July 6 2004
Mr Ian Weldon, President	The Law Society of Western Australia	July 6 2004
Senior Judge Paul Healy	District Court of Western Australia	July 6 2004
Mr Richard Titelius, Acting Manager, Court Records	Perth Magistrates Court	July 6 2004
Mr Dennis Eggington, Chief Executive Officer	Aboriginal Legal Service of Western Australia	July 6 2004
Mr George Etrelezis, Managing Director	Small Business Development Corporation	July 6 2004
Ms Ann Cockburn, Credit Controller	M & B Sales	July 6 2004
Mr George Turnbull, Director	Legal Aid Western Australia	July 6 2004
Mr Ross McLean, Acting Chief Executive Officer	Chamber of Commerce and Industry of Western Australia	July 6 2004
Ms Stefanie Smith, Secretary	Stipendiary Magistrates' Society	July 6 2004
Ms Holly Hammond, Research and Policy Officer	Federation of Community Legal Centres	July 6 2004
Mr P M Melson	Melson Robson, Chartered Accountants	July 6 2004
Mr Ajith Gunasekera, Company Secretary	Klinger Limited	July 6 2004
Mr Trevor Greenhill, State Manager	Austral Mercantile Collections Pty Ltd	July 6 2004
Mr Bill Machlin	Machlins Lawyers	July 6 2004
Mr J P Potter, Managing Director	North West Investigations Services	July 6 2004

APPENDIX 3
STATUTORY AMENDMENTS - CLAUSE 33 OF THE MAGISTRATES COURT
BILL 2003

APPENDIX 3
STATUTORY AMENDMENTS - CLAUSE 33 OF THE
MAGISTRATES COURT BILL 2003

Statutory amendments in relation to clause 33 of the Magistrates Court Bill 2003 to effect the changes in Committee Recommendation 2

Clause 33

Page 20, after line 8 - To insert -

“

- (4) In respect of criminal proceedings in the Court, where a conviction or order is made, or a complaint is dismissed, any party interested therein is entitled on request -
- (a) to receive a copy of –
 - (i) the complaint;
 - (ii) the record of proceedings;
 - (iii) any statement of the defendant’s convictions that is tendered in the proceedings; and
 - (iv) the conviction or order,from the officer who has custody thereof, subject to payment of an amount calculated in such manner as is prescribed by regulations; and
 - (b) to view any exhibit in the proceedings that is in the possession of an officer of a court and that is not reasonably capable of being copied, at a time and place appointed by that officer.
- (5) In subsection 4(a)(ii) the **“record of proceedings”** means a record of the evidence and proceedings however made whether –
- (a) taken personally by the person constituting the Court;
 - (b) recorded in any manner by a clerk or typist; or

(c) transcribed from a sound recording,

and includes any record of the reasons for the decision, and a copy of any exhibit that is reasonably capable of being copied.

”.

Page 21, after line 6 - To insert -

“

(9) Nothing in this section shall be read as requiring that in any proceedings –

(a) the person constituting the Court make available any note made for their own purposes and not in discharge of a duty to record; or

(b) a record be made of any address to the Court in the proceedings.

”.

APPENDIX 4
MAGISTRATES COURT BILL 2003 SUPPLEMENTARY NOTICE PAPER NO
260, ISSUE NO 3

APPENDIX 4
MAGISTRATES COURT BILL 2003 SUPPLEMENTARY NOTICE
PAPER NO 260, ISSUE NO 3

WESTERN AUSTRALIA

LEGISLATIVE COUNCIL

AMENDMENTS AND SCHEDULES

Supplementary Notice Paper No. 260
Issue No. 3

FRIDAY, SEPTEMBER 17 2004

MAGISTRATES COURT BILL 2003 [260-2]

When in committee on the *Magistrates Court Bill 2003*:

Schedule 1

The Minister for Housing and Works: To move -

5/S1 Page 28, lines 19 and 20 - To delete the lines.

Schedule 3

The Minister for Housing and Works: To move -

1/S3 Page 39, lines 3 to 10 - To delete the lines.

The Minister for Housing and Works: To move -

2/S3 Page 39, line 11 - To delete "declare and affirm" and insert instead -

“

*[insert an oath or affirmation according to the Oaths, Affidavits and Statutory
Declarations Act 2003]*

”

The Minister for Housing and Works: To move -

3/S3 Page 39, line 11 - To delete "and impartially".

The Minister for Housing and Works: To move -

4/S3 Page 39, line 16 - To delete the line.

LC Amendments No. 260 Issue 3 - Friday, September 17 2004

APPENDIX 5
STATUTORY AMENDMENTS - SCHEDULE 1, CLAUSE 13 OF THE
MAGISTRATES COURT BILL 2003

APPENDIX 5
STATUTORY AMENDMENTS - SCHEDULE 1, CLAUSE 13 OF THE
MAGISTRATES COURT BILL 2003

Statutory amendments in relation to clause 13 to effect the changes in Committee Recommendation 4

Page 34, line 17 – To delete “Minister” and insert instead –

“ Attorney General ”.

Page 34, line 20 – To delete “suspend the magistrate from office” and insert instead –

“ relieve the magistrate from his or her duties ”.

Page 34, line 21 – To delete “suspended” and insert instead –

“ relieved from duties ”.

Page 34, line 22 – To delete “while suspended”.

Page 34, line 23 – To delete “Minister” where it appears both times and insert instead –

“ Attorney General ”.

Page 34, line 23 – To delete “suspends a magistrate” and insert instead –

“ relieves a magistrate from duties ”.

Page 34, line 27 – To delete “Minister” and insert instead –

“ Attorney General ”.

Page 34, line 30 – To delete “Minister” and insert instead –

“ Attorney General ”.

Page 34, line 31 – To delete “Minister” and insert instead –

“ Attorney General ”.

Page 35, line 6 – To delete “terminate the suspension” and insert instead –

“

reinstate the magistrate and, if appropriate, make a recommendation about the duties to be assigned to the magistrate by the Chief Magistrate under section 25

”.

APPENDIX 6
STATUTORY AMENDMENTS - SCHEDULE 1, CLAUSE 14 OF THE
MAGISTRATES COURT BILL 2003

APPENDIX 6
STATUTORY AMENDMENTS - SCHEDULE 1, CLAUSE 14 OF THE
MAGISTRATES COURT BILL 2003

Statutory amendments in relation to Schedule 1, clause 14 of the Magistrates Court Bill 2003 to effect the changes in Committee Recommendation 5

Page 35, lines 24 and 25 – To delete “Minister may recommend to the Governor that a magistrate be suspended” and insert instead –

“

Attorney General may give notice to a magistrate to show cause why he or she should not be suspended from office

”.

Page 35, line 26 - To delete “Minister” and insert instead –

“ Attorney General ”.

Page 35, line 29 - To delete “Minister” and insert instead –

“ Attorney General ”.

Page 35, line 31 – To insert after “magistrate” –

“ ,

and shall forward a copy of the notice to the Chief Justice

”.

Page 35, lines 32 and 33 – To delete the lines and insert instead –

- “
- (3) Upon receipt of a notice referred to in subclause (2), the Chief Justice shall:
- (a) nominate himself or herself or another judge (“**the Inquirer**”) to carry out an inquiry into the allegations; and
- (b) notify the magistrate of the commencement of the inquiry,
- and upon receipt of such notice the magistrate shall be relieved from carrying out the duties of his or her office.
- ”.

Page 36, line 1 – To delete “suspended” and insert instead –

“ relieved from duties ”.

Page 36, line 3 – To delete “subclause (8)” and insert instead –

“ subclause (7) ”.

Page 36, lines 4 to 6 – To delete the lines.

Page 36, line 7 – To delete the subclause designation “(6)” and insert instead –

“ (5) ”.

Page 36, line 7 – To delete “Chief Justice, or a Judge nominated by the Chief Justice” and insert instead –

“ Inquirer ”.

Page 36, line 8 - To delete “Minister” and insert instead –

“ Attorney General ”.

Page 36, line 12 - To delete “Minister” and insert instead –

“ Attorney General ”.

Page 36, line 15 – To delete “subclause (8)(b)” and insert instead –

“ subclause (7)(b)”.

Page 36, line 16 – To delete the subclause designation “(7)” and insert instead –

“ (6) ”.

Page 36, line 16 - To delete “person conducting an inquiry” and insert instead –

“ Inquirer ”.

Page 36, line 19 – To delete the subclause designation “(8)” and insert instead –

“ (7) ”.

Page 36, line 19 – To delete “subclause (6)” and insert instead –

“ subclause (5) ”.

Page 36, line 21 - To delete “terminate the suspension” and insert instead –

“

reinstate the magistrate and if appropriate, make a recommendation about the duties to be assigned to the magistrate by the Chief Magistrate under section 25

”.

Page 36, line 22 - To delete “continue any suspension” and insert instead –

“ suspend the magistrate ”.

Page 36, line 24 – To delete the subclause designation “(9)” and insert instead –

“ (8) ”.

Page 36, line 24 – To delete “subclause (8)(b)” and insert instead –

“ subclause (7)(b)”.

Page 36, line 24 - To delete “continues any suspension of” and insert instead –

“ suspends a magistrate ”.

Page 36, line 26 - To delete “continued”.

APPENDIX 7
MAGISTRATES COURT (CIVIL PROCEEDINGS) BILL 2003
SUPPLEMENTARY NOTICE PAPER NO 261, ISSUE NO 2

APPENDIX 7
MAGISTRATES COURT (CIVIL PROCEEDINGS) BILL 2003
SUPPLEMENTARY NOTICE PAPER NO 261, ISSUE NO 2

WESTERN AUSTRALIA

LEGISLATIVE COUNCIL

AMENDMENTS AND SCHEDULES

Supplementary Notice Paper No. 261
Issue No. 2

WEDNESDAY, JUNE 30 2004

MAGISTRATES COURT (CIVIL PROCEEDINGS) BILL 2003 [261-2]

When in committee on the *Magistrates Court (Civil Proceedings) Bill 2003*:

Clause 30

The Minister for Housing and Works: To move -

1/30 Page 25, lines 25 and 26 - To delete the lines and insert instead -

“

- (3) The Court may give a party leave to be represented by an agent who is not a lawyer —

”

The Minister for Housing and Works: To move -

2/30 Page 26, lines 4 to 8 - To delete the lines and insert instead -

“

- (4) The Court may give a party leave to be represented by a lawyer —
- (a) in proceedings prescribed under subsection (3)(a);
 - (b) if all parties agree; or
 - (c) if the Court is satisfied that it is in the interests of justice for the party to be represented by a lawyer.

”

Clause 31

The Minister for Housing and Works: To move -

3/31 Page 27, lines 12 and 13 - To delete “the costs were incurred due to an unreasonable act or omission by the other party.” and insert instead -

“

- (a) because of the existence of exceptional circumstances an injustice would be done to the successful party if that party’s other costs were not ordered to be paid; or
- (b) the unsuccessful party’s claim or defence was wholly without merit.

”

APPENDIX 8
PROPOSED AMENDMENTS - CLAUSES 30 AND 31 OF THE MAGISTRATES
COURT (CIVIL PROCEEDINGS) BILL 2003

APPENDIX 8
PROPOSED AMENDMENTS - CLAUSES 30 AND 31 OF THE
MAGISTRATES COURT (CIVIL PROCEEDINGS) BILL 2003

30. Representation of parties

- (1) In this section —
“**agent**” means a lawyer or any other person.
- (2) Despite section 44(2), a party to a minor case is not entitled to be represented before the Court but —
 - (a) a party referred to in section 44(2)(b) or (c) may be represented by a person who may represent the party under paragraph (b) or (c) of section 44(2); and
 - (b) any party may be represented by an agent with the leave of the Court given under this section.
- (3) ~~Subject to subsection (4),~~ ~~†~~The Court may give a party leave to be represented by an agent who is not a lawyer —
 - (a) in proceedings, not being the trial of the case, if the proceedings are prescribed by the regulations; or
 - (b) in the trial of the case, if the Court considers that the party should be given leave so that the party is not unfairly disadvantaged.
- (4) The Court ~~must not~~ may give a party leave to be represented by a lawyer ~~unless~~ —
 - (a) in proceedings prescribed under subsection (3)(a);
 - (ab) if all parties agree; or
 - (bc) if the Court is satisfied that none of the other parties will be unfairly disadvantaged as a result it is in the interests of justice for the party to be represented by a lawyer.
- (5) If it appears to the Court that it should give leave for a party to be represented by an agent, the Court —
 - (a) if a particular agent is proposed for its approval, must satisfy itself that the proposed agent has sufficient knowledge of the issue in dispute and is vested with sufficient authority to bind the party; and
 - (b) may give leave subject to any reasonable conditions needed to ensure that none of the other parties will be unfairly disadvantaged as a result.
- (6) If the Court gives leave subject to conditions, the entitlement of a party to be represented by an agent is subject to compliance with those conditions.
- (7) The Court may revoke leave for a party to be represented by an agent if the agent does not conduct himself or herself in a proper manner when representing the party.
- (8) A contravention of this section in a case does not invalidate any order made, or the judgment, in the case.

- (9) Leave given under this section does not authorise an agent who is not a lawyer to claim, receive or recover, directly or indirectly, money or other remuneration for representing a party.

31. Costs

- (1) In this section —

“allowable costs” means —

- (a) the court fees and service fees paid by a successful party; and
- (b) the costs of enforcing a judgment.

- (2) A successful party to a minor case is entitled to an order under section 25(1) in relation to the party’s allowable costs but not in relation to the party’s other costs in the case.

- (3) Despite subsection (2), the Court may make an order under section 25(1) as to the payment of the party’s other costs by another party if it is satisfied that ~~the costs were incurred due to an unreasonable act or omission by the other party —~~

(a) because of the existence of exceptional circumstances an injustice would be done to the successful party if that party’s other costs were not ordered to be paid; or

(b) the unsuccessful party’s claim or defence was wholly without merit.

APPENDIX 9

**EXPLANATORY NOTE TO PROPOSED AMENDMENTS - CLAUSES 30 AND 31
OF THE MAGISTRATES COURT (CIVIL PROCEEDINGS) BILL 2003**

APPENDIX 9
EXPLANATORY NOTE TO PROPOSED AMENDMENTS - CLAUSES
30 AND 31 OF THE MAGISTRATES COURT (CIVIL
PROCEEDINGS) BILL 2003

EXPLANATORY NOTE

Magistrates Court (Civil Proceedings) Bill 2003

Objective of the minor cases procedure

The primary objective of the proposed minor cases procedure, as set out in clause 27(1) of the Bill, is for the Magistrates Court to bring the parties in dispute to a settlement acceptable to all parties. An informal court process will facilitate settlement.

Clause 30. Representation of parties

There are limitations placed on representation by lawyers in both the Small Claims Tribunal and the small debts jurisdiction of the Local Court. Section 32 of the *Small Claims Tribunal Act 1974* (WA) provides that parties before the Tribunal are to have carriage of their own cases, that is, no lawyers are allowed to be present. Subsection (3) provides that a party may have legal representation if all parties agree and the Tribunal considers that the other party is not unfairly disadvantaged thereby. The jurisdictional limit of the Tribunal is \$6,000.

A similar limitation exists in the small debts division of the Local Court. While there is no restriction on lawyers appearing in the general jurisdiction of the Local Court, section 106L of *Local Courts Act 1904* (WA) provides that there shall be no legal representation in the small debts division unless all parties agree and the Court considers that the other party is not unfairly disadvantaged thereby. The jurisdictional limit of the small debts division is \$3,000.

The Bill, as originally drafted, preserved the rules that apply in both existing courts. The key difference was that the jurisdictional limit was increased to \$7,500. Clause 30(4) of the Magistrates Court (Civil Proceedings) Bill 2003, as originally drafted, was similar to section 32 of the *Small Claims Tribunal Act 1974* (WA) in that legal representation in a minor case was only allowed if all parties agreed or the court is satisfied that none of the other parties will be unfairly disadvantaged as a result.

To ensure that the informal processes of the Small Claims Tribunal and the small debts division are preserved the Bill will continue to provide that there is no automatic right of representation in hearings. However, following consultation with the Law Society of Western Australia it is recommended that clause 30 be altered to provide that the court may allow a party to be represented if all parties agree or it is in the interests of justice for the party to be represented by a lawyer. This could include a situation where one party is represented by a "professional" officer or agent under clauses 44(2)(b) and (c).

Clause 31. Costs

Section 35 of the *Small Claims Tribunal Act 1974* (WA) provides that costs are not allowable in Tribunal matters except where the Tribunal is of the opinion that because of exceptional circumstances an injustice would be done if costs were not allowed. Section 106M of the *Local Courts Act 1904* (WA) makes similar provision in relation to the small debts division of the Local Court.

Clause 31 presently provides that only court and service fees and the costs of enforcing a judgment (the “allowable costs”) are allowable in the minor cases procedure. This is consistent with the intention of the minor cases procedure that parties should represent themselves.

As a result of consultation with the Law Society of Western Australia it is recommended that clause 31 of the Bill be altered to provide that the only costs that may be awarded are “allowable costs”, except where exceptional circumstances exist as in the present law or the court determines that there is no merit to the application. The words “exceptional circumstances” are adopted from the present law in the *Small Claims Tribunal Act 1974* (WA) and *Local Courts Act 1904* (WA).

The inclusion of the “merit” test is intended to thwart other parties who attempt to use the process to defer payment.

APPENDIX 10
COMPARATIVE TABLE - CLAUSE 30 OF THE MAGISTRATES COURT
(CIVIL PROCEEDINGS) BILL 2003

APPENDIX 10
COMPARATIVE TABLE - CLAUSE 30 OF THE MAGISTRATES
COURT (CIVIL PROCEEDINGS) BILL 2003

Current clause 30 - Representation by leave		
Type of proceedings	Representation by agent (not including a lawyer)	Representation by lawyer
Interim proceedings	If prescribed.	If prescribed AND <ul style="list-style-type: none"> • all parties agree; or • Court satisfied none of the other parties will be unfairly disadvantaged.
Trial	If the Court considers that the party should be given leave so that the party is not unfairly disadvantaged.	If the Court considers that the party should be given leave so that the party is not unfairly disadvantaged AND <ul style="list-style-type: none"> • all parties agree; or • Court satisfied none of the other parties will be unfairly disadvantaged.
Proposed amendments in Supplementary Notice Paper No 261, Issue No 2		
Type of proceedings	Representation by agent (not including a lawyer)	Representation by lawyer
Interim proceedings	If prescribed.	If prescribed.
Trial	If the Court considers that the party should be given leave so that the party is not unfairly disadvantaged.	<ul style="list-style-type: none"> • All parties agree; or • Court satisfied that it is in the interests of justice for the party to be represented by a lawyer.

APPENDIX 11
STATUTORY AMENDMENTS - CLAUSE 30 OF THE MAGISTRATES COURT
(CIVIL PROCEEDINGS) BILL 2003

APPENDIX 11
STATUTORY AMENDMENTS - CLAUSE 30 OF THE
MAGISTRATES COURT (CIVIL PROCEEDINGS) BILL 2003

Statutory amendments in relation to clause 30 of the Magistrates Court (Civil Proceedings) Bill 2003 to effect the changes in Committee Recommendation 7

Page 25, lines 25 and 26 - To delete the lines and insert instead –

“

- (3) The Court may give a party leave to be represented by an agent who is not a lawyer –

”.

Page 26, lines 4 to 8 – To delete the lines and insert instead –

“

- (4) Subject to subsection (5), the Court may give a party leave to be represented by a lawyer –
- (a) in proceedings prescribed under subsection (3)(a);
- (b) if all parties agree; or
- (c) if the Court is satisfied that it is in the interests of justice for the party to be represented by a lawyer.
- (5) The Court must not give a party leave to be represented by a lawyer in a consumer/trader claim unless –
- (a) all parties agree; or
- (b) the Court is satisfied that the parties, other than the party who is seeking leave to be represented by a lawyer, or any of them shall not be thereby unfairly disadvantaged

”.

APPENDIX 12
STATUTORY AMENDMENTS - CLAUSE 25 AND CLAUSE 31 OF THE
MAGISTRATES COURT (CIVIL PROCEEDINGS) BILL 2003

APPENDIX 12

STATUTORY AMENDMENTS - CLAUSE 25 AND CLAUSE 31 OF THE MAGISTRATES COURT (CIVIL PROCEEDINGS) BILL 2003

Statutory amendments in relation to clause 25 and clause 31 of the Magistrates Court (Civil Proceedings) Bill 2003 to effect the changes in Committee Recommendation 8

Clause 25

Page 21, after line 8 - To insert -

“

- (6) For the purposes of subsection (5), where judgment has been given under section 18 the allowable costs under section 31 will include the successful party's costs of the application for judgment.

”.

Clause 31

Page 27, lines 12 and 13 - To delete “the costs were incurred due to an unreasonable act or omission by the other party.” and insert instead -

“

—

- (a) because of the existence of exceptional circumstances an injustice would be done to the successful party if that party's other costs were not ordered to be paid; or
- (b) the unsuccessful party's claim or defence was wholly without merit.

”.

APPENDIX 13
COURTS LEGISLATION AMENDMENT AND REPEAL BILL 2003 -
PROPOSED AMENDMENTS

APPENDIX 13
COURTS LEGISLATION AMENDMENT AND REPEAL BILL 2003 -
PROPOSED AMENDMENTS

Courts Legislation Amendment and Repeal Bill 2003 — Draft amendments

Legislative Council

Courts Legislation Amendment and Repeal Bill 2003
(No. 263—2)

When in Committee on the *Courts Legislation Amendment and Repeal Bill 2003*:

Clause 146

The **Minister for Housing and Works**: To move —

Page 156, after line 33 — To insert —

“

- (3) In subsection (2), a reference to a writ of *feri facias* includes a reference to a warrant of execution issued out of a Local Court under the *Local Courts Act 1904*.

”

[Clerks: Renumbering of subsequent subclauses and changes to cross references in them will be required.]
