

MAGISTRATES COURT BILL 2003

EXPLANATORY MEMORANDUM

This Bill is the centrepiece of a legislative package that reforms the lower courts in this State and implements recommendations of the Law Reform Commission (LRC). Other Bills included in the package are the Magistrates Courts (Civil Proceedings) Bill 2003, the Justices of the Peace Bill 2003, the Civil Judgments Enforcement Bill 2003 and the Courts Legislation Amendment and Repeal Bill 2003. Also included are the Oaths, Affidavits and Statutory Declarations Bill 2003 and the Oaths, Affidavits and Statutory Declarations (Consequential Amendments) Bill 2003.

The Western Australian court system operates at three levels. The Supreme Court, the District Court, and the Lower Courts. In contrast with their superior counterparts there are two distinct lower courts exercising separate civil and criminal jurisdictions. Local Courts, constituted under the *Local Courts Act 1904* (WA) and courts of petty sessions, constituted under the *Justices Act 1902* (WA), exercise minor civil and criminal jurisdictions respectively.

This fragmented structure of the lower courts creates confusion to the public, restrictions in operations and contributes to inconsistencies in practices. Furthermore the administrative powers of the Chief Magistrate are seen to be deficient and the procedures prescribed by the relevant statutes are, in many respects, outmoded and inefficient.

A 1985 Law Reform Commission review and a 1997 Court Services report both recommended that legislation should be enacted to merge the lower courts and the Small Claims Tribunal to form the Magistrates Court of Western Australia. The states of Queensland, Victoria, South Australia and New South Wales also have legislation setting up unified summary courts.

In September 1999, the Law Reform Commission released its Report No 92 "Review of the Criminal and Civil Justice System in Western Australia". Many of the recommendations in the that Report focus on the procedures of the lower courts and will contribute to improved case management thus minimising late adjournments and listing delays and simplifying process to enable greater community access to justice and more efficient use of resources.

This Bill is the vehicle to implement a range of Law Reform Commission recommendations and to set up a new court, the Magistrates Court of Western Australia, with the capacity to deal with both civil and criminal matters, and able to sit at various locations throughout the State. The Bill also provides for the appointment and conditions of service of Magistrates.

This Bill also makes provision for magistrates also holding appointments as magistrates of another State or Territory and vice versa. This is necessary to accommodate the Ngaanyatjarra, Yankunytjara, Pitjandjatara (NPY Lands) Justice Tri-Jurisdiction Initiative.

Part 1-Preliminary

This Part contains the title of the Act, the relevant commencement provisions and definitions of terms used within the Bill.

Clause 1. Short Title

Citation of the Act.

Clause 2. Commencement

Clause 2 makes provision for the commencement of the Act to be by proclamation, as the various Acts in the reform package, together with subsidiary legislation, will need to come into effect simultaneously.

Clause 3. Interpretation

Clause 3 defines the terms in the Bill.

Part 2-The Court

This Part establishes the new Court and sets out the functions of magistrates who are appointed under the Act. It also provides how the Court is to be constituted, provides for registries and for the Court sitting at various locations throughout the State.

Clause 4. Court established

This clause names the new court, provides it to be a court of record and to utilise seals.

This clause is fundamental to the nature and existence of the Court and is similar to existing provisions found in sections 5 to 7 of the *Local Courts Act 1904* (WA)

Clause 5. Magistrates, appointment of

Refers to Schedule 1 of the Bill.

Clause 6. Magistrates, functions of

Subclauses 1 and 4 provide that magistrates must carry out the functions and public duties required of them by Western Australian laws and in addition to the functions imposed by this Bill will also have to perform other judicial and administrative duties such as a Mining Warden, Children's Court magistrate, Family Court magistrate and visiting justice for prisons. It also enables a magistrate to be appointed to chair an enquiry without having to relinquish his or her magisterial appointment.

These subclauses are based on, but extend and clarify, existing provisions in sections 8 and 10 of the *Stipendiary Magistrates Act 1957* (WA) and are designed to remove any doubt as to the functions a magistrate is required to perform.

Subclause 2 gives a magistrate the authority to perform any function of a Registrar. This provision has been included to cater for unforeseen circumstances, particularly in the country, where a magistrate may be at a location without a court officer or Registrar and certain procedures are to be followed that are normally the responsibility of the registrar. If there is any degree of urgency the magistrate can perform those functions.

Subclause 3 is similar to section 34 of the *Justices Act 1902* (WA) but also makes provision for the holding of an office or appointment made under the law of another State which accommodates magistrates also holding appointments as magistrates of another State or territory and vice versa. This is necessary to accommodate the Ngaanyatjarra, Yankunytjara, Pitjandjatara (NPY Lands) Justice Tri-Jurisdiction Initiative.

Subclause 4 provides that the Governor can extend the protection provided by clause 37 to a magistrate whilst performing other authorised functions.

Clause 7. Constitution of the Court

Subclauses 1 to 3 provide that the Court is constituted by a magistrate and, in circumstances to be prescribed by regulations, by either 1 or 2 Justices of the Peace.

As far as magistrates are concerned these provisions are similar to section 33 of the *Justices Act 1902* (WA) and sections 8 and 9 of the *Local Courts Act 1904* (WA). Currently the *Justices Act 1902* (WA) provides that courts of petty sessions can be constituted by any 2 Justices. These subclauses recognise the uniform nature of the new court, especially the fact that it will be exercising a criminal and civil jurisdiction, and it is appropriate that the Bill should reflect that as a matter of practice Justices are currently restricted to granting bail, adjournments, dealing with minor traffic matters and Violence Restraining Orders. Regulations will continue the current practice with the exception that Justices will no longer be permitted to deal with Violence Restraining Orders.

Subclause 4 entertains an exception to the normal constitution of the Court if another written law requires the Court to be constituted in a certain way, excepting adjournments.

Subclause 5 provides that though the court is a single Court it can sit at a number of places at the same time. The Court can also sit simultaneously irrespective of the fact that it is being constituted by different persons.

Subclause 6 provides for adjournment to cover those situations where Justices cannot agree. When 2 or more Justices constitute the Court the decision is by the majority. If equally divided this subclause sets out the procedure to be adopted which is similar to that currently in force by section 30 of the *Justices Act 1902* (WA).

Clause 8. Where and when the Court operates

Subclauses 1 to 5 provide for the continuation of the established country and regional court sittings by accommodating the Court sitting at and having registries at various locations throughout the State.

Subclause 2 provides that the Chief Magistrate is able to decide the times at which the Court will sit at places where there is a registry.

Public notification of decisions made under the provisions of this clause is to be given in such a manner as the Chief Magistrate decides. Traditionally such notices have been placed in the Government Gazette. This practice is likely to continue, however

subclause 3 gives flexibility and allows for more appropriate options of advertising, such as community newspapers or on the Internet, given that the Gazette has a limited readership.

Despite the nomination of certain places to have registries and sittings of the Court, subclause 4 allows the Court to be convened at any place and time thus accommodating, for example, the circumstances when the Court is convened at a hospital to take the evidence of a patient, adjourns to the scene of a crime or convenes to a place more convenient to the parties. The Chief Magistrate must approve any exercise of the Court's jurisdiction outside the State.

These provisions are similar to sections 10, 10A and 38B of the *Local Courts Act 1904* (WA).

Subclause 5 allows the Court to deal with a case in chambers in circumstances to be prescribed by rules of court.

This is similar to section 11 of the *Local Courts Act 1904* (WA) and preserves the ability of the court to deal with pre-trial matters in an expeditious, informal environment.

Subclause 6 restricts acting magistrates of this State, who are appointed magistrates in South Australia and the Northern Territory, from exercising jurisdiction outside of the geographical area for which they may perform magisterial functions.

Part 3- Jurisdiction and powers

This Part sets out in general terms the jurisdiction and powers of the Court.

Division 1 - Jurisdiction

Clause 9. Jurisdiction conferred by statute

This clause provides that, unlike the Supreme Court, the Magistrates Court will not have any inherent powers and only has the jurisdiction conferred on it by this Bill and other written laws.

Clause 10 Civil jurisdiction

The Court's civil jurisdiction is found in the *Magistrates Courts (Civil Proceedings) Act 2003* (WA), which is a companion Bill to this Bill.

Clause 11 Criminal jurisdiction

Subclauses 1 and 2 set out the court's criminal jurisdiction, which enables the Court to deal with simple offences and indictable offences that are triable summarily and is unchanged from that provided for by the *Justices Act 1902* (WA). The subclauses also empower the Court to commit a person charged with an indictable offence for sentencing in the Supreme or District Courts.

Subclause 3 provides that reference must be made to the *Criminal Code (WA)*, *Criminal Procedure (Summary) Act 1902* (WA) and the *Children's Court of Western*

Australia Act 1988 (WA) and any other written law conferring jurisdiction on the Court. These Acts contain procedures and rules for bringing matters before the Court.

Subclause 4 provides that in exercising its criminal jurisdiction, the Magistrates Court is a court of summary jurisdiction.

Clause 12. Court may exercise all of its jurisdiction at one sitting.

This clause recognises that the Magistrates Court is a unified court and there is no need to adjourn and reconvene when hearing, for example, a civil matter followed by a criminal matter.

Clause 13 Court to decide factual and legal questions

This clause places an obligation upon the Court to decide all questions of law and fact that arise in the exercise of its jurisdiction.

Clause 14 Evidentiary rules applicable

This clause provides that the Magistrates Court will have the same rules of evidence that apply in the Supreme Court.

Clause 15 Contempts of the Court

This clause sets out the circumstances that constitute contempts of the Court.

Whilst the Court is actually sitting contempts occur if a person interrupts proceedings, misbehaves or insults the person/persons constituting the Court.

Within the building where a courtroom is located and its immediate environs contempts occur if a person insults or obstructs judicial officers on their way to a courtroom for the purpose of constituting the Court or leaving the courtroom after having constituted the Court.

Contempts also occur in the following situations:

- Ignoring the Court's summons to attend.
- Failing to produce documents or other evidentiary material when required to do so.
- Refusing to take an oath or affirmation
- Refusing to give evidence.
- Failing to comply with a lawful direction of the Court.
- Failing to comply with an order of the Court requiring the person to perform an act or to cease doing an act.

Clause 16 Contempts of court, powers to deal with

Subclause 1 defines the term "contempt".

Subclause 2 provides that if the contempt is committed in the face of the court the presiding court officer may have the alleged offender arrested or summoned to appear before the court. In other cases a magistrate may either issue a summons or an arrest warrant to have the alleged offender brought before the court.

Subclause 3 provides that rules of court may provide a procedure for dealing with persons allegedly guilty of contempt and for the matter to be dealt with without a formal charge and in a summary way.

The clause also provides a penalty of \$12,000 or imprisonment for 12 months or both but also provides that the court may amend or cancel any order imposing punishment if the offender apologises to the Court. The clause therefore recognises that a contempt may be committed in the heat of the moment and the Court should have the flexibility to amend its order when an apology is forthcoming.

The purpose of the clause is to provide for the efficient functioning of the Court and to preserve the status of the Court and is similar to section 63 of the *District Court of Western Australia Act 1969* (WA).

Division 2 - Powers

Clause 17 Abuse of process etc., power to reuse documents

This provision allows a registrar of the court to refuse to accept a document if it is an abuse of the courts process or is frivolous or vexatious. Any refusal by a registrar is reviewable by a magistrate who may give leave to lodge the document.

This is a useful power for a court and prevents wasting of resources. The provision is similar to existing powers found in Order 67 Rule 5 of the Rules of the Supreme Court 1971.

Clause 18 Oaths may be administered by registrars etc

This clause provides for oaths to be administered by registrars and other authorised officers of the Court.

The purpose of the clause is to continue the existing procedures whereby oaths to witnesses are generally administered by court officers.

Clause 19. Affidavits

This clause allows the use of affidavit evidence is similar to section 80 of the *Local Courts Act 1904* (WA).

Clause 20. Warrants etc, consequential on orders, who may issue

This clause clarifies and continues existing practice in that it allows a warrant or other consequential document to be issued by a magistrate or JP even if that magistrate or JP did not constitute the court when the order was made.

The purpose of the clause is to provide for the efficient functioning of the Court and is similar to section 27 of the *Justices Act 1902* (WA).

Clause 21 Summonses etc. may be cancelled

This clause gives the Court the power to cancel a summons or like process that has been issued by the Court on either its own initiative or on the application of an affected party. Particularly the clause provides for the cancellation of a witness

summons if the court is satisfied the person is unable to give evidence or to produce items that have been summoned to be produced.

The purpose of this clause is to provide for those circumstances where a process has been issued in error or where there is other good reason to cancel a process. One example is where a person charged with an offence has given a false name and a warrant subsequently issues against the person whose name has been used. Another example is where the Police may take out a Warrant but subsequently can't find the person named in the warrant or do not wish to proceed with the case.

Clause 22 Entry and inspection of property

This clause provides that the Court may enter any land or any structure on the land for the purpose of exercising the Court's jurisdiction.

This clause facilitates existing practices of the lower courts and, by way of example, enables the court to inspect scenes of accidents, inspect scenes of crime and to view exhibits or anything that has a bearing on a case that because of size or other reason cannot be physically brought to the Court.

Subclause 2 provides that the magistrate or persons constituting the Court do not need to make the inspection personally, but can authorise a registrar, a Court officer and other persons authorised by the court, such as an expert, to make the inspection.

Clause 23 Correction of accidental errors

Subclauses 1 and 2 provide that the Court can correct a judgment or order if it is found to contain accidental errors. The clause also provides that the court can exercise this power on either its own initiative or on the application of an affected party.

Subclause 3 provides that when exercising this power the court can be constituted differently the constitution of the court when the judgment or order that contains the error was made.

The purpose of the clause is to provide for the efficient functioning of the Court and is similar to Order 22 Rule 10 of the Rules of the Supreme Court 1971.

Part 4– Administration

This Part contains those provisions that are necessary for the court to function administratively. It provides for a judicial head of the Court with powers to assign duties to magistrates, the administrative staff that will support the court, administrative directions from the judicial head, delegations to registrars and appeals from registrar's decisions.

Clause 24 Chief Magistrate responsible

Subclauses 1 provides that the Chief Magistrate shall be the principal judicial officer of the Court. The purpose of subclause 1 is to provide judicial and administrative leadership to the Court, as is the case with the Supreme and District Courts.

Subclauses 2 and 3 provide that the Chief Magistrate may establish divisions of the Court to deal with specific types of cases such as the Drug Court. The provision gives flexibility and expeditious adaptability to be able to deal with future initiatives such as identifying offenders that would benefit from a regime designed to address particular forms of anti-social behaviour.

There is no formalised training programme for magistrates at present nor is there any form of induction programme or manual for newly appointed magistrates. There is also no continuous education programme to ensure that magistrates remain fully apprised of recent relevant decisions and developments. A degree of responsibility for training of magistrates currently falls to, or is taken up by, the Magistrates' Society. The Society currently hosts a conference annually at which guest speakers are invited to present papers on current relevant issues.

Subclause 4 provides for the Chief Magistrate to be responsible for supervising the professional development and training of magistrates, the principal registrar, registrars and deputy registrars. This is particularly necessary since registrars will, as is presently the case, constitute a court in relation to civil proceedings and, it is anticipated, will also now constitute the court in some preliminary proceedings relating to criminal matters.

The provision is similar to section 13B of the *Magistrates Court Act 1989* (Vic).

Clause 25 Chief Magistrate may assign duties to magistrates.

This clause empowers the Chief Magistrate to assign judicial and administrative duties to magistrates including a specification of where and when the duties are to be performed. The clause therefore facilitates the performance of the Court's business throughout the State as a magistrate can be directed to perform country service as required.

These are powers that the Chief Magistrate currently does not possess but given that the Chief Magistrate will, under this Bill, be the judicial head of the Court it is seen as appropriate that he/she has these powers to facilitate achieving consistency, efficiency and control over the operations of the court. In no way does this power diminish a magistrate's independence as a judicial officer as it does not apply to how a magistrate conducts a case or arrives at a decision.

A magistrate must comply with a direction given by the Chief Magistrate under this section or risk suspension from office for substandard performance under the provisions of Schedule 1 Clause 12. Although this may seem extreme it is pointless to give these powers to the Chief Magistrate if there is no sanction for non-compliance by a magistrate.

Magistrates are required to comply with directions of the Chief Magistrate but failure to do so does not constitute an offence.

In the case of Family Law Magistrates reference to the Chief Magistrate is to be taken to be reference to the Chief judge of the Family Court. This provision is necessary to cater for the situation of those registrars of the Family Court who also are appointed ma and are based at the Family Court.

Clause 26 Administrative staff

This clause provides for the appointment by the Minister of the necessary administrative staff that will facilitate the working of the Court. The Court will have a single Principal Registrar but sufficient Registrars will be appointed to ensure representation at each of the Court's registries. The clause also provides for other necessary administrative appointments including that of Deputy Registrars. The clause also provides for the continuation of the current practice of police officers being appointed to the Court's administrative staff as Deputy Registrars in remote areas. Unless restricted by the appointment instrument persons appointed to the administrative staff can exercise their functions at any place the Court sits.

To accommodate the Ngaanyatjarra, Yankunytjara, Pitjandjatara (NPY Lands) Justice Tri-Jurisdiction Initiative the clause provides that if the court sits outside the state the minister may appoint any person as a Registrar or Deputy Registrar at that place outside the State.

Clause 27 Administrative directions

This clause complements the provisions of clause 25 as, for the good management of the Court, it provides a wider power for the Chief Magistrate; that is, a power not confined to the allocation of magistrates to particular courts etc., but a power to make administrative directions designed to regulate the work environment in which magistrates work and to regulate the administrative (but not judicial) practices and procedures that magistrates are required to observe in carrying out their functions.

To ensure judicial independence is preserved the clause provides that administrative directions must not limit judicial independence.

The clause provides that magistrates must comply with the directions but contravention does not constitute an offence.

Clause 28 Court may delegate to registrars

The purpose of this clause is to allow the registrars of the Court to continue to perform a range of pre-trial and interlocutory functions they currently perform under the *Local Courts Act 1904* (WA) and the *Justices Act 1902* (WA). The clause provides that by rules of court the Court may delegate any of its powers to the registrars with the exceptions of:

- Determinations of guilt or innocence in the criminal jurisdiction and the power to commit for trial or sentence to another court.
- Entering final judgment on a case after trial in the civil jurisdiction.
- Findings of contempt.

To ensure the appropriate separation of functions, Police officers who are appointed registrars are limited to a power of adjournment only.

Clause 29 Appeal from decisions of registrars

This clause provides that a person who aggrieved by a decision of a registrar, that is made pursuant to delegated powers in the preceding clause, may appeal, within 21 days or such extended period a magistrate allows, to a magistrate who can hear the matter afresh.

The purpose of the clause is to provide an expedient method of dealing with internal appeals.

Part 5 Miscellaneous

This Part deals with various miscellaneous provisions that pertain to the efficient functioning of the court.

Clause 30 Court's duties in respect of self-represented parties

This clause places an obligation on the Court to advise self represented parties about rules relating to evidence that is likely to be rebutted.

The purpose of this clause is to implement Recommendation 229 of Report No 92 of the Law Reform Commission which states:

“There should be no change to the rule that if a witness does not have notice of an opponent's case, the nature of that case must be put to him or her during cross-examination. The rule is satisfied so long as notice of the case has previously been given to the party calling the witness.”

Clause 31 Judgments, content of

This clause specifies the factual and legal components that are to be included in written reasons for judgment.

The clause also requires that Court must also give reasons for judgment thus complying with the minimum requirements set by the Full Court regarding judgments.

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.

Clause 32 Effect of Court's summons etc

Subclauses 1 and 2 provides that warrants and summonses issued by the court are to have effect according to their tenor and, when directed to a member of the Western Australia Police Force, must be obeyed.

The purpose of the subclauses is to place an obligation upon police officers and to ensure that a procedure exists to serve the Court's processes and enforce the Court's orders.

Subclause 3 provides that a police officer who fails to obey any warrant, order or direction of the Court is to be dealt with under the provisions of section 23 of the *Police Act 1892* (WA).

Clause 33 Court’s records, access to

Subclause 1 defines the terms “reasons” and “electronic recording”.

Subclause 2 provides that the section is subject to any other written law that relates to the possession or publication of documents and other records of information or to the possession of any thing.

Subclause 3 details those records of the court that a party may inspect or obtain a copy of as of right.

Subclause 4 provides that the court may give leave to a person to listen to or view a tape recording of proceedings and obtain a copy of the recording. The subclause also provides for the court to give leave to inspect things tendered to the Court and to copy the same.

Subclause 5 details a list of parties and government entities such as the Commissioner of Police, the DPP and others who are entitled to access the courts records and documents received in sentencing remarks in criminal proceedings.

Subclause 6 provides for rules of court to provide for unconditional or conditional access to its records.

Subclauses 7 and 8 provide court records may be supplied in an electronic format and fees may be prescribed, by regulation, for obtaining, inspecting or listening to court records.

Clause 34 Evidentiary matters

This clause provides that, in absence of proof to the contrary, it is to be presumed that the constitution and seals of the Court and signatures of magistrates and registrars are lawful.

The clause also provides that evidence of proceedings or documents may be given by copies with the Court’s certification or certificates of the Court.

The purpose of the clause is to ensure that the Court does not have to justify any action that it takes. In other words, it has acted properly unless proved otherwise. The onus is on others to prove that the Court has acted improperly rather than the Court to justify its actions.

Clause 35 Prerogative writs not available against the court

This provision provides that the writs of mandamus, certiorari and prohibition are not available against a court officer as the procedures and remedies set out in clause 36 are in substitution of the prerogative writs.

Clause 36 Supreme Court’s powers to control Court

As the superior court of the State it is appropriate that the Supreme Court exercise a degree of supervision over the Magistrates Court. With respect to court officers (which is a defined term encompassing magistrates, registrars and a JP if constituting a court) an aggrieved person may apply, in accordance with the rules of the Supreme

Court, to the Supreme Court in circumstances where a court officer fails or refuses to do an act or make any order or direction, proposes to do an act or make any order or direction or has done an act or made any order or direction on the ground that it was made without jurisdiction or was an abuse of process or might have justified orders of mandamus, prohibition or certiorari.

In each of the abovementioned situations the clause provides that the Supreme Court can make the appropriate remedial and consequential orders and if it considers that in respect of the act or order or direction that an appeal lies may treat the application as if it were an appeal and deal with the matter accordingly.

If the Supreme Court orders a court officer to perform an act the court officer must obey the order.

The provision replaces similar provisions in section 39 of the *Justices Act 1902* (WA) and Part VII of the *Local Courts Act 1904* (WA).

Clause 37 Protection from personal liability for magistrates etc.

This clause provides protection to magistrates and other persons constituting the Court by providing they have the same immunity as a Judge of the Supreme Court has in the performance of his or her duties as a Judge.

It also provides protection from an action in tort for persons obeying the commands of a warrant of the court.

The clause also relieves the Crown of any liability in the circumstances mentioned above.

Clause 38 Practice Directions

This clause enables the Chief Magistrate to issue, amend or cancel practice directions that regulate the court's practice and procedure.

The purpose of the clause is to allow the judicial head of the Court to supplement statutory rules where required and to respond quickly to the need for direction. Practice directions must not be inconsistent with statute law or any statutory rules of court.

Providing for the Chief Magistrate to issue practice directions replicates existing powers of the Chief Justice with respect to the Supreme Court and the Chief Judge with respect to the District Court.

Clause 39 Rules of court, making

This clause provides for rules of court to be made by the Chief Magistrate and at least 3 other magistrates including the Deputy Chief Magistrate if appointed. Having four magistrates make the rules is considered a sufficient number to represent a cross section of opinion without involving all magistrates in the process. Although only four magistrates will be required to make the rules it is anticipated that a rules committee will be formed to examine the needs of the court and provide recommendations for proposed rules.

Subclause 2 provides a link between rules made under this clause and the rule making power found in the Magistrates Court (Civil Proceedings) Bill 2003 which particularises the extent of rule making power in the Court's civil jurisdiction.

The clause also provides for the rules to take effect after publication in the Government Gazette and for disallowance by either House of Parliament.

Providing for the Court to have a rule making power is in keeping with similar provisions that apply to the Supreme Court and the District Court.

Clause 40 Rules of court, content

This clause stipulates those matters upon which rules of court may be made and further provides that the rules must not be inconsistent with the Magistrates Court Acts, other acts that confer jurisdiction on the Court or regulate the procedure of the Court and regulations made under those Acts.

Clause 41 Regulations

This clause stipulates those matters upon which regulations may be made by the Governor.

Clause 42 Fees, regulations may prescribe etc.

This clause stipulates those matters upon which regulations may be made by the Governor, with respect to fees in the courts civil and criminal jurisdiction.

The clause also provides that Court fees are to be credited to the Consolidated Fund.

Schedule 1 – Provisions about magistrates

This Schedule contains provisions with respect to the appointment, conditions of service, resignation, suspension and removal from office of magistrates and replaces similar provisions found in the *Stipendiary Magistrates Act 1957 (WA)* which is to be repealed.

1. Interpretation

This clause defines the term “legal practitioner” by reference to the *Legal Practice Act 2003 (WA)*.

2. Qualifications for appointment

Subclause 1 defines the term “legal experience” to provide for a combination of service as a legal practitioner and a judicial officer such as a judge or magistrate.

Subclause 2 stipulates that an appointee must be under 65 years of age and had legal experience for at least 5 years.

A person must have certain qualifications to ensure they have the necessary experience and knowledge of the law before being appointed a magistrate. The justice system would lose credibility if it were otherwise. The age requirement is consistent with the current provisions for appointment and is based on an anticipated capacity to deal with complex matters that come before the Court.

This clause is similar to provisions contained in section 4 of the *Stipendiary Magistrates Act 1957* (WA).

3. Appointment

This clause provides that the Governor may appoint a magistrate by way of a commission (**Schedule 2**).

The clause also provides for the Governor to appoint as many magistrates as are needed to deal with the workload of the Court.

This clause is similar to provisions contained in section 4 of the *Stipendiary Magistrates Act 1957* (WA).

4. Oath and affirmation of office etc.

This clause provides that a magistrate must take an oath or affirmation of office (**Schedule 3**) prior to performing any function of a magistrate.

5. Conditions of service

Subclause 1 to 3 provide that the Governor can determine the conditions of service of a magistrate other than remuneration, which is determined under the *Salaries and Allowances Act 1975* (WA).

These subclauses are similar to provisions contained in section 7 of the *Stipendiary Magistrates Act 1957* (WA).

Subclauses 3 to 5 provide for the full time or part time appointment of magistrates and preclude magistrates engaging in other work for financial reward or working as a lawyer unless permitted to do so by the Governor. This provision reflects the changing nature of our community and the courts in that it allows the appointment of practising lawyers as committed and qualified part-time magistrates, thus doing away with the idea that a conflict of interest will be always created.

Subclause 6 provides for appointees from the Public Service being paid out for all accumulated leave entitlements upon their appointment. In other words appointees from the Public Sector should be paid out in respect of Long Service and annual leave entitlements and forego any accumulated sick leave credits. This subclause is designed to reflect the clear division between the Judiciary and the Public Service

Subclause 7 provides that membership of any State superannuation scheme is allowed to continue upon appointment and is similar to provisions contained in section 7 of the *Stipendiary Magistrates Act 1957* (WA).

6. Chief Magistrate and Deputy Chief Magistrates

This clause provides for the appointment of a Chief Magistrate and as many Deputy Chief Magistrates as are necessary for the good management of the Court.

7. Seniority

This clause provides a mechanism for determining the seniority of magistrates. Determination of seniority is necessary for the functioning of clause 8.

8. Acting Chief Magistrate

This clause sets up a mechanism to provide for the continuation of the functions of the Chief Magistrate in the event of the temporary absence of the Chief Magistrate. The mechanism provides for those functions to be performed by either an Acting Chief Magistrate or a Deputy Chief Magistrate or the most senior magistrate.

9. Acting magistrates

Subclause 1 defines the term “acting magistrate”.

To give some flexibility to the court, this clause provides for the appointment of magistrates for a fixed term to assist in circumstances where-

- there is a temporary shortage of magistrates;
- there is a temporary increase in workload;
- a magistrate is involved in a lengthy trial; or
- any other reason where a short term solution is required.

Provisions regarding the appointment are the same as for permanent appointees other than if the person had been a magistrate previously, then he or she can be over 65 years but cannot have reached 70 years of age.

Acting magistrates have been excluded from the provisions regarding seniority and cannot be appointed the Chief Magistrate or a Deputy Chief Magistrate. Clause 11 of this Schedule does not apply as the appointment is for a fixed term but otherwise clauses 6 and 12 to 17 of this schedule apply to acting magistrates.

10. Acting magistrates (SA and NT magistrates)

The Ngaanyatjarra, Yankunytjara, Pitjandjatara (NPY Lands) Justice Tri-Jurisdiction Initiative is in respect to traditional countries that are covered by the northern part of South Australia, the eastern part of Western Australia and the southern part of the Northern Territory. They form a cultural bloc that is not confined by state boundaries. The people of the NPY Lands are highly mobile and frequently travel between communities and hence across State/Territory boundaries for cultural and social reasons.

At the Standing Committee of Attorney’s General (SCAG) meeting on 7 August 2003, the Solicitor General for the Northern Territory presented a paper, on behalf of the Solicitor’s General from SA, WA and the NT, giving an overview of the proposals that have been developed to improve service delivery in the NPY Lands, including policing and courts, regardless of State and Territory borders.

Serious justice issues face the people of the NPY Lands including domestic violence, problems caused by alcohol abuse and young people sniffing petrol.

The presentation stated that the justice initiative can be substantially achieved by legislative change in the three jurisdictions to allow for the appointment of

magistrates, police, court officers and the like to exercise their powers in respect of offences wherever occurring.

SCAG endorsed the proposal and work is proceeding to effect its implementation.

This clause provides that magistrates from South Australia or the Northern Territory may be appointed as acting magistrates under this Act though they will be restricted to certain geographical areas.

With necessary modifications this clause is similar in most respects to the preceding clause.

11. Tenure of Office

Subclause 1 stipulates the circumstances when magistrates cease to hold office, which is upon reaching 65 years of age, upon resignation or upon removal from office.

This subclause is similar to provisions contained in section 5B of the *Stipendiary Magistrates Act 1957 (WA)*.

Subclause 2 provides that any unfinished cases must be completed before the ceasing of holding the office takes effect. This subclause is designed to enhance the efficient functioning of the Court and to eliminate the need for cases to be reheard upon either the retirement or resignation of a magistrate.

12. Resignation

This clause provides a procedure for resignation.

13. Suspension and termination due to illness

This clause provides for a procedure when the Minister is of a view that a magistrate is incapable of satisfactorily performing his or her official functions due to physical or mental incapacity.

- Firstly the Minister may suspend a magistrate from office on full pay.
- Secondly a committee of the Chief Justice, or a judge nominated by the Chief Justice, and 2 medical practitioners inquires into the matter and makes recommendations to the Governor.
- Thirdly, in accordance with the committee's recommendations, the Governor may either terminate the suspension or terminate the magistrate's appointment.

If the magistrates appointment is terminated it is deemed to be a retirement for superannuation purposes.

This clause is similar to provisions contained in section 5 of the *Stipendiary Magistrates Act 1957 (WA)* and is necessary for the good management of the Court.

14. Suspension from office due to substandard performance.

This clause sets out the grounds upon which a magistrate may be suspended:

- Incompetence or neglect in performing functions
- Misbehaviour or inappropriate conduct
- Ignored a direction of the Chief Magistrate that assigned judicial functions or administrative duties (**clause 25**)
- Ignored an administrative direction of the Chief Magistrate (**clause 27**)
- Failed to attend a medical committee inquiry when so directed by the Minister (**clause 13 of Schedule 1**).
- Bankruptcy.

This clause also provides for a procedure when the Minister is of a view that a proper reason exists for suspending a magistrate

- Firstly the Governor may, on the recommendation of the Minister, suspend a magistrate from office on full pay unless the Governor decides to the contrary.
- Secondly (if the Governor suspends the magistrate) the matter must be referred to the Chief Justice.
- Thirdly the Chief Justice, or a judge nominated by the Chief Justice, will inquire into the allegations and make recommendations, including recommendations relating to remuneration, to the Governor.
- Fourthly, in accordance with the Chief Justice's recommendations, the Governor may either terminate or continue the suspension make a further determination as to remuneration..

If the suspension is continued the provisions of **clause 15** take effect.

This clause is similar to provisions contained in section 5 of the *Stipendiary Magistrates Act 1957 (WA)* and is necessary for the good management of the Court.

15. Removal from office

This clause follows on from **clause 14** and provides for the Governor, upon the address of both Houses of Parliament, to terminate a magistrate's appointment

This clause is similar to provisions contained in section 5 of the *Stipendiary Magistrates Act 1957 (WA)*.

16 Service counts as practice as a lawyer

This clause addresses a deficiency for appointment to judicial offices, such as judges, by providing that service as a magistrate counts as service as a lawyer. To qualify for appointment as a magistrate, a person needs 5 years practice as a legal practitioner. To qualify for appointment as a judge, a person needs 8 years practice as a legal practitioner. This provision will enable magistrates of 3 or more years seniority to compete for positions in a higher court where they may have had only 5 years practice as a legal practitioner prior to their appointment as a magistrate.

17 Title and address

Magistrates are currently addressed as “Your Worship” in court and in relation to court proceedings, which is regarded as an antiquated form of address and creates confusion with the titles of other judicial officers who are referred to as “Your Honour”. The clause changes the title and address to “Your Honour” (and reference to “His Honour” or “Her Honour”) in court and in relation to court proceedings thus removing a source of confusion for members of the public and reflecting the judicial role undertaken by magistrates in courts of summary jurisdiction.

Schedule 2 Form of commission

This form is the commission of appointment (**Schedule 1 clause 2**)

Schedule 3. Oath and affirmation of Office

This Schedule prescribes the form of oath or affirmation to be taken by a magistrate upon appointment (**Schedule 1 clause 3**)