

15 March 2018

The Hon John Quigley MLA
Attorney General of Western Australia
Level 10, London House
216 St Georges Terrace
PERTH WA 6000

Dear Attorney General *John,*

MAGISTRATES COURT REPORT

As you may be aware, the Law Society of Western Australia's Courts Committee has been considering issues that affect the efficiency of the Magistrates Court's operations, and a detailed report has been now produced which includes a series of recommendations aimed at improving the efficiency of court processes for practitioners and the broader community. A copy has already been provided to the Chief Magistrate, and we have discussed with him the recommendations within it. By and large, the Chief Magistrate is comfortable with, and supportive of, the recommendations made within the report.

I **enclose** a copy of the report for your review. The Law Society would be grateful if consideration could be given to our recommendations in the submission.

If it would assist, representatives of the Law Society would be delighted to meet with you to discuss further. Otherwise, I look forward to hearing from you in relation to the recommendations made.

Yours sincerely



Hayley Cormann
President

cc: Chief Magistrate
Solicitor General

Magistrates Court Report March 2018

To

The Hon John Quigley MLA
Attorney General
Level 10, London House
216 St Georges Terrace
PERTH WA 6000

cc:

Chief Magistrate Heath
Chief Magistrate's Chambers
Magistrates Court of Western Australia
501 Hay Street
PERTH WA 6000

Law Society Contact

Mary Woodford
General Manager Advocacy
Direct line: 08 9324 8646
Email: mwoodford@lawsocietywa.asn.au

Date

Thursday, 15 March 2018

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Introduction

- 1) The Law Society of Western Australia (the Law Society) is the peak professional association for lawyers in Western Australia. Established in 1927, the Law Society is a not-for-profit association dedicated to the representation of its members and the enhancement of the legal profession through being a respected leader and advocate on law reform, access to justice and the rule of law.
- 2) The Law Society notes 10 years have passed since the various Local Courts and Courts of Petty Sessions were merged into a single Magistrates Court of Western Australia (the Court). Some relatively minor amendments to the civil procedures were introduced in a series in 2008, 2009, 2011, 2012 and 2013. In early 2015 it was felt there were a number of issues in the Court that were worthy of more detailed attention by the Law Society's Courts Committee and that it was an opportune time to review some 'bigger issues' facing the Court. It was resolved to form a sub-committee. This is the final report of the sub-committee, the report now having been reviewed by the full Courts Committee on 11 October 2017. The Courts Committee endorses the report. It is considered that the recommendations of the report (including those with a financial cost to Government) would enhance the efficiency of the Court's operations.
- 3) Several meetings of the sub-committee were held throughout 2015.
- 4) Membership of the sub-committee comprised:
 - a) Richard Graham and Edward Greaves (Co-convenors)
 - b) Rick Cullen
 - c) Deputy Chief Magistrate Elizabeth Woods
 - d) Kelly Niclair (Legal Aid WA)
 - e) Martyn Plummer (Commonwealth DPP)
- 5) Magistrate Marleen Boon also attended two meetings, and both Magistrates Woods and Boon provided invaluable assistance to the sub-committee. Valuable input was also obtained from Maureen Kavanagh from Legal Aid, and from Private criminal lawyer and Criminal Law Committee member, Mara Barone.
- 6) The report is a unanimous report of the non-judicial members of the sub-committee named in (4) above, and the content and recommendations of the report do not necessarily reflect their Honours' views.
- 7) It is worth briefly noting that the Law Society was previously involved in:
 - a) Expressing views about the 2004 amendments that led to the creation of the Magistrates Court of Western Australia (replacing the various Local Courts and Courts of Petty Sessions).
 - b) A 2009 review of the various Magistrates Court Acts, Regulations and Rules.
 - c) A 2012 survey of members which sought feedback from members of the Society about their interactions with the Court.
- 8) The sub-committee drew upon historical reports from the above. The 2012 survey was especially useful.
- 9) A threshold question for the sub-committee was whether it should focus on smaller (and more easily fixed) areas for reform, or whether it should also make what might be seen as more ambitious recommendations (in particular, recommendations that may have a cost to

government). The sub-committee resolved to address both areas, but to clearly identify in this report which issues did and did not have a cost to government.

- 10) The 2009 review went into a detailed review of the rules. The 2015 sub-committee felt that it was not its role to draft proposed amendments (as occurred in 2009). The Court has its own internal ad hoc Rules Committee.
- 11) There was one matter that the sub-committee considered which did not result in any recommendation. The sub-committee considered the idea of transferring the minor cases jurisdiction to the State Administrative Tribunal. After discussion the idea only had the support of one member of the sub-committee.
- 12) As a result of discussions in meetings of the Committee it is understood that the Court is in the process of undertaking an audit of its online forms to ensure that all forms that have been approved by the Chief Magistrate are available to the profession and the public on the Court's website. That audit was undertaken as a result of an anomaly identified with one form by a member of the sub-committee.

Recommendations with a cost to Government

- 13) First, we recommend that each Magistrate in the State have a dedicated JSO, just as Judges have dedicated associates. This would enable parties and the profession to communicate with the Court in a more efficient, timely and cost effective manner. Although there would plainly be some cost to government, because more staff would need to be recruited, it is anticipated the additional cost should not be that high, given each Magistrate already has a JSO each time they sit.
- 14) In the alternative to 13) above, the Perth Magistrates Court (PMC) civil division have a dedicated Coordinator, just as the START Court and Drug Court do. It is understood these roles are designated public service level 5. This role would assist the 2-3 Magistrates who sit in that division outside of court. Parties and the profession could contact that person in much the same way as they contact an associate in the superior courts. At present, in the civil jurisdiction, it is extremely difficult to get before a magistrate in the week or so prior to a trial, and the usual procedure is that the registry directs a form 23 application must first be filed, which applications are then typically listed 4-6 weeks after lodgment.
- 15) Second, we recommend an additional Magistrate be appointed to enable the Court to roster a Magistrate to sit at Northbridge in a dedicated arrest court each day. We understand that presently:
 - a) the Court room and related facilities are already in place and used only for Saturday, Sunday and Public holiday sittings, with the Court room otherwise not used on the other 5 days of the week.
 - b) People arrested in as far away as Northam and Narrogin (and certainly each of Fremantle, Midland, Armadale, Joondalup, Mandurah and Rockingham) are transported by Police to Northbridge where they are held overnight. The next day they are transported by Serco back to the Court nearest the place of arrest. They are then either remanded (usually to Hakea, in which case they are transported by Serco again) or granted bail.¹ These transportation procedures must come at a cost. There are

¹ Males are remanded in custody are held either at Hakea or Casuarina Prison. Females are held at Bandyup Women's Prison.

Serco's costs², as well as costs to Legal Aid and the Police prosecutors who deal with these matters at each Court. If a truck runs late or breaks down, there are further costs of the Court, the prosecution and defence lawyers. Savings in those areas could partially offset the cost of appointing a new Magistrate. To ascertain this, the Auditor-General could be asked to review these costs and opine on whether they could offset the cost of appointing an additional Magistrate.

- c) The Auditor-General could also be asked to review prisoner transport arrangements more generally in the Magistrates Court. There are likely to be other efficiencies identified.
- 16) Third, we recommend that, in Perth in both the civil and criminal jurisdictions, the Court have the ability to docket manage cases, ie allocate the trial Magistrate early and have the Magistrate case manage the matter to conclusion.
- a) This approach is used in the Federal and Supreme Courts to considerable positive effect. It minimises the incidence of interlocutory applications, with the capacity to bring those which are necessary to a head more quickly and cheaply, through the capacity to request (usually via E-mail to the Associate) a directions hearing. This approach also ensures greater focus on the overriding issues, and reduces cost and delay to the parties.
 - b) No doubt the bulk of matters in the Court do not need docket management. However, a handful of significant matters would benefit greatly. The Court's responsibilities have grown over the years, and cases that would benefit include:
 - i) Complex (including regulatory) prosecutions (for instance some environment and WorkSafe matters) that although summary in nature, can involve voluminous briefs and where conviction can result in cancellation of a licence.
 - ii) In the civil context, some matters that fall within the statutory jurisdiction under s 8 of the *Magistrates Court (Civil Proceedings) Act 2004* (ie some of the matters listed in rule 124 of the *Magistrates Court (Civil Proceedings) Rules 2005*).
 - iii) Some of the general procedure claims, involving claims in the \$50k - \$75k range.
 - c) If a docket system was introduced in Perth, it would also be necessary to institute a procedure where matters can be transferred from other locations to Perth, for the purpose of gaining entry to the docket managed system.
 - d) Finally, Magistrates sitting in the docket list would have an even greater need for dedicated JSOs, so that the parties can contact them directly.
- 17) Fourth, we recommend the PMC be resourced with an additional Magistrate (possibly part time) to sit in more intensive blocks each week to process committals. At present the committal list routinely runs over into other lists.³
- 18) Fifth, we recommend the Court's information technology (IT) arrangements be reviewed:
- a) At a broader level, the Integrated Court Management System (ICMS) was not fully enabled when it was rolled out. Several modules were proposed but not installed. For instance, ICMS has the ability to allow both the ODPP and legal practitioners online

² Serco's costs include staff at each metropolitan court location purely to manage persons in custody and undertake movement of persons in custody for court.

³ Presently there is a 9am committal mention list that is run every day. The list is allotted one hour, but frequently runs far over the allotted time slot.

access to matters in a similar fashion to the Federal Court. ICMS also has the ability for documents to be scanned in. Neither of these opportunities have been enabled, but would be supremely useful if available. In practice, documents (minutes of orders, letters from Doctors, and so on) get handed up to the Associate during busy lists. However, the current electronic files do not allow the Magistrates the ability to do anything with such documents.

- b) Court publication on its website of civil judgments and criminal judgments that deal with novel legal questions.
- 19) Sixth, PMC lacks sufficient interview rooms in the custody area. Typically, every morning, the available rooms are utilised as follows:
- a) Legal Aid uses one and sometimes two rooms.
 - b) The Aboriginal Legal Service of Western Australia uses one room.
 - c) The Prison Visiting Service uses one room.
 - d) This leaves one (and maybe two at the most) for private practitioners.
 - e) There is often a line of people waiting to use the interview rooms.

Recommendations with no cost to Government

- 20) The following six recommendations would require legislative amendment. The first three relate to costs for general procedure claims. Several bases for points (a) and (b) are advanced. First, these changes will remove the disincentive that parties presently have to be legally represented. The presence of unrepresented parties in the Court greatly increases the amount of time Magistrates must spend explaining processes. This causes delay to all who use the system and gives rise to an access to justice issue. Second, parties should have the choice to be legally represented if they wish and ought not be penalised for exercising that choice. Third it will incentivize some parties, for example, debtor defendants who have no genuine defence to settle.
- 21) The recommendations are as follows:
- a) First, where the claim as originally commenced is for less than \$10,000, the sub-committee recommends a claimant should ordinarily be able to recover legal costs for such claims.
 - b) Second, we recommend the Court have the full power to award costs as it sees fit - including the discretion in exceptional cases to award indemnity costs. The inability to make such an award of costs was confirmed in *Rodwell v Hutchinson* [2010] WASCA 197.
 - c) Third, we recommend that costs be expressly stated to be available on appeals in minor cases.
 - d) Fourth, we recommend s 5(e) of the *Magistrates Court (Civil Proceedings) Act 2004* be amended so that all cases that can be dealt with by the Building Commissioner, irrespective of whether jurisdiction has been invoked by the claimant, are excluded from the jurisdiction of the Magistrates Court.⁴

⁴ See *Instant Transportable Offices Pty Ltd v BGC Contracting Pty Ltd* [2012] WADC 99 at [67]-[69].
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- e) Fifth, we recommend s 7 of the *Magistrates Court (Civil Proceedings) Act 2004* be amended to allow the Court to deal with damages claims in the consumer / trader jurisdiction. The wording in s 6(1)(a)(i) may provide a suitable form of wording.
- f) Sixth, we recommend a legislative amendment to allow Magistrates to refer questions of law that arise in the criminal jurisdiction to a superior Court. It seems sensible that it be to a single judge of the Supreme Court (as that is where any appeal lies). We consider there presently to be an anomaly in this regard. At present:
 - i) s 46(1) *Criminal Procedure Act 2004* allows a District or Supreme Court judge to refer a question of law that arises in a prosecution to the Court of Appeal.
 - ii) Similarly, s 39(2) of the *Magistrates Court (Civil Proceedings) Act 2004* provides a means for the parties to have a complex issue (including a question of law) that arises in the civil jurisdiction to the District or Supreme Court.
 - iii) However, a complex question of law that arises in the Magistrates Court's criminal jurisdiction must be heard and determined by the Magistrate. The sub-committee is aware of at least one case where a Magistrate has raised the lack of this ability himself, indicating that if he had the power to refer a question he would have (*AFP v Dannoun* – charge PE3978/15).

22) The following further recommendations could be effected by amendment to the Rules:

- a) We recommend a rule be inserted in the *Magistrates Court (Civil Proceedings) Rules 2005* that mirrors s 13(2) of the *Magistrates Court (Civil Proceedings) Act 2004* and s 40 of the *Magistrates Court Act 2004*, namely that the overriding object of the rules is the just, efficient and economic determination of the ultimate issue/s. It sometimes appears to members of the profession that the current rules could be interpreted as an end in themselves, rather than a means to an end; and indeed that the Rules are sometimes seen as paramount (even to the exclusion of the objects of the Act). This proposed insertion of such a rule would reflect the approach of the Supreme Court which treats Order 1 rules 4A and 4B as paramount.
- b) We see scope for consideration of the abolition of the following form, which have the capacity to add disproportionate cost:
 - i) the listing conference memorandum;
 - ii) the statutory declaration required to amend a case statement; and
 - iii) affidavits of service of a notice of discontinuance.
- c) In addition, we recommend that, where the sole purpose of the first return of a form 23 interlocutory application is to program the application to a special appointment, the first return be conducted by a Registrar by telephone. This will reduce travel and waiting times for parties no longer being required to appear for these applications.
- d) The Court could consider adopting a practice of fixing costs on routine form 23 applications. The Supreme Court has been doing this for some time with success. It ensures parties do not lose track of the costs consequences of making interlocutory applications.
- e) We recommend there be a mechanism by which a party can apply to shorten the 14 day notice required in a witness summons.
- f) We recommend the Court move towards accepting all forms for lodgment online.

- g) We recommend that forms downloadable from the Court's website not be password protected, and should be able to be unlocked.
 - h) We recommend there be a costs allowance for informal discovery.
 - i) We recommend a claimant be allowed to file a Statement of Claim (SOC) in a general procedure claim at any time. At present, until the Registry has confirmation that an order has been made for the filing of a SOC, they will not accept it. There are cases where parties may wish to file a SOC early. Whilst it should not be expected they would recover that as a party/party cost, for instance if the defendant admits liability at the pre-trial conference, there is no policy reason that we can discern for the present practice of refusing to allow a SOC to be filed early.
- 23) The following are matters of practice that do not appear to require amendment to any rules:
- a) The sub-committee recommends the Attorney-General meet with the Chief Magistrate at least twice yearly if not quarterly. As the Magistrates Court is the court with which by far the greatest number of citizens have contact, the sub-committee considers this could be of immense benefit.
 - b) We recommend the Court better publicise the methods for contacting the Court (particularly by practitioners, but also the public as well).⁵ It is understood that various email addresses for PMC are being consolidated. It is not clear how that will lead to efficiencies, it may have the reverse effect. In any event practitioners need to know how to contact the Court. In the criminal jurisdiction there should be a clear system in place whereby defence counsel can contact the Court to obtain charge numbers (these requests are made daily because prosecution notices as served on an accused have not yet been filed and thus do not reveal the charge number). Of course if practitioners had direct access to ICMS themselves (as recommended above) they could obtain this information direct. That would save Court staff from having to respond to these requests.
 - c) The sub-committee notes the Court has already agreed to publish its standard timetable, listing what days of the week and times certain types of matters are typically heard. That will be a welcome development.
 - d) We recommend that at each civil listing conference, consideration be given to whether chronologies, written submissions and trial bundles should be lodged.
 - e) We recommend the availability of a set of basic guidelines to self-represented parties in relation to witness statements for civil matters, especially as to how the statement should be drafted.
 - f) We recommend that, in the criminal jurisdiction, steps be taken to increase the use of consent orders for committal hearings. This should include:
 - i) publicising that Legal Aid WA will pay a private practitioner the same amount for preparing a consent order as an attendance at Court; and
 - ii) being able to file a *notice of consent* up until 3pm the business day prior, including by email; and

⁵ Practitioners or staff supporting practitioners report phone waiting times of up to 45 minutes to speak with a staff member in the Magistrates Court at Perth. Further, emails are usually responded to within 2 - 3 days, but sometimes longer response times are experienced.

- iii) the Director of Public Prosecutions be lobbied and encouraged to deal with requests for adjournment earlier and for a contact person to be available and made known to the profession prior to briefs being assigned to file managers. Having the ODPP agree to a consent order late in the piece does not have the intended outcome of saving any time.
- g) We recommend that, in crime, consideration be given to amending the process for listing urgent form 6 interlocutory applications. For instance, in the context of an urgent application to vary bail: an accused might move house (for example, suddenly due to violent circumstances) and his or her lawyer applies to vary bail to note the new address, PMC typically list the application 5 days out, where as if the accused applies in person, it is usually listed the same day.
- h) A date prior to the listed date of criminal trials (call over dates for longer matters) would be useful to seek to resolve matters and avoid hearings; subject to the ability of defence lawyers to get a grant of aid for the call over. Prosecution authorities often have to expend considerable resources in preparation only to have matters fall over at the hearing.
- i) We recommend both Commonwealth and other miscellaneous criminal matters be committed from their own lists, not the general committal list. This would take some pressure off the overcrowded committal list at PMC.
- j) We recommend a consolidated practice direction could be prepared for crime, which could address some of the following areas:
 - i) Return of witness summonses. The present requirement of issue and service at least 14 days out of hearing is inconsistent with the practice of other WA jurisdictions, and is unnecessarily lengthy. If it is to remain the policy, we recommend it should form a Practice Direction with ability to abridge the time as occurs in other jurisdictions. Further, lawyers are often advised they are unable to access documents requested under summons in the absence of a hearing date. The approach to this varies between registries. Defence lawyers can be told they need a Form 6 for this.
 - ii) There are also variations between registries as to whether an affidavit in support of every Form 6 is required. It is the sub-committee's view that some applications by their nature do not require a supporting affidavit. The practice direction might state that generally an affidavit is not required, but list applications where they are required (or vice versa).
 - iii) In relation to PMC it should inform practitioners of the fact that trial allocation dates are used to list trials of two days or more, and that one day trials all go to court 38 on the morning of trial to be farmed out.
 - iv) It should expressly note state that an accused is entitled to a free copy of the prosecution notice, including before the first mention. Some registries attempt to recover a fee for these, and some registries will not provide the notice until after the first mention. This practice can impede the ability to take instructions and cause additional delays.
- k) We consider there may be capacity to increase the utilisation of Justices of the Peace in interim restraining order matters, and if so, maximum possible use should be made.

- l) The time for listing of interim Violence Restraining Orders applications is generally [4 weeks from filing?], with Midland particularly problematic. We recommend registries that do not have the capacity to list urgent matters could institute a practice of advising people they could file at Perth if their matter is urgent.

- m) We recommend a brief review to ascertain which the fields are printed when a prosecution notice is produced from ICMS. In practice, it does not always seem to reflect the Court record (ie what the Magistrate sees on the screen). This has been listed in this section (and not at (17) above) as it is both an urgent priority and a matter that should not require the Court to go back to the government for further funding. In particular:
 - i) There is no tracking of amendments made to charges; and
 - ii) The guilty / not-guilty endorsement is against the prosecution notice, not each individual charge.