

## Report following consultation

# JURISDICTION AND CONSTITUTION OF THE LOWER COURTS OF THE NORTHERN TERRITORY AND RELATED MATTERS:

## DRAFT LOCAL COURT BILL 2014

22 September 2014

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FILE 20130788-04 PCD14 / 7244

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## 1 Courts’ Law Reform: Jurisdiction of the lower courts

### 1.1 Report on consultation

This is a report on consultation that occurred in respect of the draft Local Court Bill 2014 that was released for comment on and about 28 May 2014.

### 1.2 Introduction – nature of the reform project

In the Northern Territory, a number of Acts deal with the constitution and functions of the lower courts. The appointment of magistrates is regulated by the *Magistrates Act*. The general civil jurisdiction of magistrates is exercised pursuant to the *Local Court Act*, which was enacted as the result of a comprehensive review carried out in 1987-1988. The general criminal jurisdiction of the lower courts is exercised pursuant to the *Justices Act*.

The *Justices Act* commenced life as the *Justices Ordinance*, enacted in 1928, and was based substantially on the *Justices Act 1921* of South Australia. Since its commencement it has been amended 88 times. It is fragmented, archaic and in many respects does not reflect modern practice. Sometimes amendments have been ‘tacked on’ and have led to inconsistencies in terminology. At other times, significant amendments, such as reform of committals procedure in the *Justice Legislation Amendment (Committals Reform) Act 2010*, have had to be contorted to conform to existing terminology. Criminal jurisdiction and procedure in the lower courts have never had a completed comprehensive legislative overhaul that has occurred in the civil sphere.

There have from time to time been internal government reviews of the *Justices Act*. The most recent was in 2001 (the 2001 Review). This review recommended consolidation of the criminal and civil jurisdiction of magistrates, as well as a number of procedural amendments to the exercise of the criminal jurisdiction. Intervening legislative priorities meant that these recommendations have not been considered or implemented by Executive Government.

The current reform of the lower courts’ legislation is to proceed in two main stages.

The first stage involves reforms to the constitution and jurisdiction of Local Court and the Court of Summary Jurisdiction, including rationalisation regarding the appointment and functions of judicial, quasi-judicial and non-judicial officers and related matters involving the *Sentencing Act*, *Misuse of Drugs Act* and the *Criminal Code* regarding criminal law jurisdiction. This is the main purpose of this report and the related Local Court Bill 2014. The second major stage<sup>1</sup> will involve consolidation and reform of criminal procedure in both the Court of Summary Jurisdiction and the Supreme Court.

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<sup>1</sup> Noting, however, that amendments to the *Justices Act* and related legislation are expected to be introduced in the next few months concerning procedural matters in the Court of Summary Jurisdiction

To facilitate consultation and input into the development of the first stage of the reforms, a draft discussion Local Court Bill 2014 (the Draft Bill), has been prepared by the Department of Attorney-General and Justice in close consultation with both the former Chief Magistrate and the current Chief Magistrate.

### 1.3 Overview of report on consultation

This report on consultation replicates the information in the discussion paper in so far as it:

- sets out the aims of the first stage reforms;
- gives an overview of the Draft Bill;
- explains, sequentially, the provisions of the Draft Bill, including some of their legislative history and whether and if so how and why they differ from provisions in existing legislation; and
- outlines consequential amendments to other legislation proposed during this first stage of reform.

### 1.4 Submissions on the discussion paper

Letters seeking comments were sent to targeted stakeholders (as named in Schedule 1 of this report) and the Northern Territory Judiciary. The discussion paper and the draft Bill were published on the website of the Department of the Attorney-General and Justice on or about 28 May 2014.

The closing date for the making of comments was 20 July 2014.

### 1.5 Submissions received

Submissions or comments were received from:

- Director, Courts Administration Chris Cox;
- Retired Supreme Court Justice The Hon Dean Mildren AM RFD QC;
- Chief Justice The Hon Trevor Riley (including the provision of observations made by some of the judges (but not necessarily supported by all of them));
- North Australia Aboriginal Justice Agency and Central Australian Aboriginal Legal Aid Service (joint submission);
- Chief Magistrate John Lowndes; and
- The Law Society Northern Territory

## 2 Outcomes of the consultation

### 2.1 Summary of submissions received

The draft Local Court Bill 2014 consolidates the provisions of a number of Acts. Many of its provisions are re-enactments of current provisions whilst others represent new policy.

The main focus of the reform of the legislation is on the new policy. Some of the public consultation has dealt with re-enacted current provisions.

Table 1 (below) summarises the outcomes of consultation concerning the key points of difference between current legislation and the Local Court Bill 2014 and related issues.

Table 2 (below) summarises concerns with the re-enacted current provisions.

Table 3 (below) deals with technical points that were raised.

**Table 1 – consultation outcomes for new policy issues contained in the Bill or raised in the discussion paper**

	<b>Issue</b>	<b>Outcome of consultation</b>
1	Consolidation of the criminal and civil lower courts (clause 4, question 1).	No problems raised. Consensus that the consolidation should not include the Work Health Court.
2	Wider role of Justices of the Peace when exercising powers in regional and bush courts (as in Western Australia) (question 2).	No support for this suggestion.
3	Clarification of the circumstances in which another magistrate can take over a matter (clause 7).	No issues raised.
4	Increase in the civil jurisdiction (clause 11, question 4).	No consensus. Views ranged from retain current amount (\$100,000) or raise to either \$150,000 or \$250,000. No support for indexing the amount against CPI
5	Creation of Divisions by the Chief Magistrate (clause 20).	One learned commentator suggested that Divisions should be created by legislation or rules of court.
6	Reform of section 3 of the Criminal Code (classification of offences) so as to simplify understanding of the Local Court’s criminal jurisdiction (question 5)	Consensus that this reform is required subject to addressing any consequential issues.

	<b>Issue</b>	<b>Outcome of consultation</b>
7	Specific powers for the Chief Magistrate to agree with full time magistrates regarding part time work (clause 22).	No issues raised.
8	Provisions relating to access to records (clause 30)(question 6).	No issues raised.
9	Rationalisation of the principles and practices relating to accessing records including the power for regulations that provide fees for all kinds of access (clause 27).	No issues raised.
10	Power of registry officers to refuse to accept lodgement of a document on the basis that it is frivolous, vexatious or otherwise an abuse of the court’s process (clause 34).	No issues raised.
11	Duplication of the contempt provisions in the Local Court Bill 2014 for all of the lower courts and the Tribunals (question 7).	General support for consistency of the provisions.
12	Adequacy of the contempt clause (question 8, clause 40).	Suggestion that it is not adequate because it does not deal with contempt that is not in the face of the court.
13	Adequacy of provisions dealing with contempt (clause 41).	Suggestion that contempt proceedings should not be conducted by a magistrate who is the victim or, or witness to, the alleged contempt.
14	Increased maximum penalty for contempt (question 9, clause 42)..	Suggestion that the proposed increase has not been substantiated
15	Rulemaking to be a collective process (with Supreme Court rule making being the model) (question 10, clause 43).	Various suggestions ranging from leaving the role with the Chief Magistrate for making the rules to the rules to be made by a majority of magistrates (with the Chief Magistrate not necessarily being involved)
16	Re-naming of “magistrates” as “judges” (question 11).	No support other than from the Chief Magistrate.
17	If there a change of title is supported, should the NT take the lead (question 12).	Not relevant given the answer to the previous question. A number of commentators suggested that this kind of reform/change should be taken nationally. The Chief Magistrate noted that the lead has already been taken (by the Commonwealth).

	<b>Issue</b>	<b>Outcome of consultation</b>
18	Provision for part time magistrates (clause 49).	No issues raised.
19	Legislated process for dealing with complaints about judicial officers (question 13).	No support for a legislated process. Various suggestions made as to how to improve the current non-legislated process.
20	Raising the age limit for acting magistrates be raised from 70 years (question 14).	General support for this to occur.
21	Creation of position of “principal registrar” (clause 66).	No issues raised except for the observation that it will lead to some restructuring of the administrative provisions of court support services.
22	Proposal that the CEO might, by regulation, be authorised to set fees (clause 76(4)(b)).	Significant opposition to this proposal.
23	Amendment of section 122 of the <i>Sentencing Act</i> so that the maximum default fines penalty is 500 penalty units.	Generally supported but opposed by the indigenous legal aid services.
24	Removal of “summary penalties” from sections 186, 188A and 189A of the Criminal Code and section 22 of the <i>Misuse of Drugs Act</i> so that the relevant summary penalty is the one provided by section 122 of the <i>Sentencing Act</i> .	Generally supported (with some other offences subsequently identified).
25	Repeal of the <i>Records of Dispositions Act</i> (question 16).	General support except for the repeal of those provisions that deal with the status of records (particular section 16).
26	Section 213 of the Criminal Code amended so that certain offences (burglary) can be dealt with summarily (question 17).	Generally supported (with some other offences subsequently identified).



**Table 2– consultation outcomes for re-enactments of current provisions**

	<b>Issue</b>	<b>Outcome of consultation</b>
27	Retention of section 8 of the Local Court Act (clause 8 of the Local Court Bill 2014) (independence of the court) (clause 8, question 3).	Consensus that this section be retained
28	Chief Magistrate’s power to give directions regarding matters such as the place of work of other magistrates (clause 21(2)) (retention of current section 13A).	Two learned commentators noted various potential problems with the possibility of abuse of this power.
29	Consolidation of the civil contempt provisions in the Local Court Act but also applying them to criminal proceedings in the lower courts.	Generally supported.
30	Prohibition on removal of misbehaving defendants and their lawyers from the court (clause 24(4) (current sections 28 of the <i>Local Court Act</i> and 61(2) of the <i>Justices Act</i> ).	Suggestion that policy position in clause 24(4) be reversed so that it reflects section 361(2) of the Criminal Code rather than current section 28 of the <i>Local Court Act</i> and section 61(2) of the <i>Justices Act</i> .
31	Requirement that all process of the court be signed by magistrate or registrar and sealed by the court (clause 36).	Suggestion that sealing is sufficient (similar to the practice of the Supreme Court).
32	Acting Magistrates continue to be appointed by the Attorney-General (clause 55(1) for periods of up to three months at time (clause 55(3)(a) and (4)).	Only the Law Society Northern Territory opposed this provision.
33	Requirement for the appointment of a Judicial Registrar that they be a public sector employee (clause 63).	Question was asked as to why this requirement is necessary.
34	Rationalisation of provisions dealing with the appointment of bailiffs.	No comments were made.

**Table 3– technical issues**

	<b>Technical issue raised</b>	<b>Outcome of consultation.</b>
35	Ambiguity in clause 6 regarding the role of judicial registrars in small claims matters.	Clarify whether judicial registrars can make determinations of small claims matters.
36	Confusion in clause 12(4) as to the relationship between the civil jurisdictions of the Local and Supreme Courts.	Clarify the Courts share jurisdiction between \$0 and the jurisdictional limit of the Local Court (and similarly with any other jurisdiction of the Supreme Court).
37	Need for clause 43 (rules of court) to be amended so that the acting Chief Magistrate can perform the role of the Chief Magistrate in making the rules.	No amendment required. An Acting Chief Magistrate has all of the powers and functions of the Chief Magistrate.

## 2.2 Proposed changes to the Local Court Bill 2014 and other legislation

The changes to the discussion draft of Local Court Bill 2014 are as listed, in chronological order, in table 4.

**Table 4: Proposed changes to the Local Court Bill 2014 (draft as at May 2014)**

<b>Clause</b>	<b>Change</b>
6	Amend so as to remove ambiguity regarding the power of a judicial registrar to handle all matters under the small claims jurisdiction (but the need for this is subject to the possible transfer of the small claims jurisdiction to the Northern Territory Civil and Administrative Tribunal)
11	Amend so the civil jurisdiction maximum limit is raised from \$100,000 to \$250,000
12(4)	Amend so as to formally recognise that the Local Court and the Supreme Court share jurisdiction between \$0 and the jurisdictional upper limit of the Local Court (ie proposed as \$250,000) (and similarly with any other jurisdiction so that the conferral of jurisdiction (civil or criminal) on the Local Court does not limit the jurisdiction of the Supreme Court.
New clause (Part 3)	Include a clause providing for the court to have seals and for the use of a seal in each of the offices of the court and that the use of the must be in accordance with the Court Rules. Then the Rules could prescribe when, how and by whom it can be used.
20	Amend so that Divisions of the Local Court are, instead of being created by the Chief Magistrate (as proposed in the Bill), created by either legislation or rules of court
24(4)	Amend so there is a power to exclude disruptive parties and their lawyers (along the lines of section 361(2) of the Criminal Code)
36	Amend so that for documents other than warrants and orders it is sufficient

Clause	Change
	that the seal of the court is affixed (with no need for such documents to be signed by a judicial officer or registrar)
55(2)	Amend so that the upper age for a person to be appointed as an acting Magistrate is raised from 70 years to 75 years.
76(4)(b)	Remove (so that the regulations cannot provide circumstances in which fees may be set by the Chief Executive Officer of the agency responsible for the administration of the <i>Local Court Act</i> )

**Table 5: Proposed changes to other legislation**

Act	Section	Change
All legislation	Sundry	Replace, where context requires, all references to the word "crime" with the word "offence". References to "minor offence", "simple offence", "felony", "misdemeanour" "offence triable summarily" will need to be to "indictable offence" or "summary offence" as required
All legislation	Sundry	Review all generic reference to the word "crime" where it is used in a context that suggests a reference to an "offence" (eg " A person is not entitled to a licence if he or she such as been found guilty of a crime".
All legislation	Sundry	Review all references to "justice", "Justice", "justice of the peace" or "Justice of the Peace" Clarify if it is a reference to a JP persona designata or to a JP constituting the Court of Summary Jurisdiction If the former standardise the terminology to use "justice of the peace" If the latter change to "the Local Court".
All legislation	Sundry	Review all references to magistrates (including stipendiary, special and relieving) Clarify if it is a reference to a magistrate persona designata or to a magistrate constituting the Local Court or Court of Summary Jurisdiction If the former standardise the terminology to use "magistrate" (see new definition in <i>Interpretation Act</i> ) If the latter change to "the Local Court".
All legislation	Sundry	Review all references to "summary" or "summarily" in relation to an offence. eg: <ul style="list-style-type: none"> <li>offence/charge being tried/dealt with/heard summarily/in a summary manner</li> <li>summary conviction</li> </ul> Clarify meaning and standardise terminology to be consistent with Local Court Bill and change to s3 of Criminal Code.

Act	Section	Change
All legislation	Sundry	Update concepts and terminology to be consistent with new Local Court Act and to standardise terminology. For example: <ul style="list-style-type: none"> <li>• "Court of Summary Jurisdiction" → "Local Court"</li> <li>• clerk of the Court of Summary jurisdiction → a registrar</li> <li>• the registrar of the Local Court → a registrar</li> <li>• update references to repealed or renamed Acts</li> </ul> remove references to recognizances under Justices Act
<i>Biological Control Act</i>	45	Change from "crime" to "offence" (if current maximum period of imprisonment is maintained at 2 years)
Criminal Code	3	Amend so that all offences are classified as "indictable" or "summary" and remove the provision that deems all regulatory offences to be "summary offences"
<i>Australian Crime Commission (Northern Territory) Act</i>	3(5), 20(4), 23(9), 25 and 47	Remove the summary penalties (so the maximum penalty for these indictable offences prosecuted in the Local Court is the penalty set by section 122 of the <i>Sentencing Act</i> )
Criminal Code	186,188A and 189A	Remove the summary penalties (so the maximum penalty for these indictable offences prosecuted in the Local Court is the penalty set by section 122 of the <i>Sentencing Act</i> )
Criminal Code	213(5)	Amend so that these offences in these sections can be dealt with summarily (in accordance with section 121A(1)(b)(ii) and new (iii) of the <i>Justices Act</i> ).
Criminal Code	51(1) 64, 71(1),80, 82(1), 105, 106, 107, 108, 114, 121, 122, 123, 124, 125, 133, 140, 199, 200, 283 294(2)	Review maximum penalties (currently 2 years or less) and, if maintained at or below 2 years, classify each of these offences as a summary offence rather than as an indictable offence
<i>Interpretation Act</i>	Sundry	Insert or update definitions eg: "Chief Magistrate" "Local Court" "magistrate" "Justice" - delete definition (see comments below) "indictable offence"

Act	Section	Change
		"summary offence" Delete s38E
<i>Justices Act</i>	1	Rename as the <i>Local Court (Summary Procedure) Act</i>
<i>Justices Act</i>	Sundry	Repeal all sections whose provisions are to be covered by the Local Court Act 2014
<i>Local Court Act</i>	1	Rename as the <i>Local Court (Civil Procedure) Act</i>
<i>Local Court Act</i>	Sundry	Repeal all sections whose provisions are to be covered by the Local Court Act 2014
<i>Magistrates Act</i>		Repeal
<i>Misuse of Drugs Act</i>	7(1)(c), 9((2)(c)(ii) or (f) or s24(2)	Review those parts of these offences where the maximum penalty is (dependant on the facts) 2 years or less
<i>Misuse of Drugs Act</i>	22	Remove the summary penalty (so the maximum penalty for this indictable offence prosecuted in the Local Court is the penalty set by section 122 of the <i>Sentencing Act</i> )
<i>Records of Dispositions Act</i>	5-12, 17-19	Repeal all sections relating to the processes of making records of proceedings
<i>Volatile Substance Abuse Prevention Act</i>	55	Change from “crime” to “offence” (if current maximum period of imprisonment is maintained at 2 years)

**Other changes to the statute book are set out in schedule 2 at the end of this report**

### 3 Aims of first stage reforms

The first stage of the reforms aims to:

- consolidate the jurisdictions of the Local Court and the Court of Summary Jurisdiction;
- resolve inconsistencies between the jurisdictions, for example in the area of contempt;
- rationalise judicial, quasi-judicial and non-judicial offices within the main lower courts;
- reflect current practices and be sufficiently flexible to cater for future changes to practice;
- modernise and create consistency in terminology;

- address some specific issues regarding sentencing jurisdiction and offences that can be dealt with summarily; and
- raise additional issues for comment (title of lower court judicial officers and size of civil jurisdiction of the Local Court).

The consolidation of the Courts does not include the Youth Justice Court or the Work Health Court. Separately, consideration is also being given to the establishment of a Children and Family Matters Court.

## 4 Aims of Second stage reforms

The second stage reforms deal with the Criminal procedure provisions of the *Justices Act* and the Criminal Code.

## 5 Overview of the first stage reforms

The Draft Bill has been developed by removing those provisions in the *Local Court Act* and the *Justices Act* that relate to the jurisdiction of the courts, as opposed to their procedure and incorporating them (with such changes as are required for consistency, modernisation of terminology and removal of what had become obsolete) into the Draft Bill.

If, as is very likely, the reforms are staged so that the new Local Court Act is enacted before the new *Criminal Procedural Act*, it is proposed that the procedural provisions in the *Local Court Act* and the *Justices Act* remain in those statutes, which would need to be renamed as part of any such first stage reforms.

They would be called, respectively:

- the *Local Court (Civil Procedure) Act* and
- *Local Court (Summary Procedure) Act*.

Substantive reform of the *Local Court (Summary Procedure) Act* will be addressed in the second stages of these reforms.

As the Draft Bill will comprehensively cover the appointment, powers and functions of judicial, quasi-judicial and non-judicial officers, the provisions of the *Magistrates Act* are by and large also incorporated into the Draft Bill (Part 5) and the *Magistrates Act* would be repealed. The *Records of Dispositions Act* might also be repealed (see discussed later in this report).

Due to the changes in terminology and in referring to the new Local Court and its officers, there will need to be an extensive consequential Bill, to make mechanical amendments to many other statutes and legislative instruments in the Northern Territory statute book. This Bill will be developed over the next 6 months.

Some consequential amendments to the Criminal Code and the *Sentencing Act* are more significant and, although not part of the Draft Bill, are discussed in this report (at Part 9 of this report).

Regulations and rules made under the current legislation will also need to be re-made or retained by way of transitional provisions, although no changes to policy are anticipated.

The Draft Bill, the consequential Bill and all changes to subsidiary legislation will need to commence at the same time. It is anticipated that the Draft Bill and the consequential Bill will be introduced into Parliament by March 2015, with an expected commencement date no later than 1 July 2015.

This discussion also canvasses some issues not yet incorporated into the Draft Bill. These include issues such as:

- should magistrates be known as judges?; and
- should the civil jurisdiction of the Local Court be increased from \$100,000?.

## 6 Overview of the draft Local Court Bill 2014

The Draft Bill seeks to set out in a logical and comprehensive fashion, the jurisdiction of the new Local Court and the appointment, powers and functions of its various judicial and other officers. Much of the Bill does not involve any policy changes.

The main changes to the current provisions in the *Local Court Act*, the *Justices Act* and the *Magistrates Act* are:

- **Court records** (Part 4 Division 2). These provisions cover what records the Court must keep and how, by whom and to what extent the records can be accessed;
- **Contempt of Court** (Part 4 Division 4). There is considerable disparity between the contempt provisions in the *Local Court Act* and the *Justices Act* and in the penalties for contempt. These provisions have been completely rewritten;
- **Magistrates** (Part 5 and clauses 19 – 22). Part 5 incorporates the current provisions of the *Magistrates Act* with the exceptions that the criteria for eligibility have been changed to conform to the criteria in the other Australian jurisdictions and the provisions regarding the appointment of acting magistrates has been simplified and streamlined.

Clauses 19 – 22 seek to clarify the position of the Chief Magistrate as the head of the Local Court and ensure that the holder of that office has the requisite powers to ensure the efficient administration of the Court's business;

- **Other Court officers** (clause 6 and Part 6). These provisions give statutory recognition to and rationalise the positions of the Judicial Registrar, the Principal Registrar, Registrars and Bailiffs. Current legislation does not adequately provide for the position of Judicial Registrar and the positions and functions of non-judicial officers are confused and overlapping;
- **Judicial review.** Section 35 of the *Local Court Act* will be repealed and not re-enacted. This provision prohibits the Supreme Court from judicial review of decisions of the Local Court (Civil Jurisdiction). There is no similar prohibition regarding review for the Court of Summary Jurisdiction. Consolidation of the criminal and civil jurisdictions requires consistency and the preferable policy position is to extend the power of review to the civil jurisdiction rather than remove it regarding exercise of the criminal jurisdiction;
- **Clarification of Court powers.** Express power is given, for example, to refuse documents if there is an abuse of process (clause 34), cancel process (clause 36(3)), enter premises for the purpose of inspection (clause 38) and provide for greater flexibility regarding the making of Court judgments and orders and issuing of process (clauses 35 and 36). These provisions will remove uncertainty about the extent of powers and give statutory basis to some existing procedures.
- **Transitional provisions.** The Draft Bill also contains transitional provisions (Part 8). These are designed to ensure the smooth transition from the existing Local Court and Court of Summary Jurisdiction to the new Local Court. For example, all proceedings already commenced will continue uninterrupted, judgments and orders made and process issued will remain valid and all existing appointments, both judicial and other court officers, will continue. Clause 88 is intended to save the effect of various administrative actions (eg swearing in of officers) done under the repealed Acts so that they remain effective for the purposes of the new legislation.

## 7 Discussion of provisions of the Local Court Bill 2014

### 7.1 Part 1 of the Bill- Preliminary matters

The following paragraphs contain, for each clause of the Bill:

- a brief description of the clause;
- an outline of any submissions made concerning the clause;
- an assessment of whether to retain, remove or amend the clause

#### 1. Short title

This is the formal clause, which provides for the citation of the Bill. The Bill when passed may be cited as the *Local Court Act 2014*. As part of the consequential amendments to



the Bill, the current *Local Court Act* will be renamed the *Local Court (Civil Procedure) Act* and will retain the procedural provisions contained in the *Local Court Act*.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

2. Commencement

Clause 2 makes provision for the commencement of the Act to be notice published in the Gazette by the Administrator. A separate Act providing for consequential amendments and subordinate legislation (regulations and rules) will need to commence on the same date.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

3. Definitions

Clause 3 provides for various definitions used throughout the Bill and for cross-references to clauses in which various terms are defined. Most of the definitions relate to the various judicial and administrative officers of the Court, as one of the aims of the Bill is to clarify and rationalise these roles.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

7.2 **Part 2 of the Bill – Local Court**

4. Court established (*Local Court Act s.4. Justices Act 41A*)

This clause establishes the new court, which is a consolidation of the Local Court established by section 4 of the *Local Court Act* and the Court of Summary Jurisdiction established by section 41A of the *Justices Act*.

Clause 78 is the transitional provision that confirms the Court is a continuation of the Local Court and the Court of Summary Jurisdiction combined into one court.

See also clause 80 for transitional provisions concerning proceedings on foot when the Court is established.

The Bill does not provide for the incorporation of the Work Health Court into the Local Court. This reflects the view that the activity of the Work Health Court is sufficiently different so as to justify it continuing to be kept separate from the Local Court.

It is also not intended that the Youth Justice Court become a division of the Local Court (albeit this intention was not spelt out in the Discussion paper).

**Question 1: Do you agree with the assumption that there is no need to amend the *Work Health Administration Act* so that the Work Health Court is a division of the Local Court?**

#### **Submissions/comments**

The following submissions supported the view that the Work Health Court should not become a division of the Local Court:

Hon Dean Mildren,  
Hon Trevor Riley, and  
John Lowndes.

The Chief Magistrate stated that the incorporation of the Work Health Court as a Division of the Local Court is not supported for the following reasons:

- There was a recent comprehensive review of the Work Health jurisdiction of the Northern Territory, which resulted in the passage of a number of related pieces of legislation – namely the *Work Health Administration Act*, *Workers Rehabilitation and Compensation Act*, *Work Health and Safety (National Uniform Legislation) Act* and *Work Health and Safety (National Uniform Legislation) Implementation Act* and *accompanying Rules and Regulations*. That review accepted that the Work Health Court should remain a separate court from the Local Court.
- Although there are many similarities between the practices and procedures of the Work Health Court and the Local Court, which are reflected in both rules of court and practice directions, there are significant differences between the two courts to justify their separate existence. The Work Health Court is a specialist court exercising unlimited jurisdiction; but despite the breadth of its jurisdiction it is not bound by the rules of evidence. It is also a court that exercises a jurisdiction which is of a “beneficial” nature, with the power to make interim orders of compensation. The jurisdiction

exercised by the Work Health Court is sufficiently different to justify its existence as a “stand-alone” jurisdiction, separate from the Local Court.

The other commentators supported the reasoning on this issue set out in the Discussion paper.

Chris Cox stated that he was “not opposed” to the Work Health Court becoming a Division of the Local Court but did not consider that the work health court jurisdiction should be transferred to the Northern Territory Civil and Administrative Tribunal.

### **Proposed position following consultation**

Retain the Work Health Court as a separate court.

#### **5. Status of Court (Local Court Act s.4, 6 Justices Act 41A, WA Magistrates Court Act, s11(4))**

Subclause 5(1) provides that the Court is a court of record. In relation to the exercise of civil jurisdiction this is a continuation of the current position, where section 4 of the *Local Court Act* establishes the Local Court as a court of record. There is no equivalent provision in the *Justices Act* so the Court of Summary Jurisdiction, being a creature of statute, is not a court of record. The other current courts of record in the Northern Territory are the Supreme Court, the Youth Justice Court and the Work Health Court.

Characterisation as a court of record gives a court certain inherent powers, such as the power to punish contempt<sup>2</sup>. This sub-clause establishes equal status on the exercise of the Court’s civil and criminal jurisdictions and gives effect to one of the recommendations of the 2001 Review of the *Justices Act*.

Subclause 5(2) provides that the Court will have the same civil jurisdiction as is currently provided in section 6 of the *Local Court Act*.

Subclause 5(3) provides that the Court will exercise its criminal jurisdiction summarily, as the Court of Summary Jurisdiction currently does. It replaces section 41A of the *Justices Act* and is based on that section and on section 11(4) of the *Magistrates Court Act 2004* (WA).

### **Submissions/comments**

None.

### **Proposed position following consultation**

Retain the current clause of the draft Bill.

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<sup>2</sup> See section 8(1) of the *Criminal Code Act* which provides that nothing in the Criminal Code affects the authority of a court of records to punish a person summarily for the offence commonly known as “*Contempt of Court*”

6. Constitution of the Court (Local Court Act s.5(1), Local Court Rules r4.01, Justices Act 43, WA Magistrates Court Act s.7)

This clause provides that in constituting the Court, the default position is that it is constituted by a magistrate. This reflects current practice and the position in the other Australian jurisdictions.

In relation to civil proceedings, subclauses 6(2) and (3) set out the judicial powers that can be exercised by a judicial registrar.

When the *Local Court Act* was enacted in 1989, the position of Judicial Registrar did not exist. Some acknowledgement of the creation of the position was made through amendment, in the *Statute Law Revision Act 1995*, to the definition of Registrar (section 3 of the *Local Court Act*) and to section 9 of the *Local Court Act*, which provides for the appointment of Registrars, including Judicial Registrars.

The power of Judicial Registrars to exercise judicial functions is left under the current law to be provided for in Rule 4.01 of the Local Court Rules and Rule 1.09 of the Small Claims Rules. As a matter of policy, it is preferable that decisions about the exercise of a court's jurisdiction should be made by Parliament or the Administrator acting on the advice of Executive Council, rather than being determined by the court itself. Further, there is inconsistency between the Local Court Rules and the Small Claims Rules regarding the exercise of jurisdiction by Judicial Registrars. Subclauses 6(2) and (3) resolve that inconsistency and make proper provision for the main judicial functions of Judicial Registrars.

Further provisions regarding the appointment, powers and functions, are contained in clauses 64 – 65 of the Bill. Protection from personal liability of judicial registrars would be covered by section 4 of the *Courts and Administrative Tribunals (Immunities) Act 2008*.

In relation to criminal proceedings, the provisions in the *Justices Act* regarding the judicial powers of Justices of the Peace (JPs) are complex and do not reflect current practice.

A similar issue arose in Western Australia when the jurisdictions of the Local Court and the Court of Petty Sessions were consolidated in the *Magistrates Court Act 2004* (WA). The WA approach was to provide that the circumstances in which either one JP or two or more JPs could constitute the court would be covered by regulation (unless prescribed by another written law). The Magistrates Court Regulations 2005 (WA) set out in detail the circumstances in which JPs can constitute the court.

In Western Australia a distinction is drawn between the powers of JPs in country courts and in metropolitan courts. Consideration could be given to making such a distinction in the Northern Territory. In any event, the use of regulations to prescribe the judicial powers of JPs allows for greater flexibility and attention to detail than would be feasible in the Bill.

In addition, a 'justice' under the *Justices Act* includes not only JPs appointed to that office under section 5 of the *Justices of the Peace Act*, but also 'ex officio' JPs, who hold that office by virtue of holding another office. These persons include the Supreme Court Judges, the magistrates and the Registrars of the Local Court. The definition on JP in clause 3 of the Bill clarifies that only JPs appointed under section 5 of the *Justices of the Peace Act* are JPs for the purpose of the Bill.

**Question 2: Should consideration be given to making a distinction in the roles of Justices of the Peace when exercising their powers in regional and bush courts and to the courts in Darwin or Alice Springs?**

### **Submissions/comments**

John Lowndes suggested that the question is redundant as the constitution of the Court by two or more JPs or by one JP (section 6 of the Local Court Bill) is not supported for the reasons provided during the formative stages of the legislative reform process.

No other comments were received on this issue raised in question 2.

### **Other issue with clause 6**

Hon Dean Mildren suggested that there is an inconsistency between clause 6(2)(a) (judicial registrar may constitute the court for the purpose of dealing with a small claims matter) and clause 6(3)(b) (court constituted by a judicial registrar cannot hear and determine a claim). Not sure if the proposal is to allow judicial registrars to hear and determine small claims or not. He suggested that one possible outcome would be to allow judicial registrars to hear and determine small claims by consent of the parties with a right of appeal to the Supreme Court on a question of law only, or, alternatively, appeals from the new court should go to the Supreme Court by way of rehearing, i.e., the appeal can be on a question of fact or law or both with a power to admit "fresh" evidence or even "new" evidence if the justice of the case requires it.

These observations about inconsistency appear to be correct.

### **Proposed position following consultation**

Amend clause 6 so that it is clear that a judicial registrar can hear and determine small claims matters. This is said noting that, as a separate reform, consideration is being given to amending the *Small Claims Act* so that the current jurisdiction of the Local Court is transferred to the Northern Territory Civil and Administrative Tribunal.

Otherwise retain the current clause of the draft Bill.

### **7. Persons who constitute the Court (Justices Act s.45)**

This clause deals with the extent to which different judicial officers can handle various aspects of a matter that is before the court,

This clause addresses problems identified in the *Justices Act* regarding when a magistrate becomes 'seized' of a matter. It spells out that as a general rule, until the taking of evidence commences, the court need not be constituted by the same judicial officer.

However:

- for pleas of guilty, a different magistrate from the one who heard the plea may impose the penalty; and
- a new judicial officer may take over if the original judicial officer is unable to continue after the taking of evidence has commenced. Clause 7(5) defines what is meant by "**unable to continue**". It includes facts such as death, vacation of office or unreasonable delays due to illness or related causes.

### **Submissions/comments**

None.

### **Proposed position following consultation**

Retain the current clause of the draft Bill.

#### **8. Independence of court (Local Court Act s.8)**

This clause is based on section 8 of the *Local Court Act*. It might be considered unnecessary noting that the exercise of judicial function is independent and not subject to external influence. Although there is no formal separation of powers in Australia at state or territory level, this clause embraces the convention of such separation. It is noted that there is no similar provision in the *Supreme Court Act* or in the legislation establishing the lower courts in any of the other Australian jurisdictions. It is the kind of provision that is common in legislation establishing tribunals or independent statutory offices (for example sections 12 and 146 of the *Ombudsman Act*, section 13 of the *Health and Community Services Complaints Act*, section 41 of the *Public Interest Disclosure Act*).

Arguably, it is not necessary for the purposes of this legislation. It is likely that the clause will be deleted by the time that this Bill is introduced into Parliament.

**Question 3: Is there any need for clause 8 (dealing with the 'independence of the court')?**

### **Submissions/comments**

The retention of clause 8 was supported by:

Hon Dean Mildren,  
Hon Trevor Riley,  
John Lowndes, and  
Chris Cox.

The Chief Magistrate stated that clause 8 (section 8 of the *Local Court Act*) should be retained as it is a statutory recognition of the independence of lower courts in circumstances where there is no constitutional or formal separation of powers at the State or Territory level in Australia. Without such formal recognition the maintenance of the independence of lower courts depends upon faithful adherence to a convention of such separation. The separation of powers is contentious at the State and Territory level - and this particularly the case at the lower level of the judiciary.

Other commentators generally appeared to accept that the clause may not be legally necessary but noted that it puts beyond question the fact that Magistrates are not subject to the direction or control of any person whilst exercising judicial functions.

#### **Proposed position following consultation**

Retain the current clause of the draft Bill and the current section of the *Local Court Act*.

### **7.3 Part 3 of the Bill – Jurisdiction of the Court**

#### **Division 1 of Part 3 – Jurisdiction generally**

This Part sets out the jurisdiction, civil and criminal, and powers of the Court.

#### **9. Jurisdiction of the Court (WA Magistrates Court Act s9 and 10)**

This clause is introductory to Divisions 2 and 3 of this Part, which detail the civil and criminal jurisdictions of the Court. As the Court is a statutory creation, its jurisdiction is confined to what is set out in Divisions 2 and 3 of Part 3 (as well as what might be contained in other legislation).

#### **Submissions/comments**

None.

#### **Proposed position following consultation**

Retain the current clause of the draft Bill.

#### **10. Court may exercise all jurisdiction at same time (WA Magistrates Court Act s.12)**

This clause is based on section 12 of the *Magistrates Court Act 2004* (WA).

Recognising the consolidation of the civil and criminal jurisdictions, it provides that the Court does not have to adjourn and reconvene when exercising different aspects of its jurisdiction.

#### **Submissions/comments**

None.

#### **Proposed position following consultation**

Retain the current clause of the draft Bill.

## Division 2 of Part 3 – Civil jurisdiction

### 11. Civil jurisdiction – jurisdictional limit (Local Court Act s.3)

This clause is a definitional section, defining **jurisdictional limit** for the exercise of the Court’s civil jurisdiction. It is the same definition (and same limit of \$100 000) as is currently in section 3 of the *Local Court Act*.

**Table 6: The jurisdictional monetary limits for Australian state/territory lower courts**

Jurisdiction	Local Court equivalent	Intermediate court
Australian Capital Territory	\$250 000 <sup>3</sup>	No intermediate court
New South Wales	\$100 000 <sup>4</sup>	\$750 000 <sup>5</sup>
Northern Territory	\$100 000	No intermediate court
Queensland	\$150 000 <sup>6</sup>	\$750 000 <sup>7</sup>
South Australia	\$100 000 <sup>8</sup>	No limit
Tasmania	\$50 000 <sup>9</sup>	No intermediate court
Victoria	\$100 000 <sup>10</sup>	No limit
Western Australia	\$75 000 <sup>11</sup>	\$750 000 <sup>12</sup>

The current NT level was set on 1 June 1998. In 1998 this was Australia’s largest Magistrates’ Courts civil jurisdiction. A number of other jurisdictions have now greatly increased the lower court’s civil jurisdiction. The ACT has given its magistrates a civil jurisdiction of up to \$250,000. Queensland now has a civil jurisdiction of up to \$150,000. Three states share the \$100,000 civil jurisdictional limit for Magistrates’ Courts with two states having lower limit. No other jurisdiction sets the limit by way of subordinate legislation.

The Northern Territory has no intermediate Court such as the District or County Courts which exist in the various States. This means that where the NT Local Court’s jurisdiction stops at the \$100,000 limit NT Supreme Court’s jurisdiction starts at \$100,001. The Supreme Courts in the States have civil jurisdictions which usually start at a much higher figure than \$100,001.

<sup>3</sup> *Magistrates Court Act 1930*, s.257

<sup>4</sup> *Local Court Act 2007*, s.29

<sup>5</sup> *District Court Act 1973*, s.3 (definition of ‘jurisdictional limit’)

<sup>6</sup> *Magistrate Courts Act 1921*

<sup>7</sup> *District Court of Queensland Act 1967*

<sup>8</sup> *Magistrate Courts Act 1991*

<sup>9</sup> *Magistrate Courts (Civil Division) Act 1992*

<sup>10</sup> *Magistrate Courts’ Act 1989*

<sup>11</sup> *Magistrate Courts (Civil Proceedings) Act 2004*

<sup>12</sup> *District Court of Western Australia Act 1969*



The real value of \$100,000 as set in 1998 has decreased. Australian Bureau of Statistics figures show that average weekly earnings from 1998 to 2011 increased by 75.4% (see *NT Worksafe* bulletins published annually providing the average weekly earnings figures in each year), so that \$100,000 in 1998 was the equivalent of \$175,400 in 2011. If CPI Darwin is used the value would be \$150,000 as at the end of 2013.

To bring it up to date and then stay ahead of the inevitable ongoing inflation for some years into the future it may be desirable to increase the NT jurisdictional limit even further, to say \$250,000.

**Question 4: Do you consider that clause 11 should:**

- (a) retain the current jurisdiction limit for the Local Court (\$100,000); or
- (b) have a new jurisdictional limit of \$150,000 or \$250,000; or
- (c) have a jurisdictional limit that may be increased by way of regulation (either discretionary or based on an automatic CPI based review<sup>13</sup>).

#### **Submissions/comments**

The Hon Dean Mildren supported the level as being \$250,000 noting that not many matters under \$250,000 are actually litigated in the Supreme Court (mainly relating to debts) and that the costs of Supreme Court litigation would make it impractical.

John Lowndes supported the increase to \$250,000 for the following reasons:

- since the \$100,000 jurisdictional limit was set in June 1998 – some 16 years ago – the value of that limit, according to the Darwin CPI would translate to \$150,000 as at the end of 2013;
- in order to stay ahead of the inevitable ongoing inflation for some years into the future it is desirable to increase the jurisdictional limit to \$250,000;
- a jurisdictional limit of \$250,000 is not unrealistic because in recent times the civil jurisdictional limit of the Australian Capital Territory was increased to that amount.
- there are striking similarities between the Northern Territory Local Court and the equivalent of the Magistrates Court of the ACT as both jurisdictions have no intermediate court – that is either a District or County Court;
- other intermediate courts, as in New South Wales, Queensland and Western Australia, have a civil jurisdictional limit of \$750,000, which is three times the proposed jurisdictional limit of \$250,000; and

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<sup>13</sup> Compare the *Penalty Units Act* and the *Revenue Units Act* which both have mandated reviews and procedures for CPI based increases for penalty units (for fines) and revenue units (for government fees).

- although a claim in the sum of \$250,000 is very significant, claims of this magnitude do not necessarily involve complex questions of law that are best determined by a superior court of law. The experience of the Local Court is that it is not uncommon for very difficult questions of law to arise well within the current jurisdictional limit of \$100,000. Indeed, such complex matters can arise in the small claims jurisdiction, where very small amounts of money are being claimed. The Local Court is competent to hear and determine claims up to the sum of \$250,000, involving complex questions of fact and law. Bearing in mind that intermediate courts in other jurisdictions are entrusted with hearing and determining claims up to \$750,000, and the Local Court is a surrogate intermediate court, there can be no logical objection to the Local Court exercising a civil jurisdiction which is one third of its interstate counterparts.

Increasing civil jurisdiction to \$150,000 was supported by the Hon Trevor Riley who noted that this figure either equals or is a little greater than in most other jurisdictions. The Chief Justice suggested that \$250,000 is too high given the significance of matters of that magnitude to the parties.

The possible option concerning indexation was opposed by the Hon Dean Mildren because “forever changing” makes it difficult to know what is the jurisdiction – jurisdictional limits are important and should be clearly stated.

Any increase was opposed by North Australia Aboriginal Justice Agency, Central Australian Aboriginal Legal Aid Service and Law Society Northern Territory.

North Australia Aboriginal Justice Agency and Central Australian Aboriginal Legal Aid Service opposed the increase to \$250,000 on the basis that it “would bring the Northern Territory out of step with other jurisdictions in Australia that do not have an intermediate court. It should be noted that the Northern Territory is a much busier jurisdiction than the ACT. We consider that the jurisdictional limit should remain at \$100,000.”

Law Society Northern Territory suggested that any increase would put the Northern Territory “out of step with other jurisdictions.” It went on to suggest that increasing the jurisdictional limit would increase the already “overworked workload” of the court to the detriment of court users. The Law Society Northern Territory also noted:

- court users need to be assured that the Local Court can provide prompt and effective justice in relation to substantial and controversial claims
- users, it states, have “commented that it is the procedures of the Local Court that result in costs being incurred but litigants, costs which are out of proportion to the subject matter of the dispute”
- more evidence is required for the purpose of justifying any increase of jurisdiction.

### **Proposed position following consultation**

The Northern Territory led the way in increasing the jurisdiction to \$100,000. Noting, in particular, the point made by the Hon Dean Mildren regarding the fact that civil matters in the range \$100,001 - \$250,000 cannot, practically, speaking be litigated in the Supreme Court. It seems that giving this jurisdiction to the Local Court represents some hope of improving access to justice for this class of litigants.

The quantity of litigation is not such as to adversely affect the jurisdiction of the Local Court. This is particularly so at present given the transfer of various administrative appeals and decision making over the next few years to the Northern Territory Civil and Administrative Tribunal.

To the extent that it may be correct that the Supreme Court has better processes for dealing with civil litigation this is an issue that should be addressed for all local court litigation.

In respect of comparisons to other jurisdictions the one that is most similar to the Northern Territory is the Australian Capital Territory. Regardless of whether the Northern Territory court has more business (in the criminal area) there is no apparent reason for suggesting that the Northern Territory Local Court is any less capable than its Australian Capital Territory equivalent.

It is proposed that clause 11 be amended so that civil jurisdiction is increased to \$250,000.

### **12. General civil jurisdiction (Local Court Act, s.14(1), (7), WA Magistrates Court (Civil Proceedings) Act 2004, s.6)**

This clause is based on section 14(1) and (7) of the *Local Court Act* and deals with how the jurisdictional limit works (eg the parties can agree to the court dealing with a matter even if the jurisdictional limit set under clause 11 is exceeded). It replicates the civil jurisdiction currently enjoyed by the Local Court. The only differences from section 14(1) are in drafting style and minor changes in terminology. In clause 3 **claim** is defined as including 'cause of action', so sub-clauses 12(1), (2) and (3) can all be expressed in the same terminology without there being any change in meaning from the current section 14(1).

In clause 3 the term **deal with** is defined as including 'hear and determine'. The more inclusive 'deal with' has been used throughout the Bill, to simplify and provide consistency of terminology.

### **Submissions/comments**

The Hon Dean Mildren observed that, as a drafting matter, in relation to section 12 (4) of the draft, the Supreme Court already has power to hear and determine almost anything except a summary matter. He asked whether section 12 (4) should read "another court (other than the Supreme Court)..."

### **Proposed position following consultation**

It does seem appropriate to word clause 12 so that it recognises that under the *Supreme Court Act* (sections 14 and 16) it is clear that there is no lower limit on the jurisdiction of the Supreme Court – in other words, the two courts share jurisdiction for claims between \$0 and the Local Court Act's jurisdictional limit.

13. *Civil jurisdiction under other laws (Local Court Act, s.14(1)(e), WA Magistrates Court (Civil Proceedings) Act 2004, s.8)*

This is a 'catch all' provision confirming that other legislation may confer civil jurisdiction on the Local Court. Examples of such jurisdiction are found in:

- *Care and Protection of Children Act (family matters jurisdiction)*
- *Unit Titles Act and Unit Title Schemes Act (special jurisdiction to deal with disputes relating to unit titles)*

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

14. *Remedies that may be granted (Local Court Act, s.14(3), WA Magistrates Court (Civil Proceedings) Act 2004, s.11)*

This clause replicates section 14(3), (8) and (9) of the *Local Court Act*. It provides for the grants or remedies permitted by clause 12 and for the making of declarations as to the rights of the parties. Clause 14(3) prohibits the issue of writs or certiorari, mandamus, prohibition or quo warranto.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

15. *Jurisdiction not limited to matters entirely within Territory (Local Court Act, s.14(5))*

This clause replicates section 14(5) of the *Local Court Act*, except that, based on section 34(1) of the *Local Court Act* (NSW), it is written in positive rather than negative form. It provides that a claim must arise in the Territory or the defendant must have resided in the Territory when served with the claim. This means that there is a degree of extra-territorial jurisdiction to the Court exercising its civil jurisdiction.

**Submissions/comments**

None.

### **Proposed position following consultation**

Retain the current clause of the draft Bill.

#### **16. Concurrent administration of law and equity (Local Court Act, s.6)**

This clause replicates section 6 of the *Local Court Act* and simply reflects that there are no separate courts of common law and equity and that both common law (damages) and equitable remedies can be given by the Court. It is a confirmation of what is provided in clause 12 (civil jurisdiction) and clause 14 (remedies that may be given).

### **Submissions/comments**

None.

### **Proposed position following consultation**

Retain the current clause of the draft Bill.

### **Division 3 of Part 3 – Criminal jurisdiction**

#### **17. General criminal jurisdiction (WA Magistrates Court Act, s11, Vic Magistrates' Court Act 1989 mica s.25)**

The jurisdiction of the Court of Summary Jurisdiction is currently to be found by a general reading of a number of provisions in the *Justices Act* along with section 3 of the Criminal Code and section 38E of the *Interpretation Act*. The *Justices Act* also confers, in Part V Division 1, the power to conduct committal proceedings (called 'preliminary examinations' in the *Justices Act*).

The purpose of clause 17 is to consolidate in one provision the criminal jurisdiction of the Court and, together with the proposed amendment to section 3 of the Criminal Code, to standardise, simplify and modernise the way in which offences are classified.

In relation to the classification of offences, section 3 of the Criminal Code currently provides:

#### **3 Division of offences**

(1) Offences are of 3 kinds, namely, crimes, simple offences and regulatory offences.

*Note for subsection (1)*

*Generally, an offence is a crime if the penalty for the offence is imprisonment for a period of more than 2 years – see section 38E of the Interpretation Act.*

(2) A person charged with a crime cannot, unless otherwise stated, be prosecuted or found guilty except upon indictment.

(3) Unless otherwise stated, a person guilty of a simple offence or a regulatory offence may be found guilty summarily.

(4) An offence not otherwise designated is a simple offence.

The *Justices Act* continues the use of the term 'simple offence' and it is implicit in section 49 that the prosecution of a simple offence is by complaint. The *Justices Act*, however, diverges from the Criminal Code in that it does not refer to 'crimes' but rather to 'minor offences' (section 120); 'indictable offences' (section 121A) and 'an offence' (section 131A), when referring to what in the Criminal Code would be designated 'crimes'.

It is proposed that section 3 of the Criminal Code be amended so that it reads as follows:

### 3 Classification of offence

(1) Every offence is either an indictable offence or a summary offence.

(2) An offence is an **indictable offence** if:

- (a) an Act states that the offence is an indictable offence; or
- (b) subject to subsection (3)(a), the penalty that may be imposed on an individual for the offence includes imprisonment for a period of more than 2 years.

(3) An offence is a **summary offence** if:

- (a) an Act states that:
  - (i) the offence is a summary offence; or
  - (ii) the offence is not an indictable offence; or
  - (iii) a charge of the offence must be heard and determined summarily; or
- (b) the offence is a regulatory offence, unless an Act states that it is an indictable offence

**Question 5: Do you see any problem with the proposed amendment to section 3 of the Criminal Code?**

### Submissions/comments

The Hon Dean Mildren supported this proposal.

The Hon Trevor Riley agreed that it is appropriate to standardise the way in which offences are classified but "careful consideration will need to be given to other legislation impacted by any amendment"

John Lowndes supported the proposal it also noted the need for careful attention needing to be given to consequential amendments to related legislation to ensure consistency

### Proposed position following consultation

Retain the current clause of the draft Bill except delete clause 3(3)(b) but review all uses of the word “crime” and all regulatory offences carrying penalties greater than 2 years imprisonment.

This clause (which replicates current section 3(3) of the Criminal Code) deems, in the absence of something to the contrary in the offence, that all regulatory offences can be tried on a summary basis.

As part of the implementation of this change all regulatory offences that have maximum penalties greater than 2 years will be reviewed with an assessment to be made as to whether they should be treated as indictable offences or as summary offences. As a general rule it is intended that the status quo will be maintained so that such offences will be revised so that they come within proposed clause 3(3)(a)(iii) of the Criminal Code. An example of such an offence is the offence in section 18 of the *Fisheries Act*.

Other major proposed consequential amendments would be as follows:

#### Principles

- All references to “Crimes” will be replaced by references to “offences” with, as a general rule, the size of the maximum penalty determining whether an offence is an indictable offence as summary offence;
- All “crimes” that have penalties 2 years or less will be reviewed to see if they should remain as indictable offences or be converted into summary offences.
- All offences currently classified as “regulatory” (and hence summary offences regardless of penalty) will be reviewed to see if they should be classified or treated as summary offences.
- Consideration of the use of the word “crime” (eg sections such as s228A to 228F of the Criminal Code which refer to a person acting with intent to commit a crime (not always clear if the word “crime” is being used with its correct technical meaning or with its more generic meaning))

#### **Crimes that might be re-classified as “summary offences”**

- *Biological Control Act* s45
- *Criminal Code* s51(1) 64, 71(1),80, 82(1), 105, 106, 107, 108, 114, 121, 122, 123, 124, 125, 133, 140, 199, 200, 283 294(2)
- *Misuse of Drugs Act*
  - s7 if penalty imposed under s7(1)(c)
  - s9 if penalty imposed under s9(2)(c)(ii) or (f)
  - s24(2)
- *Volatile Substance Abuse Prevention Act* s55

### Generic references to the word “crime”

- identity crime provisions in Part VII Div 2A of the Criminal Code (Should these be intent to commit an offence, or should they be limited to intent to commit an indictable offence?)
- provisions that refer to a person having committed a crime in a non-specific sense. For example, qualifications for holding statutory office may exclude a person who has been convicted of a crime.
  - *AustralAsia Railway (Third Party Access) Act* Sch cl 47
  - *Compensation (Fatal Injuries) Act* s7(1)
  - *Coroners Act* s35(3)
  - *Criminal Code* s40(2), 104(1), 175, 176, 229, 230, 231, 281, 308, 329, 376, 437,
  - *Electricity Networks (Third Party Access) Act* s59(1)(b)
  - *Gaming Machine Act* s27(3)(b)(i), 49(1)(b)(ii), 63(3)(b)(i), 79(1)(b)(i), 119(1)(a)(i),
  - *Police Administration Act* s 145A(1)(a)
  - *Prostitution Regulation Act* s28(4)(a), (b), 32(3)(b)(i), (ii)
  - *Sentencing Act* s107(11)
  - *Utilities Commission Act* s10(7)(c)
  - *Veterinarians Act* s13(2)(e)(i), (ii)
  - *Veterinarians Regulations* r4(3)(g)
  - *Youth Justice Act* s31(1)(a), 159(1)
  - *Victims of Crime Assistance Act* s43(f)

A list of Acts and Regulations that will need amendment are set out in schedule 2 to this report.

18. *Criminal jurisdiction under other laws (WA Magistrates Court Act, s11(3a), Vic Magistrates’ Court Act 1989 s.25(2))*

This clause mirrors clause 13 (which relates to civil matters) and provides that other laws may confer criminal jurisdiction or jurisdiction on a court of summary jurisdiction.

The latter will cover current provisions where legislation confers jurisdiction on the Court of Summary Jurisdiction that is not necessarily criminal, for example making domestic violence orders under the *Domestic and Family Violence Act* or personal violence restraining orders under the *Justices Act*.

### Submissions/comments



None.

**Proposed position following consultation**

Retain the current clause of the draft Bill

**7.4 Part 4 of the Bill – Administration of the Court**

**Division 1 of Part 4 – Administration generally**

**19. Chief Magistrate responsible (WA Magistrates Court Act, s24, NT Supreme Court Act, s.34)**

Section 4 of the *Magistrates Act* creates the offices of the Chief Magistrate, Deputy Chief Magistrates and Stipendiary Magistrates. Section 13A empowers the Chief Magistrate to 'assign and apportion duties to Magistrates and Justices'.

Under section 201A of the *Justices Act* and section 21 of the *Local Court Act* the Chief Magistrate is empowered to make rules of court and give practice directions, which regulate the practice and procedure of the court.

It is implicit in the title 'Chief', in the powers given to the Chief Magistrate and in contemporary practice, that the holder of that office is the principal judicial officer of the court and, like the Chief Justice of the Supreme Court, is responsible for '...the orderly and expeditious discharge of the business of the Court...' (section 34 of the *Supreme Court Act*). Sub-clause 19(2) reflects the terminology in the *Supreme Court Act*.

Clause 19 establishes the position of the Chief Magistrate on a statutory footing. Similar provisions exist in other Australian jurisdictions, such as WA (section 24 of the *Magistrates Court Act*), South Australia (section 11 of the *Magistrates Court Act*) and Queensland (section 12 of the *Magistrates Act*).

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

**20. Divisions of Court (WA Magistrates Court Act,)**

This clause empowers the Chief Magistrate to establish different divisions of the Court to deal with different types of proceedings, and also to abolish them. These divisions are likely to have different procedural rules (which can be made under clause 43).

The most basic distinction is likely to be separate civil and criminal divisions, where previously there were separate courts. Other legislation may require or make implicit that a

separate division should exist. An example is the creation of a small claims division or jurisdiction of the Local Court in the *Small Claims Act*. Another example is the *Care and Protection of Children Act* (section 88), which has a quite separate procedural regime for dealing with child protection matters. The power to establish and abolish divisions provides for flexibility and would enable, for example, the establishment of a division to deal with a particular type of problem like drug or alcohol abuse.

This clause is based on a similar provision in section 24(2) and (3) of the *Magistrates Court Act* (WA).

### **Submissions/comments**

None.

The Hon Dean Mildren –stating that Divisions of the Court should be stated in the Act or, if there is to be an (administrative) power to create divisions this should be done by a majority of magistrates pursuant to rules of court).

### **Proposed position following consultation**

Arguably the clause is unnecessary because there will only be point in having Divisions if there are rules that ascribe different requirements for each of the Divisions.

Under some current Acts the Legislative Assembly had decided that some kinds of matters should be dealt with in a particular jurisdiction. Examples include the *Traffic Act* (regarding hoons) (jurisdiction given to the civil jurisdiction) and *Unit Titles Act* (jurisdiction given to small claims).

These types of provisions suggest that these kinds of divisions are of more significance than the mere administrative convenience of the Chief Magistrate. That is, in creating or abolishing divisions, there is a need to consider the legislation of the Northern Territory as a whole.

It appears appropriate to amend clause 20 so that Divisions are created by way of legislation, rules of court or regulations. In both cases the Legislative Assembly has the power of disallowance in accordance with the processes contained in section 63 of the *Interpretation Act*.

The preferred option is that Divisions be created by way of legislation or rules of court.

### **21. Assigning duties to judicial officers (NT Magistrates Act, s.13A, Vic Magistrates' Court Act 1989 s.13(3))**

This clause replicates section 13A of the *Magistrates Act*, recognising the need for the Chief Magistrate, as the principal judicial officer of the Court, to have the power to give directions to judicial officers to maintain control of the proper functioning of the Court.

Judicial officers must comply with directions of the Chief Magistrate, although failure to comply is not an offence.

This clause, like section 13A, specifically provides that the Chief Magistrate has the power to direct judicial officers as to where in the Territory they are to perform their duties.

This clause, like its predecessor, does not diminish judicial independence as the Chief Magistrate cannot direct *how* a judicial officer will perform his or her duties. Subclause 21(3) makes this clear.

There are minor differences in style from section 13A of the *Magistrates Act* and the words 'Magistrates and Justices' have been replaced by 'judicial officers', which recognises the judicial role that, in particular, judicial registrars have.

### **Submissions/comments**

The Hon Dean Mildren strongly opposed clause 21(2) saying that, in its present form it is potentially very dangerous and most undesirable both in form and in content. The Chief Magistrate should be responsible for the organisation of the lists and which magistrate will hear what list or lists. He referred to instances of former Chief Magistrates who designated certain magistrates as those who would hear certain types of cases. This, he suggests, created resentment amongst some of the magistrates, particularly those operating outside of Darwin. He gave examples of where this does not work in practice:

- As presently worded it could be used to force a magistrate living permanently in Darwin to move to Alice Springs or vice versa against his or her will. This is not a power which should be given to anyone because it is capable of being misused and can lead to resignations of magistrates.
- He notes that it was this power which the former Chief Magistrate of Queensland, Di Fingleton, used which caused so much trouble in Queensland.
- The possibility of this provision being used as a lever to force a resignation undermines the independence of the judiciary. A forced change of residence has significant implications upon life style, responsibilities for children, a spouse's interests and employment, the need to sell the existing home and buy a new one, and so on.

The Hon Dean Mildren also noted:

- there is no difficulty in the Chief Magistrate having a power to require a magistrate to sit in a place other than where the magistrate resides provided that the power is limited to say, not longer than a month or two. This will enable the Court to fill a temporary vacancy caused by illness, long service leave or the like. It can be done on a rotational basis if the period is longer than this and there is no-one willing to stay longer. It will also give enough flexibility to require magistrates to sit in other places for a while, even if they do not particularly want to.

- So far as some regional places are concerned, the Hon Dean Mildren accepted that it is not always easy to find someone willing to stay for a long term, and it is his opinion nobody should be asked to sit there long term against their will, and if there is no volunteer, either the position is filled by a new appointment advertised as “magistrate in residence, place X”, or place X is serviced on a rotational basis. Also, he thinks that clause 21 (2) (b) would be better worded if it read “incidental to the performance of those duties” rather than “as to the performance of those duties”.
- There may be circumstances also where a magistrate needs to have time out of court for some reason apart from ill-health. For example, a magistrate may become snowed under with reserve judgments and need time to catch up. Clause 21(1) would allow this, if judgment writing is considered a “duty”, which I think it obviously would be. Perhaps “duty or function” might be better.

The Hon Trevor Riley noted the concern that the proposed section impacts on the independence of the judiciary because it permits the use of the power as a lever to force a resignation.

#### **Proposed position following consultation**

The existence of any kind of administrative power in one judicial officer over his or her peers obviously opens the prospect of abuse of the power and unhappy juridical peers. However, the object of the justice system is not necessarily happy judicial officers. The overriding duty of the Chief Magistrate in respect of the administrative role is that of ensuring that justice is dispensed fairly throughout the whole of the Northern Territory.

Section 21(2)(a) (dealing with place of performance of duties) is a critical power that the Chief Magistrate must possess.

However, it seems (as suggested by the Hon Dean Mildren) that clause 21(3)(b) be amended so that the directions that might be given by the Chief Magistrate to other magistrates relate to “directions incidental to the performance of those duties rather than “directions as to the performance of those duties”.

By retaining the current clause of the draft Bill excepting amendments, this would make it clear that directions can only relate to matters that are incidental.

#### **22. Hours of work**

This clause relates to the discretions that the Chief Magistrate can exercise regarding part time work hours of Magistrates. If a Magistrate is appointed on a full time basis (clause 49) that Magistrate and the Chief Magistrate may agree that the Magistrate may work part time. Similarly if a Magistrate is appointed on a part time basis (clause 49) – an agreement can be reached regarding a lesser number of hours.

However, if a Magistrate is appointed on a part time basis under clause 49 the Chief Magistrate has no power to agree to that Magistrate being remunerated other than on the part time basis.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

23. *Where and when Court may sit (NT Magistrates Act, s.13, WA Magistrates Court Act s.8(1)(b))*

Sections 47 and 60A of the *Justices Act*, section 5A of the *Local Court Act* and sections 13 and 13A of the *Magistrates Act* deal with where and when the Court of Summary Jurisdiction, the Local Court and 'Magistrates and Justices' respectively may sit.

Clause 23 draws all these provisions together. It maintains that the default position for where the Court may sit is at places and in buildings approved by the Minister. To date, this approval has been by an instrument made by the Minister under section 13 of the *Magistrates Act*. Clause 85 of the Bill provides for the continuation of such approval when the new Act commences.

As part of the Chief Magistrate's responsibility for the administration of the Court, he or she is to decide when and at which approved places and buildings the Court is to sit.

While not abrogating from the default position that places where the Court may sit are to be approved by the Minister, subclause 23(4) provides for flexibility in particular proceedings by empowering the Court to sit in a place other than an approved place if required for expediency. For example, an approved building in a bush court circuit may on a particular occasion not be available for the Court to use. Rather than frustrate the bush court sittings, the Court may sit in another place. This subclause also facilitates the operation of the *Cross-Border Justice Act* so that the Court, operating under that Act, can sit in places in Western Australia and South Australia.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

24. *Court to be open to public ((Local Court Act, s.7(2), WA Magistrates Court (Civil Proceedings) Act 2004 s.171)*

Subclause 24(1) provides that, as a general rule, the Court is to be open to the public. This is currently provided for regarding the Court of Summary Jurisdiction in section 61 of the *Justices Act* and, for the Local Court, implicitly in sections 7 and 28 of the *Local Court Act*. It reinforces the undesirability of secret trials and the presumption that court proceedings should be open and justice should be seen to be done.

There is currently power under section 61(2) of the *Justices Act* and section 28 of the *Local Court Act* for the Court to order witnesses to leave the courtroom until called to give evidence, and this power is retained in subclause 23(2) of the Bill.

There is also power under section 61(3) of the *Justices Act* to close the Court of Summary Jurisdiction if a 'Special Act' authorises or requires proceedings to be held in a closed court (*in camera*). An example of this is section 21F of the *Evidence Act*, which provides that a court is to be closed when the evidence of a vulnerable witness in relation to a sexual offence or serious violence offence is being taken.

Section 7(2) and (3) of the current *Local Court Act* imply that, in accordance with existing practice and procedures, certain civil proceedings can be held other than in an open court. This power is retained and clarified in subclause 23(6).

However, there is no explicit power in the *Local Court Act* to close the Court and no power at all in the *Justices Act*, unless authorised or required by another Act. It was a recommendation of the 2001 review of the *Justices Act* that an express power be inserted into that Act to allow a magistrate to close a court when it is in the interests of the administration of justice to do so. Subclause 24(3) provides this power. While the general rule will still be that proceedings take place in open court, unless there is an express statutory requirement that they do not, this power places the Court on the same basis as the Supreme Court, where the exercise of its inherent jurisdiction would allow for the making of such an order.

Subclause 24(4) re-enacts section 28 of the *Local Court Act* and section 61(2) of the *Justices Act* to provide that parties and counsel or any other person who is entitled to appear on behalf of a party (such as under the *Care and Protection of Children Act*) cannot be excluded under subclauses 24(2) or (3).

### **Submissions/comments**

The Hon Dean Mildren does not support clause 24(4) (prohibition on exclude a party a party's lawyer). He notes that in a very extreme case, a defendant in criminal proceedings was removed out of court through constant and repeated misbehaviour, and the trial continued in his absence and this was upheld on appeal by the Court of Appeal in England. The point is, otherwise a defendant could make it impossible for him to be tried. Similarly, in a very extreme case, a lawyer could by his misbehaviour so disrupt the proceedings as to prevent them from coming to a proper conclusion.

The Chief Justice drew attention to the same issue. He referred to section 361(2) of the Criminal Code which contains the opposite policy position. It provides that an accused person may be removed and the trial proceed in the defendant's absence if the accused person has conducted themselves so as to render the continuance of proceedings in his or her presence impracticable.

#### **Proposed position following consultation**

Amend clause 24(4) so that it reflects section 361(2) of the Criminal Code.

#### **Division 2 of Part 4 – Court records and exhibits**

Requirements as to the keeping of court records and access to such records or parts of them or to exhibits by parties and non-parties are currently piecemeal and fragmented.

Part 4 Division 2 provides a coherent statutory framework regarding what records need to be kept and entitlements and applications for access to various parts of the records and to exhibits. The provisions regarding access are cast in general terms to allow for flexibility. Further detail as to the operation of these provisions can be made by Practice Direction (under clause 44) or Rules (under clause 43).

This Division is essentially new, with input from:

- section 12 of the *Local Court Act* (Court records);
- sections 70, 71 and 72 of the *Justices Act* (minuting court findings and furnishing copy of complaint and conviction to interested party);
- section 33 of the *Magistrates Court Act (WA)* (Court's records, access to);
- *Court Information Act 2010* (NSW);
- Chapter 12 of the Criminal Procedure Rules 1999 (Qld) (Custody and inspection of exhibits and access to court files);
- NT Supreme Court Practice Direction No. 2 of 2010 (Access to the Court building, judgments, exhibits and files by the public or the media and other matters); and
- NT Chief Magistrate's Practice Directions No. 2 of 2011 (Access to exhibits by non-parties in the Magistrates Courts of the Northern Territory), No. 3 of 2011 (Access to criminal files Court of Summary Jurisdiction and Youth Justice Court), No. 21 of 2012 (Access to files Local Court, Work Health Court) and No. 1 of 2013 (Access to Magistrates' Court files (Domestic violence and personal violence)).

It is intended that, consequent to enactment of this Division, the *Records of Depositions Act* will be amended or repealed.

#### **Submissions/comments**

None (but see below regarding *Records of Depositions Act*).

### **Proposed position following consultation**

Retain the current clause of the draft Bill.

#### **25. Court records (Local Court Act, s.12, Justices Act, s.70-72, WA Magistrates Court Act s.33, NSW Court Information Act)**

Section 12(1) of the *Local Court Act* provides that 'a Registrar' 'shall cause a record to be kept of all orders of the Court and of such other matters as are directed by this Act or the Rules to be recorded'. Pursuant to section 3 of the *Local Court Act*, a 'Registrar' is a person appointed under section 9 as a Judicial Registrar, acting Judicial Registrar, Registrar, Deputy Registrar or acting Registrar. Therefore, section 12(1) does not make it the responsibility of any one person to keep the court records.

The *Justices Act* provides even less. The Court of Summary Jurisdiction is technically not a court of record at all and the record keeping obligations seem confined to a requirement under sections 70 and 71 that a 'minute or memorandum' be made of a finding of guilt or the dismissal of a complaint respectively. There is a power also, although no obligation, for the Court to 'draw up an order of dismissal and give the defendant a certificate'. Nothing in the *Justices Act* states who is responsible for keeping these records.

In practice, the criminal and civil registries of the courts keep case files.

Clause 25 is cast wider than being confined to the keeping of case files, as there may be other records that may be considered proper to be kept. Clause 25 places the responsibility of keeping the Court records on one person, the 'Principal Registrar'. This is a new statutory position (see clause 66).

There will be a single Principal Registrar, responsible for the keeping of the Court records in all the registries around the Territory, both civil and criminal. One of the aims of the Bill is to rationalise the various non-judicial offices and the creation of the position of Principal Registrar is part of this rationalisation.

### **Submissions/comments**

None.

### **Proposed position following consultation**

Retain the current clause of the draft Bill.

#### **26. Case files**

The requirements of the contents of case files are apply both to files in the criminal and civil registries. The non-exhaustive list of the required contents has been made following consultation with registry staff as to what is actually kept on the file. These contents more than cover the existing requirements under the *Local Court Act* and the *Justices Act*.



**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

27. Access to case files

Section 12(3) of the *Local Court Act* entitles any person (unless the Court orders otherwise) to inspect Court orders, on the payment of a fee. The fee is prescribed in the Local Court Regulations. Parties may, without charge, inspect records regarding their proceedings (section 12(4) of the *Local Court Act*). Section 72 of the *Justices Act* allows ‘interested parties’ to inspect and receive copies of complaints and orders of guilt, on the payment of a fee, prescribed in the Justices Regulations.

Access to other court records and exhibits by parties and non-parties is otherwise regulated by Chief Magistrate’s Practice Directions No. 2 of 2011 (Access to exhibits by non-parties in the Magistrates Courts of the Northern Territory), No. 3 of 2011 (Access to criminal files Court of Summary Jurisdiction and Youth Justice Court), No. 21 of 2012 (Access to files Local Court, Work Health Court) and No. 1 of 2013 (Access to Magistrates’ Court files (Domestic violence and personal violence)).

Clause 27 maintains the current policy position that distinguishes between parties and non-parties regarding access to court records and materials on court files.

Parties are entitled to have access to the information and documents on a court file listed in clause 26 (a) – (h) with the exception of an audio or audio-visual recording of any part of a proceeding. For access to that, they must seek leave of the court. This reflects current practice and facilitates the efficient operation of the Court’s registry, so that arrangements can be made for listening/viewing or obtaining copies of such material. Although parties will be entitled to inspect and copy most of the contents of the court file, regulations may prescribe fees to do so (see clause 30), as is the current position under the Justices Regulations, the Local Court Regulations and the *Record of Depositions Act*.

Non-parties will require leave of the court to have access to any record other than judgments and orders (see clause 28). Subclause 27(3) provides that the Court may grant access on any conditions it thinks fit.

It is anticipated the guidelines for the exercise of this discretion will be included in Practice Directions, as currently, or in Rules. As with access by parties, regulations under clause 30 may prescribe fees for access.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

*28. Access to judgments and orders*

Reflecting the current law, under section 12(3) of the *Local Court Act* and section 72 of the *Justices Act*, access to judgments and orders is available equally to parties and non-parties, unless the Court makes an order, under subclause 28(2), in a specific case, restricting such access. Clause 30 provides that fees may be prescribed by regulation.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

*29. Access to exhibits*

Exhibits are not part of the case file or the records of the court. Accordingly, a separate provision regarding access to them has been included in the Bill. However, clause 29 mirrors clause 27, distinguishing in the same way between parties and non-parties.

As with access to case files, it is anticipated the guidelines for the exercise of this discretion will be included in Practice Directions, as currently, or in Rules. Regulations under clause 30 may prescribe fees for access.

**Submissions/comments**

Mr John Lowndes suggested that the proposed provisions appear to be adequate. Further detail as to the operation of the provisions or any oversight in the provisions can be dealt with by Practice Directions under clause 44 or by way of Rules pursuant to clause 43.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

*30. Fees (Local Court Act, s.12, Justices Act,s.201A)*

Under the regulation making powers in section 21 of the *Local Court Act*, section 201A of the *Justices Act* and section 51 of the *Small Claims Act*, regulations currently prescribe fees for: inspection of court orders (Item 4 Schedule Local Court Regulations, Regulation 5 of the Small Claims Regulations); a copy of a document in proceedings (Reg 6(1)(e) Justices Regulations); a certified copy of an order (Item 3 Schedule Local Court Regulations); and photocopying by court staff (Item 7 Schedule Local Court Regulations). In addition, the *Records of Depositions Act* provides for the recording of depositions (statements of witnesses on oath) in the lower courts.

Fees are currently prescribed in the Records of Depositions Regulations.

It is anticipated that these regulations will be repealed and remade as one set of regulations under the regulation making power in clause 76. Current provisions covering situations where there is an exemption from paying fees or fees can be waived, are expected to be continued in the new regulations. The *Records of Depositions Act* and its regulations will also be repealed. That Act is obsolete and inflexible. For further discussion of the *Records of Depositions Act* see Chapter 7 of this paper.

In respect of fee waivers, the *Interpretation Act* (section 65C ) implies into all regulation making powers concerning fees a power to also provide for waiver or refund of fees. For this reason, the Bill contains no explicit provisions dealing with waivers and refunds.

Clause 30 is based on 33(1) of the *Magistrates Court Act* (WA).

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

*31. Principal registrar to provide copies*

This clause provides that it is the duty of the principal registrar to provide for copies of things that can be accessed in accordance with sections 27-29.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

*32. Other Acts may limit access to court records and exhibits*

This clause acknowledges that other legislation may limit access to court records or exhibits or to the publication of documents or other things. For example, there is a general power in section 57 of the *Evidence Act* to prohibit publication of evidence in the interests of public decency or names of parties or witnesses in the interests of the administration of justice and there are certain prohibitions regarding publication in the *Sexual Offences (Evidence and Procedure) Act*.

**Submissions/comments**

None.

### **Proposed position following consultation**

Retain the current clause of the draft Bill.

### **Division 3 of Part 4 - Court procedure**

The main purpose of the Bill is to establish the jurisdiction of the Court, not its practices or procedures. However, some (arguably) procedural matters are so fundamental to the exercise of the Court's jurisdiction and are of such general application regardless of whether the jurisdiction exercised is criminal or civil, that they may appropriately be included in the Bill.

It is also sometimes difficult to draw a clear distinction between what is practice and what is jurisdiction.

#### **33. *Procedure generally***

Subclauses 33(1) and (2) provide reference to legislation that governs civil and criminal respectively. A similar provision, in relation to criminal jurisdiction, is found in section 11(3) of the *Magistrates Court Act (WA)*. The exercise of the Court's jurisdiction must be in accordance with practices and procedures contained in other legislation.

As part of the process for implementing this Act:

- the *Local Court Act* will be amended so that its jurisdictional provisions are removed (ie they will be in this Act). The only provisions that will remain in the old *Local Court Act* will be those dealing with civil procedure. The intention is that will be renamed as the *Local Court (Civil Procedure) Act* ; and
- similarly, for the *Justices Act*. After the removal of its jurisdictional provisions it is likely to be renamed as the *Local Court (Summary Procedure) Act*. As mentioned in the introduction to this paper, as part of the second stage of reform of the lower courts, it is intended to develop a new Criminal Procedure Act, which will deal with criminal procedure from commencement of prosecution in the Local Court to the end of the appeal process in the Court of Appeal and Court of Criminal Appeal. The *Local Court (Summary Procedure) Act* would be repealed as part of those reforms.

Subclause (3) is based on section 21(4) of the *Local Court Act*, which is a catch all provision regarding procedure and practice in the Court.

### **Submissions/comments**

None.

### **Proposed position following consultation**

Retain the current clause of the draft Bill.

**34. Refusal of documents if abuse of process (WA Magistrates Court Act, s.17)**

There is currently no express power in either the *Justices Act* or the *Local Court Act* to enable administrative staff in the court registries to refuse to accept lodgement of a document on the basis that it is frivolous, vexatious or otherwise an abuse of the court's process. The purpose of this provision is to prevent wasting resources. It is based on a similar provision in section 17 of the *Magistrates Court Act* (WA). The exercise of this power by a registrar is reviewable by a magistrate, so anyone aggrieved by a registrar's refusal can apply to a magistrate for leave to lodge the document.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

**35. Making of judgments and orders (Local Court Act, s.12(2) and Justices Act, s.14)**

This clause is based on section 12(2) of the *Local Court Act* and a modification of section 14 of the *Justices Act*. Subclause (1) reflects the current practice in both the Local Court and the Court of Summary Jurisdiction where, in particular, orders are signed by a registrar rather than a magistrate as they are prepared in the registry.

Section 14 of the *Justices Act* requires that orders, judgments, warrants and summonses be signed 'under the hand of the Justice' who made them. This is not what in practice happens. Subclause (2) is for the purpose of clarification and expediency.

Retain the current clause of the draft Bill.

**36. Issuing of process (Local Court Act, s.13, Justices Act, s.14, WA Magistrates Court Act, s.20-21)**

The current provisions of the *Local Court Act* and the *Justices Act* suggest that all documents must be signed by the judicial officer who issued them.

Subclauses 36 (1) provides that the seal of the court must be used for all documents issued by the Local Court and that all documents must be signed by either a Magistrate or a Registrar.

Subclauses (3) – (6) resolve current uncertainty about the power to cancel process, as there is no express statutory provision to do so in the *Justices Act*. Process may, for example, need to be cancelled when it has been issued in error or when a particular summons or warrant is no longer required. A similar provision is found in section 21 of the *Magistrates Court Act* (WA).

**Submissions/comments**

The Hon Dean Mildren – agreed that orders and warrants should be signed, but did not see the value of originating process being signed by a registrar or magistrate saying “surely it is sufficient if it is sealed which is the practice in the Supreme Court”. The Chief Justice also drew attention to this issue.

This appears to be a valid point.

**Proposed position following consultation**

Amend the Bill so that sealing is sufficient other than for orders and warrants. Also include a provision providing for the seals of the court and the use of them.

37. Correction of errors (Local Court Act, s.28B. Justices Act, s.185(2), WA Magistrates Court Act,s.23)

This clause is similar to existing provisions in section 28B of the *Local Court Act* and section 185(2) of the *Justices Act* and its drafting is based on section 23 of the *Magistrates Court Act* (WA). It is known as the ‘slip rule’ and allows for correction of technical errors so as not to invalidate judgments, orders or process and to ensure the smooth running of the Court. A like provision exists for the NT Supreme Court in Order 36.07 of the Supreme Court Rules.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

38. Entry for purpose of inspection (WA Magistrates Court Act 2004, s.22)

There is currently no express power for the Court to order entry to make an inspection.

Entry might be needed, for example, to inspect the scene of accident or view exhibits that are too big to be brought to court. This clause puts beyond doubt that there is power for the making of such an order. The drafting is based on section 22 of the *Magistrates Court Act* (WA).

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

**39. Party entitled to appear in person or by counsel (Justices Act, s.29)**

This clause is for clarification. It reflects section 29 of the *Justices Act*. It does not prevent another person appearing for a party if the Rules or another Act so permits. For example, section 101 of the *Care and Protection of Children Act* allows for a legal practitioner or 'any other person' to represent a party in proceedings in the Local Court's family matters jurisdiction.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

**Division 4 of Part 4 - Contempt**

Clear, express contempt provisions are integral in legislation establishing a court of inferior jurisdiction. Unlike the Supreme Court, lower courts have no inherent power to punish contempt unless it is in 'the face of the court' (i.e. behaviour that occurs in court). Without statutory power, such courts cannot punish as a contempt failure to comply with an order or undertaking to the court or failure to comply with a summons.

The contempt provisions in the Bill are new. While the provisions in sections 33 and 34 of the *Local Court Act* are reasonably comprehensive, the provisions in the *Justices Act* (sections 26, 26A, 46 and 108A) are fragmentary. They relate to discrete situations rather than being of general application.

The new provisions are based on sections 33 and 34 of the *Local Court Act* but ensuring that any aspects of contempt not covered by those sections but covered in the *Justices Act* are included. It is also made clear that failure to comply with a court order is a contempt as is failure to comply with an undertaking (such as a promise in court by a lawyer to do something).

The maximum penalty for contempt has been reviewed and increased. Currently it is \$20 under the *Justices Act* and 1 month imprisonment or 15 penalty units (\$2235)<sup>14</sup> under the *Local Court Act*. It is considered that the current penalties under both Acts are insufficient and a new maximum penalty of 6 months imprisonment or 50 penalty units is proposed (clause 42).

The power to punish for contempt is confined to magistrates only.

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<sup>14</sup> As at 1 July 2014. This amount will be reviewed by 1 July 2014 in accordance with the *Penalty Units Act*

The revision of the contempt provisions does highlight that there will be an inconsistency with like provisions of other legislation dealing with contempt for courts or tribunals that are constituted by Magistrates. For example:

- under the Work Health Court under the *Work Health Administration Act* the maximum penalty is “one month or a fine of \$2000”);
- under the *Youth Justice Act* there is no specific contempt offence but, being a court of record, the Youth Justice Court retains a common law power to deal with the offence of contempt of court (as per section 8(1) of the *Criminal Code Act* (with there being no limit on the penalty);
- under the *Coroners Act* the maximum penalty is 40 penalty units or imprisonment for 6 months; and
- under the jurisdictions of various tribunals and statutory office holders - *Alcohol Mandatory Treatment Act* (20 penalty units), *Business Tenancies (Fair Dealings) Act* (100 penalty units/6 months imprisonment), *Australasia Railway (Third Party Access ) Act* (440 penalty units), *Constitution Convention (Election) Act* and *Electoral Act* (same as Supreme Court), *Electricity Networks (Third Party Access) Act* (500 penalty units), *Information Act* (200 penalty units/imprisonment for 12 months), *Lands, Planning and Mining Tribunal Act* (20 penalty units/6 months imprisonment), *Mental Health and Related Services Act* (20 penalty units/6 months imprisonment), *Motor Accidents (Compensation) Act* (17 penalty unit/12 months imprisonment, *Prostitution Regulation Act* (8 penalty units/6 months), *Taxation Administration Act* (100 penalty units/6 months imprisonment), *Work Health Administrating Act* (\$2000/one month imprisonment)

#### Question 7:

Do you consider that, as part of the Local Court reforms, contempt of lower courts' (and related Tribunals) should be reformed so that they are the same (ie consistent with one another). Would it be appropriate to include, in addition to section 8 of the *Criminal Code Act*, a generic provision in the Criminal Code that would deal with contempt for all courts and a generic offence for all tribunals and other bodies/officials responsible for taking evidence.

#### Submissions/comments

The Hon Dean Mildren agrees with the suggestion that contempt proceedings be the same in all of the lower courts and tribunals covered by the generic provisions of the Criminal Code and agrees with the penalties.

Mr John Lowndes stated that:

- there is no sound reason why there should not be consistency between provisions for contempt of lower courts and tribunals. However, the views of tribunals should be sought in relation to this matter.



- Given the nature of contempt – namely conduct which has a tendency to interfere with or undermine the authority, performance or dignity of the courts or those who participate in their proceedings – and given that the power to punish for contempt is a power vested in courts to enable them to control their own processes it is appropriate for the proposed contempt provisions to remain in the Local Court Bill, rather than be dealt with by generic provisions in a Criminal Code (the principal purpose of which is to establish a code of criminal law).

40. Contempt of Court (Local Court Act, s. 34), Justices Act, 46, )

This clause sets out all the ways in which a contempt of court can be committed, whether it is in the face of the court or not. It covers the existing situations under the *Local Court Act* and the *Justices Act* and also includes failure to comply with an order (subclause (3)) and failure to comply with an undertaking (subclause (4)). For the meaning of “oath” as used in this section (and in all other NT legislation) see section 5 of the *Oaths, Affidavits and Declarations Act*.

**Question 8: Do you consider that the current draft provision (clause 40) is sufficiently broad?**

**Submissions/comments**

Mr John Lowndes stated that:

- the current draft provision dealing with contempt is deficient in that it appears to only address contempt in the face of the court (in facie curiae), and does not cover contempt not in the face of the court (ex facie curiae), which is a significant form of contempt of court; and
- consideration needs to be given to conferring upon the Local Court the power to deal with contempt not in the face of the court.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

*41. Dealing with contempt of Court (Local Court Act, s.34)*

This clause is based on section 34 of the *Local Court Act* and retains maximum flexibility for the Court to determine the procedure to deal with a contempt. As noted above, the power to deal with contempt is exercisable only by a magistrate. If an alleged contempt is committed in a Court constituted by a JP (or more than one JP), a Judicial Registrar or a Registrar, then it can be referred to a magistrate for consideration.

**Submissions/comments**

The Law Society Northern Territory considers that the legislation should contain provisions so that:

- contempt proceedings should not be conducted by a magistrate who is with a witness to, or the victim of, the alleged contempt; and
- there is a right of appeal from a contempt decision

**Proposed position following consultation**

Retain the current clause of the draft Bill.

The processes for dealing with contempt of the Local Court should, as with the processes for dealing with contempt of the Supreme Court, be left to the court to establish.

Section 163 of the *Justices Act* (as amended following the commencement of *the Local Court Act 2014*) will operate so as to permit appeals.

42. *Punishment for contempt (Northern Territory Civil and Administrative Tribunal Act 2014, s.86)*

Again, flexibility in the punishment for contempt is retained in this clause. However, the maximum penalty that can be imposed has been reviewed and revised at 6 months imprisonment or 50 penalty units. In determining this level, consideration was given to the wide divergence of penalties for contempt in other Australian jurisdictions and the maximum penalty for conduct akin to contempt under other Northern Territory legislation.

This is the same maximum penalty as in *Northern Territory Civil and Administrative Tribunal Act 2014, s.86*

**Question 9: Do you consider that the current draft maximum penalty (clause 42) is appropriate? If not what do you consider should be the penalty?**

**Submissions/comments**

The Chief Magistrate stated that the maximum penalty for contempt is a matter for the legislature.

The Law Society Northern Territory notes that the penalty is proposed to increase from one month/15 penalty units (\$2235) to 6 months/100 penalty units (\$14,900). The Law Society Northern Territory does not support this “unsubstantiated increase” noting that the discussion paper merely identifies current inconsistencies rather than addressing issues arising from the inconsistencies.

**Proposed position following consultation**

Retain the current clause of the draft Bill. Maximum penalties are a matter of judgment. In this case the proposed penalty recognises that contempt of court is a serious matter. The current maximum penalties ( \$20 under the *Justices Act* and 1 month imprisonment or 15 penalty units (\$2235)) are too low compared to the penalties for other offences.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

**Division 5 of Part 4 - Directions and Rules** (*Local Court Act, s.21, Justices Act, s,204A, Supreme Court Act, s.72 and 86*)

This Division replicates the power of the Chief Magistrate to make practice directions or rules of court under section 21 of the *Local Court Act* and section 201A of the *Justices Act*. In the current legislation there is considerable overlap between the subject matter of practice directions, rules and it is not clear when one should be used instead of the other.

Current practice is that criminal practice is regulated by practice directions and civil practice by a combination of the extensive Local Court Rules supplemented by practice directions.

The distinction between rules, which are disallowable by Parliament under section 63 of the *Interpretation Act* and practice directions, which are not, is blurred as it is the Chief Magistrate alone who has the power to make both practice directions and rules. In the Supreme Court, the power to make practice directions is vested in the Chief Justice (section 72 of the *Supreme Court Act*) but rules must be made by at least a majority of the judges (section 86 of the *Supreme Court Act*), which reflects that the rules are rules of 'the court'. The Chief Justice can make directions for matters that are not covered by the Act, Regulations or Rules (section 72). Elsewhere in the other Australian lower courts, jurisdiction to make rules is not vested in the Chief Magistrate alone. New South Wales and Tasmania provide for a Rules Committee and the other jurisdictions for a minimum number of magistrates (a de facto rules committee).

#### 43. Rules of court

This clause re-enacts the power in section 21 of the *Local Court Act* and section 201A of the *Justices Act*. In accordance with current drafting practice, an extensive list of matters for which rules may be made is not included. This allows flexibility in the making of rules, for example to deal with changes in practice due to developments in technology.

The proposed provisions vary, however, from the current provisions in so far as the Chief Magistrate is no longer solely responsible for the making of rules. Rather they are to be made by the Chief Magistrate and at least four other magistrates. This is comparable to the procedure under the *Supreme Court Act* subject to the fact that only five magistrates rather than, say, all or a majority being required for the making of the rules.

**Question 10: Do you agree with the revision of the rules making powers so that they, similar to the provisions in the *Supreme Court Act*, provide for collective decision making of the magistrates regarding the making of rules.**

#### **Submissions/comments**

Hon Dean Mildren makes the following comments:

- Clause 43 (1) places the rule making power in the Chief Magistrate and at least 4 other magistrates.
- In my opinion a better provision would be for the power to be given to the majority of the magistrates for two reasons. First, I do not see why the Chief Magistrate should always be involved. The role of the Chief Magistrate should be "first amongst equals". The Chief Magistrate has enough to do without being involved in rule-making. Secondly, I think all magistrates should be consulted, except the acting magistrates.
- The better model is for the Court will form a Rules Committee with probably only three or four magistrates actually doing most of the work with policy considerations being made by the whole magistracy. This would inevitably flow from a provision such as I have suggested without having to spell it out in the Act.

The Hon Trevor Riley had no difficulty with the proposal other than to note that it currently reads as if no rules can be made in the absence of the Chief Magistrate.

- The Law Society Northern Territory: does not support that the legislated rule making power should mandate collective rule making. It is “happy” that the Chief Magistrate continues to be responsible for rule making and for that purpose engage in any necessary consultation (inside and outside of the court). If there is an absence of consultation users could seek to have, through a member of Parliament, the rules disallowed by the Legislative Assembly (under the processes contained in section 63 of the *Interpretation Act*). In support of this view the Law Society Northern Territory there may be “considerable disparity” (between magistrates) meaning that consensus is unattainable with rule making not being able to occur.
- The Law Society Northern Territory also noted, in passing, that rules of court are at times ignored by Magistrates as demonstrated by (it states) “the considerable disparity between practice of the Court in Darwin and Alice Springs in the care and protection jurisdiction”.

Mr John Lowndes stated that the proposed provision is supported. However, provision should be made for the Deputy Chief Magistrate or Acting Chief Magistrate to stand in during the absence of Chief Magistrate due to any period of leave or illness.

**Proposed position following consultation**

Retain the current clause of the draft Bill noting that clause 54 provides for a structure that means that should always be position acting in the role of the Chief Magistrate. This would only not occur if there also happened not to be a person in the position of Deputy Chief Magistrate and also if the Minister has not appointed a person to act in either position..

44. Practice directions

This clause re-enacts the power in section 21 of the *Local Court Act* and section 201A of the *Justices Act*. Practice directions are made by the Chief Magistrate and operate subject to any rules made under clause 43.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

## 7.5 Part 5 of the Bill – Magistrates

### Division 1 of Part 5 – Chief Magistrate, Deputy Chief Magistrates and magistrates

This Part substantially incorporates the provisions of the *Magistrates Act*, which will be repealed.

It provides for the appointment, functions and powers of magistrates. Most of the provisions in this Part are unchanged except in drafting style and modernisation of language from the existing provision in the *Magistrates Act*. For example, clause 52 (termination of appointment) is unchanged from section 10 of the *Magistrates Act*. Substantive changes have been made regarding eligibility for appointment (clause 48), acting Chief Magistrate (clause 54) and acting magistrates (Division 2), which are explained in the commentary for each relevant clause below.

The Bill retains the title of “magistrate” for judicial officers of the proposed Local Court Bill 2014. However, both the current and former Chief Magistrate have called for consideration to be given to changing the title to that of “judge” as has occurred with Federal Magistrates and which issue is understood to be under consideration in other Australian jurisdictions.

The argument for change, as provided by the Chief Magistrate and taken from a paper he prepared in about 2009 during his presidency of the Association of Australasian Magistrates, is as follows:

*There are a number of arguments that support the title of magistrates being changed to that of “Judge”.*

*The gradual judicialisation of the magistracy<sup>i</sup> has resulted in it becoming an integral part of the Australian judiciary,<sup>ii</sup> such that there is no logical basis for drawing a titular distinction between judicial officers of the lower courts (magistrates’ courts) and those of the intermediate and higher courts. Magistrates are judges in all but name.<sup>iii</sup> Judges and magistrates are subject to common standards of judicial conduct. Magistrates are also perceived by the general public to be judges. The change of title would not only recognise the important judicial role performed by magistrates<sup>iv</sup>, but by emphasising the fact that magistrates should be viewed in the same light as judicial officers of the higher courts<sup>v</sup> it would enhance the standing of the lower courts in the community at large and within the legal profession and increase public confidence in the administration of justice overall.<sup>vi</sup>*

*Quite apart from the foregoing, the title of “magistrate” is anachronistic and misleading, reflecting a public service magistracy of a bygone age. Its continuing use has a tendency to compromise or otherwise affect the independence of the lower courts, as well as the collective independence and integrity of the judiciary as a whole.*

*The proposed change of title is neither radical nor without relevant international precedent. Considerations that influenced changes in Canada, England and New Zealand have equal application to the Australian magistracy and support an equivalent change in Australia.*

*The very substantial benefits to the community flowing from the change of title far outweigh the negligible cost of implementing the proposal.*

### **THE JUDICIALISATION OF THE MAGISTRACY**

*A number of historical and systemic processes have contributed to the judicialisation of the magistracy.<sup>vii</sup>*

- *The transformation of the Australian magistracy from a public service institution to an office which is structurally independent of the executive arm of government and the public service, and which now forms an integral part of the judiciary;<sup>viii</sup>*
- *The consequent development of the judicial independence of the magistracy resulting in the alignment of magistrates with judges as judicially independent officers;<sup>ix</sup>*
- *The transformation of a lay, untrained and unqualified magistracy into a professional, legally trained and competent body of judicial officers;<sup>x</sup>*
- *The expansion of the jurisdiction of courts presided over by magistrates and the increasing complexity of that jurisdiction;<sup>xi</sup>*
- *The divestiture of the magistracy of its administrative duties and its diversion into the performance of judicial functions;<sup>xii</sup>*
- *The allocation of “increasingly complex, qualitative, judicial work” to magistrates;<sup>xiii</sup>*
- *The assumption by magistrates’ courts of jurisdiction formerly exercised by judges of county or district courts, which has had the effect of considerably narrowing the gulf between magistrates and judges;<sup>xiv</sup>*
- *The fact that in some jurisdictions such as the ACT and the NT, where there is no intermediate court, magistrates’ courts perform the role of a district or county court;<sup>xv</sup>*

*Changing the title of magistrates to that of “Judge” is the next logical step, which, by marking the final disentanglement of the magistracy from the executive branch of government,<sup>xvi</sup> would complete the process of judicialisation.*

### **MAGISTRATES ARE JUDGES IN ALL BUT NAME**

*There is no material difference in the function performed by judges and magistrates. Magistrates are responsible “as an integral tier of the Australian judiciary for performing*

*identical tasks to those persons identified as judges”.*<sup>xvii</sup> *Magistrates are judges in all but name.*

*Just as much as judges, magistrates engage in “the business of judging”.*<sup>xviii</sup> *Just as judges do, magistrates perform the primary task and carry the basic responsibility of the judiciary to “resolve disputes between citizens, or between citizens and government, by the application of statute law and by the judge made common law”.*<sup>xix</sup> *In the same way as judges, magistrates decide cases “by finding the facts, ascertaining the law and applying the law to the facts as found or admitted”.*<sup>xx</sup>

*The business of judging also involves elements of pragmatism, discretion and choice;*<sup>xxi</sup> *and magistrates exercise all three in deciding cases.*

*There are other important dimensions to the business of judging – the notion of “fairness” and the need for openness, transparency and impartiality. Both magistrates and judges are required, in accordance with the precept of natural justice, to respond to the arguments advanced by the parties and to give reasons for decision so as to lend openness and transparency to the judicial process.*<sup>xxii</sup> *Impartiality, which requires neutrality and objectivity on the part of a judge, is an essential component of judicial decision-making;*<sup>xxiii</sup> *and magistrates are required to bring the same open, unbiased and impartial mind to the decision making process.*

*Since there is no distinction between magistrates and judges in exercising their core function of “judging”, which itself is the defining characteristic of being a “judge”, as a matter of syllogistic logic, magistrates are indeed judges.*

*The title of the judicial officers of our lower courts, particularly in the present integrated systems of courts throughout Australia, should reflect what they do, that is, hear and determine cases on the same basis and in the same competent, judicially independent, open and impartial manner as occurs in the other courts – in other words “judge” cases.*

*The very important judicial role performed by magistrates should be appropriately recognised in the title accorded to them*<sup>xxiv</sup> *and they should be seen in the same light as the judicial officers of the higher courts.*<sup>xxv</sup> *Although an integral part of the judiciary, magistrates “do not bear titles that suggest they are the members of the judiciary”;*<sup>xxvi</sup> *nor are they accorded “titles which indicate that they are judicial officers”.*<sup>xxvii</sup> *For those fundamental reasons, magistrates should be accorded the title of “Judge”.*

*All Australian magistrates are now addressed as “Your Honour” - a form of address traditionally reserved for judges of the higher courts.*<sup>xxviii</sup> *That common form of address reinforces the role of magistrates as judges.*

*That the magistracy is indistinguishable from the judiciary of the higher courts has been recognised at the highest judicial level and within the legal profession:*



*“The development of the Local Court judiciary from a group of public service administrators with special legal training into a judiciary indistinguishable from judges by attitude and competence has been remarked on many times in recent years by diverse figures as the Chief Justice of Australia, Justice Gleeson, the Chief Justice of NSW, Justice Spigelman and Mr Ian Harrison, President of the Bar Council.”<sup>xxxix</sup>*

*Recently, the Judicial Conference of Australia overtly recognised that magistrates are in fact judges by supporting the proposal to confer upon them the title of “Judge”.*

*Most significantly, in April 2008 the Federal Court of Australia in Gregory Ronald Alfred Clark and Commissioner of Taxation SAD 110 of 2007 judicially recognised the status of magistrates as judges by unanimously holding that the applicant, a magistrate of the State of South Australia, was a “judge of a court of a State” within the meaning of section 7 of the Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997 (Cth) at the commencement of that Act.*

*As the magistracy now forms an integral part of the judiciary – indistinguishable from the judicial officers of the higher courts – it is not only logical, but essential, to adopt terminology which acknowledges that the “judiciary” refers to “the judges of a State collectively”.<sup>xxx</sup>*

## **MAGISTRATES AND JUDGES ARE SUBJECT TO COMMON STANDARDS OF JUDICIAL CONDUCT**

*Magistrates are bound by the same body of judicial ethics as the judges of the higher courts.<sup>xxxi</sup>*

*“(they) pursue the same ideal, the dispensing of justice according to law...(they) have the same basic duties and procedures. There can be no doubt that (they) must respond to a common ethical perception and regulate (their) activities accordingly.”<sup>xxxii</sup>*

*The Introduction to the AJJA Guide to Judicial Conduct<sup>xxxiii</sup> states:*

*“ The purpose of this publication is to give practical guidance to members of the Australian judiciary at all levels. The words “judge” and “judiciary” when used include all judges and magistrates”.<sup>xxxiv</sup>*

*The Guide makes it clear that the Chief Justices of Australia not only consider the magistracy to be an integral part of the judiciary, but also consider magistrates to be judges.*

*The reason why magistrates are subject to the same code of judicial conduct as the judges is because magistrates are in fact judges, and that is explicitly recognised by the Guide to Judicial Conduct.*

*It is inconsistent to regard magistrates as being subject to the same standards of conduct that apply to judges (on the basis that magistrates are judges) and to simultaneously withhold from them the title of "Judge". There is no basis to use different terminology when they are bound by the same set of ethical standards that apply to their superior colleagues in other courts.*

*As acknowledged by Chief Justice Gleeson, "members of the Australian judiciary aspire to high standards of conduct" and "maintaining such standards is essential if the community is to have confidence in the judiciary".<sup>xxxv</sup> The best way of ensuring that magistrates are seen to be bound by the same ethical standards as the judges of higher courts and maintaining public confidence in the judiciary is to formally recognise magistrates as judges.*

### **THE COMMUNITY PERCEPTION OF MAGISTRATES AS JUDGES**

*There is a considerable body of anecdotal evidence to the effect that "the public apparently (and correctly) perceive no difference between judges and magistrates: magistrates are routinely referred to as "judge" by lay members of the public".<sup>xxxvi</sup>*

*As long ago as 1987, former Chief Magistrate Briese, in the course of contemplating the future direction of the New South Wales magistracy, referred to the "public perception moulded by the media which shows magistrates to be judges who are addressed as 'Your Honour'".<sup>xxxvii</sup>*

*In a similar vein, back in 1995, Lawrence made the following observation:*

*"It is interesting to note the majority of the public who appear before Magistrates' Courts perceive the Magistrate to be a Judge and address that person accordingly".<sup>xxxviii</sup>*

*As one more recent commentator has observed:*

*"There is an expectation on the part of the community that those who preside over Magistrates' Courts will act judicially, that is, they will act as judges."<sup>xxxix</sup>*

### **THE ANACHRONISTIC TITLE OF "MAGISTRATE" AND ISSUES OF JUDICIAL INDEPENDENCE**

*The existing title of "magistrate" is an anachronism which links the modern magistracy with a public service magistracy of a bygone age when the judicial officers of the lower courts were neither structurally nor institutionally independent of the executive arm of government. Furthermore, the title suggests that the current judicial officers of our lower courts are an inferior class of judicial officer – a judicial style functionary<sup>xi</sup> or "a hybrid creature, part public servant, part judicial officer, disadvantaged by inadequate training and with an imperfect understanding of the judicial role".<sup>xi</sup> Nothing could be further from the truth.*

*Notwithstanding the very significant advances in the judicial independence of magistrates, the persisting ideological connection of today’s magistracy with a past public service magistracy can give rise to some public misconception that magistrates are not truly independent judicial officers. It has frequently been observed that the perception of independence is as important as the reality of independence.<sup>xlii</sup>*

*Now that the magistracy forms an integral part of the Australian judiciary it is the responsibility of the judiciary as a whole to protect and to ensure the judicial independence of the lower courts should there be the slightest perception that its judicial officers are not truly independent. The Australian judiciary needs to guard against institutional entropy or “judicial corrosion” within the judiciary, that is to say, a decline in the institutional independence of the judiciary.<sup>xliii</sup> It is essential that the perception, as much as the reality, of judicial independence at each level of the judicial hierarchy be maintained and preserved. As observed by Sir Anthony Mason, unless the independence of magistrates [either actual or perceived] is preserved, there is a risk that the interference with the independence of magistrates [again either actual or perceived] “will eventually contribute to the erosion of the concept of judicial independence as it applies to judges”.<sup>xliv</sup> The final disentanglement of the magistracy from the executive arm of government by changing the title of magistrates to that of “Judge” is necessary in order to maintain the independence of judicial officers of our lower courts, and ultimately the collective independence and integrity of the judiciary as a whole.*

*There is a strong historical and ideological connection between judicial independence and the office of “judge”:*

*Judicial Independence, as the very term suggests, was a concept associated with judges, notably the judges of superior courts.<sup>xlv</sup>*

*The judicial independence of magistrates – and the rest of the judiciary – is best recognised and secured by renaming magistrates as “Judges”.*

#### **THE PUBLIC ASPECTS OF THE PROPOSED CHANGE OF TITLE**

*The (former) Attorney General of Victoria, the Hon Rob Hulls, has recognised that a change of title is important “not only to assist the public in recognising that the Court now has ...more extensive jurisdictions but also to further help foster and encourage public confidence in the Government’s determination both in the past and possibly in the future to widen the jurisdictions of [the Magistrates Court] thereby increasing the public’s access to affordable and expeditious justice”.<sup>xlvi</sup>*

*These observations have equal application to magistrates’ courts in other States and Territories, and there is the same justification for conferring the title of “Judge” on magistrates in those jurisdictions.*

*There is a further justification for the change of title:*

*Whilst there may be many persons interested in accepting appointment to this Court, attracting the best candidates will also be assisted by a demarcation of this Court as it now is from the days when its members did not hold law degrees and had not practised as lawyers. It will help elevate the court’s standing not only in the community at large but also within the legal profession and it will encourage the better integration and communication between all judicial officers of this State which in turn will help the administration of justice in many regards, judicial education both formal and informal being just one example.<sup>xlvii</sup>*

*Although these observations were made in relation to the Victorian magistracy, they are equally applicable to other Australian magistracies and support the change of title in other States and Territories.*

### **THE PERSUASIVE EFFECT OF PRECEDENT**

*Approximately 28 years ago in comparable jurisdictions, such as Canada and New Zealand, “the imperatives of change” were recognised and magistrates were renamed “Judges”.<sup>xlviii</sup>*

*The following observations made by the New Zealand Royal Commission on the Courts in 1978 are pertinent to the current position in Australia:*

*“ [258]... A further submission which we endorse is that Magistrates’ Courts currently exercise wide general jurisdiction requiring a high degree of judicial competence that is not reflected in the term ‘magistrate’. In our opinion, these courts should be named “District Courts’ and presided over by judges...*

*[410] One of the most distinctive features of the submission from the New Zealand Law Society and the Department of Justice was the common approach to many issues that are under our consideration. Not the least of these, as we have already mentioned, was the proposal, with which we readily concur, of giving adequate recognition to the standing of the Magistrates’ Courts and stipendiary magistrates by changing the titles to ‘the District Courts’ and ‘District Court Judge’ respectively and giving the new court an increased jurisdiction...*

*[411]... we must emphasise that our aim is not a radical transformation of the Magistrates’ Courts; we seek to increase the respect for and the responsibilities of these courts but wish them essentially to remain the people’s courts...<sup>xlix</sup>*

*As a consequence of the conferral of the title of “Judge” on magistrates in Canada and New Zealand, the Commonwealth Association of Magistrates (CMJA), which began life in 1968 as a magistrates’ association (and which remains fundamentally an association of magistrates), changed its title to the Commonwealth Magistrates and Judges Association in 1988. The purpose of changing the name of the Association was not to extend membership*

*to judges as such but to include magistrates whose title had been changed to that of "Judge" -a tacit recognition that magistrates are judges.*

*Even in England, "where one might have expected the appeal of traditional nomenclature to be strongest", stipendiary magistrates were renamed "District Judges" in 2000.<sup>1</sup>*

*The considerations that prompted the change of title in Canada, England and New Zealand have equal application to the Australian magistracy and support an equivalent change in Australia.*

### **THE COST IMPLICATIONS OF THE PROPOSED CHANGE OF TITLE**

*The very substantial benefits to the community flowing from the change of title far outweigh the negligible cost of implementing the proposal.*

*The Council of Chief Magistrates, which supports the proposed change of title, has agreed that any approval for a change of title by any Attorney General of a State or Territory or by SCAG would occur in circumstances where it was acknowledged that such a change would not mean automatic access to existing Judges' Pensions Schemes operating in States and Territories. Consistent with the constitutional freedom enjoyed by the States and Territories in relation to the appointment and remuneration of judges, retirement benefits are entirely a matter for individual jurisdictions. In that regard, it is noted that Tasmania has moved to a superannuation scheme for new judges."*

*The main argument against changing the title is that the Local Court and the Supreme Court are different courts with different responsibilities. It is accepted that both are constituted by "judicial officers" with that being the generic term for people who are provide the function of "judging". Retaining different titles maintains a distinction between the Courts that is readily understood in the community and the legal profession. It reflects the fact that there is a hierarchy within the Courts' system.*

Additionally, the Chief Magistrate has advised that:

- in 2008 the Judicial Conference of Australia, Australia's peak judicial association which is made of over 600 Judges and Magistrates, gave its unqualified support to the proposal to change the title of Magistrates, and has since made representations to all Australian governments in the support of the change.
- Prior to 2012 the issue of change of title had not been dealt with on its merits by various States and Territory governments because of an agreement between members of the Standing Committee of Attorneys General(SCAG) that such a change should only be made unanimously. However, the Federal Attorney General, a member of SCAG, abandoned this agreement by passing the Federal Circuit Court of Australia Bill 2012 on 19 November 2012 pursuant to which the Federal Magistrates

Courts and the title of Federal Magistrates were changed, including a change in title of Magistrate to Judge. There was bipartisan support for this legislation.

- The proposed change of title would involve negligible cost to government. On the other hand, if the outdated title “Magistrate” continues, there is real potential cost to the quality of justice in the Northern Territory. There is no doubt that the level of status associated with the title “Judge” is greater than that applying to the title “Magistrate”, and there may be a real benefit to the community in enhancing the appeal of appointment as a Magistrate to a greater number of practitioners. Expanding the pool of available talent that is more likely to be attracted to the office of Judge as opposed to Magistrate would provide government with an opportunity to provide an enduring benefit to the community rather than simply seen as increasing personal status of the current magistrates.

*Question 11: Do you consider that “magistrates” should be renamed as “Judges”*

#### **Submissions/comments**

The Hon Dean Mildren stated that:

- I do not support the proposal to change the title of magistrate to judge. The only jurisdiction in Australia where this has occurred is the change of title and status to the former Federal Magistrates, who are now called Judges. There was a good case for doing so in that instance because the jurisdiction which the Court inherited was equivalent in status to that of a District Court because it took over jurisdiction formerly exercised by the Federal Court or the Family Court which are both superior courts;
- In no other Australian jurisdiction has such a radical change been accepted probably because there is a need to ensure that the hierarchy of the courts does not become confused;
- It is not the case that magistrates in the Northern Territory were originally public servants and that this had anything to do with their nomenclature. In the first place, in the Northern Territory prior to World War Two, there were both Stipendiary Magistrates and Special Magistrates. Whilst the latter were generally public servants, this was because they could be co-opted without having to be paid, and in any event, there was no other pool of talent to choose from, as the population was very small. Since at least 1940, there have not been any special magistrates with one exception (a long serving JP whom it was thought fit to be given this title in the 1980s, and in order to do so, an amendment was made to the relevant Ordinance or Act to enable this to occur as by then the legislation made no provision for special magistrates;
- In South Australia, there have not been any special magistrates for a very long time; only stipendiary magistrates. It is true that in some other states, persons who worked

in courts were sometimes promoted to the position of magistrate, but this was not the universal rule throughout Australia. I doubt if anyone today thinks that any of our magistrates might just be some public servant, not legally trained, doing the job part time, so I cannot see any how there might be a perception that magistrates are anything other than professional full time independent judicial officers;

- It is true that magistrates adjudicate, and for that reason they are judges, but that does not entitle them to be called “Judge” with a capital “J”. The courts over which the magistrates preside deal with the vast majority of the litigation which comes before the courts, and whilst they are entitled to the utmost respect, because they are dealing with the general public on a daily basis, many of whom are Aboriginal or not represented by lawyers, it would be inappropriate to make the proceedings any more formal than is strictly necessary. There is no objection to calling them ‘Your Honour’ as a courtesy title, but I think “Judge” takes the matter too far. It is not suggested that it would be easier to recruit more capable people if their title were to be changed, and I cannot see how calling them ‘Judge’ would make any improvement except to the egos of some of the incumbents; and
- There is also the danger that once their status is raised to the level of Judge, there will be a push to in effect, turn the court into a district court with significant financial implications. Furthermore, not all of the functions of a magistrate are strictly speaking judicial. Some are administrative in nature, such as conducting committal proceedings

The Hon Trevor Riley stated that he does not support the need for the change noting that there is no pressing need. He suggested that the references to developments at the Commonwealth level ignore the fact that there was a significant reconstruction of the former Federal Magistrates Court so that, as the new Federal Circuit Courts jurisdiction is more akin to that of a District Court. The Chief Justice also suggested:

- the need for all administrative duties to be removed from Magistrates (it appears to be referring to jurisdictions of the kind that are being transferred to the Northern Territory Civil and Administrative Tribunal); and
- not appropriate for a small jurisdiction such as the NT to lead the way – the change should be a move supported on a national basis and by a much wider body of opinion.

Law Society Northern Territory does not support this proposal for the following reasons:

- no benefit for the people of the NT;
- does not promote the interests of justice;
- change might generate greater confusion for those appearing in the Court of Summary Jurisdiction and diminish the “important distinction between the two courts”;

- magistrates still perform quasi-judicial functions and perform administrative functions;
- differences in requirements for appointment (5 years rather than 10 years experience);
- fact that temporary magistrates can be appointed by the Minister; and
- concerned that the NT should not take this step “lightly” ahead of other jurisdictions – “The Society supports continued adherence to the agreement of the Standing Council of Attorneys General that any such change should be made unanimously:.

*Question 12: If yes, do you think that the NT, at the State/Territory level, should take unilateral action or wait until most other States and Territories, have adopted this as a policy position.*

Mr John Lowndes stated that the question is redundant as the Federal Government has already taken the initiative by renaming the former magistrates of the Federal Magistrates Court Judges of the Federal Circuit Court of Australia and there are compelling arguments in favour of the change of title to enable the Northern Territory to make and implement this policy decision. There is no sound or logical reason why the Northern Territory should not lead the way in effecting a change of title.

#### **Proposed position following consultation**

Retain the current clause of the draft Bill (ie no change of title).

#### **Subdivision 1 of Division 1 of Part 5 – Establishment of offices, powers and functions**

##### *45. Magisterial offices (Magistrates Act, s4(1) and (2))*

This clause re-enacts section 4(1) and (2) of the *Magistrates Act*. It provides that there is to be a Chief Magistrate. It also provides that the number of Deputy Chief Magistrates and the number of Magistrates are both to be determined by the Minister.

See clause 79(1) for transitional provisions.

#### **Submissions/comments**

None.

#### **Proposed position following consultation**

Retain the current clause of the draft Bill.

##### *46. Functions of magistrates (Magistrates Act, s18, WA Magistrates Court Act, s.6)*

This clause re-enacts section 18 of the *Magistrates Act* and provides that a magistrate may carry out functions conferred by other Acts or functions conferred on a JP or any registrar (including a Judicial Registrar).



**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

*47. Powers of magistrates (Magistrates Act, s.18)*

This clause re-enacts the current provision in section 18 of the *Magistrates Act*. It provides that a magistrate has the necessary powers to perform his or her functions.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

**Subdivision 2 of Division 1 of Part 5 – Appointment, terms of office etc**

*48. Appointment (Magistrates Act, s.4(3) and (5))*

This clause provides for the appointment of magistrates by the Administrator, including the Chief Magistrate and Deputy Chief Magistrate. The core requirements for appointment are that the person be a lawyer for at least 5 years and is aged under 70 years of age.

It substantially replicates the existing sections 4(3) and 5 of the *Magistrates Act* except that subclause (2) modernises and brings into line with the other Australian jurisdictions the criteria for eligibility for a magistrate. Currently, a lawyer with 5 years standing admitted in England, Scotland, Northern Ireland, Papua New Guinea and New Zealand is eligible for appointment as a magistrate in the Northern Territory. These special references are not being re-produced.

It is intended that this provision permit the appointment of part time magistrates.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

*49. Full- time or part-time appointment*

This clause provides that a Magistrate can be appointed on a full or part-time basis with the default position being that of full-time appointment.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

50. Salary, allowances and benefits ( Magistrates Act, s.6)

This clause re-enacts section 6 of the *Magistrates Act*. Terms and conditions will continue to be set by the Remuneration Tribunal under the *Assembly Members and Statutory Officers (Remuneration and Other Entitlements) Act*. There is also a “no detriment clause” (clause 50(2)) and an appropriation clause (clause 50(3)).

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

51. Vacation of office ( Magistrates Act, s7-10)

This clause is based on sections 7, 8 and 10 of the *Magistrates Act* and retains the current circumstances in which a magistrate vacates office (ie reaches 70 years, resigns or the appointment is terminated under section 52). Death is also self-vacating.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

52. Termination of appointment ( Magistrates Act, s.10, Supreme Court Act, s.40)

This clause is modelled on section 40 of the *Supreme Court Act*. As for that Act it does not address the procedure that should be adopted for the Administrator to exercise his or her power under this provision.

Other jurisdictions, such as New South Wales, have a judicial commission to address both termination of judicial appointments and complaints made against judicial officers. There is no formal complaints procedure in the Northern Territory for either magistrates or judges. It is, however, understood that a protocol exists.

**Question 13: Is there a need to set out some legislated process for dealing with complaints about judicial officers?**

**Submissions/comments**

The Hon Dean Mildren suggested the need to insert the word proven;

The Hon Trevor Riley stated that the word “proven” should be inserted; and

The Law Society Northern Territory does not support this legislative change. Instead the Society:

- advocates that heads of the courts’ jurisdictions implement

“a transparent mechanism open to all Court users to register complaints about judicial conduct. This mechanism should explain what matters are the valid bases for complaints and outline the process to be undertaken in respect of complaints received”. The Society refers to the Western Australian Law Reform Commission Report 102 August 2013 “Complaints Against Judiciary”.

- The Society is of the view that “the independence of the judiciary is paramount. As such a legislated regime has the potential to unacceptably impede that independence”. No reasons are provided for this view other than to refer to the need to balance the independence and impartiality of the Courts with the need for a mechanism to deal with the more serious concerns and to provides assurance to a concerned public.
- The Society notes that in recent years it has cause to raise problems with the courts that operate in the NT (Magistrates Court, Supreme Court and the Federal Circuit Court). The concerns have related to delays, judicial bullying and harassment. The Society also outlines problems with the current regime. One of them is not available to all Court users. It notes that it can investigate behaviour of judicial officers that occurred whilst they practised as lawyers but not post appointment behaviour.
- The Law Society Northern Territory also suggested that the word “proven” be included in clause 5(3) arguing that the requirement that misbehaviour is proven raises the expectation that there will be a proves for arriving at such proof. The Society argues that the absence of the word “proven” has implications that unsatisfactorily undermine the independence of the Magistracy.

The Hon Dean Mildren stated no personal objection to a process to enable complaints against judicial officers to be dealt with, but given that nearly all complaints are likely to be frivolous, the cost of setting up a formal statutory body, and the very few complaints that might be made, the problem is going to be how to decide on the appropriate mechanism. One possible model is for complaints to go to the head of jurisdiction, with complaints about the head of jurisdiction to go to the next senior judicial officer, with a duty to consider the complaint, deal with the complaint and report on the outcome or outcomes to the

Attorney-General. The reporting obligation might be met either by reporting each case individually, or annually depending upon whether the complaint has been made out or not.

Mr John Lowndes stated:

- Whilst there is a need to establish a structured system of dealing with complaints against judicial officers (see the various reports of the Judicial Conference of Australia (JCA) 22 April 2009, 1 December 2009 and 22 January 2010), there are a range of options as referred to by the JCA in the reports. A Committee reporting to the JCA recommended that the JCA support and promote a system of handling complaints against judicial officers based on that of the New South Wales Judicial Commission with such modifications as are appropriate for each Australian jurisdiction, given differences in size and economic considerations.
- The need for a structured system of dealing with complaints in the Northern Territory is a matter that needs to be subject of a separate and comprehensive review. It would be premature to recommend the incorporation of a mechanism for dealing with complaints in the Local Court Bill.
- If the Northern Territory decided to adopt the committee's recommendation to the JCA, then it would probably be necessary to establish a judicial commission as an independent statutory corporation (which would be part of the judicial arm of government) under special legislation. By way of example the NSW Judicial Commission was established under the *Judicial Officers Act 1986*.

#### **Proposed position following consultation**

Dealing with "judicial complaints" is an issue that relates to the judiciary as whole rather than just local court judicial officers.

Retain the current clause of the draft Bill.

#### **53. Completion of pending proceedings ( Magistrates Act, s.20A)**

This clause facilitates the completion of proceedings by a magistrate even if their appointment has been terminated or office vacated. For example, if a magistrate turned 70 in the course of a summary hearing, he or she would be able to continue to hear and determine the proceedings, including making judgment and imposing sentence (if applicable). It is based on section 20A of the *Magistrates Act*. It does not apply if termination occurs under clause 52.

#### **Submissions/comments**

None.

### **Proposed position following consultation**

Retain the current clause of the draft Bill.

#### **54. *Acting Chief Magistrate ( Magistrates Act, s.9, WA Magistrates Court Act, schedule 1, clause 8)***

This clause replaces section 9 of the *Magistrates Act* and the drafting is based on Schedule 1 clause 8 of the *Magistrates Court Act* (WA). The current section 9 is not clear about the circumstances where an acting Chief Magistrate should be appointed.

Also, the only option for appointment is by the Administrator. Given that the office of Deputy Chief Magistrate exists, it must be envisaged that one of the functions of this office is to act in the position of the Chief Magistrate when required, such as when the Chief Magistrate is on leave, or outside the Northern Territory, or unwell.

The natural devolution to the first appointed Deputy Chief Magistrate obviates the need for an appointment by the Administrator for what could be a relatively short period of time.

The power of the Administrator to make the appointment of acting Chief Magistrate is retained, however, as there may be circumstances where such appointment is preferable to devolution to a Deputy Chief Magistrate. For example, if the office of Chief Magistrate becomes vacant, it may be expedient to appoint a magistrate who does not want to apply for the permanent position, so as to create a more level 'playing field' for other applicants.

### **Submissions/comments**

None.

### **Proposed position following consultation**

Retain the current clause of the draft Bill.

### **Division 2 of Part 5 - Acting magistrates**

The *Magistrates Act* provides for three different types of 'acting' magistrate, each with different methods of appointment. Section 9 provides for 'acting' magistrates, section 9A for 'relieving' magistrates and section 14 for 'special' magistrates (applies to JPs appointed as a magistrate). Although titles differ as do methods and terms of appointment, each of the other Australian jurisdictions has only one type of 'acting' magistrate.

Division 2 creates a single type of 'acting' magistrate. The purpose of the provisions in this Division is to enable additional magistrates to be appointed on a short fixed term basis to cope with particular circumstances such as: temporary increase in workload or temporary shortage of magistrates (e.g. sick or on leave or involved in a lengthy hearing). The provisions also provide for acting magistrates to be appointed on a sessional basis (ie so that the Chief Magistrate may call on them on an as needs basis).

### 55. Appointment

This clause is based on sections 9 and 9A of the *Magistrates Act*. To allow for appointments that may need to be made quickly, the Minister is empowered to appoint an acting magistrate for a term up to 3 months. For a longer term, up to 12 months, the appointment must be made by the Administrator.

Clause 55(2)(b) is designed to ensure that Acting appointments can be made on a sessional basis.

Clause 55(4) is designed to make it clear that acting appointments can be extended – that is, so that section 55(3) is not read as imposing a time limit for cumulative appointments.

In other jurisdictions a person who has retired as a Magistrate because of the age restriction may be appointed as an acting Magistrate for a period (commonly 2 years) following the statutory age of retirement. Retired Magistrates provide a good source for acting appointments. This was the case in the NT before the statutory age for retirement was raised from 65 years to 70 years.

In considering the issue of whether a person aged over 70 is suitable to act as an Acting Magistrate there seems to be no particular need for the person to have previously been appointed as NT Magistrate.

**Question 14: should the age limit on persons who can be appointed as acting Magistrates be raised?**

#### **Submissions/comments**

The Hon Dean Mildren – does not consider that there should be any age limit - person is either capable or not capable of doing the job,

The Hon Trevor Riley suggests that acting magistrates should be able to be appointed on a longer term basis so that a pool of acting magistrates can exist with the Chief Magistrate having the discretion to select which acting magistrate may act at any particular time. The Chief Justice supported the position in other jurisdictions namely of retired magistrates being able to be appointed as an acting magistrate for the period of 2 years past the age of compulsory retirement. He also stated that he could see no reason for any age restriction with the Chief Magistrate having the function of determining suitability from time to time.

Mr John Lowndes supported the raising of the age limit for acting magistrates to 75 years.

Issue raised by the Law Society Northern Territory

The Law Society Northern Territory expressed the view that appointments by the Minister undermine the independence of the magistracy. The Society suggest that acting appointments (of all kinds) should be:

- made by the Administrator;
- made on conditions that are transparent and accountable;
- subject to the scrutiny of the Legislative Assembly;
- renewable beyond 12 months; and
- subject to the same provisions for removal (as for other magistrates).

**Proposed position following consultation**

Clause 55(2) is designed to permit the establishment of a pool of persons who, on an as needs basis, can be called on by the Chief Magistrate. This is limited to 12 month periods, A time period is necessary so as to ensure that tenure for magistrates is retained as a general principle while accepting the practical necessity, for the purpose of providing judicial services, to have short term appointments. Retain the current clause of the draft Bill excepting raise the age to 75 years

**56. Functions and powers of acting magistrates ( Magistrates Act,s.57)**

This clause provides that acting magistrates have the same functions and powers as a magistrate and reflect existing provisions in the *Magistrates Act*.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

**57. Conditions of appointment( Magistrates Act, s.9-9A)**

This clause reflects existing provisions in the *Magistrates Act*. If the Minister makes the appointment then he or she determines the conditions of appointment. If the Administrator makes the appointment then he or she determines the conditions of appointment.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

**58. Vacation of office ( Magistrates Act, s. 9-9A)**

This clause reflects existing provisions in the *Magistrates Act* and is similar to clause 51. It provides that an Acting Magistrate's appointment ceases on end of their term of

appointment, on reaching the statutory age of retirement, on resignation on a termination by the person (administrator or Minister).

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

59. Completion of pending proceedings (see clause 53)

Similar to clause 53 regarding full time magistrates, this clause facilitates the completion of proceedings by a acting magistrate even if their appointment has been terminated or office vacated. For example, if a magistrate turned 70 in the course of a summary hearing, he or she would be able to continue to hear and determine the proceedings, including making judgment and imposing sentence (if applicable).

**Division 3 of Part 5 - General matters**

This Division covers general matters regarding both magistrates and acting magistrates. It is noted that section 19A of the *Magistrates Act*, which provides protection from civil liability for judicial officers exercising judicial functions, is not re-enacted here. That is because it has become superfluous given the enactment of more widespread protection in the *Courts and Administrative Tribunals (Immunities) Act 2008*.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

60. Oath of office (Magistrates Act, s.20)

This clause re-enacts section 20 of the *Magistrates Act*. The oath of office is to be taken before a judge of the Supreme Court or by a person authorised by the Administrator (if the oath is to be taken outside of the Territory). The oath of office is set out in Schedule 1.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.



61. Prohibition of other work (*Magistrates Act*, s.11)

This clause is based on section 11 of the *Magistrates Act*. It is a standard provision in equivalent legislation throughout Australia, although the Northern Territory is the only jurisdiction where the Minister can consent to magistrates engaging in other paid employment. The ability for a magistrate to continue to hold office in another Territory or to hold office in the armed services is proposed to be removed as being obsolete and out of date.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

62. Acts done by magistrate outside the Territory (*Magistrates Act*, s.19)

This clause is based on section 19 of the *Magistrates Act*. It provides that various activities of a magistrate outside of the Territory are as effective as if they occurred in the Territory. These activities include authenticating signatures and administering oaths.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

## 7.6 Part 6 of the Bill - Other Court officers

The purpose of this Part is to rationalise and give statutory authority to the quasi and non-judicial officers of the Court. Particular features of this Part are:

- establishing the criteria for eligibility of appointment as a Judicial Registrar (clause 63);
- establishing the position of Principal Registrar (clause 66); and
- rolling up the multiplicity of non-judicial officers under the *Local Court Act* and the *Justices Act* (e.g. registrar, deputy registrar, acting registrar, 'the 'Clerk of Court; 'a' clerk of court) into the office of 'registrar' (clauses 66 – 69).

## **Division 1 of Part 6 - Judicial registrars**

### **63. Appointment of judicial registrars (Local Court Act, s.9)**

The current position of Judicial Registrar was created subsequent to the enactment of the *Local Court Act*. The criteria for and mode of appointment have not been provided for by statute. Current practice is that Judicial Registrars must be legal practitioners as they exercise judicial functions in the Local Court, including hearing and determining matters in the small claims jurisdiction. They are public servants and they are appointed by the Minister. In all respects their eligibility and appointment are similar to the office of Deputy Coroner under the *Coroners Act*. It is noted that the latter office does not exercise a judicial function.

Clause 63 maintains the current provisions.

#### **Submissions/comments**

Hon Dean Mildren 63(2)(b) is this just a money saver – why cannot persons other than public servants be judicial registrars

#### **Proposed position following consultation**

Retain the current position.

### **64. Functions of judicial registrars (Local Court Act, s.9)**

This clause sets out that the functions of a judicial registrar include the exercise of the jurisdiction of the Local Court as provided in clause 6 - ie:

- dealing with claims under the *Small Claims Act*; and
- dealing with other civil matters (except for hearing and determining claims and hearing appeals); and
- performing functions provided for in the Rules of Court or in the *Local Court Act* or in any other Act.

#### **Submissions/comments**

None.

#### **Proposed position following consultation**

Retain the current clause of the draft Bill.

### **65. Powers of judicial registrars Local Court Act, s.9(2)**

This clause provides that a judicial registrar has the powers necessary to perform the functions set out in clause 64.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

**Division 2 of Part 6 – Principal registrar and other registrars**

*66. Principal registrar and registrars (Local Court Act, s.9)*

This clause provides for public servants to be assigned by the Chief Executive Officer of the Department administering the *Local Court Act* to the positions of principal registrar and registrars of the Court.

The position of principal registrar is new. The *Justices Act* provides for a Clerk of Court (although throughout the Act it is unclear whether there is only one clerk or a number).

In practice there are currently two positions of 'principal registrar' of the Local Court (one in Darwin and one in Alice Springs) but there is currently no statutory basis for these positions.

In the interests of clarifying responsibilities, providing for uniformity of practice and mitigating any north/south divide, it is proposed that there be only one principal registrar. One of the responsibilities of that person will be the keeping of Court records (clause 25).

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

**67. Functions of registrars (Local Court Act, s.9-10, 21(3))**

The functions of the registrars are:

- to exercise the powers delegated to them under rules of court as made under clause 69;
- to perform administrative functions conferred on them by rules of court or by any legislation;
- to perform other functions conferred by the Act or any other Act; and
- to perform administrative functions as directed by the Chief Magistrate.

These provisions are based on sections 9, 10 and 21(3) of the current *Local Court Act*.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

**68. Powers of registrars (Local Court Act, s.9(2))**

This clause sets out that a registrar has the powers necessary to perform his or her functions. It is based on section 9(2) of the current *Local Court Act*.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

**69. Delegation of jurisdiction to registrars (Local Court Act, s9(2), 21(3), Justices Act, s201A(3) and WA Magistrates Court Act, s,28)**

This clause is based on sections 9(2), 11 and 21(3) of the *Local Court Act* and sections 201A(3) of the *Justices Act* and section 28 of the *WA Magistrates Court Act*.

It provides that the rules of court may delegate to registrars some of the court's jurisdiction. The rules of court cannot delegate the power to hear or determine civil claims – but this operates subject to other legislation (eg legislation dealing with small claims) (see clause 6(2)) or appeals. Nor can the rules delegate the power to conduct a preliminary examination (ie committals) or to hear and determine a charge for an offence nor can they delegate the power to punish for contempt.

### **Submissions/comments**

Hon Dean Mildren see comment re small claims

### **Proposed position following consultation**

Retain the current clause of the draft Bill.

70. *Review of decision of registrar in exercise of delegated jurisdiction (Local Court Rules, rule 4, Western Australia Magistrates Courts Act, s.29)*

This clause provides that a magistrate can hear appeals from decisions of registrars. The clause is based on Local Court Rule 4.04 and WA *Magistrate Court Act*, section 29.

### **Submissions/comments**

None.

### **Proposed position following consultation**

Retain the current clause of the draft Bill.

### **Division 3 of Part 6 – Bailiffs**

71. *Bailiffs (Local Court Act, s.10A)*

This clause provides that the Chief Magistrate may appoint bailiffs for the court. A police officer may also perform all the functions of a bailiff of the court. This clause is based on clause 10A of the *Local Court Act*.

It can be noted that the *Sheriffs Act* provides for appointments by the Attorney-General of bailiffs for the purposes of the *Supreme Court Act*.

The *Commercial and Private Agents Licensing Act* also provides for the licensing of bailiffs.

Arguably, the provisions concerning the appointment of bailiffs should be rationalised – for example, for court purposes they could be appointed by the Chief Executive Officer.

### **Submissions/comments**

None.

### **Proposed position following consultation**

Retain the current clause of the draft Bill.

72. *Functions of bailiff (Local Court Act, s.10A)*

This clause is also based on section 10A of the *Local Court Act*. It provides that the functions of bailiffs are to serve and execute the process issued by the court, perform functions provided by the rules of court or perform functions as directed by magistrates.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

*73. Powers of bailiff (Local Court Act, s.10A)*

This clause provides bailiffs with the necessary powers to exercise their functions.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

**Division 4 of Part 6 – Interstate or overseas arrangements**

*74. Out-of-Territory registrars (Local Court Act, s.9(4))*

This clause is based on section 9 of the *Local Court Act* and section 42 of the *Justices Act*.

It provides that the Minister may appoint persons as registrars for the purpose of exercising the powers of the court outside of the Northern Territory.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

*75. Registrars may hold appointments for other jurisdictions (Local Court Act, s.9(4), Justices Act, s.42)*

This clause is based on section 9 of the *Local Court Act* and section 42 of the *Justices Act*.

It provides that a registrar can, with the approval of the Minister, hold office as a registrar or deputy registrar of a court of another jurisdiction.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

## 7.7 Part 7 of the Bill – Miscellaneous

### 76. Regulations Local Court Act, s.36A, Justices Act, s.203:

Clause 76 sets out the regulation making power. It should be read with the *Interpretation Act* which contains standard provisions for matters that can also be covered in regulations.

The regulation making power provides that regulations can permit the Chief Executive Officer to fix fees.

**Question 15: Is it appropriate that the regulations may permit the Chief Executive Officer (rather than the Administrator or the Minister) to also have the power under the regulations to fix fees?**

#### **Submissions/comments**

The Hon Dean Mildren stated that it is not appropriate for the CEO to fix court fees. This should be done by regulation made by the Administrator in Council, or at the least, by the minister, to ensure appropriate parliamentary accountability.

This proposal was also opposed by Hon Trevor Riley on the basis that the fixing of fees is at the heart of access to justice. He states that fee setting by the Chief Executive Officer suggests that fees are part of running a business. Further, he states that Courts and the Judiciary are the third arm of government and that there should be a conscious decision taken by government if fees are to be increased and access to justice thereby reduced.

John Lowndes also stated that given that the fixing of court fees can give rise to access to justice issues; the fixing of fees should be the province of Parliament.

#### **Proposed position following consultation**

Retain the current clause of the draft Bill excepting delete the reference to the possibility that the regulations may authorise the Chief Executive Officer setting fees.

## 7.8 Part 8 of the Bill – Transitional matters for the Local Court Act 2014

### 77. Definitions

This clause contains definitions of terms used in clauses 78-88.

#### **Submissions/comments**

None.

#### **Proposed position following consultation**

Retain the current clause of the draft Bill.

**78. New Local Court is a continuation of old Courts**

This clause provides that the old courts are combined and continue on as the new Local Court. The clause also explains how references to the new Local Court are to be read when there are references in other documents (including legislation) to the old courts.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

**79. Office holders**

This clause provides for the status quo regarding the number of Deputy Chief Magistrates and the number of other magistrates namely that, pending any changes made under clause 45, there will one Deputy Chief Magistrate and 12 magistrates.

The clause also provides for the maintenance of current conditions for holding office.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

**80. Ongoing proceedings**

This clause provides that proceedings occurring when the new legislation commences are to become proceedings of the new Local Court. Unless the Court is satisfied that proceedings under the new Act would operate unfairly, the procedures under the new Act will apply rather than the procedures that were applicable under the legislation that applied to the old courts.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

**81. Judgments, orders and process**

Judgments, orders and process under the old Acts become judgments, orders and process under the new Act.



**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

*82. Continuation of things done by Magistrates*

Things done by Magistrates under the *Magistrates Act* continue to have the same effect notwithstanding the repeal of the *Magistrates Act*.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

*83. Rules and practice directions*

Rules of court made under section 21 of the old *Local Court Act*, section 201A of the *Justices Act*, section 50 of the *Small Claims Act* and section 13(2) of the *Personal Injuries (Civil Claims) Act* become rules of court under the new *Local Court Act*.

Similarly practice directions under 21 of the old *Local Court Act*, section 201A of the *Justices Act* are deemed to be practice directions under clause 44.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

*84. Directions to judicial officers*

This clause provides that directions (to Magistrates) given under section 13A of the *Magistrates Act* become directions for the purposes of clause 84.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

**85. Approval of places to sit**

Appointments of places to sit made under section 13 of the *Magistrates Act* apply as if made under clause 23(1).

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

**86. Contempt**

The old provisions relating to contempt continue to apply to contempts that may have occurred prior to the commencement of the new legislation.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

**87. Prerogative writs in civil proceedings**

This clause maintains the status quo under the old *Local Court Act* so that the Supreme Court has no power to grant relief by way of the various prerogative writs for things done before the commencement of the new legislation.

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

**88. References to repealed Acts**

This clause provides that references in other Acts or documents to the new *Local Court Act* include a reference to the old *Local Court Act*, *Justices Act* or *Magistrates Act* (depending on context).

**Submissions/comments**

None.

**Proposed position following consultation**

Retain the current clause of the draft Bill.

## 8 *Records of Dispositions Act* - review

The *Records of Dispositions Act* provides for:

- the sound recording of depositions of witnesses if the court room is equipped with sound recording equipment (section 5(1) and (2)) or by shorthand or in writing if the court directs;
- if there is no sound recording, the depositions shall be recorded by shorthand or written (section 5(3));
- the recording of a summary of a question of law if the court considers this desirable or if a party to the proceeding applies for this to occur (section 6);
- depositions that are recorded in writing are to be signed by the witness and the judicial officer (section 7);
- the clerk of the court has custody of the record of depositions (section 8);
- the clerk of the court can give directions about the making of transcripts with certifications of the transcripts (sections 9, 10 and 11);
- automatic transcriptions (section 12);
- Clerk of Court to provide copies of depositions (section 13);
- Clerk of the Court of Summary Jurisdiction is to provide, free of charge, transcripts of proceedings where a person is committed for trial (section 14);
- the evidentiary value of a certified copy of a transcript (section 16);
- statements made under section 110 of the *Justices Act* and under section 29 of the *Coroners Act* (section 17);
- the erasure of sound recordings after the expiration of 12 months from when they are made (section 18);
- the operation of sound recording equipment (section 19); and
- the making of regulations. The Records of Depositions Regulations provide for the fees to be paid for pages of transcript.

As is plain from this summary of the provisions of the *Records of Depositions Act*, the Act mainly deals with administrative detail. For the purposes of the new *Local Court Act*, the *Records of Depositions Act* will cease to be of any practical relevance. Most of the issues covered by it will be covered administratively with the core legislative requirements, such as the keeping of records and the collection of fees, being dealt with by either specific requirements in the Act or by subordinate rules or regulations made under the Act.

However, the *Records of Depositions Act* also applies to other Courts – such as the Youth Justice Court, the Coroner and the Work Health Court. If the *Records of Depositions Act* is repealed, there may be a need to make consequential amendments to the Acts under which those other Courts are established.

**Question 16: there any problems in repealing the *Records of Dispositions Act*?**

### **Submissions/comments**

The Hon Dean Mildren noted reservations about the repeal of the *Records of Depositions Act*. He stated that the purpose of the Act was to legitimise recorded court transcripts, and to facilitate proof that the transcript was true and accurate if it is required for other proceedings. He suggested that the Act applies to both the Supreme Court and all other courts and expressed doubt that the proposals have dealt with (a) proof of authenticity and (b) transcripts of proceedings of other courts. It is important to remember that there are statutory provisions enabling the evidence given in a court to be tendered as the evidence to be given either in the same court or a different court in certain circumstances. It is important that the transcript is able to be authenticated for this purpose.

The Hon Trevor Riley also noted that an important purpose of this Act is to facilitate the proof of transcript for subsequent proceedings in the Supreme Court and possibly elsewhere, so that if the Act is repealed this aspect of the Act would need to be replaced by something else.

### **Proposed position following consultation**

The *Records of Depositions Act* applies to a range of lower courts (as set out in section 4 of that Act).

Tables 6 and 7 below set out, respectively, the current position for each of the courts mentioned in section 4 of the *Records of Depositions Act* and for other courts and tribunals (such as Northern Territory Civil and Administrative Tribunal and the Supreme Court) concerning record keeping, transcripts and the evidentiary value of them.

Table 6  
Section 4 courts

Court listed in section 4 of the <i>Records of Dispositions Act</i>	Requirement to keep records	Requirement to provide records	Evidentiary value of records
(new) Local Court	Clause 25 provides that it is the role of the principal registrar to ensure that proper records are maintained (with details spelt out in clause 26)	Clauses 27-29 and 31 deal with access to records with section 30 providing for the payment of fees	No specific provision
Youth Justice Court	No specific provisions	No specific provisions	No specific provisions
Coroner's Court	Section 11 of the <i>Coroners Act</i>	Nothing specific	Nothing specific
Family Matters Court	There is no such court. The <i>Care and Protection of Children Act</i> (section 88) provides for the "family matters jurisdiction" of the Local Court.	Nothing specific	Nothing specific
Work Health Court	No specific provisions contained in the <i>Work Health Administration Act 2011</i>	No specific provisions	No specific provisions
Warden's courts	Warden's courts no longer exist other than for the purposes of transitional provisions under the <i>Mineral Titles Act</i>	No specific provisions	No specific provisions

**Table 7 - Other courts and tribunals**

Name of court or tribunal	Requirement to keep records	Requirement to provide records	Evidentiary value of records
Supreme Court (Civil jurisdiction)	<p>No specific provisions in the <i>Supreme Court Act</i>.</p> <p>Order 83 of the Supreme Court Rules provides for appeals from “tribunals below” to the Supreme Court. “Tribunals below” includes courts. Rule 83.18 obliges the “tribunals below” to produce to the Supreme Court the records relevant to the appeal (original of transcript, exhibits and the reasons for the decision).</p>	No specific provisions in the <i>Supreme Court Act</i>	No specific provisions in the <i>Supreme Court Act</i>
Supreme Court (Criminal jurisdiction)	<p>Section 428(1) of the Criminal Code requires that a record must be made of any proceedings of a trial of any person on indictment.</p> <p>Order 81A of the Supreme Court Rules provides for way in which records are kept.</p> <p>Orders 86.20 and 86.21 of the Supreme Court Rules also provides for the Registrar to organise with the relevant Judge reports and records for appeals from or in relation to decisions of the a judge of the Supreme Court.</p>	Section 428(2) of the Criminal Code requires that copies of records must be provided to the Registrar if there is an appeal.	Section 428(3) of the Criminal Code requires that copies of records must be provided on payment of a fee to any “interested party”
Northern Territory Civil and Administrative Tribunal	<i>Northern Territory Civil and Administrative Tribunal Act</i> (section 144) provides that the Registrar has the function of managing the registry and records of Northern Territory Civil and Administrative Tribunal.	<i>Northern Territory Civil and Administrative Tribunal Act</i> (section 85) provides for accessibility of evidence. Fees may be prescribed by regulation	Nothing specific

As it can be seen:

- the *Records of Dispositions Act* has no application to the Supreme Court other than in respect of facilitating transcripts of various records (sections 13-16). For the Supreme Court there are ad hoc provisions in the Supreme Court rules dealing with the recording, transcripts etc for civil matters. For criminal matters in the Supreme Court section 428 of the Criminal Code provides for the keeping of, and access to, records of criminal proceedings with the Supreme Court Rules, Order 81A, providing for procedural matters relating to the operation of section 428.
- It is also plain that the *Records of Dispositions Act* is the only legislation dealing with the requirement to keep records for the Work Health Court and the Youth Justice Act; and
- Subject to the potential application of the *Evidence (National Uniform Legislation) Act*, the *Records of Dispositions Act* is the only legislation dealing with the evidentiary status of records of proceedings of any of the lower courts.

Section 178(5) of the *Evidence (National Uniform Legislation) Act* provides for certificates of particulars of records of “Australian courts” (and it appears that tribunal such Northern Territory Civil and Administrative Tribunal come within the definition of “Australian court”). Section 157 of that Act also provides for judgment, acts and other processes of “Australian courts”.

The genesis of the proposal to repeal the *Records of Dispositions Act* is that it contains overly prescriptive material about how to record evidence. All concerned appear to agree that this detail does not need to be included in legislation.

However, it is also plain that some of the provisions are of more substantial nature. These are the provisions relating to:

- certifications of the transcripts (sections 9, 10 and 11);
- provision copies of depositions (section 13);
- provision, free of charge, transcripts of proceedings where a person is committed for trial (section 14);
- the evidentiary value of a certified copy of a transcript (section 16); and
- the Records of Depositions Regulations provide for the fees to be paid for pages of transcript.

Instead of repealing the *Records of Dispositions Act* it appears appropriate to:

- either retain the substantive provisions (sections 12-16) or duplicate those provisions into each of the affected Acts (namely Local Court Bill 2014, *Coroners Act*, *Youth Justice Act* and *Work Health Administration Act*); and
- make consequential amendments to the *Coroners Act*, *Youth Justice Act* and *Work Health Administration Act* so that the record keeping requirements are either linked with, or duplicate, those in the *Local Court Bill 2014*.

It is proposed that the Director, Courts Administration form a working party within the Courts' Division for the purpose of identifying legislation and practice that meets the needs of all courts and tribunals.

## 9 Consequential amendments

As mentioned previously, there will be extensive consequential amendments to a large range of legislation to reflect new terminology and the creation of the new Local Court.

The following amendments will be included in the consequential bill but are of a substantive nature.

### Amendment to section 3 of the Criminal Code

This is discussed in the commentary to clause 17.

### Amendment to section 122 of the Sentencing Act

This section provides the 'jurisdictional limit' of the sentencing power of the Court of Summary Jurisdiction. For indictable offences that can be dealt with in the Court of Summary Jurisdiction (under sections 120, 121A or 131A), there is an upper penalty limit that can be imposed, regardless of the maximum penalty for the offence. Currently this is 5 years imprisonment or a fine of 250 penalty units. This pecuniary limit is anomalous as there are a great number of offences across the statute book that have a maximum imprisonment penalty of 2 years and so are, pursuant to the *Interpretation Act*, summary offences, but have a maximum pecuniary penalty of 400 penalty units. That means that only the Court of Summary Jurisdiction has jurisdiction to hear and determine the charge but it cannot impose the maximum pecuniary penalty. It means that having such a maximum penalty is meaningless. There are also some offences that do not have a penalty of imprisonment but have a maximum penalty of 500 penalty units.

It is proposed to amend section 122 of the *Sentencing Act* to increase the maximum pecuniary penalty that the Local Court exercising its criminal jurisdiction can impose to 500 penalty units.

### **Submissions/comments**

Hon Trevor Riley supported these amendments



The North Australia Aboriginal Justice Agency and Central Australian Aboriginal Legal Aid Service opposed this proposal stating that:

- heavier fines will have a devastating impact on those who can least afford to pay them. The proposed increases will see many Aboriginal people with fines that they have no realistic prospect of paying;
- countries including Germany, France, Switzerland, Sweden and Finland currently employ a proportionate fine model (“day-fines”). The Finland model, for example calculates a fine by considering the severity of the offence and the offender’s ‘daily wage’ (which is calculated as a percentage of a person’s annual wage.);
- favour approaches that require a person’s financial capacity to be considered and that require the fine imposed to be commensurate with financial capacity; and
- heavier fines in the Magistrates Court may be advantageous to corporations, who may seek to have matters heard in the Local Court instead of the Supreme Court. But this should not be a basis for legislative change that will see fines on Aboriginal people that are beyond their capacity to pay.

Amendment to sections 186, 188(2), 188A(2)(a) and (b) and 189A(2) of the Criminal Code and section 22 of the *Misuse of Drugs Act*

These provisions provide a maximum penalty if the charge is heard in the Supreme Court on indictment and a lower ‘summary penalty’ if the matter is heard in the Court of Summary Jurisdiction. For example, the maximum penalty for aggravated assault under section 188(2) is 5 years imprisonment on indictment and 2 years if heard summarily. It is proposed that the separate summary penalties be repealed. The maximum penalty that can be imposed by the Local Court exercising its criminal jurisdiction will then be that provided for in section 122 of the *Sentencing Act*. It is noted that a possible outcome of this proposed amendment would be a loss of incentive for defendants to have charges heard summarily.

**Submissions/comments**

The Hon Trevor Riley supported these amendments

See North Australia Aboriginal Justice Agency stated:

- Currently, matters heard summarily have a lower ‘summary penalty’ compared to if the matter is heard on indictment in the Supreme Court. It is proposed that the separate penalties be repealed, with s 122 *Sentencing Act* to instead provide the maximum penalty that can be imposed by a Local Court exercising its criminal jurisdiction.

- On the one hand, increasing jurisdiction supports the idea of fast-tracking matters. However, on the other hand, the increased jurisdiction of the Magistrates Court might decrease the incentive for people to plead guilty and have their charges heard summarily.
- The change is also likely contradictory to other proposed government reforms, such as criminal procedure reform and the proposed mandatory discounts for early guilty pleas.
- North Australian Aboriginal Justice Agency and Central Australian Aboriginal Legal Aid Service also wish to make clear that if more matters are to be dealt with by Courts of Summary Jurisdiction, it is essential that Magistrates Courts be better resourced, to better meet the needs of victims, witnesses, and for improved access to interpreters and other support services. This is particularly the case when considering the dire lack of resourcing for remote bush courts at the present time. They are simply not in a position to be dealing with even more matters, particularly those at the upper end of their jurisdiction.

#### Amendment to section 121A of the *Justices Act*

Section 121A of the *Justices Act* provides that specified indictable offences can be dealt with summarily (subject to various rules and agreements as set out in section 121A(1)-(1B)). The offences are those where:

- The maximum penalty is 10 years or less;
- The offence is in sections 210, 213, 228, 229, or 241 of the Criminal Code with the maximum penalty being 14 years or less of imprisonment.

It is proposed to add to the list of offences that can be dealt with summarily, an offence under section 213(4) and (5) of the Criminal Code, namely burglary of a dwelling house at night-time. This offence carries a maximum penalty of 20 years imprisonment, which takes it out of the jurisdiction of the Court of Summary Jurisdiction under section 121A. However, it is a common offence and can be committed with extremely varying degrees of seriousness, from entering the laundry room of an unoccupied house at night and stealing a can of Coke to entering the bedroom of a sleeping child and committing an assault on the child. The Court would still be able to decline jurisdiction under section 121A of the *Justices Act* if it considered the matter to be serious or difficult to be heard summarily.

Consideration will also be given to any other offences that may be similar to section 213 of the Criminal Code.

**Question 17: Are there any other offences (like section 213 of the Criminal Code) that should be dealt with in a summary way despite the fact that the maximum penalty for the offence may greatly exceed 2 years?**

### **Submissions/comments**

The Hon Dean Mildren aside from burglary, most of the mire minor drug offences and aggravated assaults

The Hon Trevor Riley supported this amendment(ie to 121A). He suggested that section 121A could be amended to include most of the minor drug offences and similarly for a range of offences for aggravated assault.

North Australia Aboriginal Justice Agency and Central Australian Aboriginal Legal Aid Service supported the amendment to s121A stating:

- The offence under ss 213(4), (5) *Criminal Code* (burglary of a dwelling house at night-time, maximum 20 years imprisonment) will be included as one that can be dealt with summarily. This offence can be committed with varying degrees of seriousness, and the Court is still be able to decline jurisdiction under s 121A *Justices Act*. We support this amendment. This change is beneficial because it will enable lower level matters to be heard summarily.
- We also support summary jurisdiction being extended to include matters such as some serious harm (s 181) offending that at present has to be heard in the Supreme Court. The broad definition of “serious harm” means that it can incorporate minor fractures and/or trivial offences. Case law demonstrates that penalties in such instances can include fines and good behaviour bonds, and are thus appropriate to be heard in the Magistrates Court.

Mr John Lowndes stated:

- Consideration might be given to conferring jurisdiction upon the Local Court to deal summarily with cases involving “serious harm” (s 181 of the *Criminal Code*) that fall towards the lower end of the scale of such offences. Drafting an appropriate provision would be difficult, but it would probably entail the Local Court making an assessment as to the appropriateness of the Court dealing with the matter, having regard to seriousness of the matter and any other relevant circumstances.
- In relation to s 6 of the *Misuse of Drugs Act*, consideration might also be given to conferring jurisdiction on the Local Court in relation to receiving or possessing tainted property the value of which does not exceed a prescribed amount.

## 10 Other issues raised

### Appeals

The North Australia Aboriginal Justice Agency and Central Australian Aboriginal Legal Aid Service noted that the Bill does not contain any provisions in relation to Appeals to the Supreme Court, transfers of proceedings to the Supreme Court or rehearings (current sections 18, 19 and 20) and stated that they strongly oppose these provisions being repealed observing that it seems to be a significant oversight that these are not included in the Bill or the consultation paper.

It is proposed that the appeals provisions be retained as part of the Local Court (Civil Procedure) Act and the Local Court (Criminal Procedure) Act. As explained earlier these Acts will, at least for the short term be renamed versions of the current Local Court Act and the *Justices Act* (as they will be following the repeal of those parts of them that will be covered by the *Local Court Act 2014*).

## 11 Issues on which comments were sought in the discussion paper

1. Do you agree with the assumption that there is no need to amend the *Work Health Administration Act* so that the Work Health Court is a division of the Local Court?
2. Should consideration be given to making a distinction in the roles of Justices of the Peace when exercising their powers in regional and bush courts and to the courts in Darwin or Alice Springs?
3. Is there any need for clause 8 (dealing with the 'independence of the court')?
4. Do you consider that clause 11 should:
  - a. retain the current jurisdiction limit for the Local Court (\$100,000); or
  - b. have a new jurisdictional limit of \$150,000 or \$250,000; or
  - c. have a jurisdictional limit that may be increased by way of regulation (either discretionary or based on an automatic CPI based review<sup>15</sup>).
5. Do you see any problem with the proposed amendment to section 3 of the Criminal Code
6. Are the proposals concerning access to records appropriate?
7. Do you consider that, as part of the Local Court reforms, contempt of lower courts' (and related Tribunals) should be reformed so that they are the same (ie consistent with one another). Would it be appropriate to include, in addition to section 8 of the Criminal Code Act, a generic provision in the Criminal Code that would deal with

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<sup>15</sup> Compare the *Penalty Units Act* and the *Revenue Units Act* which both have mandated reviews and procedures for CPI based increases for penalty units (for fines) and revenue units (for government fees).

- contempt for all courts and a generic offence for all tribunals and other bodies/officials responsible for taking evidence.
8. Do you consider that the current draft provision (dealing with contempt -clause 40) is sufficiently broad?
  9. Do you consider that the current draft maximum penalty (clause 42) is appropriate. If not what do you consider should be the penalty?
  10. Do you agree with the revision of the rules making powers so that they, similar to the provisions in the *Supreme Court Act*, provide for collective decision making of the magistrates.
  11. Do you consider that “magistrates” should be renamed as “Judges”?
  12. If yes (to previous question) do you think that the NT, at the State/Territory level, should take unilateral action or wait until most other States and Territories, have adopted this as a policy position.
  13. Is there a need to set out some legislated process for dealing with complaints about judicial officers?
  14. Should the age limit on persons who can be appointed as acting Magistrates be raised
  15. Is it appropriate that the regulations may permit the Chief Executive Officer (rather than the Administrator or the Minister) to also have the power under the regulations to fix fees?
  16. Are there any problems in repealing the *Records of Dispositions Act*?
  17. Are there any other offences (like section 213 of the Criminal Code) that should be dealt with in a summary way despite the fact that the maximum penalty for the offence may greatly exceed 2 years?

**Schedule 1- judicial officers and stakeholders provided with the draft Bill and the discussion paper**

<b>Name</b>	<b>Position</b>	<b>Company</b>
Dr John Lowndes	Chief Magistrate	Northern Territory Magistrate Courts
The Hon Trevor Riley	Chief Justice	Supreme Court of the Northern Territory
Mr Chris Cox	Director, Courts and Tribunals	Department of the Attorney-General and Justice
Ms Susan Cox QC	Director, Northern Territory Legal Aid Commission	Northern Territory Legal Aid Commission
Ms Elizabeth Morris	Chair, Northern Territory Legal Aid Commission	Northern Territory Legal Aid Commission
Mr Russell Goldflam	President	Criminal Lawyers Association of the Northern Territory
Mr John Lawrence SC	President	Northern Territory Bar Association
Ms Peggy Cheong	President	Law Society Northern Territory
Ms Priscilla Collins	Chief Executive Officer	North Australian Aboriginal Justice Agency
Ms Janet Taylor	Principal Solicitor	Central Australian Women's Legal Service
Mr Mark O'Reilly	Principal Legal Officer	Central Australian Aboriginal Legal Service
Ms Caitlin Perry	Executive Director	Darwin Community Legal Service
Ms Joanne Sivyer	Acting Principal Solicitor	Katherine Women's Information Legal Service
Ms Nicki Petrou	Managing Solicitor	Top End Women's Legal Service
Ms Phynea Clarke	Chief Executive Officer	Central Australian Aboriginal Family Legal Unit
Mr Tony Lane	Chief Executive Officer	North Australian Aboriginal Family Violence Legal Service
Ms Hannah Meredith	Manager, Domestic and Family violence Service	Ngaanyatjarra Pitjuntatjara Yankuntjatjara Women's Council Aboriginal Corporation
Mr Joe Morrison	Chief Executive Officer	Northern Land Council
Mr David Ross	Director, Central Land Council	Central Land Council
Mr Gibson Illortuminni	Chairman	Tiwi Land Council

<b>Name</b>	<b>Position</b>	<b>Company</b>
Mr Jack Karczewski QC	Director of Public Prosecutions	Office of the Director of Public Prosecutions
Mr Charles Parrott JP	President	Northern Territory Justice Association
Mr John McRoberts	Commissioner of Police	Police, Fire and Emergency Services

## Schedule 2 - Acts and regulations that will be amended if the Local Court Bill 2014 is enacted

<b>Act /Regulations</b>
<b>Major overhaul</b>
Local Court Act (rename and amend)
Local Court Regulations (repeal and replace with regulations under new Act)
Local Court Rules (amend/repeal)
Local Court (Adoption of Children) Rules (rename and amend)
Justices Act (rename and amend)
Justices Regulations (amend/repeal)
Justices Rules (amend/repeal)
<b>Significant/substantive amendments required</b>
Assembly Members and Statutory Officers (R&OE) Act
Australian Crime Commission (Northern Territory) Act
Bail Act
Bail Regulations
Care and Protection of Children Act
Criminal Code
Cross-border Justice Act
Cross-border Justice Regulations
Domestic and Family Violence Act
Domestic and Family Violence Regulations
Fines and Penalties (Recovery) Act
Fines and Penalties (Recovery) Regulations
Misuse of Drugs Act
Personal Injuries (Civil Claims) Act
Police Administration Act
Prisoners (Interstate Transfer) Act
Prisoners (Interstate Transfer) Regulations
Record of Depositions Act
Sentencing Act
Sentencing Regulations
Serious Crime Control Act
Small Claims Act

<b>Significant/substantive amendments required</b>
Small Claims Regulations
Small Claims Rules
Work Health Administration Act
Work Health Court Rules
Youth Justice Act
<b>Minor amendments required</b>
Absconding Debtors Act
Adoption Of Children Act
Adoption Of Children Regulations
Adult Guardianship Act
Advance Personal Planning Act
Aged And Infirm Persons' Property Act
Agents Licensing Act
Agents Licensing Regulations
Agricultural And Veterinary Chemicals (Control Of Use) Act
Animal Welfare Act
Australasia Railway (Third Party Access) Act
Biological Control Act
Building Act
Building Regulations
Business Tenancies (Fair Dealings) Act
Caravan Parks Act
Cemeteries Act
Child Protection (Offender Reporting And Registration) Act
Classification Of Publications, Films And Computer Games Act
Commercial and Private Agents Licensing Act
Commercial and Private Agents Licensing Regulations
Companies (Unclaimed Assets And Moneys) Act
Compensation (Fatal Injuries) Act
Constitutional Convention (Election) Act
Consumer Affairs And Fair Trading (Pawnbrokers And Second-Hand Dealers) Regulations
Consumer Affairs And Fair Trading Act
Co-operatives Act
Coroners Act
Corporations Reform (Northern Territory) Act
Court Security Act
Criminal Investigation (Extra-Territorial Offences) Act
Criminal Property Forfeiture Act
Criminal Property Forfeiture Regulations
Criminal Records (Spent Convictions) Act
Cullen Bay Marina Act
Darwin Rates Act



<b>Minor amendments required</b>
Darwin Waterfront Corporation By-Laws
Director of Public Prosecutions Act
Education And Care Services (National Uniform Legislation) Act
Electoral Act
Electricity Networks (Third Party Access) Act
Essential Goods And Services Act
Evidence (National Uniform Legislation) Act
Evidence Act
Fences Act
Firearms Act
Firearms Regulations
Fisheries Act
Food Act
Gaming Machine Act
Geothermal Energy Act
Guardianship Of Infants Act
Health And Community Services Complaints Act
Health And Community Services Complaints Regulations
Health Practitioner Regulation (National Uniform Legislation) Act
Health Practitioners Act
Heritage Act
Housing Act
Housing Regulations
Information Act
Interpretation Act
Jabiru Town Development (Control Of Dogs) By-Laws
Kava Management Act
Land Title Act
Lands Acquisition Act
Law Reform (Miscellaneous Provisions) Act
Legal Aid Act
Legal Profession Act
Legal Profession Act - Rules Of Professional Conduct And Practice
Liquor Act
Livestock Act
Local Government - Borroloola Community Government Council (Control Of Dogs) By-Laws
Local Government - Coomalie (Dog Management) By-Laws
Local Government - Coomalie Community Government By-Laws
Local Government - Katherine Town Council By-Laws
Local Government - Mataranka Community Government Council (Control Of Dogs) By-Laws

<b>Minor amendments required</b>
Local Government - Nhulunbuy (Animal Control) By-Laws
Local Government - Pine Creek (Control Of Dogs) By-Laws
Local Government - Tennant Creek (Control Of Dogs) By-Laws
Local Government - Tennant Creek (Control Of Public Places) By-Laws
Local Government - Timber Creek Community Government Council By-Laws
Local Government Act
Marine Act
Marine Pollution Act
Medicines, Poisons And Therapeutic Goods Act
Mental Health And Related Services Act
Mineral Titles Act
Misuse Of Drugs Regulations
Motor Vehicles Act
Notifiable Diseases Act
Occupational Licensing (National Uniform Legislation) Act
Ombudsman Act
Parole Act
Parole Orders (Transfer) Act
Pastoral Land Act
Petroleum Act
Planning Act
Poppy Regulation Act 2014
Powers Of Attorney Act
Price Exploitation Prevention Act
Prostitution Regulation Act
Public and Environmental Health Act
Public Transport (Passenger Safety) Regulations
Racing And Betting Act
Rail Safety (National Uniform Legislation) Act
Residential Tenancies Act
Retirement Villages Act
Serious Sex Offenders Act
Sexual Offences (Evidence And Procedure) Act
Sheriff Act
Soil Conservation And Land Utilisation Act
Status Of Children Act
Summary Offences Act
Supreme Court (Absconding Debtors) Rules
Supreme Court (Judges Pensions) Act
Supreme Court Act
Supreme Court Rules
Swimming Pool Safety Act

<b>Minor amendments required</b>
Taxation Administration Act
Teacher Registration (Northern Territory) Act
Tobacco Control Regulations
Totalisator Licensing And Regulation Act
Traffic Act
Transport Of Dangerous Goods By Road And Rail (National Uniform Legislation) Act
Trespass Act
Trustee Act
Unauthorized Documents Act
Uncollected Goods Act
Unit Title Schemes Act
Unit Titles Act
Unit Titles Regulations
Unlawful Betting Act
Utilities Commission Act
Veterinarians Act
Victims Of Crime Assistance Act
Volatile Substance Abuse Prevention Act
Volatile Substance Abuse Prevention Regulations
Warehousemen's Liens Act
Waste Management And Pollution Control Act
Weapons Control Act
Witness Protection (Northern Territory) Act
Workers Rehabilitation And Compensation Act
Workers Rehabilitation And Compensation Regulations
Youth Justice Regulations

#### ENDNOTES

<sup>i</sup> The “judicialisation of the magistracy” refers to the process whereby the magistracy has gradually become separated from the executive arm of government and become part of the judiciary, and “increasingly associated with the mainstream court system” : see The Honourable Marilyn Warren, Chief Justice of the Supreme Court of Victoria, “The Independence of the Magistracy: Crossing Over to Judicialism” (2005) 7 TJR 293 at 301.

<sup>ii</sup> J Lowndes “The Australian Magistracy: From Justice of the Peace to Judges and Beyond” Part 11 (2000) 74 ALJ 592 at 593. See also J Lowndes “The Australian Magistracy: From Justices of the Peace to Judges and Beyond” Part 1 509 at 510; Chief Justice Warren, n 1 at 301.

<sup>iii</sup> I Pike and A Reidel “Epilogue” in H Golder *High & Responsible Office: A History of the NSW Magistracy* (1991 Sydney University Press) p 215 cited in Lowndes n 2 at 592.

<sup>iv</sup> See page 3 of a document entitled “Change of Name from Magistrate to Judge” prepared by Magistrate Jillian Orchitson and presented to the Judicial Conference of Australia for its consideration.

<sup>v</sup> This argument was raised by the magistracy of Victoria and presented to Rob Hulls, the Attorney -General in support of the proposed change of title.

<sup>vi</sup> See endnote 5.

<sup>vii</sup> Chief Justice Warren, n 1 at 301.

<sup>viii</sup> J Lowndes “The Australian Magistracy: From Justices of the Peace to Judges and Beyond” Part 1 (2000) 74 ALJ 509 at 510. See also Lowndes , n 2 at 599; Chief Justice Warren, n 1 at 301.

<sup>ix</sup> Lowndes, n 2 at 593. See also Lowndes, n 8 at 510.

- <sup>x</sup> Lowndes, n 2 at 599. See also Lowndes, n 8 at 510; Chief Warren, n 1 at 310.
- <sup>xi</sup> Lowndes, n 8 at 510. See also Lowndes, n 2 at 595; Chief Justice Warren, n1 at 301.
- <sup>xii</sup> Chief Justice Warren, n 1 at 301. See also Lowndes, n 2 at 599.
- <sup>xiii</sup> Chief Justice Warren, n 1 at 297.
- <sup>xiv</sup> R Lawrence “Magistrates – Change of Name” paper presented to the Executive of the Australian Stipendiary Magistrates Association 25 March 1995, p 5.
- <sup>xv</sup> Lawrence n 14, p 5.
- <sup>xvi</sup> See Chief Justice Warren, n 1 at 304 where Her Honour makes the following observation:  
“...there are significant aspects of the state of the magistracy which indicate that it has a long way to go in untangling itself from its life-giver, the executive”.
- <sup>xvii</sup> Lawrence, n 14, p 1.
- <sup>xviii</sup> Judging is referred to as a “business” in “The Business of Judging: Selected Essays and Speeches, (2000 Oxford University Press)
- <sup>xix</sup> M Sexton and L.W Maher *the Legal Mystique, The Role of Lawyers in Australian Society* (1982) Angus & Robertson Publishers, p 62.
- <sup>xx</sup> Sir Anthony Mason “The Nature of the Judicial Process” in *A Matter of Judgment – Judicial Decision-making and Judgment Writing*, Judicial Commission of New South Wales, p 1
- <sup>xxi</sup> Sir Anthony Mason, n 20, p 1.
- <sup>xxii</sup> Sir Anthony Mason, n 20, p 2. See also Kirby J “Judging: Reflections on the Moment of Decision” in *A Matter of Judgment – Judicial Decision-Making and Judgment Writing*, Judicial Commission of New South Wales, p 45.
- <sup>xxiii</sup> The Right Honourable McLachlin PC “Judicial Impartiality: The Impossible Quest” in *A Matter of Judgment – Judicial Decision-Making and Judgment Writing*, Judicial Commission of New South Wales, p 15.
- <sup>xxiv</sup> See endnote 4, p 3. See Lowndes, n 2 at 595 where the author makes this observation:  
“There is often a perception that the work done by magistrates is trivial, inferior, non-qualitative work; nothing could be further from the truth. The present “magistrate/judge” dichotomy is responsible for this perception and perpetuates an artificial distinction between the role of judges and magistrates and the work they perform. The renaming of magistrates as “judges” would remove this erroneous perception”: see C Briese “Future Directions in Local Courts of New South Wales” (1987) 10(1) UNSWLJ 133; see also Michelides “Report on the Change in Terminology From Magistrate to Judge”, paper prepared for the Australian Stipendiary Magistrates Association, March 1995, pp 10, 13.
- <sup>xxv</sup> See endnote 5.
- <sup>xxvi</sup> E Campbell and H.P. Lee *The Australian Judiciary* Cambridge University Press 2001, p 17.
- <sup>xxvii</sup> Campbell and Lee, n 26, p 23.
- <sup>xxviii</sup> See Chief Justice Warren, n 1 where Her Honour makes the observation that the recent change in the form of address for magistrates in Victoria from “Your Worship” to “Your Honour” is a “sign of the times”, and indicative of the gradual judicialisation of the magistracy.
- <sup>xxix</sup> See endnote 4, p 1.
- <sup>xxx</sup> In a similar vein, “judge is a synonym for judiciary”: citation subject to ethical clearance.
- <sup>xxxi</sup> Lowndes, n 2 at 595.
- <sup>xxxii</sup> Justice Thomas “The Ethics of Magistrates” (1991) 65 ALJ 387 at 389-390.
- <sup>xxxiii</sup> This guide was published for the Council of Chief Justices of Australia by the Australian Institute of Judicial Administration Incorporated.
- <sup>xxxiv</sup> *Guide to Judicial Conduct*, Chapter One [1.1], p1.
- <sup>xxxv</sup> See the preface to the *Guide to Judicial Conduct*.
- <sup>xxxvi</sup> See endnote 4, p 1.
- <sup>xxxvii</sup> Briese, n 24 at 133; see also Michelides, n 24, pp 10,13.
- <sup>xxxviii</sup> Lawrence, n 14, p 3.
- <sup>xxxix</sup> Lowndes, n 2 at 596
- <sup>xl</sup> See A Castles *An Australian Legal History* (LBC, Sydney 1982), p 327.
- <sup>xli</sup> Justice Thomas, n 32 at 389-390.
- <sup>xlii</sup> Campbell and Lee, n 26, p 49.
- <sup>xliii</sup> J Kleinig “Judicial Corrosion: Outlines of a Theory”, paper delivered at “Confidence in the Courts” conference, Canberra 9-11 February 2007, p 1.
- <sup>xliiv</sup> Sir Anthony Mason “The Appointment and Removal of Judges” in *Fragile Bastion Judicial Independence in the Nineties and Beyond* Judicial Commission of New South Wales, p 34.

<sup>xlv</sup> Sir Anthony Mason, n 44, p 31.

<sup>xlvi</sup> See endnote 5.

<sup>xlvii</sup> See endnote 5.

<sup>xlviii</sup> See endnote 5.

<sup>xlix</sup> See endnote 5.

<sup>1</sup> See endnote 4, p 1.